

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 89 OF 2017

(ARISING OUT OF CHIEF MAGISTRATES COURT AT MENG0

CIVIL SUIT NO 2343 OF 2008)

KIYEMBA NICHOLAS.....APPELLANT

VERSUS

1. KIZITO FLORENCE

2. LUKAAYI PEREZI.....

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT:

Introduction:

This appeal arises from the judgment and orders of the trial Magistrate, Grade 1 at Mengo Chief Magistrates Court.

The brief facts are that the respondents filed **Civil Suit No. 2343 of 2008** against the appellants seeking a declaration that the 1st respondent is the rightful owner of land and *kibanja* located at Lungujja Ssendaula Zone having bought it from the 2nd plaintiff/respondent; an eviction order against the respondent; special, general and punitive damages against the appellant for trespass.

The appellant (Kiyemba) in his amended Written Statement of Defence denied the respondents' claims stating that the suit *kibanja* was purchased and built by his late grandmother Mirios Nakamya and has all along lived in the house with her, from 1977 when she occupied the *kibanja* to date knowing that the *kibanja* and the house belonged to her.

He further contended that the 1st and 2nd respondents have never occupied or possessed the *kibanja* directly, individually or at all.



That the sale agreement by which his father, the 2nd respondent, Mr. Lukaayi Perezi allegedly acquired the *kibanja* had been forged and should not therefore be relied upon. Kiyemba also claimed in the alternative that he is a lawful or *bonafide* occupant whose security of occupancy is guaranteed by law.

The four issues at trial were:

- 1) ***Whether the 2nd plaintiff was the owner of the suit property***
- 2) ***Whether the 1st plaintiff lawfully acquired the suit property***
- 3) ***Whether the suit was time barred.***
- 4) ***Remedies available***

Judgment was entered in favour of the respondents declaring the 1st plaintiff/respondent Florence Kizito the rightful owner of the suit property, having lawfully bought it from the 2nd plaintiff/respondent, Lukaayi Perezi.

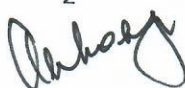
Kiyemba who was declared to be a trespasser on the suit property was thereafter ordered to vacate the land within 60 days; and pay punitive damages of **Ugx 800,000/=** for refusal to vacate the suit property; general damages of **Ugx 5,000,000/=**; and costs of the suit.

Dissatisfied with the judgment and orders of the trial court, Kiyemba appealed raising the following grounds of appeal:

1. ***That the learned trial magistrate erred in law and fact when he held that the 2nd respondent/plaintiff was the owner of the suit land and before disposing it off to the 1st respondent/plaintiff hence occasioning miscarriage of justice.***
2. ***That the learned trial magistrate erred in law and fact when he held that the 1st respondent/plaintiff lawfully acquired the suit property hence occasioning a miscarriage of justice.***
3. ***That the learned trial magistrate erred in law and fact when he failed to properly analyse and evaluate the evidence on record, hence arriving at a wrong decision and occasioning a miscarriage of justice.***
4. ***That the learned trial magistrate erred in law and fact when he made orders for punitive damages of Ugx 800,000/= (eight hundred thousand shillings) and general damages of Ugx 5,000,000/= (five hundred thousand shillings) in favour of the respondents/plaintiffs, hence occasioning a miscarriage of justice.***

Background to the appeal:

By way of a brief background, this appeal had been dismissed on 6th February, 2019 for want of prosecution. Counsel representing Kiyemba, the appellant went ahead on 19th March, 2019 to file **MA No. 390 of 2019**, seeking its reinstatement.



MA No. 390 of 2019 was however dismissed on 19th August, 2020. But by consent order entered on 28th August, 2021, the parties agreed to have the appeal reinstated.

5 Court on 14th September, 2021 gave the parties specific timelines within which to file written submissions. The appellant side was directed to serve the respondents by 28th September, 2021. The reply was to be filed by 13th October, 2021; and a rejoinder by 20th October, 2021.

Both sides were made aware by this court of the said timelines. However, only the respondents filed their submissions. The firm representing the appellant, **M/s Lwere Lwanyaga and Co. Advocates**, duly received the submissions in reply on 5th November, 2021. The respondents' side represented by **M/s Sekabanja & Co. Advocates**, had filed their response, upon failing to hear from the appellant's side.

10 Given the fact that the appellant had taken some trouble to have the appeal reinstated, this court could not allow the omission by his counsel to file the submissions to be visited on him.

Consideration of the appeal:

15 This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.

The appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. (**Father Begumisa Nanensio and 3 others vs Eric Tiberaga SCCA No. 17 of 2000**).

20 Accordingly, the appellate court can interfere with the finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

Grounds 1, 2 & 3

I will jointly address the matters issues raised in **grounds 1,2 and 3**.

The case of the respondents/plaintiffs at trial was led through the evidence of 7 witnesses.

25 **Pw1**, Florence Kizito testified that she lost her husband in 1999; got tired of renting and in 2003 got the money to buy a house for herself. She met Aziz Mutaawe who introduced her to Perezi Lukaaya, as the owner of the suit property which he later sold to her.

30 She had inspected the property, met the LC chairman, Kasule Semugenze and the tenants who were in occupation. According to her, Kiyemba had not been among those tenants. It was also her evidence that she had met the land owner Joyce Nakyagaba, the LCs and neighbours, some of whom were called in to testify.

She told court that the LC Chairman and the neighbors had duly confirmed that the suit property belonged to Lukaaya Perezi who had acquired the *kibanja* and constructed the house. The respondents had thereupon entered into an agreement for the purchase of the suit property. (**PE1**).



It is not in dispute that a sum of **Ugx 11,000,000/=** was paid as purchase price to Lukaaya Perezi, whom she later admitted was her lover; and **Ugx 1,000,000/=** to the land owner, Joyce Nakyagaba. Lukaaya upon receipt of his share had paid some money to the LC chairman.

5 A transfer was made into Florence Kizito's names. **(PE6). PE7** was the certificate of title. This was proof that she had duly acquired legal title from the land owner. She further told court that Kiyemba had requested for **Ugx 6,000,000/=** before he could allow her to take over the house; and that he had even threatened to kill her if she did not give him the money.

10 Kiyemba had initially presented a will of his grandmother under which he claimed to have been bequeathed the house. He had also given a photocopy of that will to the Police and to Florence Kizito. The said will was however never availed to court.

Pw1 further argued that by a letter dated 6th November, 2003, the office of the Administrator General had also given guidance to the effect that the *kibanja* belonged to the 2nd plaintiff/respondent, Lukaaya Perezi **(PE10.)**.

15 In support of her evidence was **Pw2**, the 2nd plaintiff, Lukaaya Perezi, father to the appellant, Kiyemba. **Pw2** claimed that he himself had bought the *kibanja* and had put up the structure for his mother who prior to that had been renting. He maintained in his evidence that his late mother had no means to put up that house as the defendant/respondent alleged.

20 That he had rented it out to three tenants who were supervised by his sister, now late Jukira. They had started renting the premises as early as 1990 and in 2003, he had notified the said tenants of his intention to sell the property to Florence Kizito, to whom after the sale he had given vacant possession.

The initial sale agreement dated 28th September, 1977 was signed between him and one Salongo Esiba the original owner of the *kibanja*. The two had however also signed a second agreement in 1996 after the first one of 1977 had got lost. Esiba had died around 1998. According to Lukaaya, from the time he acquired that land, no one had contested its ownership.

25 His son, Kiyemba had only lived in the house between, 1995-1996 and therefore had not been on that land at the time he had sold it to Florence Kizito. But that as soon as Kiyemba got to learn about the sale, in 2003, he forcefully entered the house, putting one Muwanga in charge of the house.

30 **Pw3** Ssentongo Janet a daughter to Joyce Nakyagaba the land owner, stated that she and her mother had been staying together at the material time. It was not in contention that her mother was the owner of the legal interest nor was it in issue that Esibu Salongo had been the original owner of the *kibanja* a portion of which Lukaaya claimed to have bought.

That evidence was a suggestion therefore that by the time Nakyagaba had acquired that interest Lukaaya Perezi himself, going by his evidence, he was already on that land as a *kibanja* owner. **Pw3** in her evidence thus corroborated Lukaaya's interest in the land.

35 She also told court that he had approached her, initially intending to buy the legal interest but did not return until some four years later and that was when he had introduced Kizito to them as the person to



whom he had later sold the *kibanja*. She further confirmed that a sum of **Ugx 1,000,000/=** had been paid to Joyce Nakyagaba in respect of that transaction.

5 It was also her evidence that the LC Chairman had come with Kiyemba, not only once and had expressed interest in buying some land from her mother. Upon inspection of the land that they wanted to buy, she had told the two that it belonged to Lukaaya Perezi. It is clear that Kiyemba never at that point registered any complaint against his father's alleged acquisition/possession of that land.

According to her, no other person was introduced as having interest in that *kibanja* comprised in **plot 389, block 24**. At the time there had been errors on the title. One Patrick Musisi, since deceased, had initially been registered as owner but this error was later rectified, with Musisi's cooperation.

10 In cross-examination, the witness also told court that she had also attended the meeting where Esiba had introduced Lukaaya Perezi as the owner of the *kibanja*. That evidence was not refuted.

Pw4, Mutaawe Aziz knew Perezi as a neighbor in Sendawula Zone and Kiyemba, the appellant as his son. He himself had lived on the land from 1977. He told court that in 2003, he had assured Kizito as the intending buyer that the *kibanja*, located only about 8 metres away from his, belonged to Lukaaya.

15 The sale agreement entered by the respondents (**PE1**) had been witnessed by **Pw4**. The evidence of **Pw4** who was a close neighbor also corroborated the evidence of **Pw2 and Pw5** that Kiyemba had left the suit premises and later started renting in Kikandwa.

Pw5, Nanyunja Fausta Nalongo, Secretary for Sendaula Zone LC1 for 10 years told court that Lukaaya was known to him as a neighbor since her childhood and had decided to sell the land in 2003 to Kizito whom she had met when the witness was with her mother who had resided in the neighborhood for 40 years.

20 That Lukaaya had bought the land when they were already residents in that area. It was not developed by that time and it was him who had put up the house that he had started constructing between 1970-1979; and that he used to keep the building materials at their home.

25 After the construction, he had put his mother in that house where she lived with Kiyemba, the appellant who subsequently left, and started renting his own premises in Kikandwa, only to return later upon learning that the house had been sold to Kizito.

Her evidence supported that of **Pw2 and Pw1** that Kizito had met the LC Chairman prior to the transaction. That money exchanged hands purportedly as development fee; and the LC Chairman assured Kizito that she was free to use the land.

30 **Pw4's** evidence also corroborated that of the two plaintiffs/respondents **and Pw7** (Kalema Bashir) to the effect that Kiyemba had not been in occupation in that house whether as a tenant/owner/care taker when Kizito bought it in 2003.

Pw6, Kamya Peter aged 80 years, was one of the porters employed at the construction site for the residential house in 1978. Lukaaya was known to him as the owner of the site. His evidence was not disputed.

In short, the plaintiffs/respondents' evidence pointed to the fact that Lukaaya was the owner of the *kibanja*, having acquired it from Salongo Esiba; had constructed a house on that land around 1978; and that both plaintiffs/respondents had met the LCs, the land owner and neighbors, prior to the purchase; and that his ownership was never challenged until 2003.

5 On his part however, **Dw1**, Nicholas Kiyemba, aged 46 years, claimed to have been on that land from 1977, with his late grandmother Mirios Nakamya whom he claimed to have bought the *kibanja* from one John Nsiba who had been staying on the same land.

10 The basis of his perceived interest was that during the last funeral rites of his grandmother the family had given him the role of the caretaker of the suit property. He relied on the evidence of eight witnesses to confirm so.

He admitted that he was not present when his grandmother bought the land but that in 1976 it was she who had put up the house on that land. She died around 1993, and left no other property.

15 His father never took possession of the land. He however did not avail to court any copy of the sale agreement for the purchase of that land by his grandmother, claiming that it got lost. The loss was however never reported to Police.

Dw1's also claimed that a will that had been left by his grandmother, which was the basis of his claim of ownership of the disputed property had been lost around the time her last funeral rights were held.

20 **Dw3**, Ahmed Kasule Semugenze LC1, Chairman however admitted to have seen the purported will brought to him by one Jukira and indeed from the evidence of **Pw1**, a copy of the same had been availed to her and to the Police.

25 **Dw3** however made it clear that what he received as the will was not witnessed. Court also noted that he had seen the purported will around 2003, about ten years after the death of Mirios, and some years after the funeral rites had been held, which therefore put to serious doubt Kiyemba's testimony that he had lost it around the time the funeral rites had been held. In the event that it did, it had not been not proved in any court.

Besides, the evidence of Kiyemba's other witnesses: **Dw2** (Muwanga) and **Dw5** (Sarah Kaliisa) and **Dw4**, Jane Namagembe aged 75 years, a maternal aunt to Perezi was clear as each ruled out any possibility that Mirios Nakamya had left a will, or a valid will at that.

30 **Dw2** Muwanga claimed to have started living with their grandmother in 1984, at around the age of 12 years and was only 19 when their grandmother passed away. Like his brother Kiyemba, he maintained however that the property belonged to their grandmother, but not to their father and faulted Kizito therefore for failing to heed the advice not to buy the *kibanja*.

35 He however admitted that he was not present when the land was being bought by their grandmother; never saw any agreement by which she had acquired that land; and never witnessed the construction of that house.

The above come as no surprise considering the fact that he was only a minor at the material time. As such therefore he lacked real knowledge and information, or a basis upon which to question or challenge any transaction in respect of the disputed property which may have taken place prior to 1990.

5 The argument that his brother Kiyemba had been in occupation of the house from 1985-1992 could only imply that Kiyemba occupied the house for a limited time; had left before or soon after the death of his grandmother and thereafter as confirmed by other defence witnesses, started renting and residing in other premises in Lunguja Kituunzi, Kikandwa.

10 That also suggests that in 2003 when the transaction was entered between the respondents, Kiyemba was not in occupation as he had wanted court to believe. This also lends credence to the contention by the plaintiffs/respondents that he only came back in 2003 after learning that the property had been disposed of by his father.

Kiyemba himself argued in cross examination that his grandmother had given the land to him *to look after it*. That he was also chosen by family to look after the property but that he had no letters of administration and admitted that the authority from the family was not put in writing.

15 The evidence of such appointment as a care taker of the suit property came out clearly through the oral testimonies of **Dw5, Dw4 and Dw6**, who also told court that Lukaaya Perezi (who was the deceased's only child) never objected to the appointment of his son as the care taker.

20 To Jane Namagembe (**Dw4**), Kiyemba was given charge over the house, in her presence and that of Gladys, Gertrude Nabanja, Ruth Nanyanzi, Ruth Nantume, Nakaayi, Paul Mukwaya, Kaliisa Fred. It was a house put up on land bought by the deceased from Esiba, since also deceased. She admitted though that she was not there when her sister was buying the land.

Dw5 Sarah Kaliisa, the heir to the deceased Mirios raised the point that Lukaaya had sold the property without the family's knowledge and consent. Just like **Dw6**, **Dw5** however did not know who purchased the suit land, when or who had put up the house on that land or and how the deceased had come to occupy it.

25 **Dw6**, Muwonge Kaseego Willy, an uncle to Lukaaya Perezi claimed he did not know much about the disputed land but what he knew was that the family had agreed verbally that Kiyemba should stay on the land to look after it.

30 Although therefore no minutes of the said meeting or proceedings were availed to court, the defence oral testimony was consistent and it became clear to court that the family had appointed Kiyemba, merely as a caretaker of the property. None of the witnesses availed court with any useful evidence that Kiyemba was the actual owner of the disputed property.

35 As a care taker, his role had no permanence and he as an individual had no personal or proprietary interest in the property. It was transitory role, requiring him therefore to hand over the property to its rightful owners at the appropriate time or to the appointed administrator of the estate, which he himself was not, as he never made any attempt to secure from court the letters of administration for the estate.

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Kiyemba could not have been both a care taker and at same time the owner of the suit property, as his evidence seemed to suggest as he could not care take what actually belonged to him. It explains why he left the land to rent else where.

5 On the other hand however, a person introduced as a *kibanja*/property holder to the mailo owner and recognized as such by that mailo owner, the LCs and/or neighbours as in this case, would have every right to dispose of such property (if individually owned,) without seeking prior consent of his family. Consent of family could only be sought if the property to be disposed of fell within the category of family property, a mandatory requirement under **section 38A of the Land Act, Cap.227**. There is nothing to show that this was family property.

10 All in all, while the evidence by the plaintiffs/respondents was consistent and satisfying to court that it was Perezi Lukaaya who bought the *kibanja* from Esiba; it was him who constructed a house thereon, and as any responsible son would do, allowed his mother to reside in that house. There is nothing to show that he had put up the house for the benefit of any other person in that family, other than for use at that time by his own mother.

15 Kiyemba on his part did not show how he had acquired the land from his grandmother. His evidence showed inconsistencies, not only in regard to the existence (or otherwise) of a valid will but also on how and when the land/property had been acquired by the deceased.

20 There was besides no way of knowing how and why he came to believe it was for his exclusive ownership/use yet his witnesses, (none of whom had been present when the land was bought), knew him only as a care taker.

Reliable evidence ought to have come from the local leaders, and neighbours at the time. **Dw3**, Ahmed Kasule Semugenze LC1, Chairman had been a leader from 2002 and was therefore acquainted with the area and the parties as well.

25 He had also known the late Mirios, mother to Lukaaya Perezi since 1950s. He did not deny the fact that Kizito had been introduced to him as an intending buyer in 2003. His evidence was however riddled with inconsistencies, making it difficult for court to choose what to believe, and what to leave out.

On pages 69 and 70 of the proceedings, this is what he said:

30 *I don't know how the land was acquired. (Perezi) Lukaaya built the house in dispute.. Lukaaya never showed me any agreement that he was building for the mother.....Lukaaya told me that he had built the house for his mother but he did not mention Kiyemba.*

I never tried to find the ownership of the kibanja in issue. Mirios never told me that she bought that land. It is Lukaaya who bought the land. I have no contrary agreement. Lukaaya never told me that he lost an agreement; he only brought a false agreement.

The same witness still in cross examination.



I don't know Nanyunja's evidence that Lukaaya bought the land, built the house and was the owner of the house.....I have never seen any document showing that Kiyemba was the owner of the land. I was never a witness to the will by Nakamya. I only saw the will later. It was brought to me by Jukira . I don't know whether Kiyemba is aware of the will.....never told me that his grandmother left a will. The will was not witnessed.

The credibility of **Dw3**'s evidence was put to test, with him having denied the allegation made by **Pw1** and **Pw5** that he received money in regard to the sale transaction between the respondents. As noted earlier, **Pw5**, Nanyunja Fausta Nalongo, Secretary for Sendaula Zone LC1 for 10 years told court that **Dw3** had shared money with her regarding this transaction, only for him to deny its validity later.

According to **Pw5**, it was also the LC Chairman who later asked Kiyemba to apologise to his father following a dispute between the two; and even requested Lukaaya to give the tenants more time before vacating the premises, such conduct and actions which implied that he too had recognized him as the owner.

Her evidence as an LC put to serious doubt the credibility of **Dw3**, the LC chairman who initially told Kizito that Lukaaya was the rightful owner (though he later on denied the claims in his evidence). But what however court was able to decipher from **Dw3** (as quoted above) was the fact that Lukaaya had put up the building, on land which he had bought.

I could not agree more therefore with court's conclusion that such evidence could not help in supporting Kiyemba's claim. Kiyemba did not at any point raise a complaint; he did not take up the offer by his father to purchase the property; and never filed a counterclaim to prove his allegations of unlawful purchase by the respondents.

Such was evidence which was sharply divided in all the crucial areas: the availability and/or validity of the will of Mirios; the existence of the sale transaction between her and Esibu, the original *kibanja* owner; how Kiyemba had acquired the property; the nature and extent of authority granted to him over the estate, and whether or not appointing him as care taker was sufficient to accord him actual ownership of the *kibanja*.

In the case cited by counsel for the respondents in submission: **Adam Bale vs Willy Okumu No. 21 of 2005** it was held that where court finds major contradictions and inconsistencies intended to mislead or tell deliberate untruthfulness it may reject such evidence, as I now hereby do.

Court in declaring Lukaaya Perezi the lawful owner of the disputed property before he lawfully sold it to Kizito, observed that all plaintiff witnesses, as well as **Dw3**, the chairman of the area corroborated the plaintiffs/respondents' case that Lukaaya Perezi had built the house.

I am therefore inclined to agree with court's finding that Kiyembe had led no proof of ownership of the suit property by himself or that of his grandmother. Since he came to live with his grandmother at the age of 6 years, it showed that he himself was not fully conversant with the history of this land. That same argument also equally applied to his brother, **Dw2**.



5 Court relying on the consistency in the evidence of the plaintiffs/respondents; believed Lukaaya Perezi's explanation that he had lost the previous agreement but managed to secure another from the *kibanja* owner, Esiba even though the witnesses were different this time. What is important to note is that though Kiyemba questioned the second agreement he never led any evidence to prove that Esiba's signature appearing on that agreement had been forged.

The trial court also dismissed the claim that the suit was time barred, as the action in trespass had been filed in 2008, five years after the dispute arose. I have not been given any reasons to think differently.

10 Court therefore made the correct analysis, came to the right conclusion when it stated that Kiyemba as a care taker had no interest in the land. He merely sought to illegally obtain the suit land, well knowing that it belonged to his father.

15 It was therefore more probable than not, that Lukaaya Perezi had bought the land and had put up the house and that when he did so, it was not for his son, Kiyemba or his siblings for that matter. The fact therefore that Kiyemba had made substantial improvements on that land was not enough to grant him such ownership. He was simply fulfilling his role as a care taker. He ought to have but did not file any counterclaim for such expenses incurred by him.

In light of those findings, the four grounds of this appeal are therefore dismissed. I therefore uphold the orders of the lower court.

The appellant is ordered to pay the costs of this appeal and those incurred by the respondents in the lower court.

20 
Alexandra Nkonge Rugadya

Judge

31st January, 2022

Delivered by mail
