

UGANDA / JUDGMENT

**Babirye v Matovu Mutalyanikya and
Others (Civil Suit No. 325 of 2006)
[2013] UGHCLD 404 (20 June 2013)**
[2013] UGHCLD 404

COURT

HC: Land Division (Uganda)

BEFORE

Aweri-Opio, J

CASE / FILE NUMBER

Civil Suit No. 325 of 2006

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA

LAND DIVISION

CIVIL SUIT No. 325 of 2006

PLAINTIFF

\$15\$

DAMALIE BABIRYE ROSEMARY

VERSUS VUMUTALYANIKYA & OTHERS DEFENDANTS \$0.976\$ JUDGMENT BEFORE HIS
LORDSHIP RUBBY AWERI OPIO

The plaintiff brought this suit against the defendants who are 10 administrator and administratrix of the estate of the late Yowana Wamala Kiti, praying for the following orders;

- A declaration that the plaintiff is the equitable owner of the a) land comprised in Kyandondo Block 214 plot 213 situate at Kisaasi measuring 2.00 acres.
- General damages against the defendants for interference \$\mathsf{b}\$ with the plaintiff's land.

- injunction restraining/prohibiting permanent Δ preventing the defendants or their agents/servants $\overline{\text{or}}$ persons deriving from them from interfering, evicting and disposing or in any way dealing prejudicially or in any manner contrary to the law with interests and rights of the plaintiff on the land.
- d) An peaceful enjoyment and occupation by the her interest, rights and estate over the suit order for Plaintiff of Property.

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- e) Costs of this suit against the defendants.
- f) Any other reliefs this court deems fit.

The facts constituting the cause of action are contained in the plaint as follows;

- a) By an agreement of sale dated 3/09/1959 the late Yowana Wamala as vendor sold to Harrison Johnson Micheal Ndwokya Sabwe (deceased) as purchaser 2.00 ID acres of land (suit land) and the purchaser paid the full price agreement was lost but ^a copy thereof is in possession of Yowana Wamala or his legal representatives. which was acknowledged by the vendor. The said
- b) Upon payment of the purchase price the late Sabwe lodged ^a caveat dated 4/6/1963 against the vendor's certificate of was lodged. title by virtue of the said sale agreement which was exhibited before the chief registrar of titles before caveat
- c) The late Sabwe with the approval of the late Wamala caused the suit land to be surveyed and demarcated and ^a mutation form was made.

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On 12/8/1969 the mutation form was duly registered as instrument No. KLA 54663, which registration created a subtitle under mailo register volume 1955 folio 9 plot 213 as to 2.00 acres which certificate of title on conversion is now known as Kyandondo Block 214 plot 213 to which the purchaser said caveat was transferred.

\$d\$)

- \$e)\$ That on or about 1966 the late Sabwe in part performance of the said contract of sale with the knowledge and approval of the late Wamala erected a residential /commercial building on the suit-land and that as of \$\overline{1}\$ 22/2/1979 when Sabwe died he was in lawful occupation of and collecting rent from the said building.
- The late Sabwe through negligence or ignorance never \$f\$ demanded for a formal instrument of transfer from the late Wamala in a mistaken belief that the caveat was sufficient 15 document of transfer.
- The beneficiaries of the estate of the late Sabwe including \$g)\$ the plaintiff demanded for instrument of transfer of the suit land but the late Wamala refused to do so on the ground that he never sold the land to the late Sabwe.
- Sometime in August 2003 the 1st defendant forcefully \$h\$ entered into the said land, slashed some of the plaintiff's property and demolished some of the plaintiff's father's \$342\$

house situated the defendant used forceful means to occupy part of the suit land. on the said land, towards the end of 200\ \$ W

- i) That the defendants trespassed on the said land.

The defendants' statement of defence alleged the following;

- 1. cause of action arose in or about 1959. The plaintiff's suit is time barred because the purported
- 2. defendants in respect of the same subject matter The plaintiff's suit was an abuse of court process there being ^a previous suit HCCS No. 798 of 1998 filed by the Administrator General on behalf of the plaintiff against the
- 3. defendants. The plaint does not disclose any cause of action against the
- 4. The late Wamala was ^a registered proprietor of the said land.
- 5. ever agreement. The late Wamala never entered into any agreement of sale of the suit land to the late Sabwe. The defendants denied knowing of or being in possession of any such

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- 6. The caveat lodged by the late Sabwe on the said land was unlawfully registered.
- \$7.\$ The defendants deny knowledge of the mutation form.

- 8. Possession of the said land by the late Sabwe was denied. Sabwe never built any building on the said land and the building on the said land belonged to the late Wamala and was at all material times occupied by his tenants.

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- 9. In 2003 the plaintiff and her agents attempted to illegally occupy the defendants' land by fencing the same but were resisted by the defendants.

Agreed facts:

- The suit land is registered in the names of the defendants as 1. administrators of the estate of the late Yowana Wamala Kiti.
- The particulars of the land are mailo register block 214 plot \$2.\$ 213 land at Kisaasi comprising of 2 acres.
- The title has an encumbrance by way of a caveat lodged by \$3.\$ Harrison Sabwe on 4/6/1963.
- The plaintiff is the daughter of the late Harrison Sabwe. \$4.\$
- The defendants are children of the late Yowana Wamala Kiti. 5.
- The 3rd defendant passed away. 6.

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Agreed issues:

- 1. Whether or not the late Sabwe purchased the suit land.
- $\overline{\$2}$. whether the plaintiff is an equitable owner of the suit property.
- \$3.\$ Whether or not the defendants are the owners of the suit land.

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- \$4.\$ whether the plaintiff or defendants trespassed on the suit land
- \$5.\$ What remedies are available to the parties?

Resolution of the issues.

Issue No. 1. Whether or not the late Sabwe purchased the suit land. For this court to determine the above issue in favour of the plaintiff, the plaintiff has burden of proof under section 102 of the Evidence Act to prove on the balance of probabilities that;

- The late Wamala Kiti sold the suit property to the late \$(i)\$ Sabwe on 3/9/1959.

- That the late Sabwe paid the purchase price of the said (ii) land,
- That the land was donated to the plaintiff by the late (iii) Sabwe in 1965.
- That thereafter the plaintiff took possession of and (iv) used the land for growing thereon food crops and built thereon a residential house for tenants.

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5) O IS ^P intiff relied on the evidence of six witnesses (herself inclusive) attempt to prove the above ingredients. Norah Nalongo Sabwe PW1 testified that her late husband Sabwe purchased the suit property from the late Wamala during the reign of Kabaka Mutesa before Uganda gained independence. That, her late husband and his friends briefed her about this purchase of the suit land and that he (Sabwe) had not acquired the title to the suit land. After the purchase, her husband started cultivating on the suit land and putting ^a small house near the road. Subsequently the late Sabwe gave the suit land to the plaintiff as ^a gift to her and her husband on their marriage in 1965. From there the plaintiff began using the suit land and built ^a house thereon. After the death of the late Sabwe, the plaintiff went to Wamala Kiti to have the land transferred into her names, but the said Wamala told her that he did not know her whereupon the plaintiff reported the matter to the RCs who heard the case and determined it in her favour. She further stated that her late husband made ^a will and that in the said will, her husband stated that the plaintiff owned the suit land. PW1 further stated that her late husband placed ^a caveat on the title.

PW2 Sempijja Michael presented before court a translated version of the will of the late Sabwe exhibit P3.

Kiwanuka Nsubuga Epianeto testified that he was the husband the plaintiff and that he knew the defendants through their father | Wamala Kiti. He testified that the suit land belonged to the plaintiff \ ^I as ^a gift by her late father in ¹⁹⁶⁵ after their wedding as ^a wedding i gift. After the donation the plaintiffs father showed them the land ' and introduced them to the late Wamala Kiti. After that they took over possession of the land and planted cassava, potatoes and also built a house thereon. At the time they took over the land there was ^a small house belonging to the late Sabwe. He stated that the suit land was 2 acres in Kisaasi. It stretched from the main road and the neighbours included Mrs. Bwanika, Mr. Katabira opposite the road and Kiti Wamala on the other side. He stated that they did not live in the house they had built because he was transferred to Masaka and left the place in the care of his late father-in-law who took care of it before he died in 1979. After the death of the late Sabwe the plaintiff continued to visit the land upto 2003 when the son of Wamala the (1st defendant) claimed that the land was theirs. He emphasised that they constructed that house when Wamala Kiti was alive but never complained.

PW4 Dr. Magambo Micheai Sengendo testified that he was the heir to the plaintiffs father and knew the suit property well because the [|] intiffs father told him about it and showed him the same and

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? ^t 'V !' ^r properties elsewhere. He confirmed that the suit property §ed to the plaintiff who got it as a donation from her father before he died. He stated that he was surprised to hear that the family of the defendants was claiming the suit land.

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5)o 15 PW5 Rosemary Damalie Babirye Kiwanuka, the plaintiff testified that the suit property was donated to her as ^a gift by her late father after their wedding in 1965, thereafter her late father introduced her and her husband (PW3) to the late Wamala Kiti as the new owners of the land; that her father told her that he had paid for the land in the presence of the late Kiti Wamala but it had not been transferred into his names. After that they inspected the land and saw its boundaries. From there they started growing crops on the land. Later on they built ^a house thereon. However they could not occupy the same because her husband who was ^a civil servant was transferred to Masaka. They left the house to their father to care take. She told court that neighbours to the suit land are Mr. Bwanika, Mrs Sekakira, the late Byron Kawadwa and Yowana Wamala Kitti on the other side and opposite the road was Mr. Katabirwa. She concluded that her father had put ^a caveat on the land and in the caveat it was to indicated that Sabwe had bought that land by agreement dated 3/09/1959- She also stated that in her father's Will the suit land was mentioned as belonging to her and that it had been bought from

emphasised that Wamala Kiti never complained at any - .jy were using the suit land for cultivation and also Wamala. She < moment when the '' they built there.

PW6 Damulira Ahmed produced registry file in respect of the suit property showing that the property had been caveated.

agreement. The 1st defendant James Matovu Matalyankya denied any knowledge of the late Sabwe buying any land from his father the late Wamala Kiti. He denied any Knowledge of the plaintiff owning any developments on the suit land. He stated that in 1988 the plaintiff came looking for land her father had allegedly bought from his father which his father denied. After asking the plaintiff to produce any document of sale and she produced ^a Will but there was no sale

IS father. The 2nd defendant Jane Nalubega in her testimony also denied any knowledge of the plaintiff owning the suit land. She stated that the suit land belonged to their father and used to be owned by her late

DW1 Henry Sentongo Waiuiya Salongo was a Muluka chief who testified that he knew the late Wamala Kiti who was resident of Kisaasi Trading Centre. He stated that he knew the suit land. He

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stated that he had cross never met the plaintiff and did not know her. In examination he stated that he did not know all the residents who owned land in Kisaasi and that he would not have known if Sabwe had acquired land in 1959/1960. He concluded that he did not know the land claimed by the plaintiff.

late Wamala in conclusion that arising from the land to his daughter, the plaintiff in ¹⁹⁶⁵ upon donated the same her marriage to Mr. Kiwanuka From the above evidence, it is very clear that sale agreement which should have proved the existence of a sale between the late Sabwe and the late Wamala Kiti was not produced before this court. This is aggravated by the fact that both of them died before this suit was instituted. Death therefore robbed court of any chance to investigate the demeanours of the two parties in respect of the integrity of the alleged transaction. However, from the available evidence this court should be able to decide whether or not there was ^a transaction of sale between the two deceased old friends. From the evidence of Norah Nalongo Sabwe who was 84 years old, ^I am able to agree that the late Salongo Sabwe had a dealing with the 1959 in respect of the suit land. It is also my above transaction the late Sabwe

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land which he had bought from the late Wamala Kiti to his daughter the plaintiff. detail mentioning all the neighbours surrounding the land. They testified that when they were cultivating and constructing thereon, the late Wamala never complained or obstructed them if there was no sale of land ^I do not think the late Sabwe would have donated the same as ^a gift for the holy matrimony of his beloved daughter. Further to that, ^I do not think the late Sabwe would have indicated in his Will that he had given the plaintiff PW5 and her husband Nsubuga Epianeto PW3. Both the nuka Nsubuga PW3 testified that after the donation, the late bwe introduced them to the late Wamala as the new owners of the suit land and they took possession of the same by cultivating crops and constructing thereon house. In their testimonies, they described the land in

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IS" Zo Another important evidence is the caveat which the late Sabwe instrument No. Kia 38237 dated 1963. In that caveat registered as the late Sabwe claimed as ^a purchaser of 2 acres by nature of the agreement dated 3rd September 1959 claiming to have purchased from Yowana Wamala. There was also mutation form relating to the suit property signed on 27/6/1963 and the signatures were Yowana Wamala as vendor and Harrison Sabwe as beneficiary of the survey. The import of the two documents would go to enforce the

implication that there was a sale agreement between the late Sabwe and Wamala in respect of the suit land. In my view the circumstances of this case call for analysis of evidence according to King's Solomon's paradigm in the case of the two prostitutes who were contesting ownership of a child in 1Kings 3:16-28. Therefore on the F balance of probabilities the evidence before court points to the fact even in the absence of sale agreement the late Sabwe was the owner of the suit land, which he acquired from the late Yowana Wamala Kiti and according to the evidence of the plaintiff and her witnesses and the caveat and mutation form looked at together, the $\$10$ only logical and truthful conclusion is that, the late Sabwe purchased the suit land from the father of the defendants. It is also important to note that the defendants' evidence did not contravene the evidence adduced by the plaintiff nor the exhibits cited. It is therefore my conclusion that the late Sabwe purchased the suit land $\$15$ which he donated to the plaintiff who took possession and built thereon a residential house. Accordingly, the st issue is answered in favour of the plaintiff.

Issue No. 2, 3 and 4 put together, I must say that the st issue is central in the determination of this suit. 20 Much as I would observe that most interest in land exist in law and in equity, in the instant case following my conclusion on the $\mathbf{1}^{\text{st}}$ issue

^P ticular the fact that the late Sabwe donated the same to Wg . the Plaintiff ¹ do not see any logic in arguing the 2nd issue and 3rd part from saying that after the late had purchased the suit p roperty from Yowana Wamala, the said land ceased being the property of Yowana Wamala Kiti. After the late Sabwe donating the same to the plaintiff it logically followed that the plaintiff became the owner of the suit land, thereby making the plaintiff the equitable owner of the suit land and the defendants not the owners of the suit property. Therefore the defendants are trespassers on the suit land.

Issue No. 5 Remedies available;

- 1. Having found that the plaintiff is both legal owner and equitable owner of the suit property it is declared that the plaintiff is the legal and equitable owner of the suit land

- (S 2. 2.0 General damages for interfering with the suit property. The learned counsel submitted that the plaintiff be awarded Shs.. 70,000,000/= by way of general damages in view of the high handedness and arbitrary acts of the defendants. The above figure is on a higher side more especially since the plaintiff did not adduce in court the activities which were taking place on the suit property. ^I also note that the plaintiff and the

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defendants are close neighbours because of the suit land. The current dispute should not therefore be allowed to worsen their human relationships. The dispute was a miscalculation on the defendants due to human error. There should be room for reconciliation even at the initiative of the court. In view of the above circumstances I would offer the plaintiff general damages of 10,000,000/= (ten million only).

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- Permanent injunction to issue against the defendants, \$3.\$ or their agents, servants from interfering, evicting and FO disposing or in any way dealing with the interests and rights of the plaintiff on the suit land.
- An order for quiet enjoyment and occupation of the \$4.\$ suit land by the plaintiff.
- Costs of the suit. \$5.\$
- Interests on the above suits at court rate from the date 6. of judgment until payment in full.

Ω JUDGE \$20/06/2013\$

26/07/2013

Court:

Magambo Victor holding brief for Mr. John Fisher Kamiembwa for the defendants.

Samali Kide holding brief for Counsel Wycliff Birungi for the plaintiff. Dillis for court clerk

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Judgment read in the presence of the plaintiffs.

ASSISTANT REGISTRAR 26/07/2013

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