THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CS-0086-1999

1. **PIUS OKELLO UMONI**
2. **OKECHO CHRISTOPHER**
3. **ALECHO CHARLES**
4. **OCHIRYE ZACARIA**
5. **SILVER ONDERA**
6. **OBBO JOSEPH…..…..……...PLAINTIFFS**

VERSUS

OBBO CHRISTOPHER……...……..…….…… DEFENDANT

BEFORE: THE HON. MR. JUSTICE E.K. MUHANGUZI

JUDGMENT

This suit relates to a land dispute between the parties in respect of leasehold land at Merikit, Tororo, Bukedi comprised in LRV. 982 Folio 1 and measuring approximately 19.67 Hectares, (hereinafter referred to as “the suit land”).

The brief background of this case is that on 13.10.99 the six plaintiffs (the first plaintiff being the father of the other five plaintiffs) sued the defendant claiming/seeking recovery of the suit land, a declaration that the plaintiffs are the

rightful owners of the suit land, an order cancelling the Certificate of title for the suit land (LRV.982 Folio1), general damages and costs of the suit. That claim was based on fraud allegedly committed by the defendant's late father and predecessor in title in the course of registering himself as proprietor of the suit land.

In his written statement of defence filed on court record on 03.11.99 the defendant denied the plaintiffs' claim and specifically denied the fraud allegation by the plaintiffs against the defendant. Further the defendant pleaded that the suit was time barred and prayed that it be dismissed with costs but when he raised that objection on 30.6.2000, court, its ruling delivered on 21.8.2000, overruled and dismissed the objection with costs to the plaintiffs.

Subsequently at the scheduling conference held on 19.02.2003 the parties agreed on one fact, namely that both parties were in occupation of the suit land. Also the parties are on record as having agreed on three issues for court's determination, namely:-

1) Whether the plaintiffs had proprietary rights in the suit land;
2) If so whether the defendant's acquisition of title to the suit land was fraudulent;
3) What remedies are available to the parties?

The actual taking of evidence at the trial commenced on 13.3.2003 when three witnesses (plaintiffs No.1, No.2 and No.3) testified. At the instance of the

plaintiffs and with the consent of the defendant, plaintiffs No.4, No.5 and No.6 withdrew from and were struck out of the suit on that date.

On 18.6.2003 three more witnesses testified for the plaintiffs and the case for the plaintiffs was closed. Hearing was adjourned to 09.9.2003 for defence case which, however, did not commence till 04.7.2006 when the defendant testified. At the end of the defendant's full testimony counsel for the plaintiffs applied for and, by consent of counsel for the defendant, was granted an adjournment to amend the plaint. Six months later, namely on 07.02.2007, the plaintiffs, by consent of the defendant, were allowed to file and did file an amended plaint on that day. In the amended plaint the plaintiffs effectively abandoned the allegation of fraud they initially leveled against the predecessor in title of the defendant. Instead the plaintiffs prayed for orders for:-

> "(a) *a declaration that they are the owners by customary tenure of the portion of land they occupy (the suit land).*
>
> *(b) That the defendant cannot, in law evict them from the said land and act to do so is unlawful.*
>
> *(c)That the plaintiffs are entitled to peaceful occupation of the suit land.*
>
> *(d) That the defendant pays general damages for inconveniences caused to the plaintiffs.*
>
> *(e) That the defendant pays costs of the suit.*
>
> *(f) That the awards above attract interest at court rate till settlement in full.*

(g) That any other relief be granted to the plaintiffs."

The defendant did not reply to the above said amended plaint but called a second defence witness on 23.8.2007 and closed the defence case.

On 21.8.2009 court visited the *locus –in-quo* in Seseme village, Merikit Parish, Merikit Sub-county, Tororo County in Tororo district in the presence of Mr. Tuyiringire, learned counsel for the plaintiffs, Mr. Majanga, learned counsel for the defendant and both parties. For the plaintiffs the first plaintiff showed and clarified to court on the ground what he had earlier testified in court and the defendant did likewise. At the close of the testimonies of plaintiff No.1 and the defendant, court drew a sketch plan. Counsel for both parties requested to be allowed to file written submissions which court allowed them to do within a fixed time frame. Plaintiffs' counsel duly filed written submissions but defendant's counsel filed submissions out of time with court's leave so to do vide MA No.210 of 2009.

In view of the amendment of the plaint counsel for the respective parties, in their submissions abandoned, the issues earlier agreed on at the scheduling conference for court's determination. Instead they agreed on the issues for court's determination as, namely:-

1. Whether or not the plaintiffs have any interest recognizable at law, in the suit land or part of the suit land.
2. Whether the defendant has got a right under the law to evict the plaintiffs from the suit land.

3. Whether the plaintiffs are entitled to the remedies prayed for.

In order to resolve the above issues court must first begin by properly directing its mind on the burden and standard of proof the parties are required to discharge at law. In this regard sections 101-103 of the Evidence Act, Cap.6 of the Laws of Uganda impose the burden of proof of assertion or allegation on the party that makes such assertions or allegations. The ages old principle that "he who asserts/alleges must prove" is derived from the provisions contained in those sections of the Evidence Act.

The standard of proof in civil cases, such as this case, is that of balance of probabilities, which was set long ago and still remains the law as can be seen in the cases below:-

1. ***Muller vs. Minister of Pensions, [1947] 2 ALL E.R. 372***;
2. ***Nsubuga vs. Kavuma, [1978] HCB 307***;
3. ***Sebuliba vs. Co-op Bank, [1982] HCB 129***;
4. ***Lugazi Progressive School & Anor. Vs. Serunjogi & Ors [2001-2005] 2 HCB 121***

ISSUE NO.1:- Whether or not the plaintiffs have any interest recognizable at law in the suit land or part of the suit land.

The plaintiffs claimed to be customary tenants of part of the suit land having derived such customary tenure from the suit land being their ancestral land jointly with the defendant's father. They further stated that they knew of the whole process of surveying the suit land for purposes of bringing it under the operation of

the Registration of Titles Act but that they neither surrendered their customary tenure on the land nor did they know when the Certificate of Title to the land was finally issued till 31.01.98 when the defendant required them to vacate the land.

The point to address in resolving this issue, in my view is if, when, how and in what circumstances the plaintiffs acquired the customary tenure on the suit land which they claimed. The plaintiffs asserted that claim and it was incumbent on them to prove it on a balance of probabilities.

The plaintiffs' witnesses relevant to this issue are Plaintiff No.1, Pius Akello Umoni, Bitarisi Opoya Owora (PW.4), George Martin Obbo (PW.5) and Martin Owori Umoni (PW.6). Plaintiff No.2 (PW.2) and Plaintiff No.3 (PW.3) who are sons of plaintiff No.1 (PW.1) did not witness or claim to know of their own the circumstances under which their father (PW.1) claimed to have acquired customary tenure on the suit land. Yet their claim is entirely derived from their father's interest in the suit land.

Plaintiff No.1 (PW.1) testified in chief that he was born on the suit land. That his late father Umoni Obonyo was staying on the same land till he died in 1954 but before his death he had given the land to both the witness and the defendant's father in 1949.

Under cross-examination PW.1 stated that the defendant's father (Alechoi) and the father of plaintiff No.1 (Umoni) did not belong to the same clan. That Umoni was Irarak by clan and that Alechoi's clan was not known to plaintiff No.1 (PW.1).

That PW.1 and the defendant were step brothers. That when his father Umoni was giving him the suit land in 1949, clan members Bitarisi Opoya (PW.4), George Obbo (PW.5) and Martin Owori (PW.6) and others were present. Further, he testified that he did not know the clan of the defendant's father but later he stated that the defendant is of the same clan as himself (PW.1). Further, that his father Umoni Obonyo is the one who allowed the defendant's father to stay on the suit land.

In re-examination PW.1 stated that the people who were present when his father gave him the suit land are all still alive.

While PW.4 (Bitarisi Opoya Owora) in cross examination confirmed that he was present with PW.6 in 1949 when PW.1 was being given the suit land others who were also present have passed away, which contradicts the testimony of PW.1 that claimed that all those that were present when he was being given the suit land by his father were still living. George Martin Obbo (PW.5) stated that he was not present when Umoni gave the suit land to both plaintiff No.1 and defendant's father contrary to the evidence of PW.1.

In his testimony in-chief PW.6 testified that he is a real brother to plaintiff No.1 and that when plaintiff No.1 was being given the suit land PW.6 was present. That he knew the land in dispute and that Umoni divided the land in dispute between his two sons, plaintiff No.1 and the defendant's father in 1949. Under cross-examination PW.6 stated:-

> "*Among the people present, when the land was being given away I am the only one surviving. The land is about 30 acres. It was just divided in the middle……."*

That witness also contradicts both PW.1 who testified that all those who witnessed how the father of PW.1 gave him the suit land were still living as well as PW.4 who testified that among those the people who witnessed the father of PW.1 giving the suit land to PW.1 only him (PW.4) and PW.6 (Martin Owori Umoni) were still living.

In his testimony in –chief the defendant (DW.1) stated that plaintiff No.1 merely occupied part of the suit land without owning it. That plaintiff No.1 was fully aware of and witnessed the inspection, survey and registration of the suit land into the names of the defendant's father. He tendered various documents which were admitted in evidence to prove what he stated and to illustrate that plaintiff No.1 did not at any point throughout that process either object to the exercise or state that he had any proprietary interest in the suit land. That the Certificate of title was eventually issued on 13.9.77 in the names of the defendant's father alone and plaintiff No.1 only laid claim on the land after the death of the defendant's father. Under cross-examination DW.1 stated that the suit land had never belonged to first plaintiff's father but rather it belonged to defendant's father who had inherited it from his own father.

DW.2 (Okumu Florence) testified in-chief that the suit land never belonged to the father of plaintiff No.1 at any time. That the land which belonged to the father of plaintiff No.1 was across the road on the southern side of the suit land. That when

the defendant's father surveyed the suit land and had it registered in his names plaintiff No.1 was present and accepted that the land belonged to the defendant's father. Under cross-examination that witness testified that plaintiff No.1 witnessed the survey exercise of the suit land in favour of the defendant's father alone and that the suit land never belonged to the father of plaintiff No.1 (Umoni) but rather it belonged to the grandfather of the defendant (Alechoi Obonyo). Both defence witnesses were cross-examined but remained firm and consistent.

At the *locus-in-quo* on 21.8.2009 plaintiff No.1 took court around the suit land, showed court his homestead including his houses and those of plaintiffs No.2 and No.3. He showed court several trees of different types which he claimed marked the boundary between his land and that of the defendant's father and stated that all his land was incorporated in the land surveyed and registered in the names of the defendant's father.

The defendant testified at the *locus-in-quo* that what plaintiff No.1 showed court was not a boundary at all. He illustrated to court that the trees that plaintiff No.1 stated to be boundary marks were same as those both inside and outside the portion of land that plaintiff No.1 had been claiming.

He further showed court one big eucalyptus tree and several lukomera trees, mango tree and remnants of barbed wire that formed a cattle kraal established by the defendant's father in 1981 which was entirely inside the portion of land that plaintiff No.1 showed court as being the land he claimed to belong to him. Under cross-examination the defendant reiterated that his late father is the one who had allowed plaintiff No.1 to stay on the suit land temporarily in 1960 till such a time

plaintiff No.1 got his own land. He finally insisted that the Bongi tree that plaintiff No.1 showed court as part of the boundary of his land was actually part of defendant's cattle kraal as indicated by remnants of barbed wire that joined that tree and others in a sort of circular shape.

I have carefully considered and weighed the evidence of both plaintiffs' and defence witnesses relating to the plaintiffs' claim of acquisition of part of the suit land. The first plaintiff appears, on evidence, the only plaintiff who claimed to have been given part of the suit land by his late father (Umoni) as a gift *inter vivos*. He claimed his late father also gave part of the same land to the grand father of the defendant but he also stated that he did not know the clan of the defendant's grand father at one stage in his testimony. At another stage he claimed the defendant's grandfather was of the same clan as himself, a contradiction that depicts plaintiff No.1 as not being a truthful witness. Further, I note that plaintiff No.1 and his witnesses contradicted each other as to who of the people who witnessed the suit land being given to him in 1949 were still alive and as such whether those witnesses indeed are some of those who testified. I find that inconsistency casting serious doubt about the credibility of these major plaintiffs' witnesses.

Plaintiff No.1 himself was present and witnessed the process of surveying the suit land and registering it in the sole names of the defendant's father without raising any objection or claim of interest in the suit land. He did not claim to have ever signed any document relating to the process of acquiring the lease on the suit land and yet in court he claimed that he was of the impression that the defendant's father was pursuing a joint process of acquiring title to the suit land in the joint names of plaintiff No.1 and the defendant's father. I find the plaintiffs' version very difficult to believe and would reject it. This is especially so when initially

alleging fraud on the part of defendant's father, moreover without particularizing such fraud as required by rules of pleading, the plaintiffs not only failed to prove fraud and the defendant proved that plaintiff No.1 was fully involved and witnessed the process of defendant's father acquiring the leasehold title to the suit land and that is why the plaintiffs abandoned the fraud allegations against the defendant.

Finally on this issue I note that there is no paternal relationship between plaintiff No.1 and Joseph Obbo Alechoi the defendant's father. The plaintiff (No.1) and the defendant's father were fathered by different fathers though mothered by one mother. The plaintiffs did not explain how the father of plaintiff No.1 came to give his land (the suit land) to both his son (plaintiff No.1) and to the defendant's father who was not his son. Was that transaction an acceptable custom among the Irarak clan? That ought to have been proved by the plaintiffs as part of a custom relating to acquisition of customary tenure which the plaintiffs claimed. It was not so proved.

Therefore I find that the plaintiffs' evidence was riddled with inconsistencies and contradictions on major aspects. The witnesses did not impress me as honest ones. No clear customary giving of land as claimed by plaintiff No.1 was proved. Consequently the plaintiffs failed to discharge their burden of proof of their claim on a balance of probabilities. I therefore find that the plaintiffs have failed to establish any interest recognizable at law on the suit land or any part of the suit land.

ISSUE NO.2: Whether the defendant has got a right under the law to evict the plaintiffs from the suit land.

Having held that the plaintiffs failed to prove their claim of customary tenure or any interest recognizable at law on the suit land I will now consider whether the plaintiffs have any other right on the suit land which stops the defendant from evicting them from his land.

It is not in dispute that by virtue of a grant of Administration of his late father's estate dated 06.10.89 from the High Court in Administration Cause No.457/89 the defendant has every right of a registered owner of the land in relation to the land registered in the names of his late father. That includes the right to evict anybody who trespasses or encroaches on the suit land. However, the defendant admits that his late father allowed plaintiff No.1 to occupy 0.13 hectare of the suit land temporarily though plaintiff No.1 has over time encroached and trespassed on much more of the suit land. I find and accept that evidence of the defendant as unchallenged proof that his late father allowed plaintiff No.1 to occupy and utilize 0.13 hectares of the suit land. The evidence of both plaintiffs' and defence witnesses suggested that long before 1995 the defendant's father had allowed plaintiff No.1 to occupy that land and use it.

According to section 29 (2) (a) of the Land Act, Cap.227;

> "*BONAFIDE occupant means a person who before the coming into force of the Constitution:-*

a) *had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more;*"

From 1977 alone up to 1995, when the Constitution came into force, is a period of 15 years which is well over the 12 years period provided for in section 29 (2) (a) referred to above which qualifies one to be a bonafide occupant if one occupied land unchallenged by the registered owner or agent of the registered owner.

Nevertheless section 29 (4) of the same Act provides:-

"(4) *for the avoidance of doubt a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bonafide occupant under this section.*"

On evidence the defendant (DW.1) and Akumu Florence (DW.2) testified that plaintiff No.1 was allowed to stay on the suit land beginning about 1959 and 1960 unchallenged by the defendant's father till the death of the defendant's father in 1984. I accept that evidence and hold that on the basis of that evidence plaintiff No.1 was on the suit land on the basis of a licence from the defendant's father who was the registered owner of the suit land. According to section 29 (4) of the Act cited above plaintiff No.1 is therefore neither a lawful nor a bonafide occupant under section 29 of the Act. In my view the defendant is entitled to evict the plaintiffs as trespassers on the suit land because they have failed to prove any

interest they claim and the defendant's notice to them to quit issued on 31st January 1998 terminated the licence earlier given to plaintiff No.1 by the defendant around 1959 or 1960. As such from the date of the notice to quit the suit land the plaintiffs became trespassers and the defendant in law became entitled in law to evict them from the suit land.

ISSUE NO.3: Whether the plaintiffs are entitled to the remedies prayed for.

Having held that from the date of the notice to quit issued to the plaintiffs by the defendant on 31st January 1998 the plaintiffs became trespassers. I am unable to hold that the plaintiffs are entitled to any remedy at all.

In conclusion I find and hold that the plaintiffs have failed to discharge their burden of proof on the balance of probabilities, that they became trespassers on the suit land when their licence was revoked by the defendant by notice to quit on 31st January 1998 by virtue of which the defendant became entitled to evict the plaintiffs from the suit land.

Consequently the plaintiffs are not entitled to the remedies prayed for in the plaint.

In the result I hereby give judgment in favour of the defendant who is entitled to vacant possession of the suit land. I order the plaintiffs to pay the defendant the costs of the suit.

E.K. Muhanguzi

JUDGE

28.6.2010

Assistant Registrar:

Please summon the parties and deliver this judgment at the earliest possible.

E.K. Muhanguzi

JUDGE

28.6.2010

13.1.2011

The Defendant in court.

All the plaintiffs save for 4th plaintiff are absent.

Court Clerk Hadija.

Mr. Majanga:

I appear for the defendant on brief for Mbale Law Chambers. The plaintiffs are represented by Tuyiringire but he is also absent. The matter was for delivery of a judgment and we are ready to receive it.

Court: Judgment read.

My instructions were to read this judgment, which was written and signed by the Judge on 28th June 2010 at the earliest possible date but I received it only on 4th December, 2010. Anyhow, I have read it.

Lillian C.N. Mwandha

ASSISTANT REGISTRAR

13.01.2011