

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

CIVIL SUIT NO. 2570 OF 2016

NABUSO ROSE RUSIYATA:PLAINTIFF

VERSUS

1. KATENDE ENOS

2. NAMAKULA SARAH:DEFENDANTS

Before: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT:

The facts according to the plaint are that the Plaintiff's claim against the Defendants jointly and severally is for trespass to land.

The particulars are enumerated under paragraph 5, but briefly are that. The 1st Defendant was a kibanja a holder of approximately 11 acres previously belonging to his father; George Mukasa Kyagaba, stealthily obtained Letters of Administration to the Plaintiff's father's estate following his death in 1993, vide Admin Cause No. 67/1995 at Chief Magistrates Court of Kampala at Mengo.⁹ *including the suit land*).

In 2006 or about then, the 1st Defendant (Katende Enos) and George Mukasa Kyagaba, caused the division of the 1st

Defendant's (Katende Enos) then kibanja whereby he; (Katende Enos) received land titles to the land **comprised in Kyadondo Block 180 Plot 210 and 211 Kitukutwe measuring 5.21381 acres**, and the remainder remained for the estate of the late Benard Kasaato Kasirye (the Plaintiff's late father). The Plaintiff sued George Mukasa Kasirye (the Plaintiff's late father). The Plaintiff sued George Mukasa Kyagaba (Administrator of the late B. Kasaato) in 2007, as the sole beneficiary of the estate/sole biological child of the deceased).

On November 12, 2009, George Mukasa Kyagaba and the Plaintiff entered into a consent judgment. In the said consent judgment, George Mukasa Kyagaba undertook to surrender the entire estate which included the suit land to the Plaintiff. In spite of the agreement, when the Plaintiff waited to utilise the land in 2011, she was prevented by both the 1st and the 2nd Defendants; hence this suit.

In defence, both the 1st and the 2nd Defendants denied the plaint. In their written statement of defence, both the 1st and the 2nd Defendants denied the contents of the plaint as summarised above, claiming that they are bonafide occupants on the suit land, having bought their interests from the deceased; Benard Kasaato. They relied on a purchase agreement annexed 'A' to the written statement of defence, claiming that the 1st Defendant occupied 12 acres but not 11 acres acquired in 1976 by the 1st Defendant.

While in Court during the scheduling, both parties marked their exhibits and also re-affirmed the joint scheduling memorandum filed by the parties on October 29th 2019, where they consented to agree the facts indicating two issues for determination.

The issues are as herebelow:

- 1. Whether the Defendants are trespassers on the suit land.**
- 2. Whether the Plaintiff is entitled to the remedies prayed for.**

I however note that, arising from the joint scheduling memorandum, it was indicated as disagreed facts, yet there are some of the claim in trespass.

I will therefore redraft the issues so that they consider the following as the questions for determination;

1. Who owns the suit land?
2. Did the Defendants trespass on the suit land?
3. What remedies are available to the parties?

Determination of the issues.

Issue 1

1. Who owns the suit land?

In Court, the Plaintiff led a total of 4 witnesses to wit; PW1; Nabuuso Rose, PW2 Odokel Opolot, PW3; Kasule Arison

Kabuye, PW4; Kiggundu Vicent. The plaint also relied on exhibits marked as PEX1 - PEX13. In their defence, the Defendants called DW1; George Mukasa Kyagaba, DW2; Namakula Sarah, DW3; Ssalongo Noah Kiiza and DW4; Katende Enos.

The Defendants lined up exhibits from DEX1 - DEX5 and DID - DID3. Court also visited the *locus*.

The gist of the evidence before Court was as follows:

PW1; Nabuuso Rose, told Court that the land in dispute forms part of the estate of her late father; Benard Kasaato Kasirye's estate. Benard Kasaato Kasirye passed away in March 26, 1993. Which estate is administered by George Mukasa Kyagaba who got Letters of Administration fraudulently in 1995 whereupon she sued him in Court in 2007.

Following the suit, a consent decree was reached on November 13, 2009 and that the Defendant handed over the lands in dispute (paragraph 8) in the presence of the 1st Defendant; Mr. Kiiza Noah, Odokel Opolot (lawyers) and others. That the said Kyagaba disclosed that the said lands used to constitute the 1st Defendants kibanja, but he had settled him and the 1st Defendant confirmed so in the presence of those present. The 1st Defendant and Kyagaba also promised to remove the depilated house thereon (para 9).

After sometime, when she went to check on the land in dispute, she found DW2; Namakula Sarah building. From then the Defendants chased her off the land (paragraph 1), hence the suit.

She further indicated in her evidence from paragraph 11-22 of her testimony the steps taken by other agencies to resolve this dispute which all ended in her favour as evidence by annexure PEX7 and annexures 'H' and 'Y' herein PEX9 and c1d1.

In cross examination, she reaffirmed what she stated in paragraph 23 that the land was inspected in the presence of Enos Katende and Kasule Mukasa Kyagaba.

In re-examination, she clarified that the land at Kitukutwe is approximately 200 acres and is part of the land Mukasa had to give back to her; and is part of the land that is the subject matter of the conflict before Court.

PW2; Odokel Opolot old Court that he represented the Plaintiff in the Family Division HCT CS No. 103 of 2007; **Nabuuso Rose Rusiyata versus George Mukasa Kyagaba**; *Administrator of the estate of the late Benard Kasaato Kasirye*, wherein she sought the accountability and recovery of her late father's estate, from George Mukasa Kyagaba among others.

That a consent decree was signed between the parties culminating in a settlement wherein on November 19, 2009, a meeting was held between the Plaintiff and George M. Kyagaba

and he took them around Kitukutwe, showing them the titles in respect of each land. He also introduced the Plaintiff to the kibanja holders and lands which had no kibanja holders. (*See paragraphs 6 & 7*).

That on Block 180 Plot 209, they found Mr. Katende Enos, Mr. Kiiza Noah and other people. Mr. Kyagaba told the Plaintiff that his land used to form part of Mr. Katende Enos's kibanja, but he had settled him and that Kyadondo Blok 18 Plot 209, formed part of the portion of the former kibanja that they (Katende Enos and George M. Kyagaba) agreed, would be for the estate of Ms. Nabuuso Rose Rusiyata's late father and Mr. Katende Enos agreed that he had been settled and has no claim over Kyadondo Block 180 Plot 209 and the estate of the late Benard Kasaato Kasirye.

However, Mr. Katende and his children have since denied Nabuuso's access to Block 180 Plot 209, which lawfully belongs to her.

In paragraph 13 of the witness of the opinion that Katende Enos was dully settled for his kibanja on Block 180 Plot 209.

PW3; Kasule Arison Kabuye told Court that he had been approached by George M Kyagaba to conduct a survey under the firm; Jolanam Survey Services. This was in the late 2005. That under paragraph 5, a few days thereafter, Mr. George M Kyagaba, Mr. Kagodo and Mr. Kiiza Noah, the son to Mr.

Katende Enos; again went to his home and together they moved to the site which is the former kibanja belonging to Mr. Katende Enos (1st Defendant).

The kibanja was approximately 12 acres and Kyagaba instructed him to survey, demarcate and cut off portions with titles. They then produced three titles. They then produced three titles regarding Kyadondo Block 180 Plots 209, 210 and 211 plus the residual out of Mr. Katende Enos's former kibanja. Under paragraph 10, he stated that Kyadondo Block 180 Plot 209 measured 1.475 hectares, Block 180, Plot 210, was 1.85 hectares and 180 Plot 211 was 0.259 hectares. The residual out of Mr. Katende Enos; former kibanja was 1.271 hectares and remained in the mother title.

Under paragraph 11 that Kyagaba took disputes to Kyadondo Block 180 Plot 209 and authorised his handover Kyadondo Block 180, Plots 210 and 211 to Mr. Katende Enos or his son; Kiiza Noah.

Under paragraph 12; Mr. Katende Enos later picked the land title from him.

PW4; Kiggundu Vicent testified that in December 2011, Mr. Enos Katende filed a complaint with the Presidential land Task force, a complaint that the Plaintiff; Nabuuso Rose R and George Mukasa Kyagaba; Administrator of the estate of the late B. Kasaato Kasirye were evicting them from their land

(kibanja). His complaint was that he had approximately 3 acres of kibanja and they had agreed with the administrator; Kyagaba to share the kibanja so that he gets exclusive rights over his portion. (*See paragraph 3*).

That he was not satisfied with his share having expected a bigger portion and he also (paragraph5) comprehend that through Kyagaba had promised to compensate them with land from elsewhere he had not done so, and the Plaintiff (Nabuuso) should not be allowed to occupy his kibanja before being compensated.

That a fact finding exercise was conducted as per paragraph 6-11, he concluded that Mr. Enos Katende's kibanja was approximately 11.38 acres and he had been given exclusive ownership of 5.31 acres and the landlord retained approximately 6.1 acres.

In paragraph 14, the witness is of the opinion that the kibanja that was being raised over Kyadondo Block 180 Plot 209 at Kitukutwe (suit land) is a dishonest calculation between the Defendants and George Mukasa Kyagaba to deprive the Plaintiff of her beneficial interest in the said land. He referred Court to PE12 & PE 13.

In defence, the defence case was as follows:

DW1; George Mukasa Kyagaba stated that the 1st Defendants' kibanja was about 12 acres that he signed the agreement dated February 4, 2007 with the first Defendant and had never dealt with the 2nd Defendant. The stated that the kibanja which the Defendant relinquished to him by the nature of the agreement dated February 4, 2007 was the lower side. That the parcel of land occupied by the 2nd Defendant is not part of the land to the 1st Defendant relinquished; and that he authorised Yobu Kagodo to collect rent from the tenants on the estate land of Kasaato Kitukutwe.

DW2; Namakula Sarah stated that she is a daughter to the 1st Defendant. It is the 1st Defendant (her father) who authorised her to occupy and use and develop the kibanja since the 1980's.

That she has been paying busulu to the land agent Kagodo Yobu. That she has enjoyed quiet possession since then, having lived thereon with her father since birth.

DW3; Ssalongo Noah Kiiza stated that he was part of the negotiations with Kasaato Kyagaba in 2007. That Kyagaba surveyed and demarcated off Blocks 180 Plot 210 and 211 whose titles were given to the 1st Defendant. That the two titles did not constitute the whole of the portion of kibanja as agreed with George Mukasa registered himself on the land title for Plot 209 which her late father transferred to the Plaintiff (yet it was part of his father's portion; (paragraph 4,10,11).

That since his father had given that portion to Namakula Sarah, he demanded George Mukasa to hand over the land title and have the part delaminated which information was passed over to the Plaintiff (paragraph 12, 13. Instead, the Plaintiff demanded that the Defendants vacate the land.

DW4; Katende Enos stated that he acquired the kibanja on the suitland on September 11, 1979 from George W Kinene. That upon his demise, George Mukasa Kasaato *alias* Kyagaba obtained Letters of Administration. The Defendant witness then entered an understanding with him to delineate his kibanja interest in exchange for a portion of the title on his acquired portion. That Mukasa agreed and duly surveyed and demarcated land according to the agreed portions. He processed and gave him one certificate of title for Kyadondo Block 180 Plot 211, but it did not constitute the entire portion of kibanja owned by the time agreed with George Mukasa Kasaato.

That Mukasa registered himself on the land title for Plot 209 (suit land) which constituted part of his kibanja and later transferred the same to the Plaintiff. He said that he had given part of his kibanja to D2, so he wanted the land title back so that the said portion is delaminated.

Counsel referred to a set of documents during cross examination of DW4, regarding a mutation from Mr. Owing to

the objection by the defence, I received them as CIDI pending further inquiry as scrutiny by Court on their relevancy and admissibility.

Having looked at the law, I do admit these documents as exhibits for the Plaintiffs and retain them as on record as CIDI and having the above evidence on record, and having looked at, studied and internalised the submissions, I do find as follows:

The evidence above is clear. The facts are simple. The truth is glaring for all to see. Simply put the orchestration of this controversy is the fact that following the demise of the Plaintiff's father Benard Kasaato Kasirye on March 26, 1993, a one George Mukasa Kyagaba obtained Letters of Administration to his estate in 1995. The said Kyagaba testified as DW1 took it upon himself to begin dealing with the estate's properties including the kibanja holders thereon who included D1; Katende Enos.

He entered in an understanding to allow Katende Enos;D1, chance to obtain title to his kibanja. They made an agreement and they said that D1 was to relinquish part of the kibanja in exchange for a title. The evidence shows that a survey was done and the land demarcated and the title for the portion of kibanja for the Defendant was given/contained in Block 180 Plot 210 and 211. The said land is titled and delineate the rest of the kibanja, now sitting on Block 180 Plot 209 (suit

land) in the names of the estate. The whole of the defence evidence is an attempt to justify that what was titled off, is not been agreed, and hence the land Block 180 Plot 209, does not belong to the Plaintiff, but should be found to belong to the Defendant.

I have carefully examined the evidence by PW1 – PW4 and DW1 – DW4. I have also looked at PEX1 – PEX13 and DEX1 – DEX7. I have found that the evidence had by the Plaintiff is consistent and coherent to establish that the Plaintiff is the registered proprietor of the suit land as per EXB. She was registered on March 16, 2010. I also, by virtue of the evidence on record, is aware that the suit is a resultant of the fact that the Plaintiff had sued a one Kyagaba. Kyagaba being aware of his flaws over the estate, entered a consent which covered the subject matter (kibanja) before me.

The decree of the Court was received as PEX2. From that decree, what was to follow was to vacant possession to enable the extension of the said agreed position to enable the restoration of the deceased's property to the rightful beneficiary who is the Plaintiff before me as a sole/child/beneficiary thereof. Instead, the Defendants (father and daughter), with the connivance of Kyagaba as seen from his evidence as on record as (DWI), but contradicted by both DW4 (Katende) and DW3; (Kiiza).

In his submissions regarding this kibanja, the matter ended up in Court as a civil suit.

There is overwhelming evidence through; PEX1, PEX2 (*decree*) PEX3; Title, PEX11 (*committee findings*) PEX9; (*area schedule*) and CIDI: all bearing witness to the fact that the kibanja in issue is the portion which remained and was meant to be part of the original estate of the late.

It does not belong to the Defendants. In reaching this conclusion, I found that the evidence given by the Defendants is full of falsehoods, contradictions and is not cogent. For example while all;

In Court, the Plaintiff led a total of 4 witnesses to wit; PW1; Nabuuso Rose, PW2 Odokel Opolot, PW3; Kasule Arison Kabuye, PW4; Kiggundu Vicent and DW2; Namakula Sarah, DW3; Ssalongo Noah Kiiza and DW4; Katende Enos, all claim that the survey off parties produced two titles namely; Block 180 Plot 2010 and 2011, which were handed over to DI (DW4); Katende Enos. He, Katende Enos said that the got only a title foe block 2011. Both DW2; Namakula Sarah, DW3; Ssalongo Noah Kiiza contradicted each other on this matter.

DW2; Namakula Sarah clamed this portion was not part of the kibanja available for negotiation with the land lord; Kyagaba for delineating. However, DW3; Ssalongo Noah Kiiza said he was part of the negotiations (paragraph 7) and George Mukasa was to delineate the land by having the land surveyed,

demarcated and process the title (paragraph 8), that George Mukasa Kasaato then processed the land titles for the said estate and handed over to the 1st Defendant two certificates of titles for his kibanja namely; Block 180 Plots 210 and 211 (paragraph 9).

However, the two land titles issued to the 1st Defendant by George did not constitute the whole of my father's portion of the kibanja as agreed with George Mukasa Kasaato.

That George Mukasa registered himself on the land title for 209 which constituted part of my father's kibanja and later transferred the same to the Plaintiff; Nabuuso Ruth.

It is import to note that these demarcations were done after a survey done by PW3; Kasule as authenticative of DW1; Kyagaba.

However, DW1; George Mukasa Kyagaba in his evidence in chief, dodges to mention the issue of what was actually meant to remain as the estate land after survey. He said; *the portion of kibanja the Defendant relinquished to me by virtue of the agreement dated February 4, 2007, was on the lower side and was made part of the residue of the entire land belonging to the estate of Kasaato'* the parcel of land occupied by the 2nd Defendant relinquished in the agreement dated February 4, 2007. This witness does not say whether the lower or upper side is what he himself as a landlord had authorised the surveyor to demarcate. While DW3 and DW4 claim that he

registered the upper part into his names and later transferred to the Plaintiffs names, he is silent about it.

Worst of all, both DW3 and DW4 claim the land on the Plaintiff's title, include the portion which they claim ought to have been included on the 1st Defendants land actions, they blame on DW1, but who is giving contrary evidence regarding the same aimed at concealing the truth. DW4 in paragraph 7 said; *'the title issued to me by the said George Mukasa Kasaato did not constitute the whole and entire portion of the kibanja owned by me by the time I agreed with George Mukasa Kasaato, while DW1 denies (feigns ignorance of the demarcations giving rise to the Plaintiff's acquisition of title.*

DW4 categorically says in paragraph 10; *'since I had given my portion of my kibanja to Namakula Sara, the 2nd Defendant, I demand that George Mukasa Kasaato; DW1, hands over the certificate of title for the same to me so that the portion occupied by the 2nd Defendant is delineated (pg 10).*

The sum total of the evidence above is that it's grossly contradictory and misleading. It is as Counsel for the Plaintiffs submitted, intended to and the Defendants in their scheme to cheat the Plaintiff. It puts the authenticity of DEX3 to question.

This finding is further bolstered by what Court observed during the *locus in quo* visit.

During the *locus* visit, PW3 (Kasule) was able to clarify and show boundaries of Plots 209, 210 and 2011. He was able to clarify where the football field is located. He even showed the residue area which is mapped on the area schedule. He was not contradicted at all in his evidence showing that Plot 2010 and 2011 were handed to Katende Enos while 209 and the residue were left for Mukasa Kyagaba.

DW1; Mukasa Kyagaba, while at *locus* also agreed with what Kasule showed Court as boundaries in respect of Plots 2010 and 2011 and confirmed that they belonged to Katende. He also agreed that the field belongs to Plot 209. He kept on referring to Katende's kibanja as the boundary going up to the 'field'. He then stated; *'the remainder was land for Plot 209 which I had not given him because my aunt Nabuuso wanted her father's property. So I gave her more than 20 acres. The titles for Plot 209 being in Nabuuso's names, were not meant to be part'*.

The evidence of DW2; Namakula at *locus* reaffirmed the 3 names as shown by PW1. She also said that the field is outside her land and is her '*boundary mark*'. The football field and the road were her boundary marks. Therefore the evidence at *locus* confirmed that the suit land is distinctively the portion described as Plot 209 comprising as shown at *locus*.

I do agree with the Plaintiff's Counsel submissions that the Defendants are not truthful. I do find that the 1st issue is answered in the affirmative.

Issue 2:

Whether the Defendants are trespassers on the suit land.

Having resolved the above issues in the positive, it is obvious that the actions by the Defendants cannot be exercised as innocent.

The case of *E M N Lutaaya versus Sterling Civil engineering Co.; SCA No.11 of 2002*, puts the question of trespass in context. While it distinguishes trespass being attributable to possession, it also recognises the legal paradigm that a certificate of title places legal possession into the hands of the holder of a valid certificate of title.

I agree that in that case; *JSC Mulenga* held in that case;

‘...by virtue of her certificate of title, the appellant had legal possession of the suit land and therefore, the capacity to sue in trespass’

The evidence on record shows that the Defendants, being aware of the fact that their bibanja holders as such, took a step to legalise ownership, DW1, Katende testifying as DW4 categorically states that it is him who gave DW2; his daughter a portion of the land (suit land) to cultivate. She is not therefore a bonafide occupant, but is a licence on land that

was given her by her father to cultivate to D1's right of a kibanja holder.

However, in a bid to obtain a title, he gave over the kibanja when DW2 is in occupation a licence for purposes of obtaining a title to the portion DW1 hold. The fact that DW1 even acknowledges that the titling was done and surveying completed in his knowledge only that he complains about the size, does not *nullify* the Plaintiff's acquisition and holding thereof by virtue of PEX3(Land title). The instance therefore to remain on the land and occupy the same with impunity is in itself an action in trespass.

I do find that the Defendants are in trespass of the Plaintiff's land and do find this issue in the positive.

Issue 3:

What are the remedies open to the parties

The Plaintiff is entitled to the following reliefs as prayed:

- a. Permanent relief as prayed against the Defendant/agent's action of the trespass on the Plaintiff's land.
- b. Vacant possession of the Plaintiff's land.
- c. Special damages for trespass need be specifically pleaded and general damages are in Courts discretion.

The Plaintiff prayed for shs. 250,000,000/- (*two hundred fifty million shilling only*) to atone for pain and suffering.

I do recognise that damages are compensatory in nature.

This matter entered the Court system in 2019, when the Plaintiff first sued Kyagaba, but the Defendants are said to have begun their trespass in 2011. The land in question being in an upcoming area increases in value and perhaps if it's left to no use every year can be given a residual value of shs. 1,000,000/- per acre per annum. Since it's approximately to be 3.5 acres, this Court will give it a yearly value of shs. 3,500,000/- which we shall allow for the 10 years since 2011. The amount is (*shs. 3,500,000/- x 10 years*), = 35,000,000/-.

d. Accordingly, Court will allow the Plaintiff the amount of shs. 65,000,000/- (*sixty five million shillings only*) as general damages to compensate for her pain and suffering for non-use of her land.

e. This Court grants the Plaintiff costs of the suit.

f. Court also grants the Plaintiff interest on costs and damages at Court rate of 6% from date of judgement till payment in full.

I so order.

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Henry I. Kawesa

JUDGE

28/02/2022

28/01/2022:

Omalla Deogratiuous for the Plaintiff.

Bahati; Counsel for the Defendant absent.

Defendants absent.

Plaintiff present.

Lydia - clerk.

Court:

Judgment read in the presence of the parties above present
and in the absence of the Defendant and Counsel.

Sgd:

Ayo Miriam Okello

DEPUTY REGISTRAR

28/01/2022