

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL No. 088 OF 2011

*(This appeal arises from the Judgment of Hon. Lady Justice Monica Mugenyi in High Court Civil Suit No 54 of 2009 (Land Division) dated 29<sup>th</sup> April 2011.)*

**JACOB MUTABAZI.....-APPELLANT**

**VERSUS**

**THE SEVENTH DAY ADVENTIST CHURCH.....**

**RESPONDENTS**

**CORAM: Hon. Mr. Justice Remmy Kasule, JA**

**Hon. Lady Justice Solomy Balungi Bossa, JA**

**Hon. Mr. Justice Geoffrey Kiryabwire, JA**

**JUDGMENT**

### **Background**

The appellant in 2009 brought a suit at the High Court of Uganda jointly against the present respondent and one Dan Namaswala (then 2<sup>nd</sup> Defendant and originally the 2<sup>nd</sup> respondent in this appeal). The respondent claimed ownership of land measuring approximately 1 ½ acres situated at Kireka Hill in Kampala (hereinafter referred to as the "suit Land") but currently occupied by the respondent church under a land title (Mailo Land Register Block No 232 Plot No 814) and the 2<sup>nd</sup> Defendant. In the plaint the appellant claimed and prayed for:

- a) a declaration that the plaintiff is a bonafide occupant and the lawful owner of the suit land

- b) a declaration that the defendants are trespassers on the suit land
- c) an order of cancellation of the 1<sup>st</sup> defendant's certificate of title and that of the 2<sup>nd</sup> defendant where it is found to exist.
- d) An eviction order
- e) In the alternative an order directing the defendants to pay the market value of the land trespassed on
- f) General damages
- g) Costs of the suit

The respondent denied the claim and insisted in its defence that it was the registered proprietor of the portion of the land while the 2<sup>nd</sup> defendant did not file a defence.

The trial Judge found for the defendant and held that the plaintiff (now appellant) did not possess any interest in the suit land and that the respondent's registration was not as a result of fraud. She further found that even though the case had proceeded against the 2<sup>nd</sup> defendant (original 2<sup>nd</sup> respondent) in his absence under Order 9 rule 10 of the Civil Procedure Rules (CPR), the case against him had not been proved. The suit was then dismissed and each party ordered to bear their own costs.

The appellant now dissatisfied with that decision appeals against the Judgment and Orders of the Court on the grounds that:-

1. The Learned trial Judge erred in law and fact when she blatantly failed to conduct a proper proceeding at the visit of the Locus in quo.
2. The Learned trial Judge erred in law and in fact when she found that the appellant failed to sufficiently prove that the appellant's deceased father had a kibanja interest in the suit land and thereby came to a wrong conclusion.
3. The Learned trial Judge erred in Law and in fact when she misdirected herself on the law relating to existing customary tenancies on public land.
4. The Learned trial Judge erred in law and in fact when she failed to find that the respondent's certificate of title was fraudulently acquired.

When the matter came up for hearing of the appeal, Counsel for the appellant withdrew the appeal against the 2<sup>nd</sup> respondent. Court accepted the withdrawal with no order as to costs.

Mr. Didas Nkurunziza appeared for the appellant while Mr. Ogwado Francis was for the respondent.

#### Role of the Court

This is a first appeal. Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions (S.I. 13-10

hereinafter referred to as "the Rules of this Court") provides:

***"... (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—***

***(a) re-appraise the evidence and draw inferences of fact; and in its discretion; for sufficient reason, take additional evidence..."***

This position has also been well adjudicated on by the Supreme Court which confirmed the holding of the Court of Appeal by Justice Amos Twinomujuni in the case of Frederick .J K. Zaabwe V Orient Bank Civil Appeal 04 of 2006 where he held:

*"The duty of this court as the first appellate court is well settled. It is to evaluate all the evidence which was adduced before the trial court: and to arrive at its own conclusion as to whether the finding of the trial court can be supported*

We shall now proceed to address the appeal.

**The Learned trial Judge erred in law and fact when she blatantly failed to conduct a proper proceeding at the visit of the Locus in quo.**

### **Case for the Appellant**

Counsel for the appellant submitted that there is no record of the Locus in quo conducted by the trial Judge and referred to in her Judgment when she stated at page 10 of the record that:

***"...a visit to the locus in quo revealed that two pieces of land are adjacent to each other but the land attributed to the 2<sup>nd</sup> defendant is undeveloped..."***

He submitted that the High Court case was about the existence or non-existence of a kibanja interest on the suit land and a visit to the Locus in quo was essential in determining the truth of the matter. He argued that Para. 3 (d) of Practice Direction No. 1 of 2007 (Practice Direction on the issue of Orders relating to Registered Land which affects or impacts on tenants by occupancy) provides that Courts should take interest in visiting the Locus in quo and while there:

***"...Record all proceedings at the Locus in quo..."***

He further submitted that it was a misdirection resulting into an error of Law and fact for the learned trial Judge not to take or direct the taking of a record of the proceedings at the Locus in quo.

He pointed out that at the scheduling conference held on the 9<sup>th</sup> May 2012, it was not disputed by both parties that proceedings of the locus in quo were missing.

He argued that the failure for the trial Judge who visited the Locus in quo to conduct proper proceedings was prejudicial to both parties and in particular the appellant and ought not to **be** allowed to stand. He

submitted that this was similar to having no visit to a Locus in quo when the need for it cried out loud and in such a situation, a retrial could be ordered. In this regard, he referred Court to the case of ***Yowasi Kabiguruka V Samuel Byarufu***, Civil Appeal No. **18** of **2008** (CA)

He argued that this appeal could be upheld on this ground alone and prayed that this Court exercise its discretion under Rule 32 of the Rules of this Court to order a new trial.

### **Case for the Respondent**

Counsel for the respondent submitted that the duty to prepare a record of appeal lay with the appellant and that it was wrong for the appellant to fault the trial Judge for not following the proper procedure when the appellant failed to produce the record to show how the proceedings took place. He submitted that the criticism amounted to evidence from the Bar which could not be relied upon. He submitted that there was no authority for the proposition that failure to conduct a Locus in quo within the meaning of Practice Direction No 1 of 2007 made the Court proceedings a nullity. He submitted that each procedure failure while conducting a Locus in quo should be looked as all other procedural failures and see whether any injustice was occasioned to any of the parties. In this regard he referred us to the High Court decision of Lady Justice Irene Mulyagonja (as she then was) in *Mukama Yasoni and 2 ors Vs. Sosi Peter Bamulangeyo* kaiza HCCS No. 42 of 2008.

He further argued that the dispute was not about boundary demarcations but rather ownership which could be determined by documentary and oral evidence. Counsel for the respondent submitted that the legal burden to prove ownership of the suit property lay with the appellant and they had failed to discharge the burden.

He further submitted that there was no need for a retrial as there was enough evidence on record for the trial Judge to determine the case.

### **Decision of the Court**

We have considered the submission of both counsel and the record of appeal as filed before Court.

It is not in doubt that the record of proceedings of the locus in quo are missing from the record.

It is well settled under Rules 83 (1) (b) and 87 of the Rules of this Court that the duty to prepare the record of appeal lies with the appellant. We need not go into the details of this well-established Rule. However it is important to emphasize that under Rule 87 (8) that:

***"...Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 23 of these Rules to appear on his or her behalf..."***

Counsel for the respondent (then Murungi, Kairu & Co Advocates) certified the record as correct on the 22<sup>nd</sup> August 2011.

The purpose of Rule 87(8) is to signify the close of pleadings for the appellant and to allow the Court to process the appeal for hearing and for the respondent to prepare to defend the appeal in its entirety.

Thereafter any changes to cure the record already filed should be done under Rule 90 of the Rules of this Court either by the appellant or the respondent filing a supplementary record. Rule 90 provides:

*"... (1) If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case, he or she may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal.*

*(2) The respondent shall, as soon as practicable after lodging a supplementary record of appeal, serve copies of it on the appellant and on every other respondent who has complied with the requirements of rule 80 of these Rules.*

*(3) Where an appellant desires to lodge a supplementary record of appeal in the court, the appellant may, at any time, lodge in the registry four copies of the supplementary record of appeal, and shall as soon as practicable thereafter, serve copies of it on every respondent who has complied with the requirements of rule 80 of these Rules.*

*(4) A supplementary record may be lodged to cure defects in the original record of appeal due to want of compliance with rule 87 of these Rules.*

*(5) A supplementary record of appeal shall **be** prepared as nearly as may be **in the same** manner as a record of appeal..."*

In this case no supplementary record was filed. Indeed there is nothing on record to suggest that the appellant, who on appeal wished to rely on the proceedings of the Locus in quo, formally asked the trial Court to provide the record of the Locus in quo. It was the appellant's duty to pursue the said record of the Locus in quo, put it on record then criticise it for not being properly taken. That is what vigilant parties and lawyers do. To set the ground that the trial Judge erred in law and fact by "**blatantly**" failing to conduct a proper proceeding at the visit of the Locus in quo in absence of the record is clearly an unfair and uncalled for attack on the trial Judge. The lawyers of old had a Latin adage for this:

***"...Omnia praesumuntur legitime facta donee probetur in contrarium..."***

That is, all acts are presumed to have been legitimately done, until the contrary is proved. In this case without the record, which the appellant in our view should have pursued, the appellant cannot now at this late stage be heard to say the record of the Locus in quo was blatantly not properly conducted. If the absence of the record of Locus in quo would prejudice his case then the appellant had 4 years to cure this which he did not.

We accordingly answer the first ground in the negative and accordingly decline to Order a re-hearing.

Ground Two;

The Learned trial Judge erred in law and in fact when she found that the appellant failed to sufficiently prove that the appellant's deceased father had a kibanja interest in the suit land and thereby came to a wrong conclusion.

Case for the Appellant

Counsel for the appellant submitted that the learned trial Judge erred in fact in holding that the suit land as a new post 1975 kibanja holding when in fact it existed dating back in 1953 to 1987 when Enock Mwambali (RIP) the appellant's father acquired it before the respondent wrongfully trespassed on it. He further submitted that Enock Mwambali had occupied the suit land for 22 years continuously and it was inconceivable that a person could occupy land owned by another for that long without the consent of the owner (in this matter the original mailo owner was the Kisosonkole family) being given or presumed. He pointed out that the appellant testified that he remembered his father telling him around 1953 that he paid busuulu, a land tax for kibanja holders. This meant that Enock Mwambali was a Kibanja holder and therefore a lawful occupant under section 29 (1) (b) of the Land Act.

Furthermore the late Enock Mwambali had occupied, utilized and developed the land unchallenged for the same period of time which was more than 12 years which meant that he was also a bona fide occupant under section 29 (2) (a) of the Land Act as well. He disagreed with the interpretation given to the case of Kampala District Land Board V Venansio Babweyaka CA No 2 of 2007 (SC) that the 12 years had to run backwards from the time when the Constitution came into force in each and every case for one to qualify to be a bonafide occupant within the meaning of the Land Act.

Counsel for the appellant submitted that the learned trial Judge did not mention or evaluate the evidence of Baziga Jonathan (PW2) who testified that when the appellant's father died, PW2's father was made a caretaker of the suit land. Baziga testified that Enock Mwambali was a kibanja holder and not a mere tenant in the houses of one kalete. He further argued that the trial Judge relied on the evidence of the defence witnesses yet defence evidence especially that of Sewanyana Florence Nankya (DW 1) and Pastor Diffus Isabirye (DW 2) was contradictory as one claimed to know the late Enock Mwambali as a casual labourer while the other called him a retired pastor of the respondent church.

## **Case for the Respondent**

Counsel for the respondent submitted that the trial Judge was right to find that the appellant had failed to discharge the burden of proof under this ground as well.

He submitted that Baziga Jonathan (PW2) at page 20 of the record testified that he did not know how the appellant's father acquired the suit property and therefore was not competent to testify on issues of ownership. He pointed out that Pastor Diffus Isabirye (DW 2) testified that he came to Kireka where the suit land is in 1957 and found the appellant's father working in the respondent church but that he lived in a rented house near the church. He argued that this evidence was not challenged and that the trial Court found it to be consistent and more reliable. He pointed out that there was no corroborative evidence that the appellant's father acquired the suit land in 1953 or that the local chiefs in the area

allocated the appellant's father the suit land according to the custom in the area or that the appellant's father paid busuulu to one Kikomeko. It was for the appellant to prove that his late father was a kibanja holder but the appellant failed to do so.

## **Decision of the Court**

We have considered the submission of both counsel and the record of appeal as filed before Court.

There is conflicting evidence on record as to how the appellant's late father Mwambali came to acquire his kibanja/customary interest in the suit land. One version is that he was a tenant of one Samson Kalete in one of Kalete's houses (3 mizigos/mud and wattle huts) while the other version was that the appellant's late father was a kibanja holder since 1957.

The trial Judge found (page 7 of the record) that it was true that the appellant's father had utilised the suit land for 25 years before the promulgation of the present Constitution of Uganda. However the appellant's father from whom the appellant claims to derive title died in 1974 and with his death the occupation thereof ceased. She went on to find:

***"...the plaintiff (present appellant) had left the suit land slightly earlier than 1974 and has not been in occupation of the suit land since. Therefore not only did the plaintiff and Mwambali cease to occupy the land prior to 1974, they had not been in occupation thereof for a continuous period of 12 years immediately preceding the coming in force of the Constitution../'***

in this regard the learned trial Judge relied on the Judgment of Odoki (CJ as he then was) In Kampala

District Land Board and anor V National Housing And Construction Corporation- CA 2 of 2004 (SC)

On the issue of the customary holding again relying on the decision of Kampala ***District Land Board*** (*Supra*) the learned Judge held that customary tenure has to be proved by evidence alluding to the customary practices in a given area by the party relying ***on it***. She went on to hold (page 9 of the record):

***"...in the present case though the plaintiff (the present appellant) claimed he had a kibanja interest in the suit land, save for his testimony that his father paid busuulu to the local chiefs, no witness was called to prove the customs of the area where the suit land is located with regard to acquisition of customary interest in land..."***

The learned Judge then found that the plaintiff did not have a customary interest in the suit land as a result.

As to how the appellant derived interest in the suit land she went on to hold:

***"....Accordingly, I do not find an absentee "occupant" who has ceased occupation of the suit premises more than 20 years prior to the coming into force of the 1995 Constitution to be a bona fide occupant within the precincts of Section 29 (2) (a) of the Land Act I am satisfied that the plaintiff is not a bonafide occupant on the suit land and do hold so..."***

Even today the appellant is a leader in Norway and is resident in a town called Hamar.

We agree with the learned trial Judge's interpretation of the decision in ***Kampala District Land Board*** (*Supra*) and respectfully disagree with argument of counsel that the decision is not applicable in each and every case.

We have further re-evaluated the evidence of PW2 Baziga Jonathan and find that he did not testify as to the appellant's late father acquisition of the suit land and therefore it is our finding that this evidence would not have led to a change in the trial judge's overall holdings.

The above being our findings we also dismiss ground No. 2 as well.

### **Ground Three:**

***The Learned trial Judge erred in law and in fact when she misdirected herself on the law relating to existing customary tenancies*** on public land. Given our findings in ground No 2 above we find it moot to decide this ground as no customary tenancy was proved in favour of the appellant.



**Ground Four: The Learned trial Judge erred in law and in fact when she failed to find that the respondent's certificate of title was fraudulently acquired. Case for the Appellant**

Counsel for the appellant argued that the conduct of the respondent in procurement of the certificate of title was intended to defeat the legitimate interest of the appellant as son, heir and successor to his late father Enock Mwambali the kibanja holder. He referred to the evidence of Ojera Venansio (PW 3) a cartographer who testified that the Kalamazoo map of the suit land was not clear and the ink used was not of the type they used so the suit property plot was "*bogus*" and needed further examination. He submitted that the whole transaction depicted a dishonest dealing in land which pointed to fraud.

**Case for the Respondent**

Counsel for the respondent denied that there was any evidence of fraud. He further argued that if there was fraud then the appellant and PW 5 in particular failed to attribute it to respondent.

He further submitted that the appellant and PW2 in their testimonies failed to show how the respondent procured registration to defeat the unregistered interest of the applicant.

**Decision of the Court**

We have considered the submission of both counsel and the record of appeal as filed before Court.

The trial Judge (at page 10-11) of the record addressed the issue of fraud. She pointed out that Section 59 of the Registration of Titles Act provides that a certificate of title shall be conclusive evidence of title and shall not be impeached on grounds of informality or irregularity in the application for issuance thereof or processes leading to such issuance. The Judge observed that under Sections 64 and 176 of the Registration of Titles Act the certificate can be canceled because of fraud. She referred to the case of Kampala District Land Board (*Supra*) where fraud was defined to include dishonest dealing in land, sharp practice intended to deprive a person of an interest in land or procuring the registration of a title in order to defeat an unregistered interest. The Learned trial Judge then found:

***"... in the present case, I have already found that the plaintiff is not possessed of any interest in the suit land. I, therefore do not find the 1<sup>st</sup> defendant's registration of its interest tantamount to fraud..."***

We have already upheld the trial Judge's finding that the appellant did not have an interest in the suit land so it follows that there could be not active fraud by the respondent to deprive him of the suit land. Furthermore that being our finding then the respondent's certificate of title is protected by Section 59 of the Registration of Titles Act. Moreover, there was no evidence tendered to prove any fraud. We accordingly dismiss this ground of appeal

#### Final Result

The foregoing being our finding the Appeal is dismissed with costs to the respondent Church, We so order

Dated at Kampala this 7<sup>th</sup> day of January 2015

Hon. Justice Remmy Kasule

JUSTICE OF THE APPEAL COURT

Hon. Justice Solomy Balungi Bossa

JUSTICE OF THE APPEAL COURT

Hon. Justice Geoffery Kiryabwire

JUSTICE OF THE APPEAL COURT