

UGANDA / JUDGMENT

Abbasi Ali v Salama Ibrahim Abia (HCT-17-LD-CA-0040-2023) [2023] UGHC 511 (5 July 2023) [2023] UGHC 511

COURT

High Court of Uganda

BEFORE

Wolayo, J

CASE / FILE NUMBER

HCT-17-LD-CA-0040-2023

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT LUWERO HCT-17-LD-CA-0040-2023 (ARISING FROM CIVIL SUIT NO.002 OF 2021 AT THE CHIEF MAGISTRATE'S COURT OF LUWERO AT NYIMBWA) ABBASI ALI
..... APPELLANT VERSUS SALAMA IBRAHIM
ABIA.....RESPONDENT BEFORE LADY JUSTICE HENRIETTA
WOLAYO JUDGMENT**

Introduction

1. By a memorandum of appeal lodged on 24.7.2023, the appellant Abbasi appealed the judgement of HW Kayaga Salima, magistrate grade one at Nyimbwa delivered on 5.7.2023 on nine grounds of appeal. Counsel for the appellant filed written submissions on 18.4.2024 while counsel for the respondent filed on 27.6.2024. I have carefully considered both submissions.

Background facts

- 2. By a plaint lodged on 25.3.2021, Salama Ibrahim Abia sued Abbasi Ali for a declaration that the plaintiff is the rightful owner of land/house at Sedatula village, Nakatonya parish, Nyimbwa sub county, Bombo, Luwero district and that the defendant is a trespasser. Additionally, the plaintiff sought an order for eviction, general damages and costs of the suit.
- 3. This case was first heard by HW Hope Bagyenda, magistrate grade one Nyimbwa as she then was followed by magistrate grade one HW Kayaga Salima who delivered the judgment.

- 4. It was Salama's claim that she is a daughter and sole beneficiary of the estate of the late Ibrahim Hasan Abia who died in 2006 but had built and owned the property or house at Sedatula village, Nakatonya parish, Nyimbwa Sub County, Bombo, Luwero district. Abbasi, the defendant is a son of Salama's paternal aunt Manguru Ramathan. Abbasi had followed his mother at the time but has forcefully entered into and remained in the said house despite advice from various family members.
- 5. Salama claimed that in 2019, Abbasi admitted that the property belonged to Salama's father and undertook to vacate the premises in January 2020. The parties signed an agreement in which Salama allowed Abbasi to occupy the premises for eight (8) months and allowed him to remove the iron sheets and doors witnessed by the local authorities but Abbasi has on several occasions threatened harm and violence to her if she came on the suit land.
- 6. Abbasi filed a written statement of defense on 10.5.2021 in which he denied the claim. He averred that in or around 1996, he was invited from Jinja by his uncle, the late Ibrahim Hasan Abia, to come and stay with Abia's sister Manguru Ramathan, his mother. He averred that upon arrival, the late Ibrahim Hasan Abia gave him his house which was on foundation level together with its plan to keep it safe and also requested him to complete it and stay there since Ibrahim was going back to Canada. He further averred the late Ibrahim Hasan Abia informed his family that Abbasi is authorized to use the land together with Abia's sister Manguru for their life time. He embarked on the completion of the house with his hard earned income until 2007 when he completed it and occupied it up to date.
- 7. In her judgment, the learned trial magistrate found that Abbasi had no legal interest in the suit land/house as the same belonged to Ibrahim throughout his lifetime. She also found that Abbasi was only a caretaker and therefore a licensee which license terminated at the death of his uncle Ibrahim Hassan Abia. The learned magistrate further found that when the respondent Salama permitted him to continue staying in the house, and therefore he continued to be a licensee until the same was

terminated when she asked him to vacate in 2019. She further held that it was incumbent upon him to hand the over the house to the beneficiaries of the estate of the late Ibrahim upon his demise and demand by the beneficiaries. She further held that Abbasi's refusal to hand over the house to Salama, the sole beneficiary of the late Ibrahim in 2018 and his continued stay thereafter upon demand amounted to trespass.

- 8. The learned trial magistrate ordered Abbasi to vacate the suit property and Salama was also awarded general damages of Uganda shillings Two Million (UGX 2,000,000) and costs of the suit. Dissatisfied with the judgment, the appellant appealed to this court hence this judgment.

Duty of the first appellate court

9. It is the duty of this court as a first appellate court to re-evaluate the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny before coming to its own conclusion.

10. In *Father Narsensio Begumisa and 3 Others v Eric Tibebaga* SCCA 17 of 2002; [2004] UGSC 18 (22 June 2004) Ulii, court observed that 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.

Ground one

The learned trial magistrate erred in law and fact when she held that the suit was not barred by limitation.

- 11. Abbasi contends that the suit land being estate property, that the rights of Salama to the same accrued at the point of the deceased's death or at the point the appellant acquired adverse possession.
- 12. Abbasi contends that adverse possession began running in 1996 when he occupied and developed it unchallenged. **Section 5 of The Limitation Act**, provides that no action may be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her. **According to section 16 of The Limitation Act**, time begins to run from the date of the adverse possession.
- 13. The implication of the above provisions of the law is that the adverse possessor acquires an equitable interest in the land when the right of action to terminate the adverse possession expires under Section 5 of the Limitation Act.
- 14. It was not disputed that the parties are cousins while the late Ibrahim Hassan Abia, father to Salama the plaintiff is a brother to Manguru Ramathan, the mother to Abbasi the defendant. It is also not disputed that the late Ibrahim was the owner of the suit property or house located in Sedatula village, Nakatonya parish, Nyimbwa Sub County in Luwero district.
- 15. Abbasi averred in his written statement of defense that around 1996, he was simply invited by his uncle the late Ibrahim, father to Salama to go and stay with his sister, Manguru, his mother. Upon arrival, the late Ibrahim gave him his house which was on foundation level together with its plan and tasked him to keep it safe and complete it as the late Ibrahim was going back to Canada. He further averred that he immediately embarked on the completion of the house with his hard earned income. The fact that Abbasi claims that he was given the responsibility to care take the suit property by the rightful owner, the late Ibrahim means that he cannot turn around and claim adverse possession since 1996.

- 16. On the other hand, Salama's case is that she was surprised when she returned to Sedatula village to check on the family in 2007 after her father's death in 2006 when she found that Abbasi had occupied the house. According to her, Manguru informed her that Abbasi was her son who was occupying the commercial house temporarily until Salama came to use the property.
- 17. Indeed, Abbasi admitted that he continued to stay in the house until 2010 when Salama came back and informed him that she was the late Ibrahim's daughter. This was indeed the first step by Salama to repossess her late father's property until she returned from Sudan and informed Manguru about her intention to occupy the same. I am in agreement with the learned trial magistrate that in law, Salama gave an unwritten license to Abbasi to continue staying in the house while she was in Sudan.
- 18. This would mean that between 2007 when Abbasi occupied the house and 2010 when Salama came to ask him to leave, Abbasi was a licensee at the pleasure of Salama. Time began running for Salama in 2010 and it was in 2019, nine years after she asserted her claim to the house that she reported Abbasi to local authorities and he agreed in writing to vacate the house. This document is dated 23.4.2019 and admitted in evidence as PExh.1 in the presence of Local Council officials and sixteen other people who were in attendance at the reconciliation meeting. The gist of this agreement is that Abbas agreed that the land belongs to Salama's father Ibrahim; that he would comply with Salama's demands except that he needed more time. In the agreement, Salama agreed to give Abbas eight months to vacate with effect from June (2019) to January 2020 and that Abbasi would take all his property including iron sheets, and doors.
- 19. From the foregoing analysis, Salama asserted her claim to the suit property initially in 2010, then in 2019 and finally in 2021 when she commenced court action. This

is eleven years from 2010. Clearly, Salama was not time barred when she commenced court action in 2021. This ground of appeal fails.

Ground two

- 20. The learned trial magistrate erred in fact and in law when she held that the respondent was the sole beneficiary of the estate of the late Ibrahim Hassan Abia.

Ground four

- 21. The learned trial magistrate erred in fact and in law when she failed to properly evaluate the evidence and arrived at the conclusion that the appellant had no right or interest in the suit property.

Ground five

- 22. The learned trial magistrate erred in fact and in law when she held that the respondent was the rightful owner of the house at Sedatula village, Nakatonya parish, Nyimbwa sub-county, Bombo Luwero district.
- 23. The standard of proof has been well elaborated in **Miller v Minister of Pensions [1947]2ALL ER 372 at 373-374**. Denning J when speaking on the degree of cogency of evidence required to discharge the burden of proof in civil cases had this to say:

"That degree is well settled. It must carry a reasonable degree of probability, but not as high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not, the burden is discharged but if the probabilities are equal, it is not'

- 24. According to Salama Ibrahim Abia PW1, a 43-year-old moslem and hair dresser, resident of Kazinga village, Bweyogerere ward parish, Kiira Town council subcounty in Wakiso district, in the year 1996, she went to the suit property with her father who had just returned from Canada and had constructed the suit property or commercial house up to the beam level through sending funds to her uncle Yusuf Mohammed Said PW3.
- 25. Yusuf Mohammed PW3, a 79-year-old moslem, resident of Sedutula village, Nakatonya Parish, Nyimbwa sub county, Luwero district confirmed that in 1994, the late Ibrahim while in Canada asked him to supervise the construction of his house when he sent him money and the whole community knew that the house belonged to him. According to him, the late Ibrahim only stopped sending the money when he got misunderstandings with his wife Leila to allow the two to sort their issues. It was further his testimony that the late Ibrahim returned in 1996 to check on the progress of the house.
- 26. According to Salama, the late Ibrahim took her around the suit property and told her that when he goes back to Canada, he would send money for the house to be completed. It was Yusuf and Salama's testimony that Salama's father travelled back to Canada and he agreed with her aunt Manguru that he would send the money for completion of the commercial house and indeed, he started sending her money when he returned to Canada. It was further Salama's testimony that around 1997, her father asked her to go to Sedutula and ascertain whether the aunt Manguru had resumed the construction which she did. Her aunt Manguru informed her that she had received the money and after sometime, the house was partially completed with just a small part remaining without iron sheets and had stayed like that to date.
- 27. According to Salama, her father died in Canada in 2006 and they had to perform the duwa (funeral rites) for him after which she returned to Kampala. However, when she returned to check on the family in 2007, she was surprised to find that Abbasi, her cousin and the defendant had occupied the house.

- 28. It was Salama's testimony that her aunt Manguru then informed her that Abbasi was her son who was occupying the commercial house temporarily until Salama came to use her property. She then went to Sudan, and upon return, she informed her aunt Manguru about her intentions to occupy her father's house who in turn suggested that they divide the house into two wherein she would take one part and Salama the other but Salama refused. Manguru suggested a nearby plot in the alternative but Salama insisted that she wanted the plot which had her father's house.
- 29. According to Salama, upon failure to agree, she reported the matter to the Local Council 1 committee who convened a meeting on 23.4.2019 where Abbasi informed them that the late Ibrahim had asked him to care take the house when he returned from Canada
- 30. It was the evidence of Abbasi DW1 that maama Atum went to Jinja where he was working in 1996 and informed him that his uncle, the late Ibrahim had called for him in Bombo. According to Abbasi, he went to meet his uncle who showed him his properties, which included the suit property and those of his mother, Manguru. According to Abbasi and Manguru DW4, the late Ibrahim asked Abbasi to keep the suit property safe, complete and occupy it as he returned to Canada. It was further Abbasi's testimony that he brought all his belongings to Bombo, completed the suit property and occupied it thereafter.
- 31. I find that the trial magistrate correctly found that Abbasi was simply a caretaker of the suit property and did not acquire any legal interest in the same. This finding is strengthened further by Abbasi's own admission that when Salama requested to have her father's property, he advised that they would arrange a family meeting in which he would hand over the same to her. Indeed, in an agreement PE1 executed by both Abbasi and Salama following a reconciliation meeting dated 23.4.2019, Abbasi agreed to give Salama her father's house but requested to be

given eight (8) months (June 2019 – January 2020) within which to vacate the suit property.

- 32. Worthy of note is that Abbasi claims to be a licensee on the suit property in his written statement of defense. As correctly pointed out by the trial magistrate, the unwritten license given by the late Ibrahim only gave him permission to use the suit property and it was terminated in 2006 when the late Ibrahim died and his property reverted to his estate. Abbasi cannot claim to be an adverse possessor and at the same time claim to have got onto the land with the consent of the late Ibrahim which in effect means he admits that he was not in adverse possession but rather, he was a licensee during the lifetime of Ibrahim.
- 33. Apart from the evidence, in a society that is patrilineal where ancestry is determined by the father, it is incredible that Abbasi who is a maternal nephew to Ibrahim can make claims, without any legal and factual basis, to the late Ibrahim's property when he has a surviving daughter.

- 34. As a maternal nephew, **Section 23(1) (a) (iii) of the Succession Act Cap. 268** excludes Abbasi from inheritance because he is not a lineal descendant. A lineal descendant is defined under Section 2 thereof as a person who is descended in a direct line from the deceased and includes a child and grandchild of the deceased and any other person related to the deceased in a direct descending line up to six degrees descending.
- 35. Evidently, Abbasi is claiming the property because to him, Salama is a woman and therefore she can neither inherit land nor own it. Far from it. **Article 5 of CEDAW (Convention on the Elimination of Discrimination Against Women; Article 21(2) of the Maputo Protocol on Rights of Women in Africa; Article 32(2) of the 1995 Uganda Constitution as amended** assert the principle of gender equality. Article 5(1) of CEDAW places on obligation on States to take steps to modify cultural patterns with a view to the elimination of prejudices and customary practices that are based on the idea of inferiority or superiority of the sexes. Article

21(2) of the Maputo Protocol confers on both women and men the right to inherit in equal shares the property of their parents. Lastly, Article 32(2) of the Uganda Constitution prohibits laws, cultures and traditions that are against the dignity, welfare and interests of women.

- 36. Moreover, Section 2 of the Succession Act Cap. 268 defines a dependent relative to include *'a parent, brother, sister, niece, nephew...'*, who on the date of death of the deceased, *'was wholly dependent on the deceased for the provision of the ordinary necessities of life to a person of his or her station.'* No evidence was led by Abbasi to bring him under this definition which would have entitled him to a share in the estate.
- 37. Based on the evidence, the Gender Equality Jurisprudence, and statutory law, I find that the learned trial magistrate rightly rejected the appellant's case. She properly evaluated the evidence and arrived at a correct conclusion that the appellant was the sole beneficiary of the estate of late Ibrahim.
- 38. On whether the learned trial magistrate erred in holding that the appellant was the rightful owner of the house in Sedatula, she is the sole beneficiary with an equitable interest in the property until she obtains letters of administration to acquire full proprietary rights.
- 39. In deference to **Section 21 of the Succession Act Cap 268** which provides that all property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property, I find that Salama, being the only surviving child to the late Ibrahim and in the absence of any claim by a spouse, is entitled to letters of administration to administer her late father's estate. The learned trial magistrate properly evaluated the evidence and arrived at a correct conclusion. Grounds two, four and five fail.

Ground three

The learned trial magistrate erred in law and fact when she held that the appellant was a trespasser on the suit property since 2018.

- 40. It is not in dispute that the late Ibrahim died in 2006 and a duwa (funeral rites) were held in Bombo where Salama attended and thereafter left for work in Sudan. It is also not in dispute that Abbasi is a maternal nephew to Ibrahim and Salama's cousin and had lived on the suit property since 1996 when he joined his mother Munguru until Ibrahim's death in 2006. I have found as a fact and so did the learned trial magistrate that the respondent required Abbasi to leave the property as far back as 2010 and more purposely in 2019 when matters reached the local council authorities and finally the court in 2021.
- 41. The question that arises is whether by refusing to leave, he is a trespasser. In **Mitwalo Magyengo v Medadi Mutyaba [1998] UGSC 3(24 March 1998)** where the appellant in the Mitwalo case claimed he had been given the kibanja when he was young but failed to prove who gave him the kibanja. He refused to leave the land and on a second appeal, the Supreme Court found him a licensee going by the work he had done on the land and declined to declare him a trespasser since the evidence did not clearly show the area under occupation. Similarly, as there has been reference to a house and then land, it is impossible to ascertain where Abbasi trespassed. For these reasons, I find that the learned magistrate erred in finding that the appellant is a trespasser. Ground six of appeal succeeds.

Ground seven

The learned trial magistrate erred in law and fact when she awarded the respondent UGX 2,000,000/= as general damages with no basis.

- 42. Having found that Abbasi was not a trespasser on the suit property, it goes without saying that ground seven succeeds as the award of general damages that has no legal basis, is set aside.
- 43. In the result, the appeal substantially fails and the judgment of the trial court is upheld save for the declaration that the appellant is a trespasser and the award of general damages which is set aside.

Costs

- 44. Although costs follow the event, the fact that the two parties are family, each party will bear the costs of the appeal and the trial in the lower court.

Orders

- a) The appellant Abbasi Ali is not a trespasser.
- b) The award of general damages of 2,000,000/ is set aside.
- c) The respondent Salama Ibrahim Abia as the only lineal descendant, is the rightful beneficiary of the estate of her late father Ibrahim Abia located in Sedatula village, Nakatonya parish, Nyimbwa sub-county, Luwero district.

- d) As the only lineal descendant, Salama is granted letters of administration to her late father's estate.
- e) Abbasi is given 60(sixty) days from the date of this judgment to voluntarily vacate the suit property and in default, an eviction order shall issue in accordance with Land Evictions (Practice Directions) 2021.
- f) On the expiry of 60 days, a permanent injunction shall come into force restraining Abbasi and his agents or successors in title from interfering with Salama's quiet possession of the suit property and management of the estate.
- g) Each party shall bear their own costs of the appeal and the trial in the lower court.

DELIVERED VIA ECCMIS THIS 30TH DAY OF APRIL 2025.

LADY JUSTICE HENRIETTA WOLAYO Legal representation M. A Kajubi & Co. Advocates

M/s JP Baingana & Associated Advocates

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