

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CV-CS-0889-2001

NAMUSOKE NSANGI ::: PLAINTIFF

- VERSUS -

NAMBI EDITH NABATANZI ::: DEFENDANT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

J U D G M E N T:-

The plaintiff is the heir and legal administratrix of the estate of the Late Mumbajja Irene Namusoke Nsangi owned land measuring 0.34 acres at Kisowera 1A L.C. zone in Kawempe Parish, situated behind ROKO Construction Company premises (hereinafter referred to as the suit land). The suit land adjoined land given to the defendant by the late Mumbajja Irene Namusoke Nsangi. The plaintiff's claim is for an order of eviction, special and general damages for trespass on land and property, interest and costs of this suit.

The plaintiff claimed that in or about 1998, after the death of the late Mumbajja Irene Namusoke Nsangi the defendant without any right in law whatsoever,

illegally claimed and occupied a portion measuring 0.06 acres of the suit land and also destroyed the deceased's buildings thereon valued at shs.3,500,000/= and enclosed the suit land with barbed wires.

In her defence, the defendant denied the plaintiff's claim to the suit land. The defendant contended that the suit land (kibanja) including all developments thereon belonged to her late mother Nakabiri Najja Maria and that the late Irene Namusoke Nsangi was only caretaker of the suit land on behalf of Nakabiri Maria. Upon the death of Nakabiri the defendant became the beneficiary and successor to the kibanja. The defendant's possession and occupation of the suit land were sanctioned by the Administrator General who took out court grant to the estate of the late Nakabiri Maria, the mother of the defendant.

At the commencement of hearing three issues were agreed for determination:-

- (1) whether the plaintiff has an interest in the suit property;
- (2) whether the defendant trespassed on the suit land;
- (3) whether the plaintiff is entitled to the relief sought and what quantum.

In a bid to discharge the burden of proof as provided under section 101-103 of the Evidence Act, the plaintiff adduced the evidence of 6 (six) witnesses. The plaintiff also relied on thirteen (13) exhibits.

The defendant on the other hand called 4 (four) witness and relied on 1 (one) exhibit.

Nassiwa Magdalena (PW1) testified that the defendant was her sister's daughter. She stated that her claim against the defendant was because she had chased her from a piece of land in Kisowera which she had inherited from the late Irene Namusoke Nsangi who died in 1998 testate. After her demise she got authority from court to administer her estate (exhibit P1). She stated that the deceased had left a piece of land with three houses built of mud and wattle with iron sheets. She stated that the late Irene Namusoke Nsangi used to pay city rates in respect of the above property to Kampala City Council from 1973 to 1999 (exhibit P2). She further tendered demand notice from Kampala City Council in respect of the suit property (exhibit P3). She stated that after inheriting the suit land she entered the suit property in 1998. She lived there until she was evicted by the defendant who was claiming that she was not entitled to the property. The defendant evicted her from the property with the assistance of the Administrator General. In addition to

eviction she was charged with a criminal offence at Buganda Road Court and convicted of intermeddling with property of the late Nakabiri the mother of the defendant exhibit P3. She testified that after evicting her from the suit property the defendant destroyed the houses where she was occupying together with all her property therein. She concluded that the defendant was now occupying the land she was lawfully given by the deceased together with the portion she illegally grabbed from her. She prayed for the return of the suit land together with compensation for the lost property.

Clement Kabunga PW2 LC official of Kisowera zone testified that he was aware of the dispute between the estate of Namusoke and Nambi. He stated that he first saw Nambi on 17th September 1994 when she was introduced to her by Mrs Lumala Justin who was Secretary for Women Affairs. The purpose of the meeting was to witness the transaction where Namusoke was giving Nambi part of her land. In that agreement Nambi was given $\frac{1}{4}$ of Namusoke's land. He signed the agreement together with Nambi, Namusoke (thumbprint), Mrs Lumala Mary Musisi and others. He stated that the original was given to Nambi (exhibit P4). He stated that he was staying near the suit property because Namusoke had sold him part of the disputed property in 1992. He stated that the same Namusoke had sold part of said land to other people that included Salongo Walugembe, Kiwanuka, Lutwama and

others. He testified further that one time they made a decision in a dispute between Nambi and her father Walugembe in which she was complaining that her father had given land to another heir who was not the right person. As LCs they resolved that Nambi should remain on the portion that the late Namusoke had given her. He concluded that since 1980 he had never seen Nakabiri in Kawempe. But all along they had been seeing Namusoke as the rightful owner of the suit land who had been selling the same to various people.

Yakobo Walugembe 91 years old (PW13) testified that his daughter Namusoke died in 1998. After her death he performed funeral rites that very year. Before her death she had shown him around her kibanja at Kawempe where she had built three houses. He stated that apart from seeing the property Namusoke also showed him receipts for city rates from Kampala City Council. He stated that Namusoke's will directed him to pick a heir and perform her funeral rites. He did both and appointed Nassiwa (PW1) as her heir. He testified that the late Nakabiri was also her daughter who had followed the late Namusoke. He stated that Nakabiri mothered Nambi before she died in 1992. He stated that Nakabiri died without leaving property.

After her death he appointed Nabweteme to be her heir upon her directive. He concluded that the suit land belonged to the late Namusoke and not Nakabiri. He stated that the land belonged to Namusoke because she had constructed houses there and stayed for a longtime without anyone disturbing her.

Stephen Nyaruguma PW4 testified that he carried out valuation on the suit property. He stated that the value of the whole plot was shs.10,000,000/= while that of the destroyed building was about shs.3,000,000/=. He stated that the whole plot was 0.34 of an acre while the encroached portion was 0.06 of an acre. The report was exhibit P7.

Walugembe Livingstone Ssalongo PW5 47 years old testified that the property in dispute belonged to the late Namusoke who died in 1998. He stated that the land belonged to her because she had documents for busulu and a will, which she wrote in 1995. In that will she talked about the disputed property belonging to her. (The will was exhibit P8). He stated that the property belonged to Namusoke because she donated part of the same to her relatives, which included himself and Nambi. He stated that he was given the same in 1987.

On top of the same to other people which included Lubwama, Kiwanuka Ssebwami and Kabunga. He concluded that prior to this suit Nambi had taken the same matter before LC court accusing her father Walugembe of giving away the suit land whereupon the LC decided that she would remain on the portion which Namusoke had given her.

Mulongo Christopher PW6 testified and produced records showing that the suit property belonged to the late Namusoke – (certificate of ownership exhibit PW12 and valuation Role for properties in Kampala City Council exhibit P13).

Mary Nanteza Musisi 83 years old (DW1) testified that she came to know Maria Nakabiri when she (Nakabiri) went to buy kibanja belonging to Mariam Nabagala who was her neighbour. She stated that she got Nakabiri at Nabagala's place. From there she saw Nabagala, Sebagala and Zechariah inspecting the kibanja. At that time it was Zechariah who was buying the same on behalf of Nakabiri who came in on a third occasion. In that kibanja there was coffee trees, sugarcane and sweet bananas. The kibanja had two houses and a kitchen. After sometime Nakabiri brought in Irene Namusoke to look after the kibanja because she was married in Wobulenzi. She stated that Namusoke was a mere caretaker of the

kibanja and never put any building on the kibanja. She concluded that she did not know how Walugembe Ssalongo entered that kibanja.

Edith Nambi Nabatanzi 48 years old DW2 testified that she knew the late Namusoke as a distant relative of her mother Nakabiri who lived at Mbukiro in Luwero District. She testified that Namusoke used to live Kikamulo in Luwero but later Nakabiri brought her to Kawempe to look after her (Nakabiri) suit property. He stated that the suit land had two main houses with several rooms. Namusoke was staying in one room while the other rooms were being rented on behalf of Nakabiri who used to go to Kawempe to collect money earned from the houses. She testified that Namusoke was only caretaker who used to pay busulu from the proceeds of the rent. She testified that in 1989 he mother allowed her to build on the suit property and requested the late Namusoke to show her where to put up a house. She did not take immediate use of the said authority because she had to return to London where she was residing. She returned in 1994 when Nakabiri had died. As Namusoke was still in-charge of the property she contacted her to allow her proceed with the construction of her house. In the process they wrote an agreement before the LCs of Kisowera zone on 16/9/1994. Upon the death of Namusoke, her daughter Nassiwa was installed as heir and she started claiming that the whole kibanja belonged to the late Namusoke. She testified that since that

was not true she reported the matter to the Administrator General who investigated the matter and found that the suit property did belong to the late Nakabiri. The property was thereafter passed to the defendant as daughter and beneficiary of the estate. As a result the plaintiff was arrested, charged, prosecuted and convicted for intermeddling with the said estate. She concluded that there were other people staying on the disputed property.

Miriam Nabaggala DW3 confirmed she was the original owner of the suit property. She testified that in 1960^s she sold the said kibanja to Nakabiri at shs.70/= she stated that Nakabiri was introduced to her by Sebagala who was a muluka chief and they concluded the sale and she received the money. She stated that the kibanja had two houses, which she had built. She stated that she used to pay busulu to Najwenge Sebagala who was a muluka chief.

Fenekasi Ssebagala Najwenge DW4 93 years old testified and confirmed the sale of the kibanja to Nakabiri the mother of the defendant. He testified that he was directly involved in the sale transaction between Nabagala and Nakabiri whereby the kibanja was sold at 70/=. He stated that after buying the kibanja Nakabiri went to Wobulenzi but she brought someone to care take her kibanja. He stated that the kibanja had coffee, bananas and two houses.

From the above summary of evidence it can be stated that the plaintiff's claim is based on the busulu receipts and the role of landlords in Kawempe exhibit P3 and P13 respectively, which indicated that Irene Namusoke was the owner of the suit land and had been paying busulu from 1974 up until she died in 1998. The plaintiff also relied on the written agreement dated 16/9/1994 exhibit P4 in which the late Namusoke gave to the defendant a portion of the suit land; Another piece of evidence was a will of the late Namusoke exhibit P8 where she pronounced that she owned the suit land and three houses thereon.

On top of the above evidence, the plaintiff further relied on the evidence from the Local Council member to the effect that the Local Council court decided that the suit land belonged to the late Namusoke. The above position was supported by Livingstone Walugembe Ssalongo PW5 the brother of Namusoke and Mzee Yakobo Walugembe the father of Namusoke.

The defendant on the other hand relied on oral evidence the witness who allegedly sold the same to the defendant's mother and others who witnessed the transaction.

As far as the first issue is concerned, I have perused the evidence on both sides. I do not have any doubts as to the fact that the late Namusoke was residing on the suit property before she died. However, the evidence from the plaintiff falls short of establishing how the late Namusoke acquired ownership of suit property. Even Mzee Yakobo PW3 who was the father of the late Namusoke owned the suit property. The defendant and her witness on the other hand were clear and consistent on the history of ownership of the suit property. They testified that the late Nakabiri was the owner of the suit property having bought the same from Miriam Nabagala DW3. The same was witnessed by Najwenge Ssebagala DW3. After buying the same, Nakabiri entrusted the same with the late Namusoke. From the above evidence, I am convinced on the balance of probabilities that the late Namusoke was a mere caretaker of the suit land and her interest did not extend beyond that. The fact that she was the one paying for the busulu and city rates did not bestow on her ownership of the suit property. She was doing that as a mere agent of the late Nakabiri who was living very far from the suit property. Therefore, payment of city rates could be construed as conclusive evidence of ownership of the property: See section 6(2) of the Local Government (Rating) Decree.

It is important to note that such a tax is normally imposed on the occupier of the property notwithstanding whether he is the owner of the property. From the evidence on record my only opinion is to find that the late Namusoke fell in the category of an occupier and not as owner of the suit property. The defence witnesses were emphatic on the above position. I saw them demeanour in court and I must say that it was Miriam Nabagala DW3 who said the suit property to the late Nakabiri. In that regard I find that it was very fraudulent on the side of the late Namusoke to purport that the suit property was hers. There is no evidence to support her claim. Her purported will and agreement with the defendant were mere instruments of fraud. The plaintiff's main witnesses were either her relatives or those who benefited from the fraud like Clement Kabunga (PW2) who had bought part of the suit land from the late Namusoke.

For the reasons stated above, I find that the estate of the late Namusoke Nsangi does not own the suit land. The suit land clearly belongs to the estate of the late Nakabiri whose interest is represented by the defendant.

Having found that the plaintiff has no interest in the suit land, she cannot be entitled to sue on trespass since trespass onto the land was without consent of the owner: See **Sheikh Mohammed Lubowa Vs Kitara Enterprises H/C Civil**

Appeal No. 4 of 1987. There was therefore no trespass since the defendant's action of enclosing the suit property with barbed wire was to secure her mother's estate, which was being threatened by the plaintiff.

Should it be found to be wrong I would award the plaintiff special damages of shs.3,500,000/= for the value of the damaged houses and general damages of shs.5,200,000/= for rent as claimed. The plaintiff would also be entitled to costs of the suit and interest at court rate from the date of this judgment until payment in full. Otherwise the plaintiff's suit is dismissed with costs.

RUBBY AWERI OPIO

J U D G E

12/9/2004.

14/9/2004:-

Lutakome for defendant. Plaintiff absent.

Court:-

Judgment read.

SGD: GODREY NAMUNDI

DEPUTY REGISTRAR

14/9/2004.