

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUIT NO. 1081 OF 1999.

EMILY LUWEDDE:.....PLANTIFF

VS

YAFESI

KATIMBO:.....DEFENDANT

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

JUDGMENT.

The Plaintiff seeks, from this honourable court:

- a) an eviction order against the defendant.
- b) an order requiring the defendant; to remove his alleged illegal structures from the plaintiff's land;
- c) an order awarding general damages to the plaintiff
- d) an order awarding costs of this suit to the plaintiff.

The orders sought by the plaintiff relate to land in Kyaddondo Block 253, Plot 793, situate at Lakuli, within the city of Kampala. The land is referred to in this short judgement as the "suit property". There are two fundamental facts that are not in dispute. First there is no dispute that ms Emily Luwedde Kayondo, the plaintiff in this case, purchased the suit property, which measures only some 0.095 hectares, way back in 1995. She purchased it as private milo tenure from one G.W. Kirembwe, PW2. The plaintiff was registered, by the Registrar of

Titles, as proprietor of the suit property on 14th February, 1996. She was registered as private milo proprietor. Her certificate of title is exhibit P2 on the record.

Second, it is not in dispute that the defendant owns a kibanja (customary holding) upon land sharing a common boundary with the suit property and that the defendant and his wife, DW2, reside upon that kibanja.

In brief, the plaintiff's case is that she purchased the suit property in 1995. She paid the full purchase price to G.W. Kirembwe, PW2, who sold the land to her. Kirembwe held private milo interest in the suit land prior to the sale. The remaining part of Kirembwe's land is plot 794 and the relevant certificate of title is exhibit P3 on the record. Plot 794 is the parent plot to that of the plaintiff which is plot 793.

In 1996, the plaintiff commenced upon developing the suit property. As she embarked upon fencing her plot, the defendant together with his wife, DW2, descended upon her and her workers. They chased them away from the suit property. The defendant, thereafter, allegedly trespassed upon the suit property took possession of it and constructed an alleged illegal structure upon the suit property. The plaintiff has since lost possession and has been unable to develop the suit property.

On his part, the defendant, in his defence, claimed that PW2, Geresom Kaggwa Kirembwe, who sold the suit property to the plaintiff and the plaintiff herself, obtained the suit property through dubious means. The defendant further averred that the plaintiff, when buying the suit property, was in full knowledge of the defendant's interest in the land and the fact that the defendant was in occupation. The defendant claimed that he had been a customary tenant on Kabaka's land since 1932 and that the land in question belonged to the Kabaka of Buganda. The defendant contended that he was protected by the Constitution of the Republic of Uganda and section 30(2) of the Land Act, 1998.

Only two issues are for determination:

- a) Whether the defendant has any interest in the suit property, and
- b) What are the remedies available to the parties?

I now turn to the evidential analysis in relation to the issues set out for determination in this case.

As a general rule, in civil cases the burden of proof lies upon the plaintiff who must prove his or her case on the balance of probabilities if he or she is to deserve the reliefs he or she seeks. Olinda De Souza Vs. Kassamali Nanji (1962) E.A. 756. However, when it comes to particular allegations made by each party, the principle remains that whoever alleges any fact or set of facts to exist must prove the allegation. Sections 100-102 of the Evidence Act, Cap. 43.

Regarding the first issue, I am duly satisfied with the evidence of the plaintiff to the effect that she holds a registered private milo interest in the suit property. She obtained registration after purchasing the suit property for value from PW2, G.W.Kirembwe. There is no dispute about that evidence. PW2 who has testified that he sold the suit property to the Plaintiff has also produced his own parent title, Exh. P3, which shows that he obtained registration of his milo interest in 1991 after purchasing the larger plot from the Namasole of Buganda, one Waggwedde Essubi, who was herself the registered proprietor.

The defendant has merely alleged, both in his pleadings and in his testimony in court, that the plaintiff and PW2 who sold the suit property to her got it through dubious means. He has produced no evidence to prove that allegation. The defendant claims that the suit property is part of his Kibanja which he claims to have occupied since 1932. He testified that he was in occupation of the suit property when the plaintiff purchased it. The defendant testified that he had crops and a house on the suit land and that ten years previously, he used to graze his cattle upon the same land.

In her evidence, however, the plaintiff stated, and her testimony was supported by PW2, that when she inspected the land and, afterwards, when she surveyed the land, there was nothing in terms of development upon it. She produced Exh P2.1-5, which are photographs taken at various stages of the dispute. It is clear that those photographs support the plaintiff's evidence that when she purchased the land it was empty and that the scattered young banana plants and the structure, in terms of a house, were placed upon the land by the defendant after the plaintiff had purchased the land. They were intended to punctuate the claim by the defendant that the suit property was part of his kibanja as he claims. The structure was, clearly not completed and occupied until late 2001. DW2, Mrs.Margret Nakimwero Katimbo, wife to the defendant, a witness whom I consider to have helped the defendant's case to no positive degree at all lied to this court that the structure was built upon the suit property as early as 1993. She is an accomplished liar whose entire testimony cannot be relied upon having told a naked lie about that material fact.

Be that as it may, the defendant after claiming that the suit property is part of his kibanja and after failing to substantiate the claim that both PW1 and PW2 obtained title to the suit property through dubious means, he contradicted himself materially, by stating unequivocally that his own kibanja is restricted to the land belonging to the Kabaka of Buganda.

Since the evidence contains nothing which shows that the suit property has ever belonged to the Kabaka of Buganda, then it is clear that the defendant's kibanja which is restricted to the Kabaka's land does not extend to the suit property which is outside the Kabaka's land. The evidence before me clearly shows that the suit property was, for very many years before it was sold to the plaintiff, held under private milo tenure of proprietors other than the Kabaka of Buganda. Under section 56 of the Registration of Titles Act, the plaintiff's certificate of title is exclusive evidence of her ownership of the suit property. This court cannot speculate about that ownership.

In view of the above very simple analysis, it appears to me that the defendant's claim that the suit property is part of his kibanja has no basis whatever. The suit property appears to me to have been empty land adjacent to the defendant's own kibanja. The defendant may have taken his own liberty and grazed his cows upon it when it was bushy and because it was near his own home and perhaps because nobody stopped him. That did not give him any interest, equitable or legal, in the suit property. The defendant produced PW3, Godfrey Musisi who was Muluka Chief of Lukuli parish from 1979 to 1985. The witness adversely testified that both the Kabaka and the Namasole of Buganda had lands at Lukuli, Katimbo zone where the suit property is. He did not know to whom of the two the suit property belonged. The defendant claimed to have occupied the suit property since 1932 yet he could not produce a single "Envujjo" or "Busuulu" receipt in respect of that land in order to substantiate the claim. If it were true that he occupied the suit property since 1932, then he was a trespasser all along. That illegal position cannot advance his case.

I duly agree with learned counsel, Mr. Mbogo, that any act of entry upon the land owned by another person without the consent of the owner, constitutes trespass to the land. Sheik Muhammed Lubowa Vs. Kitara Enterprises Ltd, C.A. NO. 4 of.1987. In the instant case, the defendant entered upon the land which had been registered in the names of the plaintiff as the owner. The plaintiff had not given consent for the entry.

In fact the plaintiff was forcefully chased away from the land. She was prevented from developing her land. The defendant hurriedly planted some banana plants upon the land and started constructing a visibly poorly built illegal structure on it. He completed the illegal structure and occupied it in spite of a temporary injunction issued by this court in the year 2000. He has clearly been a trespasser from the date of entry in 1996 to date. He had no equitable or legal interest in the suit property. Neither does he have any today. The evidence before me has established none at all.

I also find that neither the Constitution of Uganda of The Republic of (Article 237 (8) or section 30 (2) of the Land Act, 1998, appear to me to render any protection to the defendant in this case. For he is neither a lawful or a bonafide occupant of the suit property. He is not an occupant at all.

I will now move to the remedies available to the parties.

Since the plaintiff has undoubtedly established her case, upon the balance of probabilities, that the defendant is nothing but a trespasser upon her land, she will have the eviction order which she prays for. The defendant is hereby ordered to hand over vacant possession of the suit property to the plaintiff within seven days from the date of the delivery of this judgement.

The plaintiff prays for general damages for trespass. It is my considered view that she duly deserves an order for general damages. She purchased the suit property with her meagre savings from her salary. She had a purpose of developing it for her own use. For over six years she has been illegally denied that use or enjoyment by somebody who knew fully well that he had no justifiable claim to the land and who appears to me to have been driven by sheer greed and sturboness to forcefully acquire what never belonged to him. Considering all the circumstances of this case, I would award 1,500,000/= to the plaintiff as general damages for trespass. The sum of 4,000,000/= suggested by learned counsel, Mr. Mbogo, appears to me to be excessive considering the purchase price and all the other circumstances of this case.

I find that this is not a proper case for the award of mesne profits. I, therefore, award none.

The plaintiff is to recover her costs from the defendant in addition to the general damages.

In the final result, I enter judgment for the plaintiff. I make orders:

- a) requiring the defendant, within 7 days from the date of the delivery of this judgment, to hand over vacant possession of the suit property to the plaintiff,
- b) awarding 1,500,000/= as general damages to the plaintiff; and C) awarding the costs of this suit to the plaintiff.

V.F.MUSOKE-KIBUUKA (JUDGE)

30. 12.2002.

Court Order:

The Deputy Registrar of the High Court, in charge of civil matters, may deliver this judgment on a date and at a time fixed by her.

V.F.MUSOKE-KIBUUKA (JUDGE)

30. 12.2002.