

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL APPEAL NO. HCT-00-LD-CA-0044-2017
*(Appeal from the judgment of Her Worship Kimono Juliana, Magistrate
Grade One, Civil Suit No. 0026 of 2013, Chief Magistrate’s Court of Entebbe
at Entebbe delivered on the 30 March 2017)*

MARIA SPECIOZA MUKASA:..... APPELLANT

VERSUS

1. KASIFA NAMBI

2. LEKOBOAM MUKWANGA:..... RESPONDENTS

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. Legal issues considered in this case include, the applicability of the law of adverse possession in relation to long and unchallenged possession of land by the appellant having settled on the land for approximately slightly over 12 years from the year 1997 up to 2009 when her possession was challenged by the respondents; admissibility of oral or extrinsic evidence to provide clarity and meaning to a written contract; and grant of remedies not included in pleadings.

Background:

2. This case concerns disputed land situated at Namulanda, along the Kampala – Entebbe Highway. It is an appeal against the judgment of Her Worship Kimono Juliana, Magistrate Grade One in the Chief Magistrate’s Court of Entebbe at Entebbe, Civil Suit No.26 of 2013 delivered on 30 March 2017 in favour of the respondents. The appellant in the lower court sued the respondents for trespass on her kibanja located on land comprised in Busiro Block 401 Plot 131 at Namulanda (hereinafter referred to as “the suit land”).



She sought an order of vacant possession of the respondents on the suit land; a permanent injunction restraining the respondents from further encroaching on her kibanja; general damages; exemplary damages; aggravated damages; mesne profits; costs of the suit; interest on general damages; exemplary damages; aggravated damages; and interest at the rate of 30% per annum from the date of judgment until payment in full.

3. The appellant's case is that she purchased a kibanja on the suit land on 27 June 1997, from Sam Lwanga. She took possession of the kibanja, and had quiet enjoyment until December 2009, when the respondents encroached on a portion of it by demolishing structures thereon, and constructing their own structures on it.
4. The respondents through their amended joint written statement of defence and counterclaim, averred that they are the joint registered proprietors of the suit land which they have developed since 1986. That their developments do not extend into the appellant's land. They counterclaimed against the appellant and contended that it is her who trespassed on their property. They prayed for the dismissal of the suit with costs, a declaration that the appellant is a trespasser on their property, an order evicting the appellant from their land and general damages.
5. In the lower court, the following issues were framed for determination by the court: i) whether the defendants trespassed onto the plaintiff's kibanja; ii) whether the counter defendant trespassed on the counter claimant's land; and iii) what remedies are available to the parties. The appellant called 2 witnesses: PW1 (Maria Specioza Mukasa) and PW2 (Nsigalira Apophia Nabunnya). The appellant adduced evidence of the following documents that were admitted in evidence: i) PEX No.1 – a copy of a sale agreement

- ii) The learned trial Magistrate erred in law and fact when she found that there had been no trespass on the appellant's kibanja by the respondents;
 - iii) The learned trial Magistrate erred in law and fact when she did not make and/or read a report on the locus in quo visit to the parties thereby occasioning a miscarriage of justice.
8. In his submissions, counsel for the appellant attempted to amend the grounds of the appeal, arguing that this will help to narrow down the dispute to specific issues of controversy. It is my considered view that the issues in controversy between the parties are clearly laid out in the grounds of the appeal as presented in the memorandum of appeal, and I will therefore restrict my decision to those grounds.

Representation:

9. At the hearing of the appeal, the appellant was represented by Mr. Peter Allan Musoke and Mr. Betunda Yusuf of M/s. Musoke & Marzuq Advocates, while the respondents were represented by Ms. Annet Nanfuma of M/s. Lukwago & Co. Advocates.

Additional evidence at the hearing of the appeal:

10. During the hearing of the appeal, the appellant adduced one additional witness, Sam Kakembo (surveyor) as well as the following documents: Exh.A1 – a copy of a survey report dated 15 April 2019, addressed to the appellant. The respondents adduced one additional witness, Serunjogi Joseph (surveyor) as well as the following documents: i) Exh.R1 – a copy of a letter dated 12 November 2019; ii) Exh.R2 – a copy of a report dated 6 March 2020 on opening boundaries; iii) Exh.R3 – a copy of a certificate of title for Busiro, Block 401 Plot 843; and iv) Exh.R4 – a certificate of title for Busiro Block 401 Plot 844.



Locus in quo visit:

11. On the 23 November 2023, the High Court (appellate court) carried out a locus in quo visit to the suit land in the presence of counsel for the appellant; and counsel for the respondents. The parties present were the appellant and the respondents. The witnesses – Sam Kakembo (surveyor); Serunjogi Joseph (surveyor); Maria Specioza Mukasa; and Kasifa Nambi took the oath and gave evidence at the locus in quo visit. Both counsel were given the opportunity to cross examine and re-examine the witnesses. The court observed that the disputed land is located at Namulanda Trading Centre on Kampala – Entebbe Highway, and is developed with several permanent structures. There are several other bibanja claimants who are not parties to the case, who include: Kabanda Paul; Rosemary Nakitende (who claims the ownership of a house adjacent to that of the appellant), and Nakiyimba Mary Nakatikombi. This locus in quo visit was in addition to the one that was conducted by the trial court.

Duty of the first appellate court:

12. The duty of the first appellate court is to subject the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal, before coming to its own conclusion. While doing so, the first appellate court must keep in mind that, unlike the trial court, it had no chance of seeing and hearing the witnesses while they testified, and therefore had no benefit of assessing the demeanour of the witnesses. To this effect, the first appellate court must be guided by the impression made on the judicial officer who saw the witnesses. The case of *Fr. Narsensio Begumisa and Ors v Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002) [2004] UGSC 18 (Coram: Oder, Tsekooko, Karokora, Mulenga & Kato JJ.S.C)* sets out the duty of the first appellate court in the following words:



“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.”

13. I shall keep the above principles in mind while resolving the grounds of this appeal.

Consideration and determination of the grounds of the appeal:

14. I will consider all the three grounds of appeal as presented in the memorandum of appeal concurrently.

Did the appellant purchase registered interest in the land or kibanja (unregistered interest in the land)?

15. It was strongly submitted by counsel for the respondents that the appellant purchased a registered interest in the land, and not a kibanja (unregistered interest in the land). That the appellant does not meet the requirements set out under section 29 of the Land Act to qualify as a lawful occupant on the respondents’ land, and that therefore the learned trial Magistrate was right in holding that the appellant did not own a kibanja interest and that neither could she legitimately claim a registered interest in the land.

16. As to whether the appellant purchased registered interest in the land or kibanja (unregistered interest in land); the learned trial Magistrate held as follows:

“During the hearing of the suit, Court noted that there was an issue as to whether the plaintiff had purchased registered land or

kibanja? It is the submission of the [Plaintiff's] Counsel that by an agreement dated 22/7/1997 (P Exh No.1) with one Sam Lwanga, the Plaintiff purchased a kibanja. [Defendant's] Counsel in his submission asserted that none of the agreements dated 22/7/1997 and 27/6/1997 and marked P Ex No. 1 and P Ex No. 2 respectively...support her assertion that she acquired a kibanja interest. Further that both agreements stated that she was purchasing Busiro Block 401 Plot 131. PWI in her evidence stated that she bought land from one Samuel Lwanga on the 27th June 1997. It was described as Busiro Block 401 Plot 131 land at Namulanda. The sale agreement was admitted and marked P Exh N.2...PWI also stated that on 22/7/1997, she bought a house from Sam Lwanga. According to the agreement...the house was on Mpiima's titled land on Plot 131 Block 401/402. The agreement was admitted and marked P Exh No.1...Clearly P Exh 1 and 2 are not about purchase of kibanja. The plaintiff was purchasing a house on Busiro Block 401 Plot 131 and all lands described in Busiro Block 401 plot 131. However, Court notes that the Plaintiff did not process a registration of her name as registered proprietor onto the certificate of title for Busiro Block 401 plot 131...It is the finding of the court that the plaintiff acquired an equitable interest in Busiro Block 401 Plot 131. The correct framing of the issue should therefore, be whether the defendants trespassed on the Plaintiff's equitable interest...The land that the plaintiff claims is an equitable interest on registered land. According to the foregoing definitions, it is imperative that [the] plaintiff demonstrates what land is in her possession, the boundary of the land such that court can determine the point of entry onto her land by the defendants...[plaintiff's] side did not inform court of



Trust (Civil Appeal No. 5 of 1998) [1999] UGSC 8 (Coram: Oder, J.S.C., Karokora, J.S.C., Mulenga, J.S.C., Kanyeihamba, J.S.C., Kikonyogo, J.S.C); and Plant v. Bourne [1897] 2 Ch 281.

19. Section 92(b) of the Evidence Act (Cap 6) provides that:

“92. Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—...

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;”

20. Therefore, according to the law, if a written contract is silent on a matter that is material to both parties, then oral evidence may be admitted to provide clarity to the contract, and give meaning to the contractual relationship between the parties. In the case of *General Industries (U) Ltd v. Non-Performing Assets Recovery Trust (supra)*, it was held that:

“...the way to give effect to the intention of the parties in the instant case is not to discard the mortgage as invalid for lack of consideration, but to take the extrinsic evidence into account to ascertain what the real consideration for the mortgage was...In conclusion my opinion is that neither the Court of Appeal nor the

6). In this respect, in the lower court, the appellant, PW1 (Maria Specioza Mukasa) testified as follows:

“...I bought this land [on] 27/6/1997. I bought from Sam Lwanga who is dead now. I have a document to show that I bought. It is the one because it had witnesses. LC Chairman signed, Vice Chairman signed, mobiliser signed and Lwanga Sam from [whom] I bought the land. The agreement is dated 22/7/1997. Joseph Senkatuuka LCI Chairman, Kamyia Deogratius Vice Chairman, Lekobowamu Mukwanga. I was shown the boundaries of the kibanja. He told me I could buy the title of the land if I was prepared. I was buying a kibanja. I did not try the process of getting a title. Not straight away...I bought a plot. It was plot 131. Yes, I ascertained – I bought plot 131. I did not ascertain that Sam Lwanga had COT for plot 131. Lwanga told me that once I settle down, I would get a title also when I get the money I would work on the title. No, I never got the money up to now I have no title. I did not get or conduct a search at the land registry. He just showed me the boundaries. Yes, I ascertained the size. I know registered land- when one has a title. I do not have a title. Lwanga told me Mpiima was owner. I did not ascertain who the registered proprietor was. I do not know defendants as owners of plot 844. I do not know that where I am, is plot 844. I have never conducted a survey to ascertain where plot 131 is. I have interest in plot 844 that is where I am. I did not buy plot 844...I bought a kibanja from Sam Lwanga who was owner. I bought kibanja on plot 131 not 844. It should have been helpful to conduct a survey to find out where plot 131 is. I have no document to show I bought plot 844. I do not have interest in plot 844. I bought the house. Sam Lwanga

showed me boundaries soon after buying. I can show Court my boundaries if we go to the land...”

24. Therefore, when Exh.P1 (agreement dated 22 July 1997) is considered together with the oral testimony of the appellant, it is clear to me that what the appellant purchased from Sam Lwanga, was an alleged kibanja interest on land owned by Livingston Mpiima Kataza.

Is the alleged kibanja on Plot 131 or Plot 843 or Plot 844?

25. Exh.P1 adduced by the appellant states that she acquired a kibanja interest on Block 401/402 Plot 131 at Namulanda, Entebbe Road. On the 29 October 2019, this court, presided over by Justice John Eudes Keitirima, issued a court order allowing the parties to this appeal to open boundaries for land comprised in Block 401 Plots 84, 843, 844, and 131 Land at Namulanda; and adduce additional evidence of the survey reports. Pursuant to the above court order, the parties to the appeal adduced the following additional evidence from their respective surveyors.

26. The appellant adduced evidence from a surveying firm, Redeem Consult Ltd, through Sam Kakembo, whose report (Exh.A1) stated as follows:

“...property A was found to be comprised on plot 843, with a very small portion of the structure extending out of the digitalised plot boundaries as shown on the drawing attached. Plot 843 also wholly comprises another small commercial structure, and a section of two small residential structures. The plot fronts Entebbe Road and a small existing access road on side CM1-CM2, and is bordered by mostly residential developments on sides CM1-CM4 and CM3-CM4, and small commercial structures on side CM2-CM3. The acreage of plot 843 was computed as 0.081 Hectares,

See General Industries (U) Ltd v. Non. Performing Assets Recovery Trust (supra) and Section 92(b) of the Evidence Act (Cap 6).

29. Sam Kakembo (appellant's surveyor) testified that the bulk of the appellant's developments are on Plot 843 which is owned by Kasifa Nakigudde (Exh.R3). However, according to the respondents' surveyor, Serunjogi Joseph, the bulk of the appellant's kibanja developments are on Plot 844 owned by both Lekobowamu Mukwanga and Kasifa Nakigudde (Exh.R4). This difference of opinion is minor, in my view; the fact is that the appellant's developments were confirmed to exist on Plots 843 and 844, both of which are registered in the names of the respondents.
30. The major shortcoming of the two survey reports adduced by the appellant and the respondents, is that they do not define the exact measurements of the appellant's developments on both plots. It ought to be remembered that the agreements pursuant to which the appellant claimed to have purchased the kibanja (Exh.P1 and Exh.P2), also do not define the exact measurements of the kibanja.

Does the appellant own a kibanja interest on the land?

31. The next question for me to consider is whether the appellant's interest qualifies to be a kibanja under the law. 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.”

32. In order for the appellant to prove a kibanja interest in the land, she must prove that she occupied the land by virtue of the repealed Busuulu and Envujjo Law of 1928; or that she entered or purchased the land with the consent of the registered owner. See *Section 29(1) of the Land Act (Cap 227); Muluta Joseph v. Katama Sylvano, Civil Appeal No. 11 of 1999 (Coram: Oder, Karokora, Mulenga, Kanyeihamba and Mukasa-Kikonyogo J.J.S.C); and Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA).*
33. To qualify as bona fide occupant, it must be shown that the appellant falls within the ambit of the provisions of *Section 29(2) of the Land Act (Cap 227)*. A bona fide occupant means 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 of the registered owner for twelve years or more; or had been settled on land by the Government or an agent of the Government, which may include a local authority. See the case of *Kalya & 2 Ors v. Macekenyu (Court of Appeal Civil Appeal No. 82 of 2012) [2014] UGCA 25 (Coram: Hon. Mr. Justice A.S. Nshimye, JA; Hon. Mr. Justice Kenneth Kakuru, JA; Hon. Lady Justice Prof. L. E. Tibatemwa, JA).*
34. I have considered the evidence adduced by the appellant but she doesn't qualify as either a lawful or bona fide occupant on the land. The appellant claims to have acquired the kibanja interest on the 27 June 1997. Exh.P1 (agreement dated 22 July 1997) provides that the kibanja is located on land

owned by a one Mpiima. According to Exh.R4 (certificate of title for Plot 844), Livingston Mpiima Kataza was entered as the registered owner of the land on the 18 December 1985. The area schedules attached to both survey reports prove that Plot 354 was subdivided to create Plots 843 and 844. This proves that Livingston Mpiima Kataza was the registered owner of the land when the appellant purported to purchase the kibanja on the 27 June 1997. Both Exh.P1 (agreement dated 22 July 1997) and Exh.P2 (agreement dated 27 June 1997) do not show that the registered owner of the land (Livingston Mpiima Kataza) rendered his consent to the purchase of the kibanja. Also, the appellant does not qualify as a bona fide occupant because she entered on the land in 1997, and yet the Land Act (Cap 227) requires a bona fide occupant to have settled on the land 12 years before the year 1995 unchallenged by the registered owner.

Is the law of adverse possession applicable to the appellant?

35. In the circumstances of this case, where it is proved that the appellant entered on the land in 1997 and has been on the land unchallenged by the registered owner for more than 12 years, but is neither a lawful nor a bona fide occupant, can the appellant derive protection from the law of adverse possession?

36. The law of adverse possession is a common law doctrine that allows a person to acquire ownership of land, after 12 years of continuous and unchallenged factual possession of the land. *See Megarry & Wade: The Law of Real Property, 9th Edition, Stuart Bridge, Elizabeth Cooke and Martin Dixon, Sweet & Maxwell, London, 2019 at paragraphs, 7-001; 7-004; 7-084*). The law of adverse possession is closely related to limitation which is a rule of litigation that prevents the recovery of land by the registered owner from a trespasser after the expiry of 12 years. *See Megarry & Wade (supra) at*

paragraph 7-001; and Section 5 of the Limitation Act (Cap 80). According to this doctrine, after 12 years, a registered owner loses the right to challenge a person's occupation of the land, even though the initial entry was illegal, and the registered owner's title is extinguished, and acquired by the person who is in occupation of the land.

37. The law of adverse possession is provided for in the laws of Uganda: Thus *Section 16 of the Limitation Act (Cap 80)* provides that:

“16. Extinction of title after expiration of period

Subject to sections 8 and 29 of this Act and subject to the other provisions thereof, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished.”

38. *Part V of the Registration of Titles Act (Cap 230)* lays out the procedure that a person who claims to have acquired land by possession, may follow to acquire registered title; *Section 78 of the Act* provides that:

“78. Person claiming title by possession

A person who claims that he or she has acquired a title by possession to land registered under this Act may apply to the registrar for an order vesting the land in him or her for an estate in fee simple or the other estate claimed.”

39. The law of adverse possession was considered in the case of *Hope Rwaguma v. Jingo Livingstone Mukasa (Civil Suit No. 508 of 2012) [2015] UGHCLD 26*. The brief facts of the case were that the plaintiff's late husband Dr. Rwaguma B.E bought the suit land as a kibanja at Lugo/Sukka zone from one Lwanga William on 15 June 1996. He immediately took possession and

42. In the case of *J A Pye (Oxford) Ltd and Others v. Graham and Another* [2002] 3 All ER 865; [2003] 1 AC 419; [2002] UKHL 30, the brief facts of the case were that the defendants, as personal representatives of the late Michael John Graham, sought to establish a possessory title to 25 hectares of agricultural land. At all material times the paper title to that land had been vested in the first plaintiff, J A Pye (Oxford) Land Ltd and its predecessor in title in the same group, JA Pye (Oxford) Ltd ("Pye") as registered proprietors of the land. At the trial, Neuberger J ([2000] Ch 676) held that the defendants had established title by possession but his decision was reversed by the Court of Appeal [2001] Ch 804 (Mummery, Keene LJJ and Sir Martin Nourse). The defendants appealed to the House of Lords, who allowed the appeal, and restored the judgment of the trial judge. Lord Browne-Wilkinson held that:

"...there are two elements necessary for legal possession: 1. a sufficient degree of physical custody and control ("factual possession"); 2. an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess") ..."

43. The position of the law may be summarised as follows: under limited and exceptional cases, a registered owner of land may lose ownership of registered land if it is proved that a person has been in factual occupation of the land for a period of 12 years or more without being challenged by the registered owner. To prove factual possession, a person must show that he or she had an appropriate degree of physical control of the land; that her possession was a single possession and not of several persons; that her possession was to the exclusion of the dispossessed registered owner; and that he or she dealt with the land as an occupying owner might have been expected to deal with it. *See Megarry & Wade (supra) at paragraph 7-030.*

illegal occupant, is for all intents and purposes, the undisputed owner of the land.

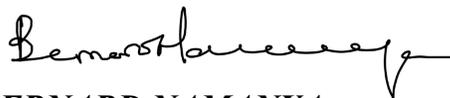
48. Therefore, it is my decision that the appellant is an adverse possessor because she succeeded in establishing effective physical control and occupation of the land for a period of more than 12 years. As a result, the respondents' registered title or that of her predecessors in title over the land under occupation by the appellant was extinguished, and the appellant is entitled to have the land registered into her name by virtue of the law of adverse possession. Accordingly, with respect to the *portion of the land* comprised in Block 401 Plot 843 and Plot 844, that has been *under the effective physical control and occupation* of the appellant since the 27 June 1997, by virtue of the law of adverse possession, this court declares that the respondents' registered title in the land was extinguished, and the appellant is the lawful owner of the land and property that is in her possession.
49. I am fortified in this conclusion by the earlier persuasive decisions of Justice Bashaija K. Andrew and Justice Stephen Mubiru in the cases of *Rwaguma v. Jingo Mukasa (supra)* and *Nebbi v. Ajoba (supra)*; and also, by the textbook *Megarry & Wade (supra)* at paragraphs 7-001 to 7-110.

Did the appellant prove trespass against the respondents?

50. In order for the appellant to establish the case of trespass against the respondents, she was required to prove that the respondents made an unauthorised entry upon her land, and interfered with her lawful possession. See the case of *Justine E. M. N. Lutaya v. Stirling Civil Engineering Company Ltd, Civil Appeal No. 11 of 2002 (per Mulenga, J.SC)*. PW2 (Nsigalira Apophia Nabunnya) testified that on the 17 June 2012, she found Kasifa Nambi (2nd respondent) digging a foundation near the appellant's house, and told her to stop but she did not oblige. Having regard to the

- iv). That the Registrar of this court shall appoint a surveyor who is duly registered by the Surveyors Registration Board under The Surveyors Registration Act (Cap 275), to undertake a survey, and determine the exact measurements of the land that has been under the appellant's physical control and possession since 27 June 1997.
- v). That basing on the findings of the survey report, the Commissioner for Land Registration is ordered to process a certificate of title of the land occupied by the appellant, and register a separate certificate of title in the name of the appellant, independent of the respondents' certificate of title.
- vi). That a permanent injunction issues restraining the respondents, their agents, servants, workmen and all those claiming under them and/or deriving authority from them from trespassing, encroaching, interfering and/or in any way dealing with the appellant's land and developments thereon.
- vii). That the respondents shall pay general damages of Uganda shillings 11,000,000 (eleven million) to the appellant.
- viii). That the respondents shall pay interest of 20% per annum on general damages from the date of judgment until payment in full.
- ix). That the respondents shall pay the costs of this appeal, and in Civil Suit No. 0026 of 2013, Chief Magistrate's Court of Entebbe at Entebbe.

IT IS SO ORDERED.



BERNARD NAMANYA
JUDGE
6 March 2024

6 March 2024 at 11:49am

Attendance for delivery of the Judgment

Mr. Betunda Yusuf

Counsel for the appellant

Ms. Nanfuma Annet

Counsel for the respondents

Both respondents are in court

The appellant is absent

Allena Kanyakire

Court Clerk

Betunda Yusuf:

I am ready receive the judgment.

Nanfuma Annet:

I am ready to receive the judgment.

Court:

Judgment delivered in open chambers.



BERNARD NAMANYA

JUDGE

6 March 2024