

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT HOIMA
CIVIL SUIT NO.04 OF 2023
Formerly Masindi Civil Suit No. 56 OF 2015**

**ALIGANYIRA YAKOBO KYOMYA ::::::::::::::::::::::::::::::::::: PLAINTIFF
VERSUS**

PATRICK BAGUMA ::::::::::::::::::::::::::::::::::: DEFENDANT

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The plaintiff brought this suit against the Defendant for trespass, vacant possession, general damages for inconvenience caused, interest and costs of the suit.

- [2] It is the plaintiff's case that at all material times, he was the owner of the suit land comprised in **LRV 3113, Folio 13, plot 38, Bugahya Block 19, land at Kyentale, Hoima District**. That on around 20/10/2015, the Defendant with a group of many other people entered onto the suit land and distributed it among themselves without his knowledge and destroyed all his food crops to wit; cassava, beans, sweet potatoes and pine and eucalyptus trees.

- [3] In his Written Statement of Defence (W.S.D), the defendant denied the plaintiff's allegations and instead contended that the suit land is family land forming part of the estate of the late **Kyomya Yafesi**, the father of both parties, for the benefit of the beneficiaries to wit; the widow **Victoria Kacwampaka** and children; **Joan Basemera, David Atuhairwe, Bamanyisa Yedidah, Timbigamba Livingstone, Eunice Bingi, Ajuna Frank, Akwetaireho Kenneth** and **Barongo Collin**.

- [4] That however, sometime in 2000, the family members collected money and entrusted the plaintiff to process the suit land title but instead of

registering it as family property, he registered it in his names and those of his son, **Abaitegeka Kyomya**. That as a result, the plaintiff started harassing family members by chasing them from the suit land where some have built their homes and have gardens thereon. The defendant however contend that the beneficiaries of the estate of their late father, **Kyomya Yafesi**, have rights to get a share in their father's estate and cannot therefore vacate the suit land as demanded by the plaintiff.

- [5] That the plaintiff has filed several claims against different people on the suit land who include **The Trustees of Hoima Catholic Diocese (vide Hoima (land) Civil Suit No.034/2003)**, but never succeeded.
- [6] However, that upon the Defendant and 2 others securing a Grant to administer the estate of their deceased father, **Kyomya Yafesi**, in 2015, the administrators distributed the land to all the beneficiaries of the estate including the plaintiff.
- [7] The Defendant counter claimed against the plaintiff for a declaration that the plaintiff fraudulently registered family land into his and his son's names, that the registration be cancelled and a permanent injunction does issue.
- [8] At scheduling, the following issues were agreed on;
 - 1. **Whether the plaintiff is the lawful owner of the suit land.**
 - 2. **Whether the Defendant is a trespasser on the suit land.**
 - 3. **What remedies are available to the parties.**

Counsel legal representation

- [9] The Plaintiff was represented by **Mr. Simon Kasangaki** of **M/s Kasangaki & Co. Advocates, Masindi** while the Defendant was represented by **Mr. Daniel Byaruhanga** of **M/s Kabuuse, Muhumuza & Co. Advocates, Kampala**. Both counsel filed their respective written submissions as permitted by this court.

Burden and Standard of proof

- [10] It is trite law that the burden of proof in civil matters is on the plaintiff to prove his/her case and the standard of proof is on the balance of probabilities. Whoever desires court to give judgment as to his/her legal right or liability must produce evidence to prove the existence of the facts he/she asserts; **Sections 100-103 of the Evidence Act** and **Lugazi Progressive School & Anor Vs Serunjogi & Ors [2001-2005] 2 HCB 12**. This court shall therefore, in the determination of this suit apply the above position of the burden and standard of proof.

Preliminary objection

- [11] Counsel for the defendant raised a preliminary objection/point of law to the effect that the subject matter herein was long tried and determined by a competent court whose decision still stands, has never been overturned and therefore, the suit is **res judicata**. That the plaintiff herein had previously filed **C.S No.034/2003** against **The Trustees of Hoima Catholic Diocese** in regard to the same subject matter at the Chief Magistrate's court of Hoima before H/W S.M.Obbo-londo and had lost both in the Chief Magistrate's court and on appeal.
- [12] That in the former suit, the plaintiff sought orders on the fact that he is the owner of the suit land, the same subject matter in the present suit, which is the same prayer he is seeking in the current suit. That the trial Magistrate found inter alia, that the plaintiff herein fraudulently acquired the certificate of title of the suit land and the Appellate court (High Court) found no merit in the plaintiff's appeal and dismissed it with an order that the Commissioner for Land Registration cancels the plaintiff's title since it was obtained fraudulently.
- [13] Counsel for the defendant concluded that the above decision is still good law and has never been overturned. That the plaintiff herein is trying to bring before this court in another way, a form of a new cause of action, a

transaction, which he already presented before a court of competent jurisdiction in previous proceedings which were long adjudicated upon. That there is therefore a likelihood of giving conflicting decisions on the subject matter if this court entertains this suit. He relied on the authorities of **Akuku Ebinfania Vs Victoria Munia & Anor, HCCA No.27 /2016, Kafeero Ssentongo Vs Shell (U) Ltd & Anor, CACA No.50/2003 and Ponsiyano Semakula Vs Susan Magala [1979] HCB 89.**

- [14] In reply, counsel for the plaintiff was of the view that this objection is misconceived. He however admitted that though there was a dispute between the plaintiff and the **Registered Trustees of Hoima Catholic Diocese**, the same was over part of the plaintiff's land which the Catholic Diocese claimed but which is different from the suit land in this matter. That the decision of court which is a subject of appeal in the Court of Appeal (at the time of filing written submissions in this matter), did not relate to the entire of the plaintiff's land but only the relevant portion which was in dispute. That the 2 decisions i.e, of the trial Magistrate and the Appellate court referred to by the Defendant did not divest the plaintiff of his ownership interest in the suit land.
- [15] Counsel concluded that the suit land could not be found to belong to the **Registered Trustees of Hoima Diocese** which won the previous case as the preliminary objection tend to suggest, when the defendant herein is also claiming the suit land. It would only be **res judicata** if the defendant was claiming his title from and/or through the **Trustees of Hoima Catholic Diocese**, which is not the case.
- [16] In this case, the defendant had filed **Misc. Application No. 114 of 2021** on this very issue but this court directed that it be considered in final discussions. I therefore have the obligation in the premises, to first dispose of this issue.
- [17] For the doctrine of **res judicata** to apply, under **S.7 CPA**, it must be shown that;
- a) There was a former suit between the same parties or their privies.
 - b) A final decision on the merits was made in that suit by a court of competent jurisdiction.

d) The fresh suit concerns the subject matter and parties or their privy;
Akuku Ebinfania Vs Victoria Munia & Anor (Supra).

[18] I have looked at and perused the pleadings and decision made in the previous **Suit No.34/2003** that was between the present plaintiff and **The Trustees of Hoima Catholic Diocese**. I have done the same with the High court Appellate decision vide **HCCA No.011/2010**. Both were attached to **M.A No. 114/2021** where the present defendant had sought for orders that the present subject matter suit was long determined against the Respondent/plaintiff in **C.S No.034/03** and **Civil Appeal No.011/2010** and therefore, that the present suit is **res judicata**.

[19] It is my finding that the parties in **C.S No.34/2003** are different from the parties in the present suit. The present Defendant was not a party to that suit and therefore, the previous suit did not determine the rights of the defendant/counter claimant in this suit. The previous suit determined the equitable interests of the **Trustees of Hoima Diocese** over the suit land and it cannot therefore be taken that it determined the equitable interest of the present defendant being sought in the present suit.

[20] It follows therefore, that this present suit is not **res judicata** and I accordingly overrule the preliminary objection.

Merits of the case

Resolution of the main issues

Issue No.1; Whether the plaintiff is the lawful owner of the suit land.

[21] In his bid to prove his case, the plaintiff testified as **PW1** and adduced the following evidence;

- a) That he is the registered proprietor and owner of the suit land measuring approximately 15.81 hectares having applied for the same as vacant land from Hoima District Land Board for registration under lease hold tenure on 28/4/1967. On 7/7/2003, he acquired the

certificate of title upon fulfilling all the requisite procedures. The certificate of title is **P.Exh.1** and the relevant documents that led to its acquisition to wit; Application for rural land recommendation, Inspection Report and lease offer etc are **P.Exh.2** and **P.Exh.10** respectively.

- b) That he is in possession and occupation of the suit land together with his children whereon he is growing food crops and valuable trees.
- c) That the suit land does not form part of the estate of the late **Kyomya Yafesi**, his late father, and that neither his father nor mother ever stayed or worked on the suit land. They were at Kihemba village which is 2 miles away from the suit land where his father was buried.
- d) That a one **Bulandina Kaahwa** lived and occupied part of the suit land. He compensated her of her trees (jack fruits and Mukasiya on the suit land).
- e) On 20/10/2015, the defendant destroyed all his food crops to wit; cassava, beans, sweat potatoes, pine and eucalyptus trees and illegally built houses thereon.

[22] The plaintiff's evidence was supported by that of **Bitamale Christopher** (PW2) an old neighbour of the suit land and **Balikagira Joseph** (PW3) who grew up on the suit land with his Auntie **Bulandina Kaahwa** who was allegedly compensated for the portion of the suit land she occupied.

[23] On the other hand, the defendant as (**DW1**) adduced the following evidence in defence of the plaintiff's claims and in support of his counter claim;

- a) That the plaintiff is his brother being the 1st born of their late father **Yafesi Kyomya**.
- b) That in 1987, the children of the late **Yafesi Kyomya** applied for the suit land which they were occupying and farming under the family group name, **Bakyomya Group and Sons** to the Hoima District Land Committee but to their surprise, in 2005, they discovered that the title was issued in the names of the plaintiff and his son **Abaitegeka Kyomya**.
- c) That the suit land belongs to the entire family of the late **Yafesi Kyomya** which the plaintiff is claiming ownership thus with the intention of depriving them of the same.

- [24] The defendant's evidence was supported by that of his sister **Eunice Biingi** (DW2) who in addition, testified that the plaintiff in 2008, filed **C.S No.05/2008** against the brothers; **Timbigamba Livingstone** and **Barongo Collin**, and **C.S No.034 of 2003** against the **Trustees of Hoima Catholic Diocese** over part of the suit land both before the Chief Magistrate's court, Hoima and both suits were dismissed, however, that in the latter suit, the plaintiff's certificate of title was on appeal ordered to be cancelled.
- [25] The mother of the parties and widow to the late **Yafesi Kyomya** (DW3) testified in support of the defendant. She emphasised that the suit land belonged to her late husband who carried out thereon farming of maize, beans, cassava, cotton etc and that therefore, the plaintiff is not the sole owner of the land but only has a share.
- [26] Counsel for the plaintiff submitted that **Kato Peter** (DW6) testified that he was the chairperson L.C1 of Kyentale village in 1993, and that on 6/6/2002, he authored a letter to the effect that the suit land belonged to the plaintiff (**P.Exh.13**) thus supporting and corroborating the plaintiff's version as the rightful owner of the suit property and not that it is a family property to which the defendant is entitled a share.
- [27] During cross examination, **DW6** however, explained; **first** of all, that **Bulandina** who the plaintiff claim to had compensated for the portion she occupied on the suit land was put on the land by the father of the parties, the late **Kyomya Yafesi** in 1992. **Secondly**, that the parents of the parties had a house on the disputed land but it collapsed. **Lastly**, that he authored the letter (**P.Exh.13**) to the plaintiff for purposes of enabling him be paid compensation by Sterling (A road construction company) for people who had land near the road. It should be noted that the plaintiff was and is in occupation of the suit land.
- [28] As a result of the foregoing, I find that the issue for determination becomes whether the suit land formed part of the estate of the late **Yafesi Kyomya**, father to the parties and therefore entitling the defendant and his siblings a share or, whether it solely belongs to the plaintiff. In the circumstances of this case, I am unable to doubt the evidence **DW6**, it is supported by the plaintiff himself as per by the ensuing findings;

As part of his defence and counter claim, the defendant relied on the pleadings and the decision in **C.S No. 034 of 2003** where the plaintiff had sued the **Trustees of Hoima Catholic Diocese** wherein it is clearly disclosed that the suit land belonged to the father of the parties, **Kyomya Yafesi**.

Judicial Notice of the pleadings, proceedings and judgment in C.S No.034/2003.

[29] It is trite that Judicial notice is the process by which courts take cognizance or notice of matters which are notorious or clearly established that formal evidence of their existence is not necessary, as well as matters of common knowledge and everyday life; **Arim Felix Clive Vs Stanbic Bank (U) Ltd, S.C.C.A No.3 /2015**. It is an exception to the rule that all facts in issue or relevant facts must be proved by evidence. As observed by Kavuma J.A and Kenneth Kakuru J.A in **Mifumi Vs A.G, Constitutional Petition No.12/2007**, the list prescribed by **S.56 of the Evidence Act** is not exhaustive. In the California Supreme Case of **Floros Vs Arroy (1961) 56 Cal.2(d) 492,496**, it was held;

“It is well established that courts may take judicial notice of the records of a court, including prior judgments of a court.”

[30] In this aspect, this court is entitled in this case to take judicial notice of the pleadings, proceedings and judgment in **C.S No.034/2003**, See also the decision of this court in **Buryahika Stephen & 2 Ors Vs Hoima Sugar Ltd & 7 Ors, HCCS No.20/2015 [2022] UG HCCRD 21**.

[31] The plaintiff in his pleadings in **C.S No.34/2003** sued the defendant therein **The Trustees of Hoima Catholic Diocese** and in **paragraph 4(v) of the plaint** stated;

“4. The facts leading to the cause of action arose as follows;

(v) The land in question was owned customarily by the claimants’ late father...The claimants lived on that land since their childhood. In 1987, the claimants started processing for a land title, a lease offer was granted and instructions to survey were issued.”

In **Civil Suit No.34 of 2003**, the plaintiff had filed the suit together with his son, **Abaitegeka**.

[32] In evidence on oath, in the proceedings thereof at **page 6**, the plaintiff testified further thus;

“I was born on that land. My father lived on that land and my grandfather, late Kampimpina was buried on that land at the age of 80 and my father died when he was 78 years while he was staying on that land...I also have a certificate of title over that land...I got this title by applying for it in 1987.”

[33] The above evidence on oath by the plaintiff in my view, settles the contentious aspects of this suit. It supports in particular the evidence of **DW6** that actually the parents of the plaintiff lived on the suit land thereby corroborating the evidence of the defendant that the suit land belonged to their father, **Kyomya Yafesi** and therefore, it forms part of his estate which entitles the Defendant, his siblings and the plaintiff a share. It is therefore and I find it strange that in the present case, the plaintiff claimed that his parents never lived or worked on the suit land. The available evidence is to the contrary.

[34] As a result, of the foregoing, I find that though it is an agreed fact that the father of the parties, **Kyomya Yafesi**, was buried in Kihemba village, as genuinely revealed by the widow, he still owned the suit land at Kyentale for which all his beneficiaries and children would be entitled for a share. The suit land is not solely for the plaintiff. The beneficiaries of the estate of the late **Kyomya Yafesi** have various varying equitable interests in the suit land as shall have to be determined by the Administrators of the estate.

[35] The 1st issue is therefore in the premises found in the negative. The suit land forms part of the estate of the late **Yafesi Kyomya**.

Issue No.2; Whether the Defendant is a trespasser on the suit land.

[36] Trespass to land occurs when a person directly enters upon another land without permission and remains upon the land, places or projects any object upon the land; **Adrabo Stanley Vs Madira Jimmy, HCCS No.024/2013 [2017] UGH CLD 102.**

[37] This court having found that the suit land forms part of the estate of the late **Yafesi Kyomya**, the father of the parties, neither of them can be found a trespasser thereon.

Issue No.3; Remedies available to the parties.

[38] 1. Remedies for the plaintiff

The plaintiff failed to establish his claim to the required standard and as a result, the plaintiff's claim is accordingly dismissed. He is not entitled to any of the reliefs/orders sought.

2. Remedies for the Defendant/ Counter claimant

a) Allegations of fraud

The Defendant/Counter claimant pleaded fraud and sought orders that the plaintiff be declared to have acquired registration of the suit land in his names and that of his son fraudulently. The particulars of fraud were pleaded as follows;

- I. Soliciting of funds from family members to register the land.
- II. Registering family land in his and his son's names who was not yet born by the time the title was processed, to the detriment of other family members.
- III. Instituting frivolous civil and criminal cases against the family members.

[39] Fraud was defined in the case of **Fredrick Zaabwe Vs Orient Bank & Ors, SCCA No.4/2006** to mean,

"Intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right..."

In **Kampala Bottlers Ltd Vs Damanico (U) Ltd, SCCA No.22/92,**

"The defendant must be guilty of some dishonest act or must have known of such facts by somebody else and taken advantage

of such act.”

[40] In the instant case, the Defendant/Counter claimant did not adduce any evidence to the required standard of fraud to prove the alleged particulars of fraud and or that in particular, the plaintiff's instituting of civil and criminal cases against the family members amounted to fraud relating to the acquisition of the title of the suit land and that by the time of registration of the suit land, the plaintiff's son was not yet born. However, there is overwhelming evidence that the plaintiff acquired registration of the suit land well aware of the defendant and other beneficiaries' claims/interests. The plaintiff's registration of the suit land into his names and those of his son was intended to defeat the interests of the other beneficiaries in the estate of **Yafesi Kyoma** and therefore, such conduct amounted to fraud.

b) Cancellation of the plaintiff's title

[41] I have had an opportunity of perusing the decision of the Court of Appeal, Kampala in **C.A C.A No.049/2014** (Arising from HCCA No.011 /2010 sitting as an appeal from the decision of the Chief Magistrate's court of Hoima before Obbo-londo, G.1 in C.S No.34/2003) where the Court of Appeal dismissed the Appellant/plaintiff's 2nd Appeal and confirmed the lower courts' decision and orders, that the Appellant/plaintiff fraudulently processed the certificate of title (also now in issue) when he included the land belonging to the Respondent, the **Trustees of Hoima Catholic Diocese** thus confirmed the order for cancellation of the title of the plaintiff that had been issued by the **HCCA No.011/2010**.

[42] The prayer therefore by the Counter defendant that this court orders the cancellation of the suit land certificate of title becomes superfluous. The High Court in **Civil Appeal No.011/2010** had already done so and the order was confirmed by the Court of Appeal.

c) General damages;

[43] These are such as the law would presume to be a direct natural or probable consequence of the act complained of, **See Kasibante Vs Shell (U) Ltd [2008] HCB 163**. In this case, the counter claimant and other beneficiaries

of the suit land have been denied use of the land by the counter defendant since 2003 when the counter defendant fraudulently got registered on the land, they have suffered mental stress, trauma and inconvenience. In the premises, I consider and award him general damages of **Ugx 15,000,000/=**.

[44] In conclusion, the plaintiff's claim is found to have had no merit and it is accordingly dismissed. The Counter claimant's claim succeeds on the issue of fraud. The plaintiff is however the 1st born in the family of the defendant while the defendant is the heir to their deceased father, **Yafesi Kyomya**. It is important therefore, in such a case, that court promotes reconciliation by not granting costs of the suit to either party and it is ordered so accordingly.

[45] All in all, the Plaintiff's suit is dismissed and the Counter claim is allowed with: **(a)** A declaration that the suit land forms part of the estate of the late **Kyomya Yafesi** where the defendant, the plaintiff and other siblings and or beneficiaries have a beneficial interest; **(b)** General damages of **Ugx 15,000,000/=** with interest of **18%** from the date of the judgment till payment in full; and **(c)** No order as to costs.

Signed, Dated and Delivered at Hoima this **20th day of January, 2023**.

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Byaruhanga Jesse Rugyema
JUDGE.