

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. HCT-00-LD-CS-0260-2017**

KATO HUSSEIN :::PLAINTIFF

VERSUS

OGING JOSEPH :::DEFENDANT

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. This case considers competing claims of ownership of a Kibanja by both the plaintiff and the defendant, against the legal requirements for acquisition of a Kibanja by purchase under the Land Act (Cap 227). The disputed Kibanja is situated on land comprised in Leasehold Register Volume 2078 Folio 16 Kyadondo Block 203 Plot 412 Land at Nabweru. The plaintiff claims to have purchased a Kibanja on the said land measuring 100ft x 50ft x 38ft x 95ft (hereinafter “the suit land”) from a one Hajji Hassan Bulwadda with the consent of the registered owner (Hassan Walubi Bulwadda) in 2013. On the other hand, the defendant claims ownership of a Kibanja measuring 1 acre which he claims to have acquired from a one Auke Mary in 2012.

Representation:

2. The plaintiff was represented by Mr. Robert Irumba from M/s Tumusiime, Irumba & Co. Advocates while the defendant was represented by Ms. Tumwebaze Immaculate from M/s Tumwebaze, Kiiza & Co. Advocates.



The plaintiff's evidence:

3. The plaintiff produced six witnesses to prove his case: PW1 (Kato Hussein), PW2 (Hassan Saidi Bulwadda), PW3 (Muhama Kawese Lumbawo Serwanga), PW4 (Wakib Bunya), PW5 (Nasaka Juliet) and PW6 (Simon Katabu).
4. The plaintiff adduced the following documents that were exhibited:
 - i). Exh.P1 – A copy of the agreement of sale between Hajji Hassan Bulwadda and Kato Hussein dated 16th September 2013;
 - ii). Exh.P2 – Photograph showing suit land (undated);
 - iii). Exh.P3 – Certificate of title in the name of Hassan Walubi Bulwadda for LRV 2078, Folio 16, land at Nabweru;
 - iv). Exh.P4 – Land sale agreement between Kato Hussein and Najjembe Agnes dated 19th October 2013;
 - v). Exh.P5 – Receipts of payment of refund by Kato Hussein;
 - vi). Exh.P6 – Agreement of sale between Kato Hussein and Nasaka Juliet dated 8th October 2013; and
 - vii). Exh.P6 – New Age Surveyors Boundary opening report on Plot 412 Block 203, Kyadondo dated 1st December 2018.

The defendant's evidence:

5. The defendant produced 1 witness to prove his case - DW1 (Oging Joseph).
6. The defendant adduced the following documents that were exhibited:
 - i). Exh.D1 – Purchase agreement for a Kibanja measuring 1 acre dated 31st August 2012;
 - ii). Exh.D2 – Decree from the Chief Magistrates court of Nabweru Holden at Nabweru, Civil Suit No.36 of 2014 dated 22nd January 2015; and



- iii). Exh.D3 – Court proceedings from the Chief Magistrates court of Nabweru at Nabweru, Criminal Case 172 of 2014: Uganda v. AI. Going Joseph & Another.

Locus in quo visit:

7. On the 12th day of May 2023, court carried out a locus in quo visit to the suit land at Nabweru North, Nansana Division in the presence of counsel Robert Irumba for the plaintiff, and counsel Tumwebaze Immaculate for the defendant. Both parties were also present.
8. The plaintiff's witnesses present at the locus in quo visit included: i) Muhammed Kaweesa and Wakib Bunya (surveyor) while Mr. Oging Joseph, the sole witness of the defence was also present.
9. Mr. Wakib Bunya took oath, gave evidence, and was cross examined by counsel Tumwebaze Immaculate and re-examined by counsel Robert Irumba.
10. On the side of the defendants, Mr. Oging Joseph took the oath, gave evidence and was cross examined by counsel Robert Irumba and then re-examined by counsel Tumwebaze Immaculate.
11. Court observed that the contested Kibanja is vacant, and that the defendant is in occupation of the adjacent plot of land, different from the Kibanja, which is developed with buildings where the defendant operates a factory for Beetle paint.

Issues to be determined by the court:

12. The following are the issues for determination by the court:



- i). Whether the plaintiff legally and/or rightfully acquired the suit land?;
- ii). Whether the defendant is a trespasser on the suit land; and
- iii). Remedies available to the parties

Issues No.1&2:

13. Issues No.1& 2 shall be handled jointly.
14. In the case of Owembabazi Enid v. Guarantee Trust Bank Limited, High Court (Commercial Division), Civil Suit No. 63 of 2019, Justice Stephen Mubiru defined a Kibanja as follows:

“A Kibanja is a form of land holding or tenancy that is subject to the customs and traditions of the Baganda, characterised by user rights and ownership of developments on land in perpetuity, subject to payment of an annual rent (busuulu) and correct social behaviour, distinct and separate from ownership of the land on which the developments are made and in respect of which the user and occupancy rights exist.”

15. In the instant case, the plaintiff claims to have acquired a Kibanja in 2013, and bears the burden to prove that it was acquired in accordance with the applicable law at the time. The applicable law was the Land Act (Cap 227) which provides in section 34(1), (2) & (3) as follows:

“34. Transactions with the tenancy by occupancy

(1) A tenant by occupancy may, in accordance with the provisions of this section, assign, sublet or subdivide the tenancy with the consent of the land owner.

(2) A tenancy by occupancy may be inherited.

(3) Prior to undertaking any transaction to which subsection (1) refers, the tenant by occupancy shall submit an application in the prescribed form to the owner of the land for his or her consent to the transaction.”

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) No transaction to which this section applies shall be valid and effective to pass any interest in land if it is undertaken without a consent as provided for in this section, and the recorder shall not make any entry on the record of any such transaction in respect of which there is no consent.”

16. For a sale, transfer or assignment of a Kibanja from one holder to another to be valid under the law, the registered owner of the land must render his or her consent. Therefore, according to the law, the sale of a Kibanja without the consent of the registered owner of the land is null and void. This is the effect of the holding by the Court of Appeal of Uganda in the case of Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA), where Justice Monica K. Mugenyi, JA held that:

“My construction of sections 34(3) and 35(1) of the Land Act is that they are couched in mandatory terms. In any case, sub-section (9) unequivocally clearly states that no transaction to which section 34 applies shall be valid to pass any interest in land if it is undertaken

without a consent as provided for. In a nutshell, therefore, a kibanja holding on mailo land is demonstrated by proof of consent by the landlord or mailo owner for the occupation of his/ her land, or proof of succession to the kibanja holding in accordance with applicable customary practices, which would in itself require proof of the envisaged customary practices. Once the existence of such interest has been established, any assignment thereof would be subject to the consent of the mailo owner. In any event, s/he would be entitled to the first option of assignment.”

17. The plaintiff testified in court as PW1. He asserted that he is a lawful owner of a Kibanja measuring 100ft x 50ft x 38ft x 95ft on Leasehold Register Volume 2078 Folio 16 Kyadondo Block 203 Plot 412 Land at Nabweru. That he purchased the Kibanja from Hajji Hassan Bulwadda with the consent of the registered owner (Hassan Walubi Bulwadda). He adduced Exh.P1 – a copy of the agreement of sale between Hajji Hassan Bulwadda and Kato Hussein dated 16th September 2013. He also adduced Exh.P3 – certificate of title for LRV 2078 Folio 16 land at Nabweru in the name of Hassan Walubi Bulwadda. PW2 (Hassan Saidi Bulwadda) testified that his father, Hassan Walubi Bulwadda was the registered owner of the land and he gave his consent to enable him sell his Kibanja to the plaintiff. That his father did not sign on the sale agreement because he was too old, and that he died at the age of 106 years.
18. PW3 (Muhama Kawese Lumbawo Serwanga), the local council chairman of the area testified that the plaintiff purchased the Kibanja from Hajji Hassan Bulwadda with the consent of the registered owner, Hassan Walubi Bulwadda. He testified that:



“The agreement was made at Bulwadda’s home. He did not sign because he was sick. He was understanding, he is the one who rang me.”

19. Exh.P7 – a boundary opening report compiled by New Age Surveyors dated 1st December 2018 confirmed that the Kibanja that was purchased by the plaintiff is located on Plot 412 Block 203 Kyadondo.
20. I am satisfied with the oral evidence of PW2 (Hassan Saidi Bulwadda); and PW3 (Muhama Kawese Lumbawo Serwanga), both of whom witnessed the purchase of the Kibanja, that the plaintiff purchased a Kibanja on the land with the consent of the registered owner of the land, Hassan Walubi Bulwadda. The oral evidence proves that the registered owner of the land was still alive at the time of the Kibanja transaction between the plaintiff and Hajji Hassan Bulwadda, was present during the purchase of the Kibanja, and gave his consent to the purchase of the Kibanja by the plaintiff. On the basis of this evidence, the presumption is that the plaintiff is the owner of the Kibanja.
21. However, the defendant asserts that he is the owner of the same Kibanja. Since the plaintiff is the presumed owner of the Kibanja according to the evidence adduced thus far, the defendant bears the burden to prove that it is him who is the owner of the Kibanja, and not the plaintiff. The burden of proof has shifted to him. See the Supreme Court case of J.K Patel v. Spear Motors Limited, SCCA No.4 of 1991.
22. The defendant claims to have acquired a Kibanja from a one Auke Mary pursuant to a purchase agreement dated the 31st August 2012 (Exh.D1). Exh.D1



states that the Kibanja that the defendant acquired measures 1 acre, with developments such as an unfinished guest house, boys' quarter and pit latrine. Exh.D1 does not provide for particulars of registration of the land such as block and plot numbers, on which the defendant's Kibanja is situated.

23. The first point to note is that the defendant's alleged Kibanja has different size dimensions from those described by the plaintiff. While the defendant testified that his Kibanja measures 1 acre, the plaintiff testified that his Kibanja measures 100ft x 50ft x 38ft x 95ft. The two size dimensions are different. Secondly, the defendant's alleged Kibanja has developments whereas the Kibanja claimed by the plaintiff is vacant as confirmed by the locus in quo visit. Thirdly, and most importantly, the defendant did not adduce evidence that he purchased the Kibanja with the consent of the registered proprietor of the land, Hassan Walubi Bulwadda.
24. The law prohibits acquisition of a Kibanja on land without the consent of the registered owner. The failure by the defendant to prove that he purchased a Kibanja with the consent of the registered owner of the land, means that he did not lawfully acquire the disputed Kibanja on the land.
25. Having regard to the evidence before court, it is my decision that the defendant owns land, adjacent to the suit Kibanja, where he currently operates a factory for beetle paint but he does not own the Kibanja that is claimed by the plaintiff. This explains why the Kibanja described in Exh.D1 (sale agreement for a Kibanja between the defendant and Auke Mary) is totally different from the Kibanja claimed by the plaintiff in terms of size.



26. Accordingly, it is my decision that the defendant has failed to prove that he owns the disputed Kibanja. The defendant is a trespasser on the Kibanja.

Issue No.3: What remedies are available to the parties?

27. In the result, I enter judgment in favour of the plaintiff, and order as follows:

- i). That the plaintiff, Kato Hussein is the lawful owner of a Kibanja measuring 100ft x 50ft x 38ft x 95ft located on land comprised in Leasehold Register Volume 2078 Folio 16 Kyadondo Block 203 Plot 412 Land at Nabweru.
- ii). That the defendant, Oging Joseph is a trespasser on the Kibanja;
- iii). That a permanent injunction issues restraining the defendant, his agents, servants, workmen and all those claiming under him and/or deriving authority from him from trespassing, encroaching, interfering and/or in any way dealing with the Kibanja;
- iv). That the defendant shall pay general damages of Ushs 1,000,000 (Uganda shillings one million) to the plaintiff;
- v). That the defendant shall pay interest of 15% per annum on general damages from the date of judgment until payment in full.
- vi). That the defendant shall pay costs of the suit to the plaintiff.

IT IS SO ORDERED.



**BERNARD NAMANYA
JUDGE**

17th August 2023

Attendance

17th August 2023 at 09:25am

Robert Irumba & Asiimwe Jotham	Counsel for the plaintiff
The plaintiff is in court	
The defendant is in court	
Allena Kanyakire	Court Clerk

Court:

Judgment delivered in open chambers.



BERNARD NAMANYA

JUDGE

17 August 2023