THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 54 OF 2009

JACOB MUTABAZI ..... PLAINTIFF

VERSUS

1. THE SEVENTH DAY ADVENTIST CHURCH

2. DAN NAMASWALA ..... DEFENDANTS

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

JUDGMENT

The facts of this case are that the plaintiff, a one Jacob Mutazindwa sued the first and second defendants for trespass and/or fraudulent acquisition of land situated at Kireka hill. The plaintiff contends that he is a bonafide occupant and thus lawful owner of land currently held by both defendants, being the heir and sole surviving descendant of his father, a one Enoch Mwambali, from whom he purportedly derives legal title to the land.

No evidence was adduced before this court to prove that the plaintiff is indeed Mwambali's customary heir. However, according to the record of my sister judge, Lady Justice Faith Mwondha who handled the case previously, the plaintiff had secured a certificate of no objection to the grant of letters of administration and was on course to secure Letters of Administration in respect of Mwambali's estate. I do take judicial notice of this fact.

On the question of the *locus standi* of a non-holder of Letters of Administration to institute proceedings in respect of the estate, the Supreme Court in the case of **Israel Kabwa vs Martin Banoba Masiga Civil Appeal No.2 of 1995 (SC)** upheld the holding of the trial judge that the respondent's *locus standi* was founded on his being the heir and son of his late father. Tsekooko JSC held as follows:

> **"The editors of <u>Williams and Mortimer on Executors, administrators and Probate</u> (15th Edition of Williams on Executors and 3rd Edition of Mortimer on Probate) at pp. 84 and 454 *et seq* show that an intending applicant for Letters of Administration can institute an action to stop trespass to a deceased's land. .... (This ground) would still fail, in my view, even if no letters of administration had been obtained because the respondent's right to the land and his developments thereon do not depend on letters of administration."**

On the basis of the foregoing ruling, the plaintiff does have *locus standi* to institute the present proceedings.

The 1st defendant, on the other hand, maintains that as the registered proprietor of land comprised in Block 232 plot 814 located at Kireka, it is the lawful owner of the said land and denies any allegations of trespass thereto.

No written statement of defence was filed by the second defendant as required by O.9 r.1 of the Civil Procedure Rules (CPR), neither is specific mention made as to his proprietary interest in the suit premises save for an averment in paragraph 4(c) of the plaint where the plaintiff seeks the "**cancellation of a certificate of title of the 1st defendant and of the 2nd defendant where it is found to exist.**"

I shall address the status of the 2nd defendant in this suit forthwith. A look at the CPR is instructive in this regard.

O. 4 r.1 of the CPR requires ordinary civil suits, such as the present one, to be instituted by plaint. O.5 r.1 provides for service of summons upon a defendant against whom a suit has been instituted, requiring him/ her to file their defence thereto. The time within which such summons must be filed upon a defendant is stipulated in O.5 r.2 and the mode of service is outlined in rules 8, 9 and 10 of the same Order.

In the present case the plaintiff duly served summons upon both defendants on or about 27th March 2009. Curiously, although both defendants defaulted on filing their defences within the time stipulated in the summons, the 1st defendant's written statement of defence was filed and duly received by court on 13th May 2009. Even more perturbing, having accepted the 1st defendant's written statement of defence filed in May 2009, on 16th July 2009 an Order was granted under O.9 r.10 of the CPR permitting the plaintiff to proceed with the hearing of the case. Counsel for the plaintiff did not raise this issue during the hearing of this case or at all.

I am mindful of Article 126(2)(e) of the 1995 Constitution that enjoins courts to administer substantive justice without undue regard to technicalities. I also note that land disputes in Uganda are sensitive and potentially acrimonious matters. Accordingly, there is need to have these disputes dealt with as judiciously and conclusively as possible. To that extent I am of the view that it would serve in the interest of justice, as far as possible, for courts adjudicating land disputes to uphold the tenet of natural justice that enjoins both parties to a dispute to be accorded a fair opportunity to be heard.

In the premises, I rule that given the receipt and stamping of its written statement of defence by the court the 1st defendant is deemed to have a right of appearance before this court. Accordingly, I do accept the evidence that was adduced on its behalf.

With regard to the 2nd defendant, attempts to serve summons on him in the manner prescribed by Order 5 were unsuccessful, and an order for substituted service granted on 24th April 2009 did not yield any results either. There is evidence on the court record that substituted service was indeed effected. This evidence is in form of newspaper cuttings, as well as an affidavit of service of summons by a one Moses Ashaba dated 14th May 2009 and duly compliant with O.9 r.5 of the CPR.

In the absence of any response to the service by the 2nd defendant the present suit did proceed under O.9 r.10 of the CPR as had been ordered in the Deputy Registrar's Order of 16th July 2009. I hasten to add that under the precincts of that rule, the plaintiff is still required to prove his case against the 2nd defendant to the required standard – balance of probabilities.

I now revert to a consideration of the substantive suit.

Section 101(1) of the Evidence Act provides as follows:

> **"Whoever desires any court to give judgment as to any legal right ... dependant on the existence of facts which s/he asserts must prove that those facts exist."**

Section 110 of the Evidence Act provides thus:

> **"When the question is whether any person is owner of anything of which s/he is shown to be in possession, the burden of proving that s/he is not the owner is on the person who affirms that s/he is not the owner."**

The sum effect of the foregoing provisions of the Evidence Act is to lay the onus of proof in the present case squarely on the plaintiff. First, the plaintiff is required to prove the assertions he makes in the plaint with regard to his purported ownership of the suit premises. Secondly, he bears the burden of proving that the defendants, though armed with legal title and/ or possession

of the suit premises, are nonetheless not the owners of the land. The plaintiff must prove his case on a balance of probabilities.

Pursuant to a scheduling conference held on 2nd August 2010 both parties agreed to the following facts, which shall require no further proof:

1. That the 1st defendant holds a certificate of title to the land comprised in Block 232 plot 814 at Kireka, which title was acquired in 1989.
2. That the plaintiff's father was the 1st defendant's employee, died in 1974 and was buried somewhere in Kireka.

The parties framed 3 issues for determination by this court.

1. Whether the plaintiff has any interest in the suit land.
2. Whether the 1st defendant's certificate of title was acquired fraudulently.
3. Available remedies.

I shall address the issues in that order.

Issue No. 1 – whether the plaintiff has any interest in the suit land.

The plaintiff testified in this case as PW1. He did not testify to having a certificate of title to the suit premises. In the plaint he claims to be a bonafide occupant and owner of the land. During his testimony he stated that he has a kibanja interest in the suit land.

A brief look at the land in dispute is pertinent. The suit land entails 2 pieces of land that are allegedly owned by the 1st and 2nd defendants respectively. The evidence on record indicates that the 1st defendant does have a certificate of title to its piece of land, which is registered as Block

232 plot 814. No evidence was adduced to prove whether or not the 2nd defendant possesses a certificate of title to his land. A visit to the locus in quo revealed that the 2 pieces of land are adjacent to each other but the land attributed to the 2nd defendant is undeveloped.

Section 2 of the Land Act provides for four modes of land ownership – customary, freehold, mailo and leasehold. The certificate of title to the 1st defendants land demarcates the land holding as private mailo land. According to the evidence of PW3, the original owner of the entire suit land (including that which belongs to the 2nd defendant) was a one C. M. S. Kisosonkole, father to a one Catherine Damalie Nakawombe to whom we shall revert later in this judgment. Mr. Kisosonkole was the original owner of plot 771 from which plot 814 of Block 232 was curved out. PW3's evidence suggests that the entire suit land is held under mailo holding.

In evidence, the plaintiff claimed to have a kibanja interest in the suit land. This, in addition to his averment in the plaint that he was a bonafide occupant on the suit land. The question then is whether or not the evidence adduced before this court proves him to be either a kibanja holder or bonafide occupant on the suit land.

Section 29(2)(a) of the Land Act defines a bonafide occupant on land as "**a person who before the coming into force of the Constitution had occupied and utilised or developed any land unchallenged by the registered owner or agent for twelve years or more.**"

In the present case the plaintiff's father, a one Enoch Mwambali, did in his life time live on and till the suit land. This was well before the coming into force of the Constitution and certainly, from the account of the DW2, he did live on the suit land for a period much longer than 12 years. DW2 testified that the plaintiff's father was already living on the suit land by 1957 when he

(DW2) started serving the Seventh Day Adventist (SDA) Church. Mwambali lived on this land until his death in 1974.

However, the 1st defendant and its agents did know the capacity in which the late Mwambali lived and tilled the land in question. All the 1st defendant's witnesses testified that they were aware at the time of Mwambali's occupancy on the suit land that he was a tenant of a one Kalete, and was employed as a porter in the SDA Church. DW1 categorically stated that the late Mwambali was a tenant to a one Kalete, and testified that she recalled seeing Kalete collecting rent from his tenants, including asking the headmaster of a school where she taught (Kireka SDA primary school) for receipts to give his tenants. Her testimony was not rebutted under cross examination. DW2 reiterated DW1's testimony, stating that late Mwambali was a tenant of a one Samson Kalete. In addition he stated that neither the house nor the land Mwambali lived on belonged to him, and clarified that a one Kisosonkole owned the land on which Kalete's houses were built.

On the other hand, as stated earlier in this judgment, the plaintiff testified that he has a kibanja interest in the suit premises which he derives from Mwambali's interest therein. He testified that he and his father lived with the family of a local chief called Kakoma after his mother's death, but subsequently his father was allocated the suit land by another local chief called Kikomeko as was allegedly the custom. He testified that his father thereafter occupied the land, and built a mud and wattle hut thereon initially but he (the plaintiff) later paid Ushs. 400 and transferred Mwambali to a house belonging to a one Ndereya Gasinzi. He further stated that both he and his father planted crops on the land including fruit trees some of which are allegedly still standing today. Furthermore, that about 1953 his father told him that he was going to pay busuulu in respect of the land and, in his view, was therefore a recognised kibanja holder thereon. Finally he testified that his father was buried on the suit land and that, in his view, was evidence of ownership thereof. PW1 (the plaintiff) made no mention of any tenancy arrangement with Mr. Kalete.

Section 101(1) of the Evidence Act places the onus to prove his interest in the suit land on the plaintiff. This burden must be discharged on a balance of probabilities. I note that no evidence was adduced by the plaintiff to prove that Mwambali did pay busuulu as opposed to rent for the property he occupied. PW1, the plaintiff, testified that all his father's documents were destroyed so he was unable to furnish documentary proof of his interest in the land. On the other hand, for the defence DW1 – a lady that worshipped at the SDA Church during the lifetime of Mwambali, testified that he (Mwambali) lived in one of 3 *mizigos* (mud and wattle huts) owned by his landlord Kalete as the latter's tenant. She stated that though the Church knew that Mwambali did not own land in the area, because he had been a faithful employee of the Church to which Kalete also belonged, Kalete allowed Mwambali to be buried on his (Kalete's) land. This evidence was corroborated by the testimony of DW2 – the pastor that conducted Mwambali's funeral service, who stated that the same Kalete was the one that identified the burial site.

In the absence of sufficient proof by the plaintiff that his father had a kibanja interest in the suit land rather than being a tenant as alleged by the 1st defendant, and considering the strength of the evidence adduced on the issue by the 1st defendant, I am constrained to find that Enoch Mwambali was indeed a tenant on the suit land.

Having established that Mwambali was a tenant on the suit land, the question then is whether as a person deriving his interest from a tenant the plaintiff qualifies to be a bona fide occupant on the land as he claims in the plaint.

In my view, a tenant was not what was envisaged as a 'bonafide occupant' under section 29(1) of the Land Act. The use of the word 'bonafide' is intended to restrict this provision to occupants of land that have extensively utilised such land, lived on it for the prescribed period of time, all with the knowledge of the registered proprietor of such land, and have done this in the honest and genuine belief that they do have a semblance of ownership over the land. Certainly, in my view, section 29(1)(a) of the Land Act should be inapplicable and unavailable to tenants that are well

aware of the capacity in which they occupy the land and subsequently purport to turn around and claim a contrary interest therein.

The question of who constitutes a bonafide occupant on land was extensively addressed in the case of **Kampala District Land Board and Another vs National Housing and Construction Corporation Civil Appeal No. 2 of 2004 (UGSC).** In that case the respondent had utilised the suit land unchallenged since 1970. The Court of Appeal held that it was indeed a bonafide occupant having utilised the suit land unchallenged for 25 years. The Supreme Court upheld the position of the Court of Appeal.

I am respectfully bound by the decision of the Supreme Court in **Kampala District Land Board & Anor vs National Housing & Construction Corporation (supra)**. However, I must point out that the facts of the present case differ slightly from those in the above case. While in the above case the Respondent had continuous, uninterrupted and unchallenged occupation of the suit land for 25 years preceding the promulgation of the Constitution, in the present case Mwambali, from whom the plaintiff derives title, died in 1974 and ceased occupation thereof. The plaintiff 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 and by 1974, they had not been in occupation thereof for a continuous period of 12 years immediately preceding the coming into force of the Constitution.

I am most respectfully guided by the decision of Odoki CJ, who in the foregoing case states as follows:

> "**The respondent had been in occupation or possession of the suit land for more than 12 years <u>at the time</u> of the coming into force of the 1995 Constitution**." (*emphasis mine*)

Accordingly, I do not find an absentee 'occupant' who ceased occupation of suit premises more than 20 years prior to the coming into force of the 1995 Constitution to be a bonafide occupant within the precincts of section 29(1)(a) of the Land Act. I am satisfied that the plaintiff is not a bonafide occupant on the suit land and do so hold.

I now revert to the issue of whether indeed the plaintiff does have a kibanja interest in the suit land as he claims. A kibanja interest in land is not formally acknowledged as such either in the Constitution or the Land Act, but has been treated by the courts as customary tenure which is acknowledged by both legal sources. See the case of **Marko Matovu vs Mohammed Sseviiri & Anor Civil Appeal No. 7/778 (CA)**.

The question of how to determine customary tenure is extensively dealt with in the case of **Kampala District Land Board & Another vs. Venansio Babweyaka & Others Civil Appeal No. 2 of 2007 (UGSC)**. In that case Odoki CJ held as follows:

> "**The prohibition of customary tenure in an urban area is clear from section 24(1)(a) of the Public Lands Act. .... The Land Reform Decree 1975 declared all land in Uganda to be public land to be administered by the Uganda Land Commission in accordance with the Public Lands Act 1969, subject to such modifications as may be necessary to bring that Act in conformity with the Decree. ... Under the Land Reform Regulations 1976, any person wishing to occupy public land by customary tenure had to apply to the sub-county chief in charge of the area where the land was situated. After processing the application, it had to be sent to the sub-county Land Committee for approval. The question is whether the respondents did acquire customary ownership following the enactment of the Land Reform Decree. The answer to this question appears to be in the negative. Restrictions on acquisition of customary tenure under the Public Lands Act seem to have continued as the law (Public Lands Act) continued to govern all types of public land subject to the provisions of the Decree. In order to acquire fresh customary tenure one had to apply to the prescribed authorities and receive approval of his/ her application.**

<u>There was no evidence that such prescribed authorities existed nor that the respondents or their predecessors acquired fresh customary tenure in accordance with the Land Reform Decree</u>. I would therefore hold that the respondents could not have legally acquired customary tenure in an urban area of Kampala City prior to the enactment of the Land Act in 1998." (*emphasis mine)*

For present purposes the import of the foregoing decision is as follows:

1. Section 24(1) of the Public Lands Act 1969 abolished customary tenure in urban areas, the provisions of sub-section (5) of the same section merely permitting the prescribed Minister to extend the prohibition to other areas that would not ordinarily qualify as urban areas. Therefore, in the present case Mwambali from whom the plaintiff derives title could not have lawfully or statutorily held customary tenure in an urban area such as Kireka.

2. The Land Reform Decree declared all land in Uganda (including urban areas) to be public land to be administered in accordance with the Public Lands Act. Thus the prohibition on customary tenure in urban areas continued in force. However, the occupation of previously designated public land could continue but only at sufferance, with the Uganda Land Commission created by the Decree at liberty to allocate such land to anyone. Therefore whether Kireka was deemed an urban area or public land by the Public Lands Act, under the Land Reform Decree the Uganda Land Commission was authorised to allocate it to any person including the 1st defendant in the present case.

3. The Land Reform Regulations of 1976 nonetheless prescribed a procedure to be followed by persons, such as the plaintiff in the present case, who wished to occupy public land by customary tenure.

With due respect to the plaintiff, I have not seen any evidence that illustrates that either he or Mwambali followed the prescribed procedure. While the plaintiff testified that Mwambali applied to local chiefs for ownership of his kibanja, he did not adduce any evidence to show that the chiefs sent Mwambali's application to the prescribed Sub-county Land Committee for

approval or indeed that such approval was obtained. I am therefore constrained to find that since Mwambali from whom the plaintiff purports to derive customary interest in the suit land did not legally acquire customary tenure in an urban area in Kampala City prior to the enactment of the Land Act, it follows that the plaintiff did not legally acquire customary interest in the suit premises either.

On the subject of customary tenure, courts have gone further to permit a claimant that does not prove that he legally acquired customary tenure under the then prevailing laws, to prove his/ her claim to customary tenure by evidence alluding to the customary practices in a given area. In the case of **Kampala District Land Board & Another vs. Venansio Babweyaka & Others** (supra) the Learned Chief Justice further held that occupation under customary tenure must be proved by the party intending to rely on it. He cited with approval the decision of Duffus JA in the case of **Ernest Kinyanjui Kimani vs. Muira Gikanga (1965)EA 735 at 789**, who held as follows:

> "**As a matter of necessity, the customary law must be accurately and definitely established. ...The onus to do so is on the party who puts forward the customary law. ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case**."

In the present case, though the plaintiff 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. In the absence of such proof, I am bound by the decision in the case of **Kampala District Land Board & Another vs. Venansio Babweyaka & Others** (supra), and do hold that the plaintiff does not have a customary interest or tenure in the suit land. Therefore, I resolve the first issue in the negative and find that the plaintiff has no interest in the suit land.

Issue No. 2 – whether the 1st defendant's certificate of title was acquired fraudulently

It was the case for the plaintiff that the 1st defendant procured registration of Block 232 plot 814 well-knowing that the plaintiff was an occupant of and had an interest in the land, and did not consult him prior to such registration. In support of this claim PW3, a mapping expert, testified that the mapping of Block 232 plot 814 was not properly done. He stated that plot 814 was very

clearly shown in a Karamazoo book in the Lands Office but on the map was not very clear; that the way it appears on the map suggests that it is not original and must be a bogus plot; that it was wrong to use ordinary ink in the mapping of this plot as original work should be in special ink. PW3, however, did concede that this was an office problem; he did not know whether the 1st defendant was involved in the works, and suggested that there was need to verify whether plots 574 and 814 of Block 232 were genuine through the preparation of a fresh report. Again no issue was raised about the 2nd defendant's land.

It was the 1st defendant's case that it duly registered Block 232 plot 814 and is the rightful proprietor thereof. DW3 tendered a certificate of title in respect of Block 232 plot 814 duly registered in the names of the 1st defendant. He testified that the land in question was donated to the SDA Church by a one Nabagereka Damalie Catherine Nakawombe, daughter of C.M.S. Kisosonkole the original owner of the land, and tendered Exh. I.D. 2 – a document dated 7th December 1986 and duly signed by the said Damalie Nakawombe in support of his allegations. DW3's testimony was corroborated by the evidence of DW1 who testified that she was a member of the SDA Church when Ms. Nakawombe donated the land to it.

Section 59 of the Registration of Titles Act (RTA) 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 the issuance thereof or processes leading to such issuance. However, sections 64 and 176 of the RTA do permit the cancellation of a certificate of title obtained by fraud. Fraud has been 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. See **Kampala Bottlers Ltd vs Damanico Ltd Civil Appeal No. 22 of 1992 (SC), Kampala District Land Board & Anor vs National Housing & Construction Corporation** (supra) and **Kampala Land Board & Another vs. Venansio Babweyaka & Others** (supra)**.**

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 1st defendant's registration of its interest tantamount to fraud. Counsel for the plaintiff contended that Ms. Nakawombe's signature on Exh. I.D.2 was different from her signature on the transfer form (Exh. I.D. 3) and connoted fraudulent transactions by the 1st defendant. I must respectfully disagree with Counsel. I have had occasion

to scrutinise both documents and find the signature in question largely the same. I therefore resolve issue no. 2 in the negative and find that the registration of the 1st defendant's interest in Block 232 plot 814 was not procured fraudulently.

In the premises, I do hereby dismiss the suit against the 1st defendant. I note that though the case against the 2nd defendant proceeded in his absence under O.9 r.10 of the CPR, the plaintiff has not proved his case against him to the required standard. I accordingly dismiss the suit against him.

I order that each party to this suit bears its own costs.

MONICA K. MUGENYI

JUDGE

29th April, 2011