THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO. 53 of 2020

(Arising from Civil Suit NO. 2404 OF 2008 of the Chief Magistrate's Court at Mengo)

1. LUTWAMA JOSEPH
2. SULAITI SEBUNYA.....APPELLANTS

VERSUS

NABANJA EVA .....RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT:

Introduction:

The appellants are children of the late Erisa Kibuuka. They filed the main suit in the Chief Magistrate's court Mengo, against their Efrance Nanfuka and Eva Nabbanja (respondent) for recovery of *kibanja* at Masanafu Bukulugi Zone; an eviction order against the respondent and her agents, employees and servants from the suit land; general damages; costs of suit.

They claimed that Nanfuka Efrance had without their consent sold to the respondent in 2004, a *kibanja* located at Masanafu in which they got beneficial interest and it was done without their consent.

Around the time the proceedings were ongoing however, Nanfuka had passed on. It was the appellants' contention that as a beneficiary their late sister Nanfuka had already obtained her share of the estate of the late Erisa Kibuuka, that is, land at Nabiyaji Kyaggwe County, Mukono district and had no interest in the *kibanja* at Masanafu.

That the said *kibanja* at Masanafu belonged to Erisa Kibuuka who had inherited it from his father Yusufu Mukasa. Erisa Kibuuka had acquired property jointly with his brother Matthias Kironde from their late father, Yusufu Mukasa.

As per Erias Kibuuka's will, he had bequeathed the *kibanja* to his son Buwembo Festo. Upon his death however, his brother Matthias Kironde had attempted to grab the suit land belonging to his brother, instituted the ***Civil Suit No. 587 of 2002*** against the plaintiffs but lost the case.

It was also not disputed that after the death of Buwembo Festo, the plaintiffs had secured a grant of the letters of administration to manage his estate. They filed the suit therefore to challenge the sale transaction between the respondent and the late Efrance Nanfuka.

At the trial, Efrance Nanfuka on her part contended that she had been gifted with the *kibanja* by her grandfather Yusuf Mukasa and had occupied it until the time she sold it to Nabbanja. According to her the *kibanja* did not form part of estate of the late Erisa Kibuuka as alleged.

The respondent, Nabbanja denied any knowledge of the earlier ***Civil Suit No. 587 of 2002,*** and claimed to be a *bonafide* purchaser for value without notice of any defect in title of the said *kibanja.*

In her counterclaim, she sought for a permanent injunction to issue against the plaintiffs/counter defendants; general and special damages; interest and costs of the suit.

At the trial, two issues were raised:

1. ***Whether the plaintiffs have a lawful claim over the kibanja;***
2. ***Remedies.***

The trial court in its judgment made the following orders:

> 1) ***That the defendant is the lawful owner of the kibanja located at Masanafu measuring 68 by 100 formerly of Nanfuka Efrance;***
>
> 2) ***A permanent injunction to issue against the plaintiffs, their assignees and agents not to trespass on the said the kibanja or interfere with the defendants/counter defendant's enjoyment of the kibanja at Masanafu measuring 68 by 100 feet.***
>
> 3) ***General damages of Ugx 2,500,000/= to the defendant/ counterclaimant; costs.***

Dissatisfied with the decision the plaintiffs filed this appeal, raising the following grounds:

1. ***That the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record when she held that the appellants do not have any***

lawful interest in the suit kibanja located at Masanafu village, Bukuluji Zone, thus arriving at an erroneous conclusion;

2. ***That the learned trial magistrate erred in law and fact when she failed to evaluate the proceedings and judgment on a previous suit (Civil Suit No. 587 of 2002) whereby the same court had made a decision giving the said piece of land to the appellants;***

3. ***That the learned trial magistrate erred in law and fact when she held that the suit kibanja was given to Nanfuka by the late Yusufu Mukasa without any valid document or gift deed thereby reaching an erroneous decision.***

Representation:

At the trial, the appellants were represented by ***M/s Musoke Suleman & Co. Advocates.*** The respondent on her part was represented by ***M/s Kajeke & Co. Advocates*** and later on by ***M/s Atigo & Co. Advocates*** who filed a notice of instructions on 28th August, 2020.

Counsel Byabakama Blast from the said firm acknowledged receipt of service for the respondent but did not file any reply.

Consideration of the issues:

Since the three grounds are interrelated, I will deal with them jointly.

This being a first appeal, court is under an obligation to subject the evidence presented at trial to a fresh and exhaustive scrutiny and to a re-appraisal before coming to its own conclusion on issues of fact as well as of law.

It must also make due allowance for the fact that it has neither seen nor heard the witnesses and so ought to weigh the conflicting evidence before drawing its own inference.

That duty as highlighted above is well explained in the case of: ***Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17 OF 2000 [2004] KLRA 236,*** cited with approval in ***Ovoya Poli vs Wakunga Civil Appeal No. 0013 OF 2014***.

Furthermore, ***section 102 of the Evidence Act*** places the burden of proof on a party who would fail if no evidence at all were given by either party.

Counsel for the appellants in his submission on these grounds argued that court came to the wrong conclusion in declaring that that the appellants have no lawful interest in the suit *kibanja.* According to him there was abundant evidence at the trial that proved that the appellants had customary tenure interest having acquired the land from their father, the late Erisa Kibuuka.

He referred to the provisions of ***article 273 of the Constitution*** under which customary tenure is duly recognized as one of the four tenure systems. By virtue of ***section 3(1) of the Land Act, Cap. 227***, customary tenure is defined as a form of tenure applicable to a specific area of land and a specific description or class of persons; governed by rules generally accepted as binding and authoritative by the class of persons to which it applies.

He also referred to an earlier suit filed vide: ***Civil Suit No. 587 of 2002*** before Mengo court, filed by Mathias Kironde, their paternal uncle, against the Administrator General against them as children of the late Erisa Kibuuka. The two appellants were the 2nd and 3rd defendants in that suit. It was the appellants' contention that the suit had determined the interests of the appellants.

That upon conclusion of ***Civil Suit No. 587 of 2002***, the appellants were shocked to see the 1st respondent starting to construct on the suit land, claiming to have bought it from the late Nanfuka Efrance, and continued to do so despite their warning to her.

Counsel further submitted that under the Constitution of Uganda and the Judicature Act, courts of law are enjoined to be consistent in their decisions. Once judgment is delivered a party who is dissatisfied has got a right to appeal.

That it was therefore procedurally wrong for the trial magistrate to ignore the decision in the previous suit: ***Civil Suit No. 587 of 2002***, from the same court. In dealing with this appeal, I find it therefore necessary to compare the prayers sought and the orders which were granted by the respective trial courts.

Civil Suit No. 587 of 2002: Mathias Kironde vs Administrator General & 3 others:

It was not in contention that the disputed land originally belonged to the late Yusufu Mukasa, father to both Mathias Kironde and Erisa Kibuuka, the father to the appellants. The appellants claimed that Matthias Kironde attempted to grab the *kibanja* at Masanafu land belonging to their father's estate, which originally belonged to Yusufu Mukasa.

He claimed in that suit that his brother, Erisa Kibuuka had no developments on that land, having disposed of the share he obtained upon the death of their father in 1967. His family (defendants in that suit) could not therefore lay any claim on the same.

Accordingly, the orders sought in this suit were: *a permanent injunction restraining the defendants from evicting the plaintiff (Kironde) from his land and against the 2nd-4th defendants from trespassing on the plaintiff's kibanja; a declaration that the suit kibanja belonged to the plaintiff; damages and costs.*

The main issue during the trial rotated around ownership of the disputed *kibanja*. However as noted by court, the actual size/area of the entire *kibanja* in dispute was not known.

Court in its judgment dated 4th November, 2005 dismissed the suit, after the finding that Mathias Kironde had failed to prove that the land had been gifted to him by his father. It was noted by court that Kibuuka had a house on the *kibanja* at Masanafu. His children used to till on that land and that no proof had been provided to show that Kibuuka had sold off his share.

That the children of Kibuuka had kept using the land even after their father's death and were only prevented from using it after the death of Buwembo when Kironde tried to claim the entire *kibanja,* and that they were therefore entitled to their father's property at Masanafu.

That the 2nd-4th defendants had therefore proved their claim of interest in the suit *kibanja* both through David Buwembo and Erisa Kibuuka and that as administrators of the estate of the late of David Buwembo were entitled to claim Buwembo's share out of the *kibanja* at Masanafu.

Accordingly, Kironde having got his share out of Yusufu Mukasa's *kibanja* at Masanafu had no right to interfere with Erisa Kibuuka's share; the children of Erisa Kibuuka were entitled to their father's property left at Masanafu in accordance with the law on succession; and were not therefore trespassers on that land.

Counsel for the appellants' point was that court orders once issued are meant to be consistent and a party dissatisfied with the decision has got a right of appeal. That it was therefore procedurally wrong for the trial court to have ignored the above decision by which the appellants' interest in the disputed land had been recognized by the court.

It is to be noted that while acknowledging the 2-4th defendants as administrators of the estate of David Buwembo and therefore entitled to claim David Buwembo's share out of the *kibanja* which Erisa Kibuuka left at Masanafu, the court however made no distinction as to what each beneficiary under Kibuuka's estate was entitled to.

Civil Suit No. 2404 of 2008: Lutwama Joseph & Anor vs Nabbanja Eva:

In the subsequent suit: ***Civil Suit No. 2404 of 2008*** (the subject of this appeal), the 2nd and 3rd defendants (appellants) sought for the following orders:

1. ***recovery of kibanja located at Masanafu Bukuluji Zone;***
2. ***an eviction order against the 1st defendant and her agents, employees and servants from the suit land;***
3. ***general damages; and***
4. ***costs of the suit.***

The trial court in its judgment dated 5th March, 2020 made the orders below:

1. ***That the defendant (respondent) is the lawful owner of the kibanja located at Masanafu measuring 68 by 100 formerly of Nanfuka Efrance;***

2. ***A permanent injunction to issue against the plaintiffs, their assignees and agents not to trespass on the said the kibanja or interfere with the defendants/counter defendant's enjoyment of the kibanja at Masanafu measuring 68 by 100 feet;***

3. ***General damages of Ugx 2,500,000/= to the defendant/ counterclaimant;***

4. ***Costs of the suit.***

The trial court in this case ruled that the respondent, Nabbanja had duly acquired a portion of land at Masanafu, measuring *68ft x 100 ft.* From the reading of the judgment in the earlier suit there was nothing in that judgment which would have prevented the trial court from arriving at those conclusions.

It is worth noting that during the trial, Nabbanja relied on the sale agreement dated 4th April, 2004 between her and the late Nanfuka Efrance to prove that she had paid for the *kibanja,* at a total purchase sum of ***Ugx5,000,000/=.***

According to that document, Nanfuka had indicated that the late Yusufu Mukasa her paternal grandfather had given her that *kibanja* in 1966.

The trial court under ***Civil Suit No. 2404 of 2008*** had this to say:

> ***The said Nanfuka as per the evidence of Dw2 which is unrebutted was in possession of this kibanja at all times cultivating it since 1986 when the defendant got to know her, uninterrupted by her father Erisa Kibuuka and also her brother Buwembo before his death...I do note that Dw1 said that the land was for Kibuuka and on leaving Masanafu for Kyaggwe the kibanja was given by Yusufu Mukasa to Nanfuka to use it since she had come from a broken marriage.***
>
> ***This means that Yusufu Mukasa still owned the kibanja and still had the right to it thus giving it to Nanfuka; and the father and the brother the heir were aware that is why they did not interfere with the possession and utilization of the same by Nanfuka.***

In reaching that conclusion court also had to consider the validity of the will ***PExh 3,*** dated 24th October, 1968, as well as the purported minutes of the family meeting: ***PExh4,*** presented by the 1st plaintiff/appellant at the trial.

The reasons and importance of a testator appending a signature to the will and attesting to his/her will, which are mandatory requirements by virtue of ***section 50 of the Succession Act*** are self- explanatory and need no elaboration.

The trial court, just like in the previous court decision had rejected the said will for the reason that other than mentioning the children and property of the deceased, neither had it been signed by the testator nor attested by any witnesses.

Court in the earlier suit found, rightly so, that since there was no valid will no bequests could have been validly made. The document dated 24th October, 1968 purported to be the will of Kibuuka and which had been the basis of the distribution of his estate had therefore been disregarded by that court.

To support that position, ***Pw2,*** Ms Alice Nakibuuka an elder and aunt to the plaintiffs/appellants during the trial told court that the late Kibuuka had died intestate, an assertion which however contradicted ***Pw1's*** statement that his father had left a will.

Pw1 during the trial which is the subject of this appeal therefore sought to reintroduce and rely on a will that had been discarded as invalid in an earlier trial while at the same time seeking to enforce a judgment that had rejected the will.

Furthermore, regarding the authenticity of the minutes at which such distribution had purportedly been made in 1986, ***Pw1*** claimed that under the said distribution Buwembo who had been appointed heir to the late Kibuuka had been given the *kibanja* at Masanafu. Their sister Nanfuka had got land at Nabiyaji, Mukono, but not the suit *kibanja* at Masanafu which she later on sold to the respondent.

The minutes of the meeting however had not been tendered in court and court gave its reasons why. Not least was the fact that ***Pw1*** himself never signed as one of those who had attended the meeting.

But secondly, that the author of those minutes never attended court to confirm that he had recorded those minutes; confirm what had transpired in that meeting; and that the distribution was done as proposed.

This is what court had to say in the previous suit (page 13):

> ***The claim that David Buwembo was heir of Erisa Kibuuka appears not to be in dispute but I noted that Dw3 did not inform court what he based on to say that Erisa Kibuuka's kibanja and house thereon at Masanafu was passed on to his heir and like I have earlier on pointed out, the document on which Dw1 and Dw2 are relying to claim that Erisa Kibuuka's kibanja and the house Erisa Kibuuka inherited from Yusufu Mukasa was given to David***

Buwembo and the house that Erisa...had built on that kibanja was given to Aida Nakandwe; is a document which court is not going to attach weight, for reasons already given. (emphasis mine).

Given the above court finds that the 2nd to 4th defendants' claim that Erisa Kibuuka's kibanja at Masanafu was given to David Buwembo has not been proved on a balance of probabilities.

That alone confirmed that there was no valid document to show that distribution was done. It was enough to prove that the Masanafu property did actually form part of the estate of Kibuuka which remained undistributed following his demise. Nanfuka was one of the beneficiaries under that estate.

The above decision which was never discharged, also indicates that without a proper record of minutes or evidence of distribution and indeed without letters of administration over Kibuuka's estate, no one could claim with certainty that the late Nanfuka had no share in the Masanafu estate. What remained to be resolved was whether the portion she sold to the respondent was rightfully hers.

The trial court therefore need not have referred to minutes whose authenticity had not been established and which in any case had already been disregarded by the earlier court. In light of the above as highlighted, the attendance and participation by ***Pw2*** in the said distribution as claimed was therefore of no consequence given the fact that the author of the minutes was not summoned to attend court during the trial to confirm the authenticity of the document which the appellants intended to rely on.

In a bid to enforce their rights accruing under the former suit not only did the appellants seek to rely on a will that had already been disregarded by the earlier decision of court but also sought to smuggle in a record of the meeting that they had failed to exhibit or prove before the same court.

In seeking to selectively apply portions of the judgment which favoured them and ignoring those key aspects which did not suit them, the appellants did not therefore come to court with clean hands.

As it were, since Kibuuka had left no valid will, the laws governing intestacy were applicable. No valid distribution could have been made without letters of administration over Kibuuka's estate. ***Section 180 of the Succession Act*** provides that an administrator of the estate of a deceased person is his or her legal representative for all purposes, and as such all the property of the deceased person vests in him or her.

In ***section 25*** all property in an intestate devolves upon the personal representative of the deceased, as trustee for all the persons entitled to the property. Any dealing with the land without prior authority of court would therefore amount to intermeddling with the estate, contrary to ***section 268 of the same Act.***

All in all, in both cases there was failure to distinguish between what rightfully belonged to Kibuuka's estate and what belonged to Buwembo's estate and to all other beneficiaries under each estate and it would be wrong to assume that upon Kibuuka's demise all his property automatically became that of his heir, Buwembo.

The issues as raised in the suit under which this appeal arises presented a rather different cause of action since the focus was on a specific area which Nanfuka had sold to the respondent. It called for court to decide the nature of the interest she held in respect to that specific portion of the land which she disposed of.

Whether or not the appellants held customary rights over the land:

The appellants claimed that there was abundant evidence at the trial that they had customary tenure interest having acquired the land from their father, Erisa Kibuuka and no evidence had been presented at the trial to prove that the suit *kibanja* was given to Nanfuka. According to them therefore, the purported purchase by Nabbanja had been invalid.

Dw1, Nabbanja Eva on her part contended that the total purchase amount for the *kibanja* that she had bought was a sum of ***Ugx 5,000,000/=***. She and Nanfuka had on 4th April, 2004 executed an agreement for the *kibanja* measuring *68x 100ft,* witnessed by Kironde an uncle to to Nanfuka and one Kiwanuka Twaibu.

According to Nanfuka, the suit *kibanja* had been given to her as a gift by her grandfather Yusufu Mukasa during his life time. She confirmed to court that Nanfuka had been utilising the land after her failed marriage.

That Nanfuka's son, Godfrey Batwerinde started constructing a house for his mother Nanfuka which he however did not complete. It was demolished by Nanfuka's brothers after they had secured the court order in the earlier suit. To prove her point, she tendered in ***DE1 (a) and (b) :*** photos showing the houses which had been demolished.

Dw1, Aida Nabatanzi aged 95, the mother of the late Nanfuka confirmed that her daughter got her share from her grandfather Yusufu Mukasa. That Nanfuka had been staying with her grandfather at the time. It was her evidence however that by the time Kibuuka died he had no *kibanja* at Masanafu which claim the appellants had however refuted.

In general terms, customary rules play a pivotal role in the laws of succession and inheritance. It is accorded recognition for as long as it is not repugnant to the written laws. Under ***section 1(l) of the Land Act, Cap. 227*** customary tenure is defined as a system of land tenure regulated by the customary rules limited in their operation to a particular class of persons.

A *kibanja* holding is a form of a customary land tenure recognised within the Buganda region according to the long established rules developed along Kiganda customs. Such tenure must however be proved. (***Kampala District Land Board & George Mutale vs. Venansio Babweyala & Ors (SCCA 2/07),).***

Proof entails for example long occupation, recognition by 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.

It was also the appellants' contention that the late Nanfuka who sold the *kibanja* in dispute to the respondent did not show that the late Yusufu Mukasa, their grandfather had donated the *kibanja* to her. Indeed as correctly pointed out, there was no documentary proof that Nanfuka got the gift of the *kibanja* from her grandfather.

The law does not ordinarily recognize a verbal gift of land. Donation of land is often characterized by a deed. In equity, a gift is only complete as soon as the donor has done everything within his/her control which are necessary for him to complete the title.

In determining whether the deceased created a gift *intervivos* in respect of the disputed land, court has to among others ascertain the intention of the donor and then ascertain whether formal requirements of the method of disposition which he attempted make have been satisfied. ***(Ref: Nassozi and anor vs Kalule HCCA 2012/5)***.

It comes out clearly from ***Pw2's*** evidence (*page 16* of the record of proceedings) that prior to his death the late Yusufu Mukasa had given some donation to the late Nanfuka. The nature and details of such donation could not however be established.

But going by the judgment in the earlier suit, and in corroboration of that assertion, Kironde the plaintiff in that suit, in his pleadings stated clearly that he and the widow of Yusufu Mukasa had given part of the *kibanja* at Masanafu to Nanfuka in 1989, before that suit was filed.

The appellants who were parties neither challenged that allegation nor did they challenge Nanfuka's occupation of the *kibanja* before she disposed it off. This goes to confirm that Nanfuka had duly received her *kibanja* which she took possession of, and occupied as early as 1989. The

evidence adduced at trial did not suggest that Nanfuka occupied or sold of the entire *kibanja* at Masanafu, but only a portion of that land which she had occupied and utilized for years without any interruption.

In ***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.

As noted by the trial court, Nanfuka had been utilizing the *kibanja* even when her father and Buwembo his heir were still alive. This court cannot fault the trial court's well-considered conclusion that since Nanfuka had not been made party to that earlier suit, the *kibanja* she occupied at the time did not constitute part of the disputed land in that suit.

The appellants do not explain how else Nanfuka had been allowed to enter, stay and utilize that *kibanja* as early as 1989 without the knowledge and consent or acquiescence of the original owners.

That even after the death of Erisa Kibuuka, his son and heir Buwembo, did not challenge or interfere with Nanfuka's possession, occupation and utilization of that land. In a nutshell, the appellants in that sense could not satisfy court that what Nanfuka had sold to Nabbanja belonged to the estate of Buwembo or Kibuuka before him.

As also noted by the lower courts, the problem also stemmed from the appellants' failure to draw a clear distinction between the three estates: for the late Yusufu Mukasa, the original owner of the *kibanja;* the estate of Erisa Kibuuka, who was his son and heir and Festo Buwembo, who was Kibuuka's son and heir.

Court noted that out of the three, only the estate of Buwembo had administrators. The appellants as the administrators of Buwembo's estate had secured a grant as early as 2001 but never filed any inventory as required by law, to show how that estate had been distributed and help this court to resolve the dispute.

As also noted by the court, there was also uncertainty about the size of the *kibanja* that Erisa Kibuuka and Buwembo had successively inherited which court duly recognized in the 2002 suit and the correlation with the *kibanja* which was sold to Nabbanja, measuring *68ft x 100ft.* ***Pw2*** told court that the total area was about 5 acres, though she did not appear certain. ***Pw1*** referred to an area almost double that size.

This can only mean that in the event that the disputed *kibanja* constituted part of Kibuuka's estate, Nanfuka had sold off to Nabbanja only *68ft x 100ft,* out of the entire Masanafu estate which was estimated by the witnesses as measuring 5-10 acres.

This could well have been considered to be her entitlement if distribution had been done. In absence of a survey report one could not also rule out the possibility that the *kibanja* sold to Nabbanja was outside the scope of the disputed land.

I wish also to add that the appellants were not the administrators of their father's estate and had no authority to deal with the same without letters of administration. Just like Nanfuka they were mere beneficiaries entitled to equal shares under that estate.

While therefore the appellants managed to prove that the late father had a *kibanja* which they recovered from Kironde as per 2002 suit, they failed to prove that the late Nanfuka's portion constituted part of Buwembo's estate which they were authorized by court to administer.

The appellants had failed to prove on a balance of probabilities that Buwembo owned the entire *kibanja* and that they have any lawful interest in the disputed *kibanja* which at the material time was in possession of and was utilized by Nanfuka and later sold to the respondent.

All in all, and in reply to issues ***1, 2, and 3,*** the learned trial magistrate properly evaluated the evidence on record and carefully took into consideration the proceedings and judgment of the previous suit ***(Civil Suit No. 587 of 2002*** before arriving at the finding and correct conclusion that the appellants did not have any lawful interest in the suit *kibanja* located at Masanafu village, Bukuluji Zone, measuring *68ft x 100 ft.*

This appeal must therefore fail. The judgment of the trial court is upheld. Since the respondent did not file any reply, no award of costs is granted in respect to this appeal.

Alexandra Nkonge Rugadya

Judge

8th August, 2022

Delivered by email.

8/8/2022.