

UGANDA / JUDGMENT

Mayanja David v Sewanona Samuel (Civil Suit No. 6 of 2021) [2025] UGHC 561 (19 February 2025) [2025] UGHC 561

COURT

High Court of Uganda

BEFORE

Oyuko Anthony Ojok, J

CASE / FILE NUMBER

Civil Suit No. 6 of 2021

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MPIGI****CIVIL SUIT NO. 06 OF 2021**

MAYANIA DAVID.....

VERSUS

SSEWANONA SAMUEL.....

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK**Judgment**

The instant suit is for trespass, vacant possession of land comprised in Butambala 10 Block 94 Plot 143 at Kabuye, fraud, specific performance, Mesne profits, special damages, general damages, interest and costs of the suit.

It is the plaintiff's case that he is the registered proprietor of land described as Butambala Block 94, Plot 143 at Kabuye measuring approximately 0.9390 Hectares which forms part of the suit property. The said Plot 143 was curved out of land comprised in Butambala Block 94 Plot 91 at Kabuye measuring approximately 1.040 hectares to which the plaintiff was formerly registered.

The plaintiff purchased the said land from a one Kansiime Francis t/a Fraka Associates while executing a court order vide Mujukira Steven versus Walugya Sande Alexander vide Mpigi Chief Magistrates Court, Civil Suit No. 0020 of 2011. 20 Upon, purchase of the suit land, the plaintiff was subsequently registered on the 5th day of February, 2013 and later subdivided the said plot 91 into plots 142 and 143.

The plaintiff then sold Plot 142 and retained Plot 143 which forms the basis of the instant suit. On the 3rd June, 2015, the plaintiff and the defendant entered into a 25 sale of kibanja agreement for two portions of Kibanja all forming part of the defendant's registered land comprised in Butambala Block 94 Plot 83 at Kabuye at a consideration of UGX 5,000,000/=. The boundaries of the said kibanja are elaborated in the agreement of sale. However, when the plaintiff attempted to take vacant possession of the said kibanja, the defendant declined, and the plaintiff has 30 to date never accessed and or used the said kibanja.

That the plaintiff on several occasions conducted surveys on the land either individually and jointly with the defendant and his surveyors and established that the defendant had trespassed on the plaintiff's Plot 143 that was formerly Plot 91.

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Representation:

Counsel Akampurira Jude appeared for the plaintiff while Kansiime Erias appeared for the defendant. Both parties filed written submissions.

.. Y .. Issues:

- 1. Whether the defendant is a trespasser on the plaintiff's suit land comprised in Butambala Block 94, Plot 143 at Kabuye?
- 2. Whether the defendant provided vacant possession of the sold part of kibanja to the plaintiff?
- 3. Whether the parties are entitled to the remedies prayed for?
- 10 Preliminary objections:

Counsel for the defendant raised preliminary objections to the effect that;

1. The suit is unmaintainable under the law since the entire land belonged to the defendant's parents Senfuka Onesimo and Feibe B. who later died in 1995, the entire land was distributed to the children of the deceased which included the defendant.

That the defendant's witnesses stated that after the distribution, the biological brother to the defendant gave him part of the kibanja on his land in 1995 which he started using and in 1997, the defendant constructed thereon a permanent house where he stays up to date.

20 That the plaintiff bought the said land of Walugya Sande Alexander in 2013 from court under execution when the former owner (the defendant's biological brother, Walugya Sande Alexander) was in prison serving a seven years sentence subject to the defendant's equitable interest acquired in 1995 unchallenged.

25 Counsel noted that it is now over 28 years since the defendant has been using the kibanja uninterrupted and thereon exists a public road for over 15 years which the plaintiff now intends to close. That the plaintiff at the time of purchase did not conduct any due diligence. That even if one were to count from the period of 1995 when the land was distributed and the suit filed it is a period of 26 years.

30 Counsel went onto define acquiescence according to Halsbury's Laws of England — equitable jurisdiction (Vol. 47 of 2021) as; used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time. And also relied on the case of *Ibaga Taratizio v. Tarakpe Faustina*, C. A No. 4 of 2017. That the defendant's brother did not interrupt the defendant's actual possession hence the plaintiff who purchased in 2013 from court with a court bailiff cannot exercise any right that was acquiescenced by the former owner.

Counsel for the plaintiff in rejoinder submitted that according to DEX2 being the certificate of title, the suit land was first created in 2010 and that was when the defendant was registered as a proprietor as such the land did not belong to Senfuka $\text{\$}\text{\textit{S}}\text{\$}$ Onesimo and Feibe B. That from 2010 when the defendant was first registered and 2012 when Senfuka got registered; to when the suit was filed in 2021 is a period less than 12 years. Not to mention that the plaintiff got registered on the suit land Block 94 Plot 143 on the 5th February, 2013. Thus, the cause of action arose when the plaintiff got interest in the suit land. 10

Counsel added that it is trite that trespass as a cause of action is not affected by limitation since every new day of trespass creates a new cause of action. That the plaintiff upon realizing the trespass in 2017 according to PEX4 engaged the defendant over the same and subsequent surveys were conducted. The defendant's failure to comply led to the filing of the instant suit.

In regard to the existence of the public road, counsel submitted that this is a submission from the bar since the claim for the road did not arise anywhere in the trial and bringing it up now is a departure from the pleadings. That PEX4, PEX5 and PEX8 none of them show that there exists an access road on the plaintiff's plot 143.

Further, that the defendant did not plead adverse possession but rather claimed that the suit land was gifted to him by his brother. He also cannot claim to be a lawful occupant of the suit land. That whereas counsel submitted that the plaintiff bought land from the defendant's brother who was in prison, they did not show

any law that was contravened in regard to that transaction since the due process 25 was followed.

I have carefully considered the submissions for both parties in regard to the preliminary objection and it is my finding that the suit land initially belonged to Alexander Senfuka Walugya, Sebayima Mayanja and James Kajongolo Agrrey who were minors before the defendant acquired a title for Block 94 Plot 99 in 2010 as

- 30 evidenced by DEX2. The plaintiff got registered on the suit land in 2013 as evidence by PEX2 and stated that he got to know about the trespass in 2017, as such the suit cannot be said to have been filed 28 years from the defendant acquired the same.
- The issue of adverse possession does not come into play in this case since the 35 defendant claims that he got the suit land as a gift from his brother. However, he did not avail court with any proof in that regard. Be that as it may the plaintiff

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brought this suit for trespass, thus limitation is not applicable and even if it were the suit was filed within time since the plaintiff got registered in 2013. This suit is therefore maintainable under the law. This preliminary objection is hereby overruled.

2. An action for recovery of land cannot be brought after a period of 12 years. \$5\$ Counsel for the defendant submitted that this matter has been filed 26 years since the defendant occupied the suit land and the plaintiff bought without carrying out any due diligence.

Counsel for the plaintiff in rejoinder submitted that the instant case is not for recovery for land as claimed for the defendant.

Having found that the plaintiff in the instant case bought the suit land in 2013, it is my finding that the suit is not barred by limitation for having been filed in 2021 even though limitation is not applicable since it is a matter on trespass. This preliminary objection is also overruled. I will now turn to the merits of the suit.

Resolution of issues: 15

> In civil matters the burden of proof lies on the plaintiff to prove their case as against the defendant and the standard of proof is on a balance of probabilities.

Section 101 of the Evidence Act provides;

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

- (2) When a person is bound to prove the existence of any fact, it is said that 25 the burden of proof lies on that person".

Section 102 provides that;

"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

Section 103 provides;

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

Section 104 provides;

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"The burden of proving any fact necessary to be proved in order to enable" any person to give evidence of any other fact is on the person who wishes to give that evidence."

Issue 1: Whether the defendant is a trespasser on the plaintiff's suit land comprised in Butambala Block 94, Plot 143 at Kabuye?

Counsel for the plaintiff submitted that it is an undisputed fact that the plaintiff is the registered proprietor of land registered in Butambala, Block 94 Plot 143 at 10 Kabuye measuring approximately 0.939 hectares as evidenced by PEX2. That the defendant in the instant case entered onto the plaintiff's land by making developments thereon and also erected a fence and made an access road on the property all without the consent of the plaintiff. That to support this piece of evidence the plaintiff tendered in court a valuation and survey report dated 8th 15 January, 2017 marked as PEX4; another survey report dated 28th September, 2020 - PEX5; PEX7; PEX8 and PEX9 all pointing to the fact that the defendant entered onto the plaintiff's land.

Counsel added that while the defendant denied having ever engaged a surveyor; PEX6, PEX7 and PEX8 prove the contrary. That from the defendant's evidence, it is 20 clear that the Plot 83 belonging to the defendant and Plot 91 formerly belonging to the plaintiff were all curved out of land formerly described as Butambala Block 94 Plot 59. That it is also uncontroverted that the mutations and distribution of Plot 59 did not happen until 2010. That this therefore proves that the defendant lied on oath when he claimed that the land was shared among siblings in 1995. 25

That DW1 during cross examination was tasked to bring evidence to show that he was given the kibanja measuring 41ftx500ft by Alexander Senfuka but he did not produce the same. That he testified that he did not have such written evidence. Additionally, that the alleged giver of the kibanja who is the plaintiff's predecessor in title, is still alive, the defendant who doubles as his brother did not bring him to court to testify on his behalf. That the defendant having failed to provide documentary evidence to prove his ownership of his equitable interest in Plot 143, indicates that he has none.

Further, that Alexander Senfuka Walugya was until December, 2012 a joint land owner with Sebayima Maynja, James Kajongolo Aggrey and Feibe B. as per PEX1. 35 Thus, he could not give what he did not have since a joint tenant cannot legally act on land exclusively without others since no evidence has been adduced to show that any portion of land had been given out prior to the subdivisions done in 2012.

Counsel for the defendant on the other hand submitted that the defendant has a kibanja thereon which he acquired from his biological brother Walugya Sande Alexander in 1995 and built thereon a permanent residential house in 1997, another house and has been living there together with his family and sold part of it to the plaintiff in 2015. And as such the defendant cannot be a trespasser on his own land. That during the locus in quo visit the plaintiff could not show court what his claim against the defendant was yet in court he stated that the issue at hand was about the boundary which was confirmed by PW2.

10 Counsel concluded that since the defendant has been on the suit kibanja since 1995, developed the same uninterrupted, this court should find that he cannot be a trespasser on his own land. That the plaintiff ought to have carried out due diligence before purchasing the suit land and the plaintiff accepted and bought from the defendant in 2015.

15 I have carefully considered the pleadings of both parties, the evidence as adduced in court and the submissions in this regard.

It was the defendant's evidence that he got the kibanja in 1995 and got title in 2010 for Block 94 Plot 83 and that the title was originally in the names of Kajongolo James, Sebalime George William. And this land has since been subdivided. That he has a kibanja on the plaintiff's land which was given to him by his brother in 1995 and he has also ever sold to the plaintiff a kibanja in 2015 at UGX 5,000,000/=.

While the plaintiff contended that the defendant in the instant case had entered onto his land by making developments thereon and also erected a fence and made an access road on the property all without his consent.

25 30 The plaintiff during cross examination stated that the part occupied by the defendant at the time of purchase was one room of the boys quarters and PEX3 indicates that there is an access road which existed at the time of purchase. He declined having an intention to close the road. He also stated that the issue at hand was a boundary issue which he confirmed even in reexamination. That the defendant sold to him the kibanja and remained in possession of the same.

During the locus in quo it was observed that the defendant had old structures on the suit land that were in existence at the time the plaintiff purchased the same. The plaintiff was categorical that at the time of purchase he did not engage the local leaders nor did he visit the land physically before purchase.

35 The plaintiff only got to learn that part of the defendant's kibanja falls on the plaintiff's titled land upon carrying out surveys. From the evidence as adduced in court I find that the plaintiff did not carry out due diligence before purchase

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otherwise he would have known that the defendant's kibanja partly falls on his land so does the access road. These are not things that happened afterwards but rather before the plaintiff purchased his land.

In the case of Sir John Bageire v. Ausi Matovu CACA No.07 of 1996, at page 26, it was held that:

> "Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations; not only of the land but of the sellers before purchase."

According to the case of Justine E. M. N. Lutaaya v. Starling Civil Engineering Co. SCCA No.11 of 2002, trespass to land is premised upon interference with the possession of land.

In line with the above authority, I find that the defendant is not a trespasser on the suit land. This issue is hereby resolved in the negative.

Issue 2: Whether the defendant provided vacant possession of the sold part of kibanja to the plaintiff? 15

It was submitted for the plaintiff that the defendant had never provided vacant possession of the kibanja he sold to the plaintiff. That it was the plaintiff's evidence that the defendant by agreement of sale dated 3rd June, 2015 sold to the plaintiff two portions of kibanja for a consideration of UGX \$5,000,000/\$ = from his land

where he was the registered proprietor. That the sale agreement clearly shows that 20 the land that was sold was a kibanja which was curved out of the defendant's land Block 94 Plot 83.

Counsel added that it is admitted that Plots 143 and 83 are distinct and belong to the plaintiff and the defendant respectively, it is clear that the defendant has never availed vacant possession of the kibanja. Thus, the defendant should avail vacant possession of the said kibanja and in the alternative, if the defendant is not willing to do the same, refund the consideration with interest.

Counsel for the defendant on the other hand submitted that the plaintiff during the locus in quo failed to show court the kibanja he purchased from the defendant in 2015.

While the defendant showed court a kibanja he sold to the plaintiff at UGX \$5,000,000/\$ = which stretches from the front where the plaintiff constructed thereon two shops, where the fence was and the other part with a banana plantation and there also exists a public road. And the plaintiff is in full occupation of the said kibanja uninterrupted.

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Counsel for the plaintiff in rejoinder submitted that there exists no road in the plaintiff's Plot 143. That it is the defendant that forcefully uses part of it as an access road to the rear part of his property.

PW2 stated that the access road is only used by the defendant and that the suit is about boundaries between the parties.

It is my considered view from the evidence as adduced in court and the observations at the locus in quo that the plaintiff is in full occupation of the kibanja that was sold to him by the defendant. The boundaries according to the sale agreement between the parties were same ones observed at the locus in quo. It is

10 therefore not correct to state that the plaintiff has never been granted vacant possession of the kibanja he bought from the plaintiff. This issue is hereby resolved in favour of the defendant.

Issue 3: Whether the parties are entitled to the remedies prayed for?

- 15 Counsel for the plaintiff prayed for; a declaration that the defendant is a trespasser on the suit land; an order for vacant possession of the plaintiff's land comprised in Butambala Block 91 Plot 143 at Kabuye by the defendant; specific performance and surrender of land the subject of the sale of land agreement dated 5th June, 2015 since the defendant was under the obligation to avail vacant possession of the kibanja to the plaintiff which he has not done to date.
- 20 And in the alternative, if the defendant cannot avail vacant possession of the kibanja purchased by the plaintiff on the 5th June, 2015.

Counsel prayed that court orders that the defendant refunds the consideration of UGX 5,000,000/= together with interest at commercial rate from the date of agreement until payment in full.

25 The plaintiff also prayed for special damages to a tune of UGX 11, 200,000/= as pleaded under paragraph 5 of the plaint and general damages to a tune of UGX 50,000,000/= together with interest and costs.

Counsel for the defendant on the other hand prayed that the plaintiff's suit should be dismissed with costs.

30 I find and hold that the plaintiff in the instant case has not proved his case as against the defendant on a balance of probabilities. This suit is hereby dismissed with costs.

I so order. Right of appeal explained.

OYUKO ANTHONY OJOK**5 JUDGE****19/02/2025**

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