

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

CIVIL SUIT NO. 578 of 2015

KASENGE JOSEPH NTABAZI-----PLAINTIFF

V

ROBINAH KYEYUNE-----DEFENDANT

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

The Plaintiff, Mr. Kasenge J. Ntabazi brought this suit against the Defendant, Ms. Robinah Kyeyune seeking the remedies below:

- a) A declaration that the Plaintiff is the lawful owner of the land measuring 4.699 Hectares comprised in Busiro Block 383 Plot 2183, Land at Kitende herein referred to as the suit land.
- b) A declaration that the Defendant is a trespasser thereon.
- c) An order of vacant possession.
- d) A permanent injunction perpetually restraining the Defendant, her agents, assignees, successors in title and any person(s) claiming under her, lawfully or otherwise from trespassing on the suit land.
- e) General damages.
- f) Costs of the suit.

PLAINTIFF'S CLAIM

Mr. Kasenge Joseph Ntabazi, PW1, stated that he is the registered proprietor of the suit land comprised in Busiro Block 383 Plot 2183 land at Kitende measuring 4.699 hectares. A copy of the certificate of title was marked Exb.P.1. His predecessor in title was his

mother, the late Negagasa Ewuneri who signed transfer forms in his favour prior to her death in 2005.

Before her death, in or around 2000, the Plaintiff's mother gave him authority to look after the suit land and run all the affairs attached to it, which he did for about six years. The certificate of title however took long to be issued, but he was finally registered in 2006, during which time the land was unoccupied.

Later, the Defendant came to him with a one Florence N. Kityo, claiming to have a Kibanja interest whereas not. They were also accompanied by a one Muwonge, the caretaker of his mother's land who also attempted to buy a Kibanja from her but she declined, since the land was under the Plaintiff's ownership. He informed them that he was not in position to sell any Kibanja on his land. And advised the Defendant to seek a refund of her monies because there were no Kibanja interests thereon.

Subsequently in 2014, the Defendant entered onto his land without his permission, she started cultivating matooke and even started erecting a permanent structure on the land as shown in Exb. P.3. On making this discovery, he approached her demanding that she vacates immediately, which she failed to do, claiming that she allegedly had a Kibanja interest in the suit land. He maintains that the Defendant has never been a Kibanja holder on the suit land and that he has never received any *busuulu* or *kanzu* from her nor does she have any proof of ownership.

The Plaintiff reported all the Defendants' acts of trespass on his land to the police and lodged a complaint with the Land Protection Unit informing them of her encroachment among others as per the copy of the complaints marked Exb. P.2. Despite the police intervention stopping the acts of trespass on his land, she did not listen and instead erected more structures at a great speed including wooden posts.

This prompted the Plaintiff to file the current suit, so that the Defendant is held liable for her actions which have hindered him from enjoying quiet possession of his land.

PW2, Mr. Irumba Roger Kaija corroborated the Plaintiff's testimony in all material particulars. He testified that he came to know the Plaintiff when he was buying land in Bwebajja in 2006. The Plaintiff was introduced as the son of the certificate of title holder,

the late Mrs. Negagasa informed him that she had delegated the responsibility of her land to the Plaintiff and that he would be the one to endorse his Kibanja purchase agreements on her behalf. When she passed away, the Plaintiff continued to operate as the landlord. Mr. Irumba added that the Plaintiff wanted to sell to him the land adjacent to his, which the Defendant suddenly started laying claim to. He maintained that the said land had been empty prior to the encroachment of these trespassers.

DEFENCE

The Defendant, Ms. Robinah Kyeyune, DW1, stated that on the 16th June 2002 she and Ms. Rose Nazziwa purchased a Kibanja on the suit land from a one Florence N. Lwanga at a cost of UGX 5,300,000/= which was paid in full. A copy of the purchase agreement was marked Exb. D.1. The boundaries of the said Kibanja are the late Mulumba's Kibanja in the East, in the North, the Kibanja that the Defendant bought from Sulayimani Mbalule in 2000, the late Nsereko's Kibanja in the South and the Late Kalungi's Kibanja in the West.

Ms. Kyeyune added that at the time of the said purchase, the said Florence was in occupation thereof having purchased it from the late Ms. Mulumba who had received it as a gift inter vivos from her late husband Mr. Mulumba. After the purchase, the Defendant and Ms. Nazziwa were introduced to the late Ewuneri Negagasa who was the registered proprietor of the mailo interest. They then paid *kanzu* and *busuulu* to her until her death. It was the Defendant's testimony that they took possession of the said Kibanja by cultivating a banana plantation and constructing a permanent structure thereon. Up to this point, the Defendant asserted that they never dealt with the Plaintiff who was neither the vendor nor the registered proprietor.

Sometime in 2015, the Plaintiff instituted a complaint in trespass against the Defendant at Kajjansi Police Station but the same was withdrawn by the DPP on 1st September 2015 as per a copy of the withdrawal letter marked Exb. D.2. Further in 2016 as the Defendant was carrying out construction works on her Kibanja, the Plaintiff forcefully entered upon the land and attempted to stop her workers from continuing their work. In 2017, the Plaintiff resurfaced again on the Kibanja and his men demolished a part of the building under construction though they were chased away by a congregation from a nearby

church. The Defendant reported the matter to Kajjansi Police Station and with the intervention of the Community Liaison office at Kampala Central Police Station, she was directed to continue with the developments on the Kibanja.

Further, since the Plaintiff introduced himself to her as the new landlord of the land on which her Kibanja is situate, all her efforts to contact to contact him for purposes of paying *kanzu* and *busuulu* to him have proved futile. As far as she was concerned, she is a Kibanja owner who has been in possession at all material times and has suffered inconveniences from the Plaintiff for which she shall seek damages. Ms. Kyeyune also maintained that she and Rose Nazziwa are the rightful owners of the said Kibanja having lawfully purchased it.

Ms. Nabukeera Florence Lwanga, DW2 corroborated the Defendant's testimony in all material particulars.

DW3, Ms. Nassuna Mariam Lubowa testified that she is the one who introduced the Defendant to DW2 from whom she purchased the suit kibanja in 2002. She also asserted that the Kibanja was indeed purchased by the Defendant and that she witnessed the agreement. She maintained that the said Kibanja belongs to the Defendant.

Mr. Sayifi Sekimpi, DW4 testified that he got to know the Defendant in 2000 when she contacted him to construct houses on one of her Bibanja. When she purchased the suit Kibanja in 2002, she contracted him to care take it and later carry out construction work. Mr. Sekimpi used to cultivate food crops like cassava, maize, beans, potatoes and others on it. And in 2016 while constructing the Defendant's houses, he confirmed that the Plaintiff introduced himself to them as the owner of the suit land and attempted to stop them from further construction.

A locus visit was conducted on the 15th December 2022 during which one additional Court witness, the LC1 Chairman Mr. Ssalongo Zziwa was called to give his testimony which corroborated the Defendant's evidence.

REPRESENTATION

The Plaintiff was represented by Mr. Nsimbi Timothy from M/S Buwule & Mayiga Advocates while the Defendant was represented by Ms. Norah Nambirige from M/S Nambirige & Co. Advocates.

Counsel for both parties filed written submissions which I have duly considered.

- 5 At scheduling conference, the following two issues were formulated for Court's resolution. I noted that Counsel for the Plaintiff included another issue in his submissions which I excluded since it was never agreed upon by the parties.

ISSUES

- 10 **1. Whether the Defendant is a trespasser on the suit land herein comprised in Busiro Block 383 Plot 2183, Land at Kitende?**
- 2. What remedies are available to the Parties?**

DETERMINATION BY THE COURT

Issue 1

- 15 **Whether the Defendant is a trespasser on the suit land herein comprised in Busiro Block 383 Plot 2183, Land at Kitende?**

Counsel for the Plaintiff relied on the holding in Supreme Court case of **Justine E.N. Lutaaya Vs Stirling Civil Engineering Company Ltd SCCA No.11 of 2002** to draw the definition for trespass. Mulenga, JSC held;

- 20 *'Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass.'*

- 25 According to Counsel for the Plaintiff, the fact that the late Negaggasa vested the suit land into the Plaintiff in 2000, the Defendant's entry on the suit land and all the activities

she carried on were unauthorised and unlawful and therefore constituted trespass on the Plaintiff's land.

This was a position denied by Counsel for the Defendant who argued that upon conclusion of the purchase of the suit Kibanja, the Defendant was introduced to the then landlord, the late Ewuneri Negagasa by Florence Nabukeera while in the presence of one Kalooli the caretaker of the late Negagasa's land. And that the Defendant paid the requisite busuulu to Negagasa upon which Negagasa asked the Defendant to go and introduce herself to the Plaintiff.

Counsel for the Defendant added that she enjoyed quiet possession from the date of purchase until 2015 when the Plaintiff instituted a complaint against her for trespass which was eventually withdrawn by the Office of the Director of Public Prosecutions vide Exb. D.2. It was Counsel's contention that the Defendant is bonafide occupant within the meaning of **section 29 (5) and (2)(a) of the Land Act**. Relying on **section 35 (8) of the Land Amendment Act No. 1 of 2010**, Counsel submitted that change of ownership of a Title effected by the owner by sale, grant and succession shall not in any way affect the existing lawful interests of a bona fide occupant and any new owner shall be obliged to respect the existing interest.

In rejoinder, Counsel for the Plaintiff submitted that the Defendant had adduced no evidence to demonstrate that she had sought and obtained the necessary consent from the late Negagasa. And that she failed to conduct due diligence prior to the purchase of the Kibanja rendering her acquisition illegal.

Section 29(5) of the Land Act as amended provides:

'Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.'

Section 35(8) provides;

‘Subject to this section, a change of ownership of title effected by the owner by sale, grant and succession or otherwise shall not in any way affect the existing lawful interests or bona fide occupant and the new owner shall be obliged to respect the existing interest.’

The suit land to which the Plaintiff lays claim is land comprised in Kyadondo Block 383 Plot 2183 land at Kitende measuring 4.699 Hectares. He was registered thereon on the 10th August 2006. His predecessor in title, his late mother, Enumeri Neggaggasa was registered a year earlier on the 19th August 2005. According to the Defendant, she purchased a Kibanja from DW2 on the 16th June 2002. This was before either the Plaintiff or his mother were registered on the suit title. DW2 testified under paragraph 5 of her witness statement, that she purchased the suit Kibanja from the Late Ms. Mulumba who had in turn received it as a gift intervivos from her husband the late Mulumba. The Plaintiff’s Counsel submitted that there was no documentary evidence to that effect. I am of the view, however, that the oral evidence is sufficient. DW2 was 78 years old when she testified and I had no reason to disbelieve her testimony. I find that DW2 qualified to be a bona fide occupant within the meaning of **section 29(5) of the Land Act** and therefore, the Defendant lawfully acquired her Kibanja interest from her by way of purchase.

It is because of this irrefutable fact I agree with Counsel for the Defendant and find that the Defendant is protected by the provisions of **section 35(8) of the Land Act as amended**. Whatever interest the Plaintiff may claim in Kyadondo Block 383 Plot 2183 land at Kitende measuring 4.699 Hectares, cannot affect the Defendant’s interest in her Kibanja.

I visited the locus and I observed that the suit land is fraction of the total acreage comprising the Plaintiff’s title. And there was ample evidence in the form of houses and a garden to demonstrate that the Defendant had been in sole physical possession of her Kibanja for many years. For these reasons, I find that the Defendant is not a trespasser on the suit land within the meaning of the **Lutaaya** case, *supra*. By the time, the Plaintiff and his mother were registered on the suit land were thereby clothed with ownership, the Defendant had already obtained possession of the Kibanja.

Issue 1 is resolved in the negative.

In conclusion, this suit is dismissed with costs to the Defendant.

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Olive Kazaarwe Mukwaya

JUDGE

15th June 2023

Delivered by email to Counsel for the parties