

UGANDA / JUDGMENT

Mwenge Dairy Cooperative Society Ltd & Anor v Kachope (HCT – CA – 22 OF 2017)

[2017] UGHCLD 239 (31 October 2017)

[2017] UGHCLD 239

COURT
HC: Land Division (Uganda)

BEFORE
Ojok, J

CASE / FILE NUMBER
HCT – CA – 22 OF 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HCT – CA – 22 OF 2017

(Arising from FPT – 21 – CV – CS – 12 of 2013)

1. MWENGE DIARY COOPERATIVE SOCIETY LTD
2. ARSEN KALYEBARA APPELLANTS

VERSUS

BADRU KACHOPE..... RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the judgment and decree of His Worship Muhumuza Asuman Magistrate Grade one at Kyenjojo delivered on the 24th of February 2017.

Background:

The Respondent instituted a Civil Suit against the Appellants for the following orders and declarations;

1. That the suit land known as Block C Plot 8 along Kampala Road, Kyenjojo Town Council legally belongs to the Respondent.

2. A permanent injunction restraining the Appellants, their agents and successors from occupying and utilizing the suit land.
3. An eviction order for vacant possession.
4. General damages.
5. Costs

The Appellants alleged that in 1968 they were allocated the suit land measuring 100ft x 120ft by the then Parish Chief of Kirongo Parish to build a milk-cooling centre for farmers in Mwenge County. That in 1995 the then Town Clerk of Kyenjojo approved their building plan for a veterinary drug shop, stores and general shops on what was left of the unutilized part of the land which encompasses Plot 8 the disputed land. The Appellants also contended that they had since the 1980s been making bricks on the said land.

The Respondent on the other hand averred that he applied for the suit land comprised in what is known as Plot 8 from Uganda Land Commission which was the Controlling Authority in 1975, and the Plot was duly allocated to him. That the process of application and acquisition was done by the Respondent's friend Mzee Said and that the Respondent personally looked at the documents and was satisfied that the property was allocated to him and was in the names of an Indian whose lease had expired.

The issues for determination in the lower Court were:

1. Whether the suit land belongs to the Plaintiff/Respondent?
2. Whether the Defendants/Appellants have trespassed on the suit land?
3. What are the remedies available to the parties?

Judgment was passed in favour of the Respondent. The Respondent was found to be the owner of the suit land, the Appellants were said to be trespassers, general damages of UGX 6,000,000/= were awarded, and costs.

The Appellants being dissatisfied with the above decision of the trial Magistrate lodged the instant appeal whose grounds are;

1. That the Learned trial Magistrate erred in law and fact, when he failed to evaluate the evidence before him properly, thus making a wrong conclusion that the Respondent had been offered the suit land by the Uganda Land Commission in 1975.
2. That the Learned trial Magistrate erred in law and fact, when he misdirected himself on the law governing equitable interest in land thus arriving at a wrong conclusion that the Respondent was an equitable owner of the suit land.

3. That the Learned trial Magistrate erred in law and fact, when he disregarded the evidence of the Appellants on their long usage of the Land and thus arriving at a wrong conclusion that the suit land was vacant until 2012, when the Appellants trespassed upon it.
4. That the Learned trial Magistrate erred in law and fact, when he held that, he is protecting the powers of the Uganda Land Commission and Land Boards to apply the law uniformly thus erroneously granting the suit land to the Respondent.
5. That the Learned trial Magistrate erred in law and fact when he decreed the suit land to the Respondent and declared the Appellants as trespassers there on.

Representation:

M/s Rwabwogo & Co. Advocates appeared for the Appellants and Counsel Ahabwe James Represented the Respondent. By consent both parties agreed to file written submissions.

Duty of the first Appellate Court:

It is the duty of this Court as a first Appellate Court while entertaining this appeal to re-evaluate the evidence as a whole to a fresh and exhaustive scrutiny and making up its own mind in light of the grounds of appeal considering the fact that it neither saw nor heard the witnesses in the lower Court. (See: *Fredrick Zaabwe versus Orient Bank Ltd*, S. C. C. A No. 4 of 2006, ULR Volume 1, Page 98 at 130).

Submissions on the grounds of the appeal:

Grounds 1 and 3 are discussed jointly, 2 and 4 jointly and 5 separately.

Grounds 1 and 3:

1. That the Learned trial Magistrate erred in law and fact, when he failed to evaluate the evidence before him properly, thus making a wrong conclusion that the Respondent had been offered the suit land by the Uganda Land Commission in 1975.
3. That the Learned trial Magistrate erred in law and fact, when he disregarded the evidence of the Appellants on their long usage of the Land and thus arriving at a wrong conclusion that the suit land was vacant until 2012, when the Appellants trespassed upon it.

Counsel for the Appellants submitted that whereas the Respondent claimed to have a registerable interest in the suit land, Section 59 of the Registration of Titles Act is instructive as it provides for a Certificate of title as being conclusive evidence of ownership save for where fraud is involved.

Counsel for the Appellants argued that instead of the Respondent presenting a title, he strangely relied and presented two general receipts purporting to be payments for the suit land. He further made reference to the Respondent's evidence in cross-examination in the lower Court that indeed he confirmed that he was given a lease offer and the land belonged to him but the receipts so presented did not corroborate with the evidence of entries from ministry of lands.

Further, that under **Section 106** of the Evidence Act it is provided that, when any fact is within the knowledge of any person, the burden of proving that fact is upon that person. He submitted that the Respondent had the duty to prove legal ownership to the suit land by providing a Certificate of title. He made reference to the authority in **Dr. Vincent Karuhanga T/A Friends Poly Clinic versus NIC & URA [2008] HCB 151**, where it was held that the general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. He concluded that the Respondent failed to prove the existence of a lease and his claim could not be sustained on a balance of probabilities.

Counsel for the Appellants noted that the trial Magistrate failed in his duty to correctly evaluate evidence and had he done so, he would have arrived on a singular logical conclusion that the Respondent was not a registered owner and consequently with no locus or cause of action against the Appellants. He applauded the learned trial Magistrate for observing at Pg. 7 & 8 of his judgment that none of the parties had acquired legal interest in the land, but faulted him in holding that it was the Appellants with no locus on the suit land since the grant by the Parish Chief was unlawful.

Counsel for the Appellants further faulted the trial Magistrate for not directing himself to the plea of bonafide occupancy enshrined under **Section 29(2)** of the Land Act, Cap. 227. He argued that the Appellants stay on the land had not been challenged for 27 years prior to the 1995 Constitution. He concluded that the learned trial Magistrate should have found that the Appellants were the rightful owners as bonafide occupants.

In response, Counsel for the Respondent raised a preliminary objection to the effect that the Appellants Counsel diverted and did not address Court on the gist in Grounds 1 and 3 as jointly argued, and in so doing offended **Order 43 Rule 2(1)** of the Civil Procedure Rules. Counsel argued that by the Appellants' Counsel arguing principles of the Torrens system of land registration and principles relating to tenancy by occupancy, he was introducing new principles that were never grounds of appeal raised by the Appellants and thus the two grounds be struck out.

The Respondent's Counsel however without prejudice went on to submit that the learned trial Magistrate properly evaluated the evidence when he found that the Respondent had been offered the suit land by the Uganda Land Commission in 1975. He referred to the evidence of PW1 the Respondent who testified in the lower Court that he applied for the suit land from the Controlling Authority the Uganda Land Commission in 1975 and was duly allocated to the Respondent.

Counsel for the Respondent further referred to the evidence of PW2 (Alinda Peter) who in the lower Court stated that the plots in the area where the suit land is located are statutory plots having been plotted and surveyed in the 1950s and that the Respondent applied for Plot 8 in 1975 and acquired the same according to the information on the file with Kabarole District Land Board.

Counsel for the Respondent concluded that the learned trial magistrate evaluated the evidence properly and in doing so compared the interest of the Appellants claiming title through the Parish Chief while the Respondent had been allocated by the Uganda Land Commission which had authority to do so by virtue of **Section 1** of the Public Lands Act, 1969. That the Appellants' submissions based on **Section 59** of the Registration of Titles Act and **Section 29(2)** of the Land Act are irrelevant and not applicable in the circumstances.

Grounds 2 and 4:

2. **That the Learned trial Magistrate erred in law and fact, when he misdirected himself on the law governing equitable interest in land thus arriving at a wrong conclusion that the Respondent was an equitable owner of the suit land.**
4. **That the Learned trial Magistrate erred in law and fact, when he held that, he is protecting the powers of the Uganda Land Commission and Land Boards to apply the law uniformly thus erroneously granting the suit land to the Respondent.**

Counsel for the Appellants submitted that the learned trial Magistrate held that the Respondent was an equitable owner of the suit land because he applied for it in 1975 and again in 2000 as per the testimony of PW2 Peter Alinda the Land Officer Kabarole District. However, the Appellants provided evidence of approved plans of 1995 authorising them to construct on the disputed land. He cited the learned author of *"Principles of Land Law in Uganda", John T. Mugambwa* at Pg. 60 on equitable interest. That in situations where all rival claims are equitable interests and are equal in all respects, priority of time gives better equity.

Counsel for the Appellants further added that the two rival claims are not equal since the Respondent has never stayed or utilized the land, hence faulting the learned Magistrate in adjudging the suit land in favour of the Respondent.

He further argued that the Respondent did not challenge the evidence of long usage of the suit land by the Appellants and that the Respondent's application marked DEc had glaring gaps. It did not bear any stamp from the land office, it was incomplete, had no sketch plan of the plot, and had no signatures of neighbours and members of the area land committee, which are very important steps in applying for freehold land. Counsel concluded by submitting that the trial Magistrate misdirected himself when he referred to the application as giving rise to equitable ownership.

Counsel for the Respondent on the other hand submitted that the Appellants failed to address grounds 2 and 4. That the trial Magistrate was wrongly faulted as he did not in any way consider the law on the rival equitable interest and that all authorities cited by the Appellants are inapplicable. He concluded that if the principle of first in time in equity is applied, the Respondent would still be considered first in time since he acquired his interest in 1975 while the Appellants' claim of interest was by a document dated 18/6/2012.

Ground 5:

That the Learned trial Magistrate erred in law and fact when he decreed the suit land to the Respondent and declared the Appellants as trespassers there on.

Counsel for the Appellants cited the authority of **Justine E. M. Lutaya versus Stirling Civil Engineering Co. SCCA No. 11 Of 2002** for the definition of trespass. He faulted the learned trial Magistrate in holding that the Appellants were trespassers. That the Respondent was not in possession of the suit land and was never offered the land by a Government official and never utilized the same for more than 12 years before the coming into force of the 1995 Constitution unchallenged. Thus, it was improper for the trial Magistrate to find the Appellants as trespassers.

Counsel for the Respondent on the other hand submitted that upon acquiring the land by the Late Said all documentation for proof of ownership were equally obtained and that the Respondent had poured building materials on the suit land ready to construct but were stolen by the Appellants. Counsel concluded that the above documents were enough to prove constructive possession and the Appellants entry on the Respondent's land in 2012 amounted to trespass.

Resolution of the Appeal:

I have carefully considered the submissions of both Counsel and perused the Court record. I now turn to the grounds of the appeal.

Grounds 1 and 3:

1. **That the Learned trial Magistrate erred in law and fact, when he failed to evaluate the evidence before him properly, thus making a wrong conclusion that the Respondent had been offered the suit land by the Uganda Land Commission in 1975.**
3. **That the Learned trial Magistrate erred in law and fact, when he disregarded the evidence of the Appellants on their long usage of the Land and thus arriving at a wrong conclusion that the suit land was vacant until 2012, when the Appellants trespassed upon it.**

Counsel for the Respondent raised a preliminary object to the effect that the Appellants' Counsel had not addressed the gist in the above grounds thus offending **Order 43 Rule 2(1)** of the Civil Procedure Rules, hence the grounds should be struck out.

In regard to this preliminary objection I do not see how Counsel for the Appellants' discussion of the principles of Torrens' system of Land Registration and the land principles relating to tenancy by occupancy prejudices the Respondent. The above principles all relate to land ownership which is the gist of the instant case.

The error is not so grave and can be cured by **Article 126(2)(e)** of the Constitution of the Republic of Uganda, 1995, which is to the effect that substantive justice is to be administered without undue regard to technicalities.

In the case of **Re Christine Namatovu Tebajjukira, [1992-93] HCB 85**, it was held that the administration of justice requires that the substance of disputes be investigated and decided on their merits, and errors and lapses should not necessarily debar a litigant from the pursuit of his rights.

This preliminary objection with all due respect is not tenable and is accordingly overruled and Grounds 1 and 3 maintained.

Section 1 of the Land Reform Decree 1975, the law in force then declared all land in Uganda Public land to be administered by the Uganda Land Commission in accordance with the Public Lands Act of 1969, subject to modifications bringing the Act into conformity with the Decree.

Section 23 (2) of the Public Lands Act 1969 provided that Uganda Land Commission would grant to the urban Authorities of designated areas, such areas, such lease and on such terms and conditions as the Minister would direct and any lease so granted would be deemed to be a statutory lease. The controlling Authority then had capacity to lease out the land entrusted to it under the statutory lease to individuals.

Under the Legal Regime in 1975 for an Urban Authority to be constituted into a controlling Authority, and hence acquire capacity to lease land or confer any similar interests in land there had to be proof of prior grant of a statutory lease by Uganda Land Commission.

In this particular case both PW1 and PW2, testified in the lower Court that the Respondent applied for the suit land in 1975 from Fort Portal lands through his agent the Late Said.

PW1 the Respondent stated*; “The Late Said was given papers and he would*

give them to me whenever I would come home.

The documents were the ones I got from Lands

and the plan ... I returned and found Said had

already died. I saw some documents and others

I am still looking for them. I saw the receipts

which I have, the originals are in the lands

office.”

PW2 Alinda Peter the Senior Land Management Officer for Kabarole testified that Plot 8 under file cover LW/1638 which is the suit land is currently owned by Badru Kachope according to the legal record and that the same record indicates that he started showing up on the land on 10th January 1975. It was his evidence that the Respondent applied and paid for the application fees then but the application itself of 1975 was not in their records but rather another application of 17th June 2000 was on file. He further testified that there was no lease offer for the application of 2000 but only a recommendation and that the two plots were separate, each identified by Plot numbers with different measurements with different survey mark stones, all this was done in 1959.

In cross examination PW2 testified that one becomes a registered owner of the land by applying to the Controlling Authority after which he or she is expected to get a title and that the Respondent is recorded as a sitting tenant but not yet a registered owner and he referred Court to the 2000 application.

Counsel for the Respondent submitted that right from the trial Court that Plot 8 the suit land was duly allocated to the Respondent in 1975.

It is my finding that the Respondent in this appeal did not acquire any legal interest in the suit land as claimed. There is no evidence on record for a grant of a lease by Uganda Land Commission to the Respondent. The legal regime at the time, the land reform decree 1975, under **Section 2(1)** provided as follows;

“There shall be no interest in land other than land held by the Commission which is greater than a leasehold, and accordingly all freehold in land and any absolute ownership, including mailo ownership, existing immediately before the commencement of this decree are hereby converted into mailo.”

The implication of the above section is that the Respondent could only acquire a statutory lease from Uganda Land Commission. A lease offer in this case would be contained in a lease agreement specifying the Redendum and Habendum and the conditions for the grant. No such document was presented to the trial Court or this Court; all that the Respondent relies on are two general receipts purporting to be payments for an application for Plot 8 and costs for the prints respectively. The receipts bare no formal stamp for the Authority to which they were paid nor are they headed with the name and details of the issuing Authority.

In as much as PW2 Alinda Peter attempted to corroborate the evidence of PW1 the Respondent, his testimony falls short of what should be believed. He told Court that Plot 8 is owned by the Respondent who made an application and paid fees but could not see the application made in 1975 except that made in 2000. It is clear from the record that there was no evidence of any application by the Respondent. An application alone cannot be said to be evidence of grant of a lease even if such evidence did exist. One wonders what term of exclusive possession was granted to the Respondent. Could Uganda Land Commission have granted an indefinite lease to the Respondent? That in law is untenable.

The Appellants on the other hand submitted that they were granted the land in 1968 by the Sub-County Chief DW2 Kalyebara Samson who in his testimony stated that on the 25th/9/1968 the Appellants made a verbal application for land to construct a diary plant and a veterinary drug shop.

DW2 together with his Committee sat and allocated the land measuring 100ftx120ft. The decision to grant the land was made in writing but a copy of the same was never tendered in Court. He further testified that in 1968 the Public land was vested in Parish Chiefs and the same was not surveyed and was without plot numbers.

The legal regime at the time required that the Urban Authority had to acquire a statutory lease from Uganda Land Commission. (See: Section 23 (2) of the Public Lands Act, 1969).

It is note worthy that the grant of what is now Plot 6 and 8 to the Appellants by the Parish Chief on 25/9/1968 predates the Public Lands Act No. 13 of 1969. Evidence was led by the Appellants during trial in the lower Court to the effect that the land in question was allocated to the Appellants in 1968. It was the evidence of the Parish Chief who allocated the land to the Appellants that he had authority at the time to allocate such vacant public land.

I agree with the finding of the learned trial Magistrate that the Parish Chief and his Committee did not have the Authority to allocate the land under the Public Lands Act 1969, which power was vested in the Urban Authorities which in this case was Kyenjojo Township. However, as earlier noted the allocation of the suit land predated the law upon which the learned trial Magistrate based his decision to the effect that the Parish Chief had no Authority to allocate the suit land and in so doing this was erroneous.

The Appellants therefore proved that they had been in possession of the suit land for a long time and were only challenged in 2012 by the Respondent, having applied for the same land in 2002. The Appellants also proved that they were lawfully allocated the suit land in 1968.

The Learned trial Magistrate thus erred in law and fact, when he failed to evaluate the evidence before him properly, thus making a wrong conclusion that the Respondent had been offered the suit land by the Uganda Land Commission in 1975.

The Learned trial Magistrate also erred in law and fact, when he disregarded the evidence of the Appellants on their long usage of the Land and thus arriving at a wrong conclusion that the suit land was vacant until 2012, when the Appellants trespassed upon it.

These grounds therefore succeed.

Grounds 2 and 4:

2. **That the Learned trial Magistrate erred in law and fact, when he misdirected himself on the law governing equitable interest in land thus arriving at a wrong conclusion that the Respondent was equitable owner of the suit land.**
4. **That the Learned trial Magistrate erred in law and fact, when he held that, he is protecting the powers of the Uganda Land Commission and Land Boards to apply the law uniformly thus erroneously granting the suit land to the Respondent.**

I have carefully considered the submissions of both counsel for which am grateful.

Counsel for the Respondent in regard to these grounds raised a preliminary objection to the effect that Counsel for the Appellants did not address the above grounds but rather hinted only on Ground 4. Thus, the grounds were to be considered abandoned and should be struck out.

I find to the contrary, Counsel for the Appellants actually submitted on only Ground 2 and abandoned Ground 4. I accordingly consider Ground 4 abandoned and strike it out.

In resolution of ground 2, I will rely on the case of **John Katarikawe versus William Katwiremu (1977) H. C. B 187**, where it was observed that, where there are competing equitable interests, the first in time takes precedence.

And, the case of **Balamu Bwetegaine Kiiza & Another versus Zephania Kadooba Kiiza, CACA No. 59 of 2009**, where it was stated that;

“It would appear to us that there are two claims of competing interests regarding the suit land by both parties to this appeal. The determination of these competing interests is a point of law though it will also be necessary in resolving this to consider the facts of this appeal.

Under classical land law, there are two interests that the law recognises. These include legal and equitable. According to **D. J. Bakibinga, Equity & Trusts, (Law Africa, 2011), at Page 46 & 47****, it is generally recognised that a legal interest is valid and enforceable against the whole world (in rem). This means that if, subsequently, a person obtains a legal or equitable interest in the same property, his or her interest is subject to the interest of the first owner. Equitable interests however, are enforceable as against another claimant (in personam).*

Where there are competing equities therefore, the maxim qui prior est tempore, potior est juelle (he who is first in time has the stronger right) becomes applicable. It deals with priority where there is a conflict between two competing equitable interests in property and the general rule is that equitable interests in property take priority according to the order in which they are created.”

In the instant case the Appellants obtained their equitable interest in the suit land in 1968 and the Respondent in 1975 as per the evidence on record. This makes the Appellants’ equity the first in time and hence in law in terms of ownership of the suit land. Thus, the maxim of competing equities applies in favour of the Appellants.

I find that the trial Magistrate indeed erred in applying the law on equitable interests and was therefore wrong in his holding to grant the suit land to the Respondent whose interest came after that of the Appellants.

This ground succeeds.

Ground 5:

That the Learned trial Magistrate erred in law and fact when he decreed that the suit land to the Respondent and declared the Appellants as trespassers there on.

The Respondent totally failed to tender in Court any documentation in relation to his ownership of the suit land. The receipts tendered showed nothing in relation to the suit land.

It is therefore my finding that the Appellants' have equitable interest in the suit land and the same was proved in the lower Court and the evidence is on record and having resolved the preceding grounds in the affirmative, the Appellants can therefore not be said to be trespassers on land that belongs to them.

The trial Magistrate therefore erred in law and fact when he decreed the suit land to the Respondent and declared the Appellants as trespassers.

This ground also succeeds.

In a nut shell, the appeal is allowed, the decision of the lower Court set aside. Costs awarded in this appeal and in the lower Court.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

31/10/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Richard Rwabogo for the Appellants.
2. Counsel James Ahabwe for the Respondents.
3. Appellants in Court.
4. Court Clerk – James
5. Court Clerk – Beatrice Katusabe
6. In the absence of the Respondent

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OYUKO. ANTHONY OJOK

JUDGE

31/10/2017

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