THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

CIVIL SUIT No. 101 OF 2011

1. KAMBUGU ALOZIUS
2. KIWANUKA BEN :: PLAINTIFFS

VERSUS

GEOFREY RWAKAZORA ..... DEFENDANT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

The Plaintiffs have instituted this suit against the Defendant, for alleged trespass on their kibanja estate situated at Birongo/Kitiko village (herein after referred to as the suit land). They seek orders of special and general damages; and, in the alternative, a permanent injunction restraining the Defendant or his agents from further trespass onto the suit land. The Defendant has denied the Plaintiffs' claim; contending, instead, that he is the registered proprietor, and is in lawful possession, of the *mailo* land comprised in Kyaddondo Block 271 Plot 89, which covers the suit land. He has counterclaimed against the Plaintiffs for trespass, and destruction of his properties, on the said land; and urges Court to restrain the Plaintiffs from further trespass thereon, and to award him general damages.

In their joint scheduling notes, done at the urging of Court, the parties apparently failed to agree on anything; but agreed on the following issues for determination by this Court; namely: –

1. Whether the Plaintiffs own eight (8) acres of kibanja on the Defendant's land.
2. Whether the Plaintiffs were compensated by the late Ssewamala.
3. Whether the Defendant took vacant possession of the land in 2006.
4. Whether the Defendant destroyed the Plaintiffs' eucalyptus and crops.
5. What remedies are available to the parties?

At the further urging of Court, the parties filed sworn witness statements to expedite the hearing of the case; based on which, counsels for the opposite side subjected the respective deponents to cross–examination.

Issue No. 1. **Whether the Plaintiffs own eight (8) acres of kibanja on the Defendant's land.**

The uncontested evidence is that the suit land (1st Plaintiff's claimed bibanja) is the same land over which the Defendant is seized with the mailo estate. The 1st Plaintiff (PW1) testified that he owned four separate kibanja in the area. One was four acres in size, the second was two and a half acres, the third was three acres; and then the suit land, being the fourth, comprising eight acres. This claim was supported by the 2nd Plaintiff (PW2), and Steven Semanda (PW3); both sons of the 1st Plaintiff. The area LC1 Chairperson, Samuel Lutwama (PW4), testified in support of the Plaintiffs; that the 1st Plaintiff owned a number of kibanja in the area, and that the 1st Plaintiff was the sole tenant (bibanja holder) of, and had used, the suit land.

The Defendant however, at first, denied that the 1st Plaintiff ever had any proprietary interest in the suit land; and then, in the alternative, contended that the 1st Plaintiff had in fact been compensated for his interest in the suit land before he, Defendant, acquired the registered title thereof. He challenges the Plaintiff's root of claim to the suit land by seeking to discredit the Luganda language document of acquisition dated 1958, which was tendered in evidence as exhibit ***PE1(a)***, with its English translation as exhibit ***PE1(b)***. In support of his contention, he relies on the laboratory report made by one Olanya Joseph Okwonga (a senior Government analyst) who was however unable to testify in Court; and so, was not subjected to cross examination, but his findings were explained by his colleague Catherine Namuwoya (DW4).

He warned in his report that *'the determination of the absolute age of a document is quite a complex analysis that is not done at our laboratory at the moment'*, and that however *'only the approximate age of a document may be determined through some analytical processes such as ink and paper analysis'*. He applied the paper analysis technique in the instant case; and came up with the opinion findings that *'the questioned document* [exhibit **PE1(a)**] *was most probably not written in 1958, but executed between the 1990s and 2000s.'* However, whereas this forensic expert compared the questioned document with documents stored at the National Archives Entebbe but made around the same time, there is no evidence that he compared the questioned document with non–official documents obtained from elsewhere.

Had he found a couple of non–official documents, and compared them with the questioned document, his findings there from would have been more persuasive. This is because official documents may differ, both in size and in texture, from the ordinary paper. Therefore, in view of his limited field of study, I have unease with the basis of his findings. Furthermore, and notably, his colleague Catherine Namuwoya (DW4), carried out ink analysis on the questioned document, and a 1959 document obtained from their laboratory, and as well on a document dated 2014. Her finding was inconclusive with regard to the age of the ink used on the questioned document, since there was no significant difference between the ink behaviour thereon and the ones on the 1959 and 2014 documents she had examined.

In the light of the inconclusive forensic analysis by the two forensic experts, Court is left with the evidence adduced by the 1st Plaintiff and his two sons (PW2) and (PW3), and corroborated by that of the area LC1 (PW4), to ascertain the 1st Plaintiff's ownership and possession of the suit land as a bibanja holder. The Defendant has not, at all, controverted this. Instead, the agreement for the Defendant's purchase of the mailo estate from Makubuya provides in Clauses 5 and 6 thereof for the compensation and removal of squatters. If the suit land were vacant and free of any encumbrances, as the Defendant now contends and wants this Court to believe, the purchase agreement would have unmistakably stated so. On a balance of probabilities therefore, I find that the 1st Plaintiff owned the suit land.

Issue No. 2. Whether the Plaintiffs were compensated by the late Ssewamala.

The Plaintiffs agree that indeed Ssewamala did compensate the 1st Plaintiff for two separate bibanja he had on Ssewamala's land. However, the Plaintiffs maintain that these compensations dated 2001 and 2006 were not for the suit land; but for two other bibanja the 1st Plaintiff had on Ssewamala's mailo land. The compensation made in 2001, at U. shs. 2,800,000/= (Two million eight hundred thousand only), was for a kibanja measuring approximately four acres; and this was when the mailo title was sold to one Rebecca. The compensation made in 2006, at the office of the LC1 of the area, was at U. shs. 1,900,000/= (Two million eight hundred thousand only); and was for a kibanja adjacent to the suit land, and measured approximately three and a half acres. This position is corroborated by (PW3), and the area LC1 Chairperson (PW4) who confirms that he was aware that the late Ssewamala had compensated the 1st Plaintiff of two bibanja only.

The Defendant has not adduced direct evidence of compensation of the 1st Plaintiff by Ssewamala with regard to the suit property. The information which he alleges Farouk Kigozi Makubuya gave him, of Ssewamala's having compensated the 1st Plaintiff for the suit land was clearly hearsay evidence and not admissible in evidence; hence of no worth. Similarly, his claim that Ssewamala himself told him that he Ssewamala had paid compensation to the 1st Plaintiff for the suit land, is not credible. This is because Ssewamala had already sold off his mailo interest in the suit land in 1993 to one Mayi Sserunjoji Makubuya; and therefore it would be strange that ten years later, he Ssewamala would still purport to compensate the 1st Plaintiff of this land over which he no longer had any proprietary interest.

If indeed Ssewamala informed the Defendant that he had compensated the 1st Plaintiff, then he (Ssewamala) could have been referring to the compensation paid to the 1st Plaintiff for the two bibanja, which the 1st Plaintiff does not contest. The area LC1 Chairperson (PW4) testified that when the mailo estate containing the suit land was sold to Makubuya, the 1st Plaintiff complained of having not been compensated. Accordingly then, the claim by the Plaintiffs that the 1st Plaintiff was paid compensation for other bibanja on Ssewamala's land, other than the suit land, stands uncontroverted. In the absence of contrary evidence, the balance of probabilities favours the Plaintiffs' contention that they have not received any compensation for the suit land.

Issue No. 3. Whether the Defendant took vacant possession of the land in 2006.

Issue No. 4. Whether the Defendant destroyed the Plaintiffs' eucalyptus trees and crops.

There is no dispute that the Defendant took physical possession of the suit land upon becoming the registered proprietor of the mailo estate. Whether this was in 2006 or 2010 is immaterial here. The issue is the condition of the land at the time of his taking possession. The Plaintiffs claim that the 1st Plaintiff had eucalyptus trees, sugar cane, potato, and maize, on the suit land when the Defendant took possession. The area LC1 Chairperson (PW4) recognized the 1st Plaintiff as the tenant on the suit land; who was using it. The Defendant however contends that it was vacant when he took possession; and had no squatter on it. Farouk Kigozi Makubuya deponed in his witness statement that there was no kibanja holder on the suit land. Unfortunately, he did not appear for cross–examination.

Ahmed Bakole (DW3), who had been caretaker of the Defendant's other land in the area, testified that he never saw the Plaintiffs cultivating the suit land. However, when he was confronted with his testimony in the Entebbe criminal case over the suit land, where he is recorded to have testified that he had found eucalyptus trees on the suit land, he denied that he had made that statement in Court! Furthermore, the report of the visit to the locus in quo by the Registrar of this Court shows that there were, amongst other things, clusters of tree stumps on the suit land. True, is was not conclusively established that these tree stumps were of eucalyptus trees. However, in the absence of evidence that these stumps were for some other trees, the balance of probabilities on the evidence is that they were for eucalyptus trees.

This also gives credence to the testimony of (PW3) regarding the photos of maize crops (***exhibits 3(a), (b), & (c)***) he claims he took from the suit land before the crops were, allegedly, destroyed in 2010. When Court visited the locus in quo, it saw no evidence of cultivation of sugar cane, maize, and potato. This is quite understandable. In the several years of the Defendant's possession of the suit land, it was possible to get rid of these crops; unlike with the tree stumps which were naturally more difficult to get rid of. Hence, there is sufficient evidence adduced before this Court that the suit land was not vacant when the Defendant took possession of it; as the Plaintiffs were in possession, and had eucalyptus trees as well as food crops on it.

Issue No. 5. What remedies are available to the parties?

The Plaintiffs seek compensation for the suit land; and for the loss of the eucalyptus trees as well as the various food crops they had on it. They also seek general and punitive damages. In the alternative, they seek an order of permanent injunction against the Defendant with regard to the suit land. This would in effect occasion the eviction of the Defendant from the suit land. I prefer to award them compensation for the loss of the suit land and the crops thereon. Nicholas Ssali (PW5) the surveying valuer placed the price of each acre of the suit land at U. shs. 40,000,000/= (Forty million only); meaning the suit land is worth U. shs. 320,000,000/= (Three hundred and Twenty million only). I am however uneasy with this finding of the value of the kibanja interest in the suit land.

The Plaintiffs themselves adduced evidence that in 2001, they were compensated for four acres of their kibanja interest in the same area, at U. shs. 2,800,000/= (Two million, eight hundred thousand only); meaning each acre was paid for at the rate of U. shs. 700,000/= (Seven hundred thousand only). Five years later, that is 2006, they were given compensation of U. shs.

1,900,000/= (One million nine hundred thousand only) for their three and a half acres kibanja which is adjacent to the suit land. This means an acre was valued at U. shs. 542,857/= (Five hundred and forty two thousand, eight hundred fifty seven only). No evidence was led as to whatever developments existed on the two bibanja at the time of the respective compensations. In the light of this rate of compensation, I find the value of U. shs. 40,000,000/= (Forty million only) for each of the eight acres of the suit land rather unreasonable and unjustified.

Giving due regard to possible inflation and upsurge in the value of land in the area, owing to developments therein, I would place the value of each acre of the suit land in 2010, without the trees and crops thereon, at U. shs. 2,000,000/= (Two million only); thus bringing the value of the suit land to U. shs. 16,000,000/= (Sixteen million only). Since the eucalyptus trees as well as the various food crops destroyed by the Defendant were not quantified, I will, doing the best I can, award the Plaintiffs U. shs. 10,000,000/= (Ten million only) for them. I will also award the Plaintiffs general damages in the sum of U. shs. 20,000,000/= (Twenty million only) for trespass, and the stress they certainly suffered by reason of the Defendant's wrongful taking over of the suit land and destruction of their crops thereon.

In the event, I allow this suit; and make the following orders: –

(i) The Defendant shall pay the Plaintiffs compensation for the suit land in the sum of U. shs. 16,000,000/= (Sixteen million only).

(ii) The Defendant shall pay the Plaintiffs compensation in the sum of U. shs. 10,000,000/= (Ten million only) for the eucalyptus trees as well as the various food crops they had on the suit land.

(iii) The Defendant shall pay the Plaintiffs general damages in the sum of U. shs. 20,000,000/= (Twenty million only), for trespass on the suit land, and for the stress they have suffered.

(iv) The Plaintiffs are awarded costs of the suit.

(v) The awards ordered herein above, shall each attract interests at the rate of 10% per annum from the date of this judgment**.**

Alfonse Chigamoy Owiny – Dollo
JUDGE