

UGANDA / JUDGMENT

Nakanwagi v Mawejje and 2 Others (Civil Suit 770 of 2016)

[2023] UGHCLD 215 (27 July 2023)

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COURT

HC: Land Division (Uganda)

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Civil Suit 770 of 2016

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(LAND DIVISION)****CIVIL SUIT NO. 770 OF 2016****ANN NAKANWAGI :::::::::::::::::::: (Through her lawful Attorney Simon Waiswa) VERSUS****1. ABDU MAWEJJE****2. MARTHA MUGIRA ASASIRA****3. NICHODEMUS MUGIRA ::::::::::::::::::::****Before: Hon. Justice Byaruhanga Jesse Rugyema****JUDGMENT**

- [1] The Plaintiff through her Attorney **Simon Waiswa** sued the Defendants jointly and severally for trespass and sought the following orders and declarations:
- a) That land comprised in **Busiro Block 592 plot 11** land at Ziba. Wakiso District registered in the names of **Serevesti Katudawo** (the suit land) belongs to the estate of **Serevesti Katudawo**.

- b) That the 2nd and 3rd defendants' acquisition of Kibanja interests in the suit land is a nullity.
- c) The eviction and demolition of the 2nd and 3rd Defendants' structures on the suit land.
- d) A permanent injunction restraining the Defendants or anyone claiming through them, their agents, alienating or claiming an interest in the suit land or doing anything prejudicial to the interests of the plaintiff.
- e) General damages for trespass and costs of the suit.
- [2] It is the Plaintiff's case that she is the sole surviving child of the seven children of the late **Katudawo** who died intestate on 2nd October 1973 and was buried in Ssesse Islands in Kibanga village, Bugove sub county, Kalangala District.
- [3] That the 1st Defendant holding himself out as the only surviving relative of the late **Serevesti Katudawo**, fraudulently sold 9.2 acre piece of the suit land to the 2nd and 3rd Defendants respectively hence the following particulars of fraud;
- The 1st Defendant fraudulently selling to the 2nd and 3rd Defendants i. land comprised in **Busiro, Block 592**, plot 11 land at **Ziba** registered in the names of Serevesti Katudawo.
- The 2nd and 3rd Defendants' attempt to lodge a caveat on the suit land ii. which is pending rejection.
- [4] The Plaintiff contend and aver that the 2nd and 3rd Defendants' purported purchase of Kibanja interests from **Ssekamatte Twaibu, Mbatudde Resty, Nambalirwa Joan** on the one part (vide Agreement dated 11/9/2016\$) and from Setaala Gerald and Nantume Josephine (vide Agreement dated 30/10/2016\$) are a nullity and that such Agreements confer no equitable or legal interest unto the 2nd and 3rd Defendants.
- [5] That as a result of the above, the Plaintiff who is the sole surviving child of the late Serevesti Katudawo seeks to have the said transactions done by the Defendants set aside/ declared null and void and the Defendants be further held liable for the emotional and financial loss suffered by the Plaintiff.
- [6] In their defence (WSD), the Defendants denied the Plaintiff's allegations. The 1st Defendant contended that he is the heir and only child of the late **Matovu Enwaldo** who had a beneficial interest in the suit land while the 2nd and 3rd Defendants (who are husband and wife) contended that they are the rightful owners of Kibanja interests in the suit land, who are bonafide occupants having acquired the same from several bonafide occupants on the suit land. All the Defendants contended that they have a registrable interest in the suit land.

- It is further, the Defendants' case that the late Serevesti Katudawo was \$[7]\$ the 1st Defendant's grandfather who left the suit land in 1972 to Ssesse Islands leaving only the 1st Defendant's father, the late **Matovu Enwaldo** on the suit land.
- \$[8]\$ That in the year 1975, the said late **Matovu Enwaldo** sold the Kibanja interest in the suit land to a one the late **Sebayizi** who in turn sold it to a one late **Kiiza** and his wife who later, sold part of the Kibanja (3 acres) to a one **Moses Ssentamu** who also sold his 3 acres to the \$2nd and \$3rd defendants.
- It is the \$2nd and \$3rd Defendants' further contention that they purchased the \$[9]\$ rest of the kibanja interests from a one **Gerald Setaala**, whose parents had acquired the same from **Sebayizi** and the other Kibanja interests were purchased from the \$1st Defendant.
- [10] Lastly, the Defendants contended that their transactions in respect of the suit land were lawful, that the 1st Defendant has never held out himself to be the only surviving relative of the late **Serevesti Katudawo** but that it is instead the Plaintiff, who is holding out to be an only surviving child of the late **Katudawo** and is in the process to illegally procure registration on the certificate of title of the suit property in a scheme to deprive the \$1st Defendant of his beneficial and registrable interest and the \$2nd & \$3rd Defendants' kibanja and bonafide interests in the suit land.
- [11] The \$2nd and \$3rd Defendants filed a Counter claim as Counter claimants against the Plaintiff and her Attorney, Simon Waiswa in person as Counter defendants for recovery of \$Ugx\$ 30,878,000/= as total damage caused by the 2nd Counter defendant, general damages of approximately Ugx \$50,000,000/\$ = for trespass and punitive and exemplary damages with costs of the Counter claim.

Counsel legal representation

- [12] The Plaintiff was represented by Mr. Patrick Alungo of Alvarez Advocates, Kampala and Mr. Sempala David of KSMO Advocates. Kampala while the Defendants were represented by Mr. Tom Mbalinda and Mr. Benjamin Ayebare of M/s Agaba Advocates & legal consultants, Kampala. Both sets of counsel filed their respective written submissions as permitted by this court for consideration in the determination of this suit.
- [13] In their joint scheduling memorandum, the following issues were agreed upon for determination of this suit.
 - 1. Whether the \$2nd and \$3rd Defendants' acquisition of kibanja interests on the suit land is lawful.
 - 2. Whether the Plaintiff trespassed onto the \$2nd and \$3rd Defendants' kibanja.
 - 3. Whether the counter claim against the \$2nd Counter defendant is maintainable in law.

- 4. What remedies are available to the parties.

Standard and burden of proof

[14] In civil suits, the burden of proof lies on the plaintiff who has to prove his or her case and the standard of proof is that on the balance of probabilities. *Sebuliba Vs Co-op Bank Ltd* [1982] HCB 130. S.101 (1) of the Evidence Act provides that,

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

S. 106 of the Act provides that,

"In civil proceedings, when any fact is essentially within the knowledge of any person, the burden of proving that fact is upon that person."

This court in the determination of this suit shall be guided by the above provisions of the law of evidence.

Resolution of issues

[15] Issues 1 & 2 shall be dealt together while issues 3&4 shall be dealt with separately.

Issues 1&2: a) Whether the \$2^{nd}\$ and \$3^{rd}\$ defendants' acquisition of Kibanja interests on the suit land is lawful.

- b) Whether the plaintiff trespassed on the \$2^{nd}\$ and \$3^{rd}\$ defendants' kibanja.
- [16] It is apparent from the evidence on record and submissions of counsel for the parties that the following facts are undisputed:
 - a) The plaintiff is the only biological daughter of the late **Katudawo Serevesti** who died intestate on 2/10/1973 and was buried in Ssesse Islands, Kibanga village, Bugoye sub county, Kalangala district (see evidence of PW1 and DW4).
 - b) The late **Katudawo Serevesti** left real estate property comprised in Busiro Block 592, plot 11, land at Ziba, Wakiso District where he was and is the registered proprietor.
 - c) The \$2^{nd}\$ and \$3^{rd}\$ defendants purchased the disputed kibanja interests comprised in **Busiro Block 592**, plot 11 land at Ziba, Wakiso District at different periods of time from various people who include the \$1^{st}\$ Defendant.
- [17] It is therefore the Plaintiff's case that as the only surviving biological daughter of the late **Serevesti Katudawo**, she has a beneficial interest in the deceased's estate, the suit land measuring approximately 9.2 acres, which the \$1^{st}\$ Defendant holding out as the only surviving relative of the deceased, fraudulently sold to the \$2^{nd}\$ and \$3^{rd}\$ Defendants respectively. That the rest of the deceased's property had already been distributed to his other children.

- [18] The \$2^{nd}\$ and \$3^{rd}\$ defendants on the other hand contend that they bought their bibanja at different periods of time from various people who include the \$1^{st}\$ Defendant who were bonafide occupants and that therefore, they are bonafide occupants of their bibanja interests.
- [19] In this case, since it has been established by evidence that the Plaintiff is the only surviving biological daughter of the late Serevesti Katudawo and therefore with beneficial interest in the suit land, the evidential burden shift to the \$2^{nd}\$ and \$3^{rd}\$ Defendants to prove that they purchased the suit

bibanjas from bonafide occupants and they are therefore bonafide occupants of their bibanjas in question protected by the law, **Section 31(1)** of the Land Act.

- [20] **S.29 (2) of the Land Act** defines bonafide occupant to mean a person who before the coming into force of the constitution-
- 2(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..."
- \$\mathsf{S}\$ "Any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant under this section shall be taken to be a bonafide occupant for purposes of this Act."
- [21] The question in this case therefore is whether the vendors of the suit bibanjas on the late **Serevesti Katudawo's** registered land/estate of which the plaintiff as a sole child of the deceased is a beneficiary, qualified to be bonafide occupants.
- [22] Counsel for the defendants submitted that when **Serevesti Katudawo** left the suit land in the 1970's, he left his eldest son, the late **Enwaldo Matovu** (brother to the plaintiff) in ownership of the land as a kibanja holder who sold the kibanja to the late **Falasiko Sebayizi** who and his wife **Christine Nakanwagi** sold off part of their kibanja to the late **Kiiza Ndekero Steven** whose children. Twaibu Sekamatte, Resty Mbatunde and Joan **Nambalirwa** also sold the kibanja to the \$2^{nd}\$ and \$3^{rd}\$ defendants. That the rest of the bibanja were purchased by the \$2^{nd}\$ and \$3^{rd}\$ defendants from a one Moses Sentamu and Gerald Setaala. The sale Agreements were witnessed by the local council officials. Counsel submitted that in this case, there is no evidence that was adduced by the Plaintiff that she or **Serevesti Katudawo** ever challenged the ownership of the Bibanja by the persons who preceded the \$2^{nd}\$ and \$3^{rd}\$ Defendants in ownership.
- [23] It is however not correct as counsel for the Defendants submitted that when **Serevesti Kaatudawo** left for Ssesse Islands, he left his son **Enwaldo Matovu** in ownership of the land as a kibanja holder. This is not borne by the pleadings of the Defendants. It was clearly stated by **Ndekero Steven**

(DW4) a grandson to the late **Serevesti Katudawo**, who was decreed vide HCCS No.229 of 2017 to administer the estate of the late Serevesti Katudawo with the Plaintiff at page 22 of the typed proceedings during cross examination by **Mr. Sempala** thus:

> "I am not aware of any propetrty Nakanwagi (plaintiff) has as her share of her father's property. Katudawo left for Sseese and left **Enwaldo behind to care take his land**. A caretaker cannot sell property he is caretaking without permission... Nakanwagi is fully entitled to get a share of her father's estate and she is entitled to deal with her share in any form she deems fit."

DW4 appeared to be such an honest and truthful witness as conceded by counsel for the Defendants in his submissions.

- [24] From the foregoing, it is clear to me as correctly put by counsel for the plaintiff in his submissions, that **Enwaldo Matovu** having been entrusted by the late **Serevesti Katudawo** to care take his land, he had no powers to sell the suit kibanja or any part of it on the deceased's land and therefore. whoever derived interest of any kibanja on the late **Katudawo's** land to the detriment of his only known surviving child, the Plaintiff, acquired no interest at all, including the \$2^{nd}\$ and \$3^{rd}\$ Defendants.
- [25] Besides, there is no evidence on record adduced by the \$2^{nd}\$ and \$3^{rd}\$ Defendants that indeed, the said **Enwaldo Matovu** sold, albeit illegally, any kibanja to the late **Sebayizi, Falasiko** or him selling a portion of it to the late **Kiiza Steven** and his wife or any other person, and then, his children selling to the \$2^{nd}\$ and \$3^{rd}\$ Defendants. There is no evidence to this effect borne by the \$2^{nd}\$ and \$3^{rd}\$ Defendants' purchase agreements (D. Exh.1-3). Otherwise, the narration of the history of the suit land as given in the testimonies of DW2 and DW3 is mere unbelievable hearsay, S.59 of the **Evidence Act**. It is just apparent that during the absence of the late Katudawo who had demised, the said Enwaldo Matovu and those surrounding him or successors went on a spree of sale of bibanjas on his land in total disregard of the deceased's sole surviving daughter, the plaintiff. As clearly reflected in the family meeting of the purported members of the family of the late Serevesti Katudawo (D. Exh.14), they unabated and without any restrictions transacted in the suit land without the involvement of his only surviving daughter, the plaintiff (D. Exh.14).
- [26] Whereas counsel for the Defendants denied in his submissions and Abdu Mawejje (DW4) denied in his testimony that no land or kibanja on the suit land had ever been sold to the \$2^{nd}\$ and \$3^{rd}\$ Defendants by DW4, this is contrary to the Defendants' WSD wherein **paragraph 5 (f)**, the \$2^{nd}\$ and \$3^{rd}\$ Defendants plead that they purchased in addition, 2.5 acres from the \$1^{st}\$ Defendant and **P. Exh.4** which is the caveat the \$2^{nd}\$ and \$3^{rd}\$ Defendants lodged over the estate suit land of the late **Katudawo** they purported to had purchased from DW4 who described himself as the only surviving relative of the deceased.

- [27] The Defendants are bound by their pleadings and cannot therefore be permitted to depart from them, \$0.6\$ r.7 CPR. All the bibanias the 2nd and 3rd Defendants purchased were all comprised on the estate of the late Katudawo.
- [28] The 2nd and 3rd Defendant's purchase of one of the Kibanja on the suit land was denied by the vendor, DW4^a self-confessed fraudster contrary to their joint pleadings. His names as per the pleadings and witness statement were disclosed as "Abdu Maweje Katudawo" signifying that he had a relationship with the Katudawo family and therefore justify the caveats P. Exhs.16 & 4, he and the purchasers, the 2nd and 3rd Defendants lodged over the suit land. However upon being dislodged by the production of his National Identity card which does not bear the last name "Katudawo". he, during cross examination conceded that he had no blood relationship with the family of Katudawo though he lodged a caveat P. Exh.16 where he described himself as "grandson" to the late Katudawo to block the Plaintiff's permission to administer her father's estate. He conveniently but fraudulently purported not to have a National Identity card that had his actual names and secured Lugoba village Urban Council Identity card to enable him perpetuate the fraud by lodging a caveat (P. Exh.16) to enable and facilitate the purchases by the 2nd & 3rd defendants.
- [29] In conclusion, I find that the Plaintiff as the sole child of the late Serevesti Katudawo had a beneficial interest in her father's residual estate, comprised of 9.2 acres of the suit land on Busiro Block 592, plot 11 at

Ziba, Wakiso District, the rest having been distributed to the other children.

- [30] The 2^d and 3^d Defendants do not qualify as bonafide occupants on the said 9.2 acres of the suit land for they purchased from vendors who had no interest in the suit land and were in illegal occupation thereof. The 2^d and 3^d Defendants did not carry out any due diligence before purchase of the suit bibanjas and if they did, it was a perfunctory one since they got in touch with the grandson of the late Katudawo. DW4 Ndekero Steven who knew that the Kibanja in question was on the suit land of the late Katudawo Serevesti, the registered owner who had a surviving child, the Plaintiff with a beneficial interest in the estate and entitled to a share but chose to ignore him and the Plaintiff but dealt with self-seekers who had no interest at all in the land. DI{4 never witnessed any of the purchase agreements of the 2^d and 3^d Defendants yet they purport to had dealt with him as per the family meeting resolution (D. Exh.f 4).
- [3U 2ndly, the purported vendors Sekamatte Twaibu (DW3) prior to the sale of his purported family Kibanja in 2016, he had met the Attorney of the Plaintiff on the suit land which the 2^d and 3^d Defendants purchased and as he stated in evidence, "knew him as the landlord". The other vendor Abdu Maweje (DW5) disowned the 2^d and 3^d defendants as purchasers upon realising that the entire fraud was on a back fire.

- [32] As a result of the foregoing, the 1st and 2nd issues are found in favour of the Plaintiff. The 2nd and 3rd Defendants' acquisition of kibanja interests on the suit land was unlawful, the kibanja in question comprising of 9.2 acres are beneficial interests of the Plaintiff from her father's estate and therefore, the Plaintiff and her Attorney could not be found trespassers on the said kibanja.

Issue No.3: Whether the Counter claim against the 2nd Counter defendant is maintainable in law.

- [33] The Defendants having been found to have neither equitable nor legal interest in the 9.2 acres of the kibanja they purported to have purchased

from illegal occupants, the counter claimants' claim collapses. Besides, no evidence was led by the counter claimants to prove the claimed alleged loss of \$Ugx\$ 30,878,0000/= or any general, punitive and exemplary damages since no body led evidence in support of the alleged damage caused by the 2nd counter defendant to the 2nd and 3rd defendants.

- [34] Counsel for the Defendants submitted relying on the Indian Supreme Court case of Man kaur (dead) By Lrs Vs Hartar Singh Sangha JT 2010(10) SC 365: (2010) 10 SCC 512 for the proposition that an Attorney holder cannot dispose or give evidence in place of his principal for acts done by the principal or transactions or dealings of the principal, of which the principal does have personal knowledge.
- [35] I do agree with the proposition of the law as stated. In Man kaur Vs Hartar Singh Sangha above, court was dealing with Order 111, Rules 1&2 CPC of India, an equivalent with our 0.3 r.2(a) CPR. It provides thus;
- "2. Recognised agents.

The recognised agents of parties by whom such appearances. applications and acts may be made or done are-

- a) persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties: and
- b) ..."
- [36] In **Man kaur case**, R. V. Raveendran J stated and held inter alia that;
- 1. A general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in a witness box on behalf of himself. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff; Shambhu Dutt Vs State of Rajasthan 1986 2 WLN 713.

- 2. An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the powers of attorney and the filing of the suit.
- 3. If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined if those acts and transactions have to be proved.
- 4. The holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which the principal alone has personal knowledge.
- 5. Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.
- 6. Where the law requires or contemplated the plaintiff or another party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant on the ground of his 'bonafide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category.
- [37] In the instant case, the Plaintiff's attorney as per the power of attorney (P. Exh.1) was authorised to inter alia, commence, enter appearance, or otherwise represent her in all such court matters, prove any relevant action, and conclude or otherwise settle and or instruct any legal counsel to represent her in any suit or action in respect of her interests in the suit property comprised in **Block 592-594**, plot 11 land at **Ziba**. In pursuance of the powers of attorney, the ² counter defendant conducted a search on the suit land and found that various caveats had been lodged by various people including the ² and ³ Defendants, who had started building on

the suit kibanja claiming that they had purchased the kibanja from different people who allegedly had kibanja interests on the suit land. Indeed, this is the evidence the attorney adduced in court including the particulars of the power of attorney itself and the undisputed facts of the case.

- [38] The approach and conduct of the Plaintiff's power of attorney holder are permissible under O.3 r.2(a) CPR for the evidence he adduced is that of the 'acts' in pursuance of power of attorney which were not the acts done by the principal or transactions or dealings of the principal of which the principal alone had personal knowledge.
- [39] In the premises, I find that the Counter claim against the 2'd Defendant in person on account of being a holder of the Plaintiff's power of attorney is not maintainable. Since the 2'd Defendant is a disclosed agent of a principal who is known, the Counter claim would only be maintainable against the principal, *Ram Vs Singh* (f935) 5 ULR 76 and *Friendship Container Manufactures Ltd Vs Mitchell Cotts (K) Ltd* (200f) 2 EA 338.
- [40] As a result of the foregoing, I do find the Counter claim against the 2'd Defendant, an agent of a disclosed principal unsustainable.

Issue No.4: What remedies are available to the parties.

- [41] This court having found that the t^h Defendant fraudulently sold parts of the suit land to the 2'd and 3'd Defendants who have also been found not to be bonafide occupants thereof, the unauthorised entrance of the Defendants on the suit bibanja amounted to trespass since the Plaintiff had constructive possession of the land by virtue of her beneficial interest in the land; *Sheik Lubowa Vs Kitara Enterprises Ltd*, CACA No.47 /1987. In the premises that the Defendants are found trespassers, the Plaintiff is entitled to an order of eviction against the Defendants.
- [42] During the course of the proceedings of this suit, this court issued orders dated 11/4/2019 and 30/3/2017 for maintenance of the status quo which the Defendants reportedly ignored and or defied and indeed of which they

were found to be in contempt in **Misc. Application No. 1397 of 2017** (Arising from this suit). Though the defendants were dealt with in the contempt proceedings, the plaintiff must have as a result of the contempt suffered stress arising from the uncertainty of the status of the suit land. The Plaintiff has been denied use of her 9.2 acres of her share in her father's estate since 2016 when the Defendants and related self-seekers went on a spree of illegally selling and buying portions of the bibanja on the suit land. In addition, at her old age, she has been subjected to great inconvenience, stress and immense psychological torture. In the premises, I consider an award of \$Ugx 80,000,000/= as reasonable for her plight.

- [43] In the premises that the issue of contempt by the 2nd and 3rd Defendants was concluded vide M. A No.1397/2017, there is no reason for this court to consider either punitive or exemplary damages against the Defendants.
- [44] In conclusion, judgment is entered in favour of the Plaintiff against the Defendants with the following orders and declarations.

- 1. The \$2^{nd}\$ and \$3^{rd}\$ Defendants' acquisition of kibanja interests in **Busiro** Block 592, plot 11 at Ziba, Wakiso District is a nullity and therefore the Defendants have no interest whatsoever on the suit land.
- 2. The Defendants are declared trespassers on the suit land.
- 3. A permanent injunction restraining the Defendants jointly and severally or anyone claiming through them, their agents, servants. and workmen, employees from entering, alienating or claiming interest in the suit land or doing anything prejudicial to the interests of the Plaintiff accordingly issues.
- 4. General damages of Ugx \$80,000,000/\$ = are awarded to the Plaintiff and are to carry on the interest of 27% p.a from the date of judgment until full payment.
- 5. Costs of the suit are granted to the Plaintiff as a successful litigant.
- 6. This judgment disposes of the **Mpigi HCCS No.21/2017** that was stayed pending the determination of the suit.

Dated at Kampala this...d \$2023\$ day of Byaruhanga Jesse Ruggyema **JUDGE**

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