THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(LAND DIVISION)

CIVIL SUIT NO 0146 OF 2018

ROBERT SHAKA.....PLAINTIFF

VERSUS

1. **NSUBUGA DISAN**
2. **MAYANJA STEPHEN.....DEFENDANTS**

Before: Lady Justice Alexandra Nkonge Rugadya

Judgment:

Introduction:

The plaintiff Robert Shaka who filed this suit claimed to be the owner of the *kibanja* situate at *Nakedde LC 1 Katerere Parish, Namayumba, Wakiso district (the suit kibanja);* and sought against the defendants several reliefs including *mesne* profits; costs of the suit as well as special damages for the loss occasioned to them, following the defendants' purported unauthorized activities on the suit *kibanja.*

The defendants filed a defence and counterclaim contending that the *kibanja* was family land, which they had jointly inherited from their grandfather with Mr. Ronald Nsubuga who had sold off part to the plaintiff, without consulting them.

The defendants also claimed that the two had colluded and that the alleged purchase was therefore null and void. They accordingly sought a declaration that the sale was illegal; and an order of eviction against the plaintiff from the suit land; general damages and costs.

Representation:

The plaintiff was represented by ***M/s Kajeke, Maguru and Co. Advocates.*** The defendants on their part were represented by ***M/s Niwagaba & Mwebesa Advocates.***

Issues for determination:

At the conferencing, the issues as agreed upon were as follows:

1) ***Whether the defendants /counterclaimants have interest in the suit kibanja.***

2) ***Whether the sale of the suit kibanja to the plaintiff/1st counterdefendant by the 2nd counter defendant was lawful.***

3) ***Remedies***

Issue No. 1: Whether the defendants /counterclaimants have interest in the suit kibanja.

The law:

By virtue of ***section 101 (1) of Evidence Act, Cap. 6,*** whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist.***(George William Kakoma v Attorney General [2010] HCB 1 at page 78).***

The burden of proof therefore must lie with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. ***(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.***

It was the plaintiff's contention that the defendants had no protectable interest and were therefore trespassers on the suit *kibanja.*

Rights acquired over unregistered land are considered to be equitable. These derive protection by virtue of ***section 29 (1) of Land Act, Cap.227***. The said law defines a *lawful occupant* to mean:

(a) a person occupying land by virtue of the repealed:

(i) ***Busuulu and Envujjo law of 1928***;

(ii) ***Toro Land lord and tenant law of 1937;***

(iii) ***Ankole Landlord and tenant law of 1937***;

(b) ***A person who entered the land with the consent of the registered owner, and includes a purchaser; or***

(c) A person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

It was the plaintiff's further claim that the defendants were trespassers on the suit *kibanja*. In ***EMN Lutaya vs Sterling Civil Engineering Company Ltd SCCA NO. 11/2002,*** trespass was defined as an unauthorized entry upon land that portends to interfere with another person's lawful possession.

It will occur when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere, with another person's lawful possession of that land, be it the land owner or a holder of the *kibanja* interest.

In ***George Kasedde Mukasa vs. Emmanuel Wabende & Others, Civil Suit No. 459/1998*** trespass to land was held to be committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another.

To prove that the defendants had no interest on the *kibanja*, the plaintiff in this case relied on the evidence of three witnesses. ***Pw3,*** Henry Rugasira to whom he had donned powers of Attorney. The said instrument dated 15th May, 2018 was tendered in as ***PExh 4.***

Pw1, Ronald Nsubuga, the 2nd counter defendant, testified that he inherited the entire portion from his father Yokana Kizito who had bought it; that he had even paid *busuulu* for it and later rightfully sold to the plaintiff/1st counter defendant on 10th March, 2014, as per the sale agreement: ***(PExh 1).***

That the land owner on which the *kibanja* was situate was one Mulondo to whom the *kanzu* had been paid. However, he did not present any proof of such payment or the sale transaction between his father, and Mulondo; and neither the plaintiff nor Mulondo appeared in court to confirm that the said transactions had taken place.

Pw1 in his testimony refuted the defendants' claim on how they had acquired the interest in the *kibanja*. That he only saw in court the 1947 instrument by which the defendants' predecessor had purportedly acquired the land and denied therefore that the *kibanja* he sold was jointly owned by him and the defendants/counterclaimants as they claimed.

According to him this was property inherited from his late father Kizito Yokana, who had only two children, himself and Jackson Mazinga, who testified as ***Dw3.*** That he had been paying

busuulu and to prove so, presented one *busuulu* receipt, ***PExh 2,*** claiming that other receipts got lost.

That the suit *kibanja* estimated by him to be around 4 acres had been subdivided into two parts for him and his brother, ***Dw3***. No document was availed however to show how this had been done, when and by whom. The size of the *kibanja* itself was a subject of contention between the parties.

From ***Pw2's*** evidence the total area was about 8 hectares, about 20 acres. Out of that, crops covering an area of two acres which had been planted by the plaintiff had been destroyed by the defendants, as per his assessment report, tendered in as ***PExh3.***

Pw2, Simon Kawuki an agricultural officer, attached to Wakiso Local Government, Production Department had been assigned to do the assessment by the Police, following a complaint made by the plaintiff.

According to ***Dw2,*** Steven Mayanja, the family was using 4 acres as family land. The sale agreement ***PExh 1*** presented by the plaintiff as proof of a sale transaction between him and the plaintiff did not show the actual size of the land in dispute.

What came out clearly through the plaintiff's evidence however was that ***Dw3,*** Jackson Mazinga, a brother to ***Pw1*** had obtained his share from their father's property and on 24th February, 2004 had sold a portion to one Kiwewa, as per agreement tendered in as ***PExh 5***. At that point in time and thereafter to date, no one had complained about that transaction or ***Dw3***'s occupation of the remaining share for that matter.

The said sale agreement was signed by ***Dw3*** and his wife and endorsed by the Chairman Lc1, Dr. Musisi Moses (who however did not testify in court). To that extent it would also be reasonable to presume that until the plaintiff purchased the *suit kibanja* in 2014, there had been no dispute regarding the defendants' and ***Dw3***'s occupation/sale of any part of the suit *kibanja,* not even from ***Pw1*** himself or Mulondo the purported land owner.

It could not however be established as to how much land had remained unsold by 2004 when ***Dw3*** sold off a part of what he was entitled to as his share or the exact portion which the defendants occupied or that disposed of by Nsubuga, ***Pw1*** to third parties, as alleged by the defendants.

Pw1 had been installed as the heir to his father. Although he maintained that the defendants/counterclaimants had no interest in the specific *kibanja* that he had sold to the plaintiff, when put to task he admitted that he held no letters of administration to authorize him to deal with any part of his father's estate.

Section 191 of the Succession Act, Cap. 162 provides that no right to any part of property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction: (***Magbwi Erikulano vs MTN U Ltd & Anor HCCA No. 0027 OF 2012).***

Under ***section 180 of the Succession Act*** an administrator is a legal representative for all purposes and all property of the deceased person vests in him/ her as such. The personal representative generally is under a legal duty to distribute the deceased's to and amongst the beneficiaries, and wind up the affairs of the estate. ***(See: Anecho Haruna Musa (legal representative of Adam Kelili) vs Twalib Noah (Legal representative of Majid Noah) & others Civil Suit No.9 of 2008).***

Furthermore, ***section 270 of the Succession Act*** stipulates that an executor or administrator has power to dispose of property of the deceased as he or she may think fit.

But just like ***Pw1,*** the two defendants who respectively testified as ***Dw1 and Dw2*** also had no letters of administration in respect of the estate, part of which had purportedly belonged to their grandfather. In their defence and counterclaim, they contended however that at all material times they have been joint owners of the suit *kibanja,* with Mr. Ronald Nsubuga, ***Pw1***.

Their father had inherited the same from their grandfather. Their third witness as noted earlier was ***Dw3,*** Mazinga Jackson, a brother to ***Pw1***, Ronald Nsubuga, the two being the only surviving children of the late Yokana Kizito. ***Dw3*** confirmed their claims.

Dw1, Mayanja Stephen testified that the late Erusaniya Kasozi and the late Yokana Kizito, had jointly acquired the land on 6th March, 1947, as per sale agreement tendered in as ***DExh 1(a)/DExh 1(b)*** and relied on the *busuulu* receipts, ***DExh2 (a)-(g).***

The agreement relied on by the defendants reads as follows:

AN AGREEMENT GIVING A PLOT (EKIBANJA TO MR. KIZITO YOKANA AND KASOZI ERUSANIYA

I, Jemusi Kiwanuka Ssabalangira Kabuga of Kakooge Busiro do hereby give to the above named persons and their children a plot/kibanja on my land of Kyasa on my miles of land I got from the committees of Buganda on nine villages and right/permission to stay in this village Katesese Nakedde and have shown them acreage of about 8 acres so that is the plot I have given them and I have received my kanzu from them of shillings six humdred and forty only.

.....

.....

signed by:

Jemusi Kiwanuka Ssabalangira Kabuga

And

1. Kizito Yokana;

2. Kasozi Erusaniya.

It was the defendants' contention therefore that the *kibanja* so acquired became joint family property, with a family grave yard, and an old house belonging to their grandfather; that the family had occupied the same since then; and that the defendants had lived on that land since childhood.

At common law where land is purchased by more than one person there is a presumption in favour of joint tenancy rather than tenancy in common. It is presumed that a joint tenancy is created every time there is more than one owner of land. ***(Morley v Bird (1798) 3 Ves 628 cited in Okelo vs Akello [2020] UGHC 186).***

Joint tenancy (a term which quite often loosely applied), at law is the default form of co-tenancy by statute, and since equity follows the law, it follows that when unregistered land is acquired by two or more persons jointly, unless the deed specifies otherwise or there is evidence of unequal contribution to the purchase price, there is a presumption that it is granted as joint tenancy.

Joint tenants hold single unified interests in the entire property. Where there is survivorship one of the tenants will take over the entire property upon the death of the other. The term therefore has its legal implications and ought not to be used loosely without taking into consideration those implications.

In ordinary or normal parlance, it could therefore imply equal or equitable sharing, and may have connotations of community or family joint ownership, a claim which the counterclaimants had to prove in this particular instance.

From the contents of the said document, the *kibanja* was handed over to *Yokana Kizito and Erusaniya Kasozi,* jointly with *their children.*

In considering what weight court should attach to a document that falls within the specific category of ***DExh 1(a)/DExh 1(b),*** three guiding principles would in my view be considered as duly applicable.

In general terms, all facts *except* contents of documents may be proved by oral evidence. ***(section 58 of the Evidence Act, Cap. 6)*** and as per ***section 59 of the same Act,*** in all cases oral evidence must be direct.

Secondly, within the context of ***sections 91 and 92*** of the said Act, the rule against parol evidence bars admission of any oral statement aimed at contradicting or varying the terms of a contract which has been reduced to the form of a document.

Thirdly, by virtue of ***section 90 of the Evidence Act, Cap. 6,*** when any document purporting to be thirty years old is produced from custody which the court considers proper, court may presume that the signature and every other part of that document which purports to be in the handwriting of any particular person is in that person's handwriting; and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

The three principles as highlighted in my view apply to the present case. Based on the above, and also given the fact that the document presented by the defendants which had been under their custody for more than three decades, the presumption which was not rebutted by the plaintiff is that the document by which the defendants claim to have acquired their interest, had been duly signed, attested and even executed.

The plaintiff could not therefore present any oral evidence to vary the deed as that would offend the parol evidence rule and the rest of the principles as highlighted above.

Court in any case found no evidence on record to support the conclusion that this was a forged document; or to prove that the ***Pw1's*** father Yokana Kizito bought and/or exclusively owned the *kibanja* in dispute, or that ***Pw1*** and/or his father had exclusively acquired the same by way of inheritance.

The defendants on their part and within the spirit of ***section 92 of the Evidence Act*** as highlighted, presented *busuulu* receipts, which the plaintiff counsel however questioned. I will deal with his arguments later.

The deed in this case described the *kibanja* that Jemusi Ssabalangira had given out to Erusaniya Kasozi and Yokana Kizito *and their children*, who presumably, included Nsubuga, ***Pw1. Pw1*** while disputing it failed to discharge the duty, to avail to court with any documentary proof of ownership.

He could only avail court with a *busuulu* receipt dated 11th December, 1968, in his names, (ref:***PExh 2)*** as proof of his exclusive ownership. This receipt was presented more or less as an afterthought since it had not been among the documents that had been listed at the scheduling. ***Pw1*** told court that he was 50 years of age. This implied that he was born in 1969, a year after the said receipt was issued in his names.

The same thing however could not be said about the receipts ***DExh 2(a) - 2(g)***, as presented by the defendants (as counsel for the plaintiff wished this court to believe). These receipts had been listed among the documents in the summary of evidence for the defendants filed as early as 29th March, 2018.

The same receipts had also been tendered in as evidence during the hearing of an application between the same parties, for a temporary injunction vide: ***MA No 900 of 2018.*** The receipts issued in the names of Yokana Kizito and Erusaniya Kasozi were duly signed, around the 40s, 50s and 60s by the Gombolola chief, and his signature was not challenged. ***Section 90 of the Evidence Act*** was therefore equally applicable to the receipts, the production of which corroborated the evidence of the defendants.

Given the above circumstances, questions on the manner of acquisition of the *kibanja*, its period of ownership, distribution and occupation all became pertinent issues in so far as they had some direct bearing with the customary rules applicable to succession and inheritance, but the details of which I shall not delve into at this point.

Based on the fact that the defendants have been in occupation of a portion of that *kibanja*, and by virtue of ***section 12 of the Evidence Act, Cap 6***, where a question arises as to the existence of any right or operation of any custom what is considered to be relevant facts are: first, the transactions by which the right or custom in question was created, claimed, modified, recognized, asserted or denied or inconsistent with its existence; and secondly, the instances in which the right or custom was claimed, recognized or exercised or in which its exercise was disputed asserted or departed from.

Furthermore, ***section 15 (1) of the Judicature Act, Cap. 13*** empowers this court to observe or enforce the observance of and not deprive any person of the benefit of any existing custom which is not repugnant to natural justice, equity and good conscience and not incompatible with any written law.

A system of customary ownership/tenure is defined in ***section 1(l) of the Land Act*** (hereinafter referred to as the Act) as *"a system of land tenure regulated by the customary rules which are limited in their operation to a particular class of persons which are defined in* ***section 3"***.

A kibanja is a form of a customary land tenure found mainly in the Buganda region and held according to long established rules developed along Kiganda customs. Thus a *kibanja* holder is a customary tenant within the meaning of ***section 3 of the Act***.

The concept of ownership of land in the traditional system in Buganda is characterized by a number of things, which are recognized as applicable to this case. It could never have been the intention of Parliament therefore to abolish the existing customary rules of acquisition of property through inheritance, following the enactment of the ***Succession Act*** in 1906, under which letters of administration became a necessary requirement for managing a deceased's estate. That explains why the laws on intestacy succession duly recognize and also make provision for a customary heir and his entitlement to a share out of the deceased's property.

In cases where conflicts exist between customary laws and written laws where written laws may fail to address or reflect the reality on the ground, customary laws would generally prevail. This was a view expressed in the case of ***Magbwi Erikulano vs MTN U Ltd & Anor*** *(supra)* and I have no reasons why I should depart from it.

Customary tenancy/ownership however requires proof.***(Kampala District Land Board & George Mutale vs. Venansio Babweyala & Ors (SCCA 2/07)*** and such proof would entail for example, long occupation, recognition of the owner of the reversion or landlord (and vice versa) and in some instances payment of a type of land tax or rent as regulated by the ***Busuulu and Envujjo law of 1928.***

Consequent upon the death of Erusaniya Kasozi and Yokana Kizito, the defendants' family had occupied that land, cultivating on it and burying their dead on that land, facts which the plaintiff had no basis to deny.

Thus although no letters of administration were issued in respect of the estate and no distribution scheme was availed to court and indeed no clan elder was presented as a witness to prove how the distribution was made in 1998, as alleged by ***Dw3***, neither the plaintiff nor the defendants could use that as the excuse to defeat each other's interest.

The defendants' long occupation and uninterrupted use of the *kibanja* were enough factors to prove that that prior to the sale of a portion of the *kibanja* to the plaintiff, their families before them had already acquired some equitable interest protectable by the law.

Thus Ronald Nsubuga, ***Pw1*** was well aware of the defendants' interests and never challenged their occupation of the *kibanja;* and in 2014 sold off portions which they had been utilizing since childhood, deriving livelihood therefrom until 2014 and according to the defendants, did so without their consent.

Through the evidence of Jackson Mazinga, ***Dw3*** which corroborated that of the two defendants, Mazinga's father had passed on in 1974, and had been buried on that *kibanja.* ***Pw1,*** Ronald

Nsubuga had been installed as his heir. ***Dw3*** had lived on that land until 1980 when he moved onto another place without encountering any dispute regarding his own, or the defendants' use and occupation of the land.

Pw1, Nsubuga, did not deny the claim that he had left the area after selling off a portion of the land. It was also ***Dw3's*** unchallenged contention that in 1990s the family had tried to resist attempts by Nsubuga to sell the *kibanja* but he still managed to sell off parts of the *kibanja* to various unsuspecting persons.

Deduced from the defence evidence, what remained after the sale was the portion that ***Dw3*** currently occupies, the burial grounds and the old home as well as the share claimed to belong to the defendants' family, which is the subject of dispute in this court.

Pw1, Nsubuga did not lead any evidence to prove how his own father had otherwise exclusively acquired the *kibanja* for himself or his family, save for the fact that old man had been buried on that same portion of land.

His father had died intestate, and becoming his heir was not enough to entitle him to the ownership of the *kibanja* and its appurtenances so as to accord him the right to dispose of the same as he wished.

His evidence also failed to tally with that of his own brother, ***Dw3.*** ***Dw3***'s evidence on the other hand tallied with that of the defendants. The plaintiff and his witnesses also failed to satisfy court as to how and from whom Mulondo who was known to them as the land lord had himself acquired the land if at all he did, since no certificate of title was presented to court bearing his names as proof of such ownership.

After mentioning Mulondo as owner of that land, in cross examination ***Pw3*** contradicted himself when he referred to the *kibanja* as Kabaka's land. The law relating to contradictions and inconsistencies is well settled.

When they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. ***(Bale & 2 ors. vs Okumu: Civil Appeal HCCA No. 21 of 2005).***

In those circumstances, it was therefore more probable than not that the defendants were truthful in their claim that the *kibanja* which they occupied jointly had been originally acquired by Kasozi and Kizito as early as 1947, and it is from them that their successors had acquired interest by way of inheritance. ***Issue No. 1*** is therefore answered in the affirmative.

Issue No. 2: Whether the sale of the suit kibanja to the plaintiff by the 2nd counter defendant was lawful.

Under ***issue No. 2***, there are three specific areas which were raised under the submissions by both counsel, which court is required to resolve:

In the first place, the defendants claimed through their evidence that what was sold by their Nsubuga, ***Pw1*** was family land, which had burial grounds and a family house and from which they derived sustenance.

Secondly, the issue arises as to whether or not there was consent of the land owner to dispose of the *kibanja*, as required by law.

Thirdly, is the issue whether the plaintiff conducted due diligence before purchasing the land. I will deal with each of these issues under separate headings.

Sub issue No. 1: Whether or not the kibanja constituted family land:

Under ***section 38 of the Land Act, Cap 227 (as amended by the Land Amendment Act, 2004)*** what constitutes family property is land:

> ***(a) on which is situated the ordinary residence of a family;***
>
> ***(b) on which is situated the ordinary residence of the family and from which the family derives sustenance;***
>
> ***(c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or***
>
> ***(d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family;***

"ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period;

Land from which a family derives sustenance on the other hand means—

> ***(a) land which the family farms; or***
>
> ***(b) land which the family treats as the principal place which provides the livelihood of the family; or***
>
> ***(c) land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food.***

Section 39 of the Land Act (Supra) precludes the sale of land that constitutes family or matrimonial property without the consent of the family. The above sections are clear and unambiguous and need no elaboration.

From the unchallenged evidence of the defendants, the land in dispute was the one on which the ordinary residence of the family was situated and from which the family derived sustenance; land on which the burial ground was located and property therefore that could not be sold without consent of the family/occupants.

Sub issue No. 2: Whether there was consent to the transaction:

The plaintiff in his evidence refuted the claim of interest by the defendants and also denied having committed any illegalities in purchasing the land. According to him, the consent of the defendants was not required as they had no interest in the land.

That the defendants/counterclaimants never introduced themselves to the landlord, one Mulondo who had consented to the plaintiff's purchasing the *kibanja* from Nsubuga Ronald and since therefore they had no interest in the suit land, their acts constituted *trespass* to land, matters which the defendants however denied.

Section 34 (1) of the Land Act, Cap. 227 provides that a tenant by occupancy may assign sublet or subdivide the tenancy with consent of the land owner. Under ***section 34 (2),*** such tenancy may be inherited. A person wishing therefore to assign the tenancy must give the first option to the owner of the land. That requirement is crafted in mandatory terms.

If it is indeed true as the ***Pw3*** alleges that the land owner was one Mulondo of Entebbe, the person to whom the plaintiff had paid the *kanzu*, then documentary evidence of such payment, his endorsement on the sale agreement signifying his consent should have been presented; and/ or his physical presence or his successors in title ought to have been secured in court. This was so crucial to the plaintiff's case. As it were, the defendants' family had long occupied the *kibanja*, without any interference from him as the purported land owner.

Furthermore, in ***Inter freight forwarding (U) Ltd Vs. East African Development Bank, Civil Appeal No. 33 of 1993,*** court had this to say on that point:-

> ***"A party is expected and is bound to prove the case as alleged by the pleadings and as covered in the issues framed. He will not be allowed to succeed on a case set up by him and be allowed at the trial to change his case as set-up ..inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."***

(Refer also to: ***Kato & Anor Vs. Nalwoga SCCA No. 3 of 2013).***

I could not agree more with the defence counsel's argument that the issue of securing consent from Mulondo did not in any case arise as it was never pleaded by the plaintiff.

From the contents of ***PExh 1***, ***Pw1***, Ronald Nsubuga had on 10th March, 2014 sold the land to Shaka Robert at ***Ugx 13,000,000/=.*** However only ***Pw3*** the plaintiff's attorney was present in court on the side of the plaintiff as one of the witnesses to that transaction. I find no evidence to show that the defendants' family in occupation had been involved.

Section 35(2) of the Land Act is also clear that a change of ownership would not in any way affect the existing lawful interests or *bonafide* occupant. Even if therefore one was to believe that the plaintiff had duly acquired the *kibanja,* as new owner he was obliged to respect the existing interests of the defendants.

In summary, the transaction between the plaintiff and ***Pw1*** was against the spirit of ***sections 34 and 35;*** and that therefore settles the 2nd sub-issue.

Sub-issue No. 3: Whether the plaintiff carried out due diligence prior to the transaction:

The general principle is that in order for a party to claim interest in the land, his title ought to be derived from someone who had a recognized right and title on land. (***Godfrey Ojwang Vs. Wilson Bagonza CA No. 25 of 2002).***

Counsel for the defendants submitted that ***Pw1*** purported to sell what he never owned, to the plaintiff who was not present in court to testify and who never conducted due diligence before buying that land.

That the plaintiff could not therefore claim to have been a *bonafide* purchaser and that the transaction was therefore illegal as it was in respect of the land which the defendants were already in occupation of, and without their consent, it was intended to defeat their interests, claims which the plaintiff however refuted.

A *bona fide* purchaser for valuable consideration of land derives protection under ***section 181 of the Registration of Titles Act.*** The term is defined in ***Black's Law Dictionary 8th Edition at page 1271*** to mean:

> ***One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."***

It has to be noted that due diligence is a requirement of law under ***Section 201 of the Registration of Titles Act Cap 230.*** That principle is not restricted to property that falls under the ambits of that law but to any prospective buyer of an unregistered land.

Whether or not a party was a *bonafide* purchaser for value without notice, the question that a court would poise is whether the party honestly intended to purchase the suit property and did not intend to acquire it wrongfully. ***(David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985).***

Halsbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977, at ***page 27*** also provides that prior equitable interest in land can only be defeated by a *bonafide* purchaser for value without prior notice.

Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is, the prior equitable interest prevails as equitable interests rank in the order of creation.

Thus also a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

A key component of due diligence is prior consultation and any such failure to make reasonable inquiries or ignorance or negligence was also held to form particulars of the offence of fraud. ***(Refer: Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995).***

Pw3 upon cross examination, told court that before purchasing the land they had made inquiries about this land from the LCs, whose names however he did not disclose, leading to the conclusion that LCs were never involved in the verification of the sale transaction.

Despite the fact that the agreement was stamped by LC1 stamp, the person who endorsed it was not called forth as a witness; and indeed no LC was invited to court to testify as to whether or not the plaintiff's purchase, occupation, and usage of the *kibanja* in dispute was known to them.

Also based on the date appearing on the powers of attorney, ***PExh 4,*** by the time of the transaction, ***Pw3*** had not been appointed the plaintiff's attorney. So clearly when he was signing the sale agreement at the time, he was not doing so as an agent of the plaintiff.

His argument in any case was that the plaintiff himself was present at the time of purchasing the *kibanja* and had even signed the agreement of sale ***PExh 1.*** Upon perusal however by this court of the said sale agreement and powers of attorney ***(PExh 4***), and as pointed out during cross examination, the signatures on the two documents appeared to be totally different.

Pw3 himself admitted that fact. The effect of this was to dent the credibility of his evidence as well as create doubt on the authenticity of the documents relied on by the plaintiff.

Pw3 moreover admitted that there were graves on the land and it was not in dispute that an old house belonging to the deceased owners was found on that land. What the plaintiff therefore found on the *kibanja* or would have found on the *kibanja* if he had taken the trouble to do so, ought to have put him on sufficient notice that it was not uninhabited. He would have thought twice before buying any portion of the *kibanja.*

Issue No. 2 is therefore answered in the negative. In the final result, the plaintiff's action cannot succeed, having failed to discharge the duty incumbent upon him to prove that he had validly acquired the *kibanja.*

Issue No. 3 Remedies.

The defendants in their counterclaim sought for:

1) *declaration that the sale of the land by the 2nd counter defendant to the 1st counter defendant was illegal;*
2) *An order ejecting the 1st counter defendant from the suit land;*
3) *General damages;*
4) *costs of the suit;*
5) *interest on (c) and (d), at court rate from date of judgment until payment in full.*

General damages:

In ***Robert Caussens v Attorney General SCCA No.8 of 1999*** it was stated that the object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered.

Therefore in the assessment of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and extent of the breach.***(Uganda Commercial Bank V Kigozi [2002]) 1 EA 305.***

A party who suffers damage due to the wrongful act of another must be put in the position he or she would have been in, had she not suffered the wrong.

In this case, the illegal acts of selling the *kibanja* to the plaintiff by Ronald Nsubuga, (both counter defendants) accordingly justifies an award of general damages against them, for the inconvenience and physical loss suffered by the defendants.

The plaintiff in the premises was only entitled to purchase the share which rightfully belonged to Nsubuga, ***Pw1*** but not to the entire portion of the *kibanja* in which the defendants held and enjoyed an equitable interest, duly acquired by them and protectable by law; and in respect of which their consent ought to have been secured first.

The defendants' counter claim therefore succeeds and the suit dismissed with costs.

Accordingly, the orders/ declarations below are made:

1) ***The sale of the kibanja by the 2nd counter defendant to the plaintiff/ 1st counter defendant of land which is occupied and utilized by the family of the defendants/counter claimants was unlawful.***

2) ***An order hereby issues for an independent survey to be conducted to establish the total area of the kibanja and its boundaries; the total area sold by Ronald Nsubuga to third parties and total area to which he ought to have been entitled to after a fair and equitable distribution of the kibanja between the two families of Erusaniya Kasozi and Yakobo Kizito;***

3) ***The plaintiff/1st counter defendant would only be entitled to what is determined to be the 2nd counter defendant's portion following the independent survey;***

4) ***An order of eviction issues against the plaintiff/ 1st counter defendant from the portion of land irregularly acquired and occupied by him;***

5) ***General damages of Ugx 20,000,000/= awarded against both counter defendants to atone for the wrongful acts of transfer of the kibanja committed against the counter claimants.***

6) ***Costs of the counterclaim awarded to the counterclaimants/defendants.***

Alexandra Nkonge Rugadya
Judge
15th November, 2021

Delivered by email
24/11/2021