

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MUBENDE**  
**CIVIL APPEAL NO.065 OF 2018**  
**[Arising from Mityana Civil Suit No.60 of 2011]**

**JOHN BOSCO LUBEGA**

**APPELLANT**

**VERSUS**

**SYRIDIO LUNYANGE**

**RESPONDENT**

**BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI**

**JUDGMENT**

This Appeal arises from the judgment of the Magistrate Grade one at Mityana court delivered on 26<sup>th</sup> October 2018. The suit was filed by the Appellant against the Respondent and it was dismissed with costs.

**Background.**

In 2010 the Appellant bought land comprised in Singo Block 119 Plot 33 located at Tanda Village in Mityana District from Barclays Bank(U) Limited. The registered proprietor on the title stated to be MALIKO SUNA had mortgaged the land to the bank for a loan and had failed to pay. The reliefs sought by the Appellant in the suit were for a declaration that he is the lawful owner of the land and that the Respondent is a trespasser thereon. He also sought costs of the suit.

In his defence, the Respondent contended that he purchased a kibanja on the suit land from Eriyasafu Jjuko Kyewazade and paid Shillings 300/=. It was his evidence that the sale agreement was destroyed in a fire that



burnt his house in 1979 and that he had enjoyed quiet possession of his kibanja interest until the Appellant started antagonizing him.

The Respondent further contended that he was at one time made to sign a memorandum to the effect that he would leave the suit land by the Village Local Council chairman. When the anomaly was realized the Local Council 111 Chairman instructed the relatives of both parties to meet and resolve the impasse.

The trial Magistrate framed two issues for the court to resolve;-

1. Whether the defendant/Respondent is a trespasser on the suit land
2. What remedies are available to the parties.

The court held that the Respondent is a lawful occupant on the suit land since he acquired his kibanja interest in 1973 as opposed to the Appellant who acquired the land in 2010. The Respondent was thus declared not to be a trespasser on the suit land.

The court ordered the Appellant to pay a compensation of Shillings 1,000,000/= for the portion of the latter's kibanja he had encroached on to build a water tank and construct a road. The court ordered the parties to continue occupying their respective portions. Costs of the suit were awarded to the Respondent.

### **Grounds of Appeal.**

The Appeal filed a Memorandum listing the following grounds of Appeal.

1. The trial Magistrate erred in law and fact when she held that the Respondent was a lawful occupant of the land comprised in Singo Block 119 Plot 33.
2. The learned trial Magistrate erred in law and fact when she awarded compensation of Ugx.1,000,000/= to the Respondent.





3. The learned trial Magistrate erred in fact when she failed to find that the Respondent is a trespasser on the suit land.
4. The trial Magistrate erred in law and fact when she failed to appraise the evidence on court record against the Respondent.
5. The trial Magistrate erred in law when she dismissed the suit and awarded costs to the Respondent.

The Appellant sought for an order to set aside the judgment of the trial court and declare that he is the lawful owner of the suit land trespassed on by the Respondent.

### **Representation.**

The Appellant was represented by M/S Muganwa, Nanteza & Co. Advocates who filed submissions. The Respondent did not enter appearance despite being served with the Appeal.

### **Duty of the Court.**

This being a first appeal, the court is required to reconsider all materials which were before the trial court and make up its own mind both on the law and the facts. In the course of re-appraising the evidence the court has however to make due allowance for the fact that it had no opportunity to see or hear the witnesses at the trial. A decision of the court based on the demeanour of a witness where there was conflicting evidence has to be given its due weight.

**Fr. Narcensio Begumisa & Others V Eric Tibebaga. CA No.17/2002.**

### **Summary of the evidence on record.**

It was the appellant's evidence that he bought the suit land in 2010 when the Respondent had no kibanja on it but has continuously trespassed on the land through cultivation using his daughter. The Appellant told court



that the Respondent was brought to the land by Eriyasafu Jjuko and had no house on it. The Appellant clarified in re-examination that he had no problem with the Respondent in 2010 until when he started claiming to be a kibanja owner in 2011.

Walugembe Isaac(PW2) stated that the Respondent was Eriyasafu Jjuko's herdsman who owned no kibanja on the suit land and had agreed to vacate the land in a document executed on 13<sup>th</sup> August 2001. PW2 stated that the Respondent has stayed on the land since 13<sup>th</sup> August 2002 but had been stopped in 2001. He however contended that the Respondent had been on the land since 1970 and had a small house on it which he built after removing one built earlier by his employer.

PW2 clarified that at the time the Appellant purchased the land the Respondent had unlawfully built a house on it since he had agreed to vacate the land in the agreement executed between him and Jjuko in 2001 prior to the latter's death in 2007. PW2 stated that the Appellant was told about the Respondent's unlawful occupation at the time he bought the land.

Zziwa Joel(PW3)told court that the Respondent had agreed to vacate the land in a document executed between him and Jjuko before the Appellant bought the suit land. PW3 told court that the Respondent had buried two of his children on the land when Jjuko was alive and he had requested him to vacate the land since it was owned by Maliko.

PW3 further stated that the Appellant bought the land in 2002 and he agreed to buy land for the Respondent to get him off the suit land. That the matter was referred to the Resident District Commissioner at Mityana but PW3 did not tell court how the efforts to resettle the Respondent ended.





Kakande(PW5) stated that he cultivates the suit land with the Appellant but the Respondent's family keeps harvesting the crops and that there was no house on the suit land in 2010 when he started using the land.

Luzira Joseph(DW1) told court that he had known the Respondent for over 32 years.DW1 stated that the Appellant and his father Kakande were employed by a one Najjalwambi who bought the suit land and had it for 40 years. She later opted to buy another piece of land to settle the Respondent but identified one that was in the hills which the elderly Respondent could not access.DW1 did not know whether Najjalwambi was a wife or a sister to the Appellant.

Bugingo Alex(DW2) claims to have been born on the suit land in 1979 and there were three houses on it but two of them got burnt.DW2 confirmed that the current house on the land was built in 2001 and that the Respondent bought the kibanja from Jjuko but did not know of any agreement between them.

Nkuusi Tadeo(DW3) stated that he had known the Respondent as a resident on the land from 1990 and that the Appellant started disturbing him in 2011.DW3 testified to the existence of earlier built houses on the land and that the last family member buried on it by the Respondent was in 2007.

The Respondent(DW4) testified about his purchase of the kibanja in 1973 and the subsequent destruction of the agreement to the effect. It was his evidence that he did not know Maliko Ssuna but bought from Jjuko.The Respondent disowned the agreement he is alleged to have executed with Jjuko and stated that he was only told to sign the documents the contents of which were not known to him.

Nakimbugwe Margaret(DW5) testified about her growing up on the suit land and the earlier destruction of her father's houses on it. She told



court that in 2001 she found the Chairman called Zziwa and Mr. Wagala coercing the Respondent to append his signature to a document after which he was told that he had to vacate the land. Later in 2011 she saw people surveying the land but the Appellant was not present.

DW5 could not confirm the contents of what her father signed but claimed to have heard what was happening from a short distance away. She confirmed that the Respondent told her about the purchase of the kibanja from Jjuko.

### **Submissions.**

Counsel for the Appellant argued that the Respondent did not carry out the necessary due diligence to establish that the land on which he bought the kibanja in 1973 did not belong to Jjuko which rendered the transaction null and void. It was further argued that the Respondent's failure to derive consent from the requisite owner before the purchase further rendered the transaction void and that he still failed pay rent to the Landlord in order to regularize his occupancy on the land.

It was argued that the Respondent became a trespasser on the land in 2002 when he agreed to vacate the suit kibanja but later refused and claimed to be a kibanja holder in 2011 after the Appellant had bought the land. Counsel further argued that the Respondent's occupation ceased with the death of Jjuko who had allowed him to stay on the land as his herdsman.

The grounds of appeal as framed principally fault the trial Magistrate for failing to properly evaluate the evidence hence arriving at the conclusion not agreed to by the Appellant. I will consider grounds 1,3 and 4 jointly.

### **Resolution of grounds of Appeal 1,3 and 4.**





1. The trial Magistrate erred in law and fact when she held that the Respondent was a lawful occupant of the land comprised in Singo Block 119 Plot 33.
3. The trial Magistrate erred in fact and law when she failed to find that the Respondent is a trespasser on the suit land.
4. The trial Magistrate erred in law and fact when she failed to appraise the evidence on court record against the Respondent.

### **Decision.**

It was agreed at the scheduling stage of the trial court proceedings that the Respondent bought a kibanja from Jjuuko in 1973 and the Appellant bought the mailo interest from the Bank in 2010. On account of the purchase by the Respondent, any arguments about the Respondent being a licensee on the land stemming from his employment as Jjuuko's herdsman would be out of place.

It is also nowhere in evidence stated that the Respondent left the land after the disputed 13<sup>th</sup> August 2001 agreement and that he returned in 2011 to haunt the Appellant as a kibanja owner. The evidence on record instead points to an uninterrupted occupation of the kibanja by the Respondent from 1973 to present day.

The undisputed evidence to the effect that the Respondent buried his child on the land in 2007 further confirms his uninterrupted occupation of the suit land even after the impugned 13<sup>th</sup> August 2001 agreement was allegedly executed between him and Jjuuko.

PW2 clearly stated that he told the Appellant about what he called the Respondent's unlawful occupation of the land prior to the purchase of the land from Barclays Bank and this was not disputed. PW2's evidence further confirms the existence of the Respondent on the land in 2010.



Even the sale agreement between the Appellant and the Bank contains an 'as is' clause which implies the Appellant bought with the knowledge of the Respondent's existence on the land. The Appellant was thus bound by the equities on the land at the time he purchased it and cannot turn around to use the court to declare the Respondent as a trespasser on the same.

Counsel for the Appellant correctly submitted on the imperative need for any purchaser of land to carry out the necessary due diligence before entering a sale/purchase transaction. The cited cases indeed espouse the principle.

**David Byatike Matovu V Richard Kikonyogo. HCCA No.3/2014; Jennifer Nsubuga V Michael Mukundane & Another. CACA No.208/2018.**

The Respondent bought the kibanja from jjuko who led him to believe that he was the rightful person to sell it. Maliko got registered on the title in 1989 and it was nowhere stated that he attempted to evict or request for rent from the Respondent. Even the purported 13<sup>th</sup> August 2001 agreement makes no mention of Maliko but refers to Daudi Walugembe as the owner of the land. It was nowhere stated that Daudi Walugembe attempted to evict the Respondent.

I find no basis on which the Appellant seeks to have the Respondent evicted for failure to fulfil the requirements of a recognized kibanja holder when those who owned the land prior to his registration did not raise complaints against him. The Appellant's nexus to the Respondent is presumed to have started when he purchased the land in 2010.

The Respondent disowned the agreement and I find credibility in his contention. The Respondent gave testimony using the Kinyarwanda language which implies he was not comfortable using Luganda yet the alleged agreement is in Luganda. It is nowhere shown that the contents of the purported agreement were explained to him.





The Appellant did not disprove the Respondent's contention that he did not append his name to the document contending it was done by those who wrote it hence the onus to prove it was him was shifted to the Appellant. The burden to prove that the Respondent wrote his name on the 13<sup>th</sup> August 2001 document was not satisfactorily discharged by the Appellant. I fail to accord any evidential weight to the document which was admitted on record as PEX1.

I thus find no basis to hold that the Respondent became a trespasser on the land after refusing to vacate as agreed in the 13<sup>th</sup> August 2001 agreement. Jjuuko is stated to have died in 2007 but took no steps to enforce the purported agreement which further points to its lack of credibility.

The Respondent occupied the land for 16 years before Maliko owned it. He was on the land for 37 years before the Appellant acquired it. The claim about the Respondent's failure to have acquired the Landlord's consent as required by the Land Act cannot be raised by the Appellant who acquired the land in 2010 and bought with the knowledge that the Respondent was on the land.

**Section 29(2)(a) of the Land Act** provides for a "*bona fide occupant*" on land to be a person who had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve or more years. There was no evidence led by the Appellant to prove that the Respondent's occupation of the kibanja was challenged by Maliko or any subsequent owners until the land was sold by the Bank.

I depart from the holding of the trial Magistrate to hold that the Respondent is not a lawful but a bonafide occupant on the land whose occupation is protected by the Law and not a trespasser as contended by the Appellant.

I find no merit in the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of Appeal.

**Resolution of the 2<sup>nd</sup> and 5<sup>th</sup> grounds of Appeal.**

2. The learned trial Magistrate erred in law when she awarded compensation of Shillings. 1,000,000/= to the Respondent.
5. The trial Magistrate erred in law and fact when she dismissed the suit and awarded costs to the Respondent.

I fail to find any basis for the compensation ordered by the trial Magistrate. The Respondent did not counter-claim for any trespass on any portion of the kibanja he purchased from Jjuko and no unpleaded claim can be based on the observations made by the court during the locus in quo proceedings.

The award of costs to the Respondents was however justified on the basis of section 27(1) of the Civil Procedure Act.

In the result the Appeal fails on the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds but succeeds on the 2<sup>nd</sup> ground of Appeal. Each party shall meet his costs on Appeal. The award of costs to the Respondent in the lower court is upheld.

  
Moses Kazibwe Kawumi

Judge

7<sup>th</sup> June 2023