
UGANDA / JUDGMENT

Nalubega and Another v Kivumbi and Others (Civil Suit 176 of 2019) [2023] UGHCLD 216 (28 July 2023) [2023] UGHCLD 216

COURT

HC: Land Division (Uganda)

BEFORE

Bernard Namanya, J

CASE / FILE NUMBER

Civil Suit 176 of 2019

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA [LAND
DIVISION] CIVIL SUIT NO. HCT-00-LD-CS-0176-2019

1. NALUBEGA EDISA

2. N AKIWALA

JESICA :::PLAINTIFFS

VERSUS

1. KIVUMBI DAVID

2. KIVUMBI DAVID S/O KIVUMBI DAVID

3. KATAMBA MAHADI

4. MAHADIA PROPERTY CONSULTANTS (U) LTD ::::DEFENDANTS

BEFORE: HON. JUSTICE BERNARD NAMANE-4

JUDGMENT

Introduction:

1. In this case, the I" defendant, Kivumbi David, seeks to evict his 86-year-old biological mother, Nalubega Edisa, the 1 st plaintiff, from the suit land. This case considers whether the Kibanja interest in land is affected by the change in ownership of the title to the land; and the legal requirement for the holder of a Kibanja interest to seek the consent of the registered owner of the land prior to the sale or transfer of a Kibanja interest on registered land.

Background:

2. The plaintiffs claim ownership of a Kibanja measuring 2 acres on land comprised in Kyadondo Block 200 Plot 216 (now Plots 1595, 1594, 1803 and 1804) and Plot 305 Land at Kawempe, Ttula, Wakiso district (hereinafter "the suit land"). The I" plaintiff claims that she settled on the Kibanja sometime in 1952 following her marriage to her late husband, Ssebwaato Damascus. Her husband died in 2005. The pt plaintiff is the administrator of the estate of her late husband. In 2011, her son, the I"

Page 1 o/23

defendant claimed that he had acquired the Kibanja from his father, the late Ssebwaato Damascus when he was still alive. The 1st defendant claimed ownership of both the title interest and the Kibanja on the land. He further claimed that he had sold the land to third parties including the 3rd and 4th defendants. The 1st defendant seeks to evict the plaintiffs from the land.

- Briefly, the 1st plaintiff claims that she got married to the late Ssebwaato \$3.\$ Damascus in a church marriage in 1952 and they settled on the suit land. The 1st plaintiff claims that the suit land is their matrimonial home. The marriage between the 1st plaintiff and the late Ssebwaato Damascus was blessed with children including the 2nd plaintiff and the 1st defendant. The late Ssebwaato Damascus died on the 24th February 2005, and left the plaintiffs in full possession and utilisation of the said Kibanja. The plaintiffs claim the following remedies from court: i) a declaration that the defendants are trespassers on the suit property; ii) declaration that the plaintiffs own the Kibanja; iii) declaration that all the transactions between the defendants for sale of the suit land are subject to the Kibanja interest of the plaintiffs; iv) declaration that the defendants are liable for trespass; v) a permanent injunction against the defendants; vi) general damages; and vii) costs of the suit.
- The \$1st and \$2nd defendants filed their written statement of defence stating \$4.\$ inter alia, that the 1st defendant is the lawful owner of title interest in the land and the Kibanja. That on the 24th July 2004, the late Ssebwaato Damascus sold part of his Kibanja on the suit land to Mr. Willy Musoke and Nassuna Musoke. That the 2nd plaintiff consented to the sale of the land after resolving the Kibanja issues. The 1st and 2nd defendants also filed a counterclaim against the plaintiffs in which they sought the following remedies against the plaintiffs: a declaration that the 1st defendant is the legal owner of the

Page 2 of 23

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suit land and exercised his rights in disposing of the same to the 3rd and 4th defendants; and a declaration that the plaintiffs have no Kibanja interest on the suit land.

5. The 1st and 4th defendants filed their written statement of defence denying all the allegations of fraud, and contended that the 4th defendant is a bona fide purchaser for value without notice of any adverse claims. That all thirdparty interests in the suit land were settled prior to the purchase of the suit land.

Representation:

6. The plaintiffs were represented by Mr. Francis Nyakoojo from *Mis* Uganda Christian Lawyer's Fraternity. The defendants were represented by Mr. Gerald Owiny and Mr. Edward Ssekika from *Mis* Shield Advocates.

The plaintiffs' evidence:

- 7. The plaintiffs produced 2 (two) witnesses to prove their case. PW1 (Nalubega Edisa) and PW2 (Nakiwala Jesica). The relevant evidence and related arguments of the plaintiffs are incorporated in my analysis and resolution of the issues below.
- 8. The plaintiffs adduced evidence of the following documents that were admitted in evidence:
 - i). Exh. P 1 Copy of letters of administration dated 19th December 2019;
 - ii). Exh. P2 Copy of the 1st plaintiff's marriage certificate;
 - iii). Exh. P3 Copies of Busuulu receipts;
 - iv). Exh. P4 Copy of Willy Musoke's agreement dated *24/712004;*

Page 3 of 23

- Exh. P5 Copy of sale agreement between the 1st defendant and the \$ \$v)\$. \$3rd and \$4th defendants dated 28/1/2019;
- Exh. P6 Copy of certificate of title for Kyadondo Block 200 Plot vi). 1595;
- Exh. P7 Copy of certificate of title for Kyadondo Block 200 Plot vii). 1804 Kyadondo;;
- viii). Exh. P8 Copy of a mutation form for Kyadondo Block 200;
- Exh. P9 Copy of a mutation form for Plot 305 Kyadondo Block 200 \$ix\$). Plot 216;
- Exh. P10 Copy of charge sheet dated \$27/12/2018\$; \$x\$).
- Exh. P11 Copy of court proceedings in Criminal Case No.41/2019; xi).
- Exh. P12 Copy of consent dated \$9/10/2018\$; xii).
- xiii). Exh. P13 Copy of letter for compensation for the damaged church dated \$1/11/2018\$:
- xiv). Exh. P14 Copy of notice of eviction dated \$1/11/2018\$.

The defendants' evidence:

- The defendants produced 3 (three) witness to prove their case. DW1 9. (Kivumbi David), DW2 (Kivumbi David (son)) and DW3 (Katamba Mahadi).

- 10. The defendants adduced evidence of the following documents that were admitted in evidence:
- i) Exh. D1 – Copy of the certificate of title for Block 200 Plot 2019, Kyadondo;
- Exh. D2 Copy of receipt dated 1/8/2004 & its English translation; ii)
- iii) ExhD3 Copy of receipt dated 7/9/2011;

Page 4 of 23

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- iv) ExhD4- Copy of summons from Ttula LC 1 to David Kivumbi dated 5/11/2018;
- v) ExhD5 -A copy of invitation to police to assist in investigations;
- vi) ExhD6 Copy of receipt dated 16/10/2018;
- vii) ExhD7 Copy of certificate of title for block 200, plot 1804;
- viii) ExhD8 Copy of sale agreement between the 1st and 3rd defendants dated 25/2/2019.

The defendants' submissions:

- 11. The defendants contend that there are two pieces of land in issue each measuring 1 acre, and were separately owned by Ssebwaato Damascus (current Block 200 Plot 2019) and the Kibanja of Dr. Ssetimba which is currently comprised in Block 200 Plot 1804. As to whether or not the plaintiffs own a Kibanja measuring 2 acres on the suit land, it is the defendants' case that the plaintiffs do not own any interest in the suit land.
- 12. It is the 1st defendant's case that the Kibanja interest on the suit land measuring approximately 1 acre comprised Block 200 Plot 2019 belonged to the late Dr. Ssetimba, and that the second Kibanja interest also measuring 1 acre comprised Block 200 Plot 305 was formerly owned by the late Ssebwaato Damascus from whom the plaintiffs purport to derive their interest. With regard to the Kibanja interest allegedly owned by the late Dr. Ssetimba, the 1st defendant contends that the late Ssebwaato Damascus was simply a caretaker of the Kibanja and not the owner.
- 13. With regard to the Kibanja interest for the late Ssebwaato Damascus, it is the defendants' contention that the plaintiffs do not own it. To this effect, DWI (Kivumbi David) gave evidence that he, with the permission of his late father, Ssebwaato Damascus, and his mother, the 1st plaintiff purchased the

Page 5 of 23

title interest in the land from Erisa Kalule, the former registered proprietor. DWI (Kivumbi David) further contends that after purchasing the title interest in the suit land, he also purchased the late Ssebwaato Damascus' Kibanja interest on the land, and compensated his late father with a portion of the land measuring approximately 25 decimals on the suit land. According to the 1st

defendant, this same portion was later sold to Dr. Willy and Nassuna Musoke at a consideration of 5 million shillings. According to the 1st defendant, out of the said total consideration, a sum of 3 million shillings was paid to the late Ssebwaato Damascus, the balance of 1.5 million shillings was paid to the 1st plaintiff. That although the 1st plaintiff claimed to have passed it on to the 1st defendant, there was no proof of payment adduced in court. Accordingly, the 1st defendant contends that the plaintiffs do not own a Kibanja interest in the suit land, and that they are not lawful occupants within the meaning of the law.

- 14. As to whether or not the 1st plaintiff was separated from her deceased husband, the late Ssebwaato Damascus at the time of his death, it was submitted for the 1st defendant that the late Ssebwaato Damascus had separated from his mother, the 1st plaintiff at the time of his death. The 1st defendant therefore submitted that the 1st plaintiff cannot claim a Kibanja interest in the late Ssebwaato Damascus' estate and thus has no locus to bring the instant suit.
- 15. As to whether the sale of the suit land to the 3rd and 4th defendants, and the subsequent demolition of the 2nd plaintiff's church were unlawful, the 3rd & 4th defendants submitted that they did all that was necessary, and legally required to ascertain the true ownership of the land, and thus it is contended that the 1st defendant is a bona fide purchaser for value without notice. Regarding the subsequent demolition of the Church, it was submitted that

Page 6 of 23

the same was done lawfully, and with the full permission and authority of the 2nd plaintiff.

- 16. As to whether the defendants are trespassers on the suit land, it was submitted that should this Court be inclined to declare that the plaintiffs own a Kibanja interest on the portion of land comprised in Block 200 Plot 2019, part of the suit land or one of the portions of the suit land, then the 3rd defendant shall remain the registered proprietor of the suit land, and consequently the plaintiffs shall be liable to pay Busuulu to the registered proprietor.
- 17. Finally, it was submitted for the defendants that this court finds that the suit lacks merit, and thus be dismissed with costs to the defendants. The defendants further prayed that this court finds merit in the counter claim and thus make necessary declarations and orders as follows: a declaration that the Plaintiffs have no Kibanja interest on the suit land; a declaration that the 1st defendant was the legal owner of the suit land properly exercised his right in disposing it off to the 3rd and 4th defendants; a permanent injunction restraining the plaintiffs from interfering with the 3rd and 4th defendants' possession of the suit land; general damages of 60 million shillings with interest of 25 % from the judgment until payment in full.

Issues to be determined by the court:

- 18. The following are the issues for determination by the court:
- i). Whether or not the plaintiffs own a Kibanja interest in the suit land.
- ii). Whether or not the sale of the suit land to the 3rd defendant extinguished the Kibanja interest of the plaintiffs in the suit land.
- iii). Whether or not the defendants are trespassers on the Kibanja interest of the plaintiffs.

Page 7 *o/23*

iv). What remedies are available to the parties?

19. I shall handle Issues No. I, 2 & 3 together.

Issue No. 1, 2 & 3: Whether or not the plaintiffs own a Kibanja interest in the suit land; Whether or not the sale of the suit land to the 3rd defendant extinguished the Kibanja interest of the plaintiffs in the suit land; Whether or not the defendants are trespassers on the Kibanja interest of the plaintiffs.

- 20. The plaintiffs claim that they own a Kibanja measuring approximately 2 acres on the suit land.
- 21. PWI (Nalubega Edisa) aged 86 years, a biological mother of the pt defendant (Kivumbi David), testified that she was legally married to the late Ssebwaato Damascus (Exh. P2 is the marriage certificate), and that her husband purchased a Kibanja measuring 2 acres on the suit land. That her husband died in 2005 and left her with her daughter, the 2nd plaintiff living in the house on the Kibanja, and using the Kibanja. She denied that her husband ever sold the Kibanja before he died. On the 19th December 2019, PWI obtained letters of administration (Exh. P1) for the estate of her late husband, late Ssebwato Damascus. According to PWI (Nalubega Edisa), when her husband was still alive, a portion of the Kibanja on the upper side (measurements not specified) was given to the 1st defendant to enable him construct a home for his second wife, Rose. That the 1st defendant later sold this piece of Kibanja to Willy Musoke. PW2 (Nakiwala Jesica) corroborated the evidence given by PWI.
- 22. On the 5th July 2002, the 1st defendant, Kivumbi David, was entered as the registered proprietor of the suit land.

Page 8 o/23

23. DWI (David Kivumbi), aged 64 years, testified that the 1st plaintiff is his biological mother, and that the late Ssebwato Damascus was his biological father. He confirmed that the plaintiffs are personally well known to him, the 1st plaintiff being his mother, and the 2nd plaintiff being his younger sister. That his father owned a Kibanja interest in a piece of land located at Ttula, Kawempe where he built his home having settled on the said Kibanja with consent of Erisa Kalule, the then registered proprietor. DWI testified that:

"[. . .] my father owned a Kibanja interest in a piece of land located at Ttula, Nabweru, where he had built his home, having acquired the said Kibanja from Erisa Kalule, the then registered proprietor. "*"

- 24. From this evidence, the 1st defendant admits to the fact of ownership of a Kibanja on the suit land by the late Ssebwato Damascus, the husband of the 1st plaintiff, and father of the 1st defendant respectively. Accordingly, it is not necessary to discuss the issue as to whether or not there was a Kibanja interest on the suit land.
- 25. The P¹ defendant however, disputes the size of the Kibanja interest of the late Ssebwato Damascus. While the plaintiffs claim that the Kibanja measures 2 acres, the 1st defendant contends that the late Ssebwato Damascus owned a Kibanja measuring only 1 acre, and that he was simply a caretaker in respect of another Kibanja measuring 1 acre allegedly owned by the late Dr. Ssetimba.
- 26. It is the 1st defendant's case that he acquired both the title interest and Kibanja interest in the suit land, and that the plaintiffs do not own any Kibanja interest on the suit land.

Page 9 of 23

- 27. DWI (David Kivumbi) testified that his father defaulted in paying nominal ground rent (Busuulu) for his Kibanja and in fact, last paid Busuulu in the 1970s. That at some point, the then landlord Mr. Erisa Kalule gave his father the first option to purchase the title interest in the land as a sitting tenant. That when his father failed to exercise the option to purchase the title interest in the land, the landlord, Mr. Erisa Kalule through Serubiri Robert, his agent, put the land on the open market for any willing buyer. That his father then approached him, and advised him to purchase the title interest in the land, a proposal that he agreed to, and went on to purchase the title interest in the land and was registered as the proprietor of the land.
- 28. DWI (David Kivumbi) presented his evidence in a way that tended to diminish the Kibanja interest of his father in the suit land. He particularly pointed out that his father had defaulted in paying ground rent for the Kibanja starting from the 1970s. I wish to state that this evidence is not credible. The evidence on record proves that the late Ssebwato Damascus died in 2005. Until this time, the Kibanja interest of the late Ssebwato Damascus was not disputed. Upon his death, his widow, the 1st plaintiff took over administration of the estate of the late Ssebwato Damascus by procuring letters of administration. I reject any suggestion by the 1st defendant, that the Kibanja interest of his late father had somehow

diminished by the time of his death.

- 29. What is even more unbelievable, is the testimony of DWI (David Kivumbi) that around December 2001, he acquired his late father's Kibanja interest of 1 acre on the suit land, and that he compensated his father for his Kibanja interest with another plot of land measuring 25 decimals, and that his father's Kibanja interest was sold to third parties, Mr. and Mrs. Willy and Nassuna Musoke at a consideration of 5 million shillings.

Page 10 of 23

- 30. His mother, the 1st plaintiff denies that his late father ever sold his Kibanja interest in the suit land while he was alive. No evidence of consent by the 1st plaintiff, the legally wedded wife of the late Ssebwato Damascus, to these alleged transactions, that are said to have taken place when the late Ssebwato Damascus was still alive was adduced. Although the 1st defendant argued that by the time of the death of his father the late Ssebwato Damascus, the 1st plaintiff was separated from him, no evidence to prove this allegation was adduced.
- 31. The allegation that the late Ssebwato Damascus was a simply a caretaker in respect of another Kibanja measuring 1 acre allegedly owned by the late Dr. Ssetimba is not supported by any other evidence except the 1st defendant's testimony. The testimony of DW1 (David Kivumbi) is silent on how late Dr. Ssetimba's alleged Kibanja of 1 acre was acquired. He claims that he acquired the title interest on the land where the late Dr. Ssetimba's Kibanja was situated but he is silent on how the Kibanja interest was dealt with. The 1st defendant did not adduce evidence to prove that he purchased Dr. Ssetimba's Kibanja allegedly measuring 1 acre. In any case, in the absence of the consent of registered owners of the land, Erisa Kalule or Charles Kabuye, to the 1st defendant's purported purchase of the Kibanja from either the late Dr. Ssetimba or from his late father, Ssebwato Damascus, the purported purchase of the Kibanja was null and void. See the case of Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA) (per the Judgment of Justice Monica K. Mugenyi, JA). Section 34(1) & (3) of the *Land Act* provide as follows:

"34. Transactions with the tenancy by occupancy

Page 11 of 23

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\$(1)\$ A tenant by occupancy may, in accordance with the provisions of this section, assign, sublet or subdivide the tenancy with the *consent of the land owner.*

- (3) Prior to undertaking any transaction to which subsection (1) refers, the tenant by occupancy shall submit an application in the prescribed form to the owner of the land for his or her consent to the transaction."

- 32. The evidence on record proves that the Kibanja interest in contention is family land on which the matrimonial home of the late Ssebwato Damascus and the 1st plaintiff is situated. It could not be disposed of by the late Ssebwato Damascus without the consent of his wife, the 1st plaintiff. The alleged family consent dated the 9th October 2018 (Exh. P12) allowing the 1st defendant to sell the suit land is not signed by the 1st plaintiff, who is also the mother of the 1st defendant. I do not believe that the transactions for the disposal of the Kibanja interest in the suit land took place as claimed by the 1st defendant in his evidence, but even if they did, any such transactions without the consent of the spouse, the 1st plaintiff, are null and void in light of the very clear provisions of the law on this point. See the case of *Bukenya & Anor v Kirumira & 2 Ors* (Civil Suit 220 of 2008) [2018] UGHCLD 34 (per Justice Henry Kawesa).
- 33. The sale of family land without the consent of the spouse is prohibited by sections 38A and 39 of the Land Act (Cap 227) which provide that:

"38A. Security of occupancy"

- (1) Every spouse shall enjoy security of occupancy on family land. (2) The security of occupancy prescribed under subsection (1) means a right to have access to and live on family land.

Page 12 of 23

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- (3) For the purposes of subsection (2), the spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred to in section 39, which may affect his or her rights.

\$(4)\$ In this section—

"family land" means land—

- (a) on which is situated the ordinary residence of a family;
- (b) on which is situated the ordinary residence of the family and from which the family derives sustenance;
- (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph \$(a)\$ or \$(b)\$; or
- (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family;

"ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite *period*;

"land from which a family derives sustenance" means—

- (e) land which the family farms; or
- (f) land which the family treats as the principal place which *provides the livelihood of the family; or*
- (g) land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food.
- (5) For the avoidance of doubt, this section shall not apply to spouses who are legally separated.

39. Restrictions on transfer of family land

\$(1)\$ No person shall—

Page 13 of 23

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- (a) sell, exchange, transfer, pledge, mortgage or lease any family land;
- (b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land; or (c) give away any family land, inter vivos, or enter into any other *transaction in respect of family land;* except with the prior consent of his or her spouse."
- 34. From the evidence before me, I understand the plaintiffs' case to be that while they do not dispute the fact that the 1st defendant procured registration as the registered owner of the land, they contend that their Kibanja interest on the registered land was not affected by the change in ownership of the title. In other words, the Kibanja interest did not cease to exist merely by the entry of the 1st defendant as the registered owner of the suit land.
- 35. The plaintiffs want this court to declare them the lawful owners of the Kibanja on the suit land. The plaintiffs contend that the registered owner can only sell the title interest in the land without any effect on the interest of a Kibanja holder.
- 36. The 1st defendant does not agree that the plaintiffs have any interest in the suit land. He contends that the Kibanja ceased to exist when he became the registered owner of the suit land. He claims to have acquired the Kibanja interest of his late father. With this in mind, the 1st defendant went ahead to sell suit land to the 3rd and 4th defendants who do not recognise the Kibanja interest of the plaintiffs.
- 37. Therefore, the legal question for this court to consider and determine, is whether the Kibanja of the plaintiffs in the suit land was legally affected in any way by the 1st defendant's purchase of the title interest in the land, and

Page 14 of 23

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subsequent transfer of the title interest to the \$3rd defendant or any other third party. Simply put, is the Kibanja interest affected by the change in ownership of the title to the land?

38. The answer to this legal question can be found in section 35 (8) of the Land Act (Cap 227 as amended by the Land Amendment Act No.1 of 2010) wherein it is provided that:

> "[...] a change of ownership of title effected by the owner by sale, grant and succession or otherwise shall not in any way affect the existing lawful interests or bona fide occupant and the new owner *shall be obliged to respect the existing interest.*"

- 39. It is abundantly clear to me that under the law, the lawful interest of a Kibanja holder cannot be affected in anyway by the change in ownership of the title to the land. The title interest in the land can change multiple times from one registered owner to another but each successive registered owner has a legal obligation to respect the Kibanja interest on the land. The Kibanja holder has absolute protection under the provisions of section 35 (8) of the Land Act (Cap 227 as amended). That is why, there are several provisions in the *Land Act* governing the relationship between the registered owner and the lawful or bona fide occupant.
- 40. It is true that there was been a change in ownership of the title of the suit land from Erisa Kalule to Kivumbi David (the 1st defendant) (5th July 2002) and then from Kivumbi David (the 1st defendant) to Katamba Mahad (the 3rd defendant) (5th November 2018).
- 41. In accordance with section 35 (8) of the Land Act (Cap 227 as amended), the change in ownership of title from Erisa Kalule to Kivumbi David, and

Page 15 of 23

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then from Kivumbi David to Katamba Mahad had no effect whatsoever on the Kibanja of the plaintiffs measuring approximately 2 acres on the suit land. See my earlier decision in the case of *Namata Sarah & 3 Others v.* Damulira Edrisa, High Court of Uganda (Land Division), HCT-00-LD-CA-0016-2018.

- 42. Although the 3rd defendant (Katamba Mahad) is the registered owner of the suit land, he is legally obliged to respect the Kibanja of approximately 2 acres owned by the plaintiffs on the same land. That is the effect of the law under section 35(8) of the Land Act (as amended).

- 43. The 3rd defendant is the current registered proprietor of the suit land, as per the evidence before court, and the 3rd and 4th defendants put forward the defence of a bona fide purchaser for value without notice. In paragraph 5(b) of the written statement of defence, they aver that:

"The 4th Defendant is a bona fide purchaser for valuable *consideration without notice."*

- 44. In my considered opinion, the defence of a bona fide purchaser for value without notice is not applicable in the instant case because the dispute between the parties is about the legal relationship between a registered owner and a lawful occupant; and the rights and obligations accruing to both parties.
- 45. A Kibanja holder enjoys security of occupancy under Uganda's legal regime. Lawful or bona fide occupants can be evicted only for non-payment of the annual nominal ground rent, and upon an order of eviction issued by a court.

Page 16 of 23

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46. The plaintiffs are lawful occupants on the land in accordance with *section* 29(1)(a) of the Land Act (Cap 227), and accordingly, enjoy security of occupancy as per the provisions of sections 31 & 32A of the Land Act (Cap 227\$) which provide that:

"31. Tenant by occupancy

- (1) A tenant by occupancy on registered land shall enjoy security of occupancy on the land.
- (2) The tenant by occupancy referred to in subsection (1) shall be deemed to be a tenant of the registered owner to be known as a tenant by occupancy, subject to such terms and conditions as are set out in this Act or as may be prescribed.
- (3) The tenant by occupancy shall pay to the registered owner an annual nominal ground rent as shall, with the approval of the Minister, be determined by the Board.

32A. Lawful or bona fide occupants to be evicted only for non payment of ground rent

"(1) A lawful or bona fide occupant shall not be evicted from registered land except upon an order of eviction issued by a court and only for non payment of the annual nominal ground rent."

- 47. In accordance with the above provisions of the law, the plaintiffs can only be evicted from the land by an order of court, and the court *can only* make that order if the plaintiffs have defaulted in payment of the annual nominal ground rent.

- 48. Moreover, under *section 3(4) of the Land Act (Cap 227)*, a mailo landowner holds the land subject to the rights of lawful or bona fide occupants. See the case of Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi,

Page 17 of 23

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JJA) (per the Judgment of Justice Monica K. Mugenyi, JA). Section 3(4) of the Land Act (Cap 227) provides that:

"(4) Mailo tenure is a form of tenure deriving its legality from the *Constitution and its incidents from the written law which—*

(*a*) involves the holding of registered land in perpetuity;

- (b) permits the separation of ownership of land from the ownership of developments on land made by a lawful or bona fide occupant; and
- (c) enables the holder, subject to the customary and statutory rights of those persons lawful or bona fide in occupation of the land at the time that the tenure was created and their successors in title, to exercise all the powers of ownership of the owner of land held of a freehold title set out in subsections (2) and (3) and subject to the same possibility of conditions, restrictions and limitations, positive or negative in their application, as are referred to in those subsections." underlining is mine for emphasis
- 49. It is my finding therefore, that the plaintiffs are the lawful occupants on the suit land being owners of a Kibanja measuring approximately 2 acres on the suit land. The defendants must respect the plaintiffs' Kibanja on the suit land. They have a constitutional and legal obligation to do so, and there are legal consequences for failure including criminal sanctions.
- 50. Under Section §92(1)(e)\$ of the Land Act (as amended by Act 1 of 2010), it is a criminal offence to attempt to evict a lawful or bona fide occupant without a lawful court order. The section provides that:
- "92. Offences and penalties §(1)\$ A person who—

(a) ...;

Page 18 of 23

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- (b) ...; §(c)\$...; §(d) \ldots; § (e) attempts to evict, evicts, or participates in the eviction of \$a\$ lawful or bona fide occupant from registered land without an order of eviction [...] commits an offence."

51. This is further buttressed by constitutional guarantees for security of occupancy under *article 237(8)* of the *Constitution of Uganda (1995)* which provides that:

> "(8) Upon the coming into force of this Constitution and until Parliament enacts an appropriate law under clause (9) of this article, the lawful or bonafide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land."

- 52. The change in ownership of the title interest in the suit land had no impact whatsoever on the Kibanja interest of the plaintiffs, and all persons that purportedly acquired the title interest from the defendants did so subject to the Kibanja interest of the plaintiffs. Any such new owners of the title interest in the suit land, both those that are before court, and those that are not parties to the suit, have a legal obligation under the land laws of Uganda to respect the Kibanja interest of the plaintiffs.
- 53. In conclusion, it is my finding that the plaintiffs own a Kibanja interest. The 1st defendant lawfully sold the title interest in the suit land but that did not affect the Kibanja interest of the plaintiffs in any way. The defendants own the title interest in the suit land and they have a legal obligation to respect the Kibanja interest of the plaintiffs.

Page 19 of 23

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- 54. The 1st and 2nd defendants counterclaimed against the plaintiffs and prayed for the following reliefs: a declaration that the 1st defendant was the legal owner of the suit property and exercised his rights in disposing of the same; a declaration that the plaintiffs have no right to the suit property as Kibanja holders or otherwise; general damages of Ushs 50 million plus interest thereon at 25% per annum from the date of judgment till full payment; a permanent injunction restraining the plaintiffs from interfering with the 3rd and 4th defendants' lawful possession and use of the suit property; and costs of the suit.
- 55. In view of my findings above, the counterclaim filed by the 1st and 2nd defendants is dismissed with costs.

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

- 56. The plaintiffs prayed for the following remedies: i) a declaration that the defendants are trespassers on the suit land; ii) a declaration that the plaintiffs own a Kibanja on the suit land; iii) a declaration that all the transactions between the defendants for the sale of the suit land are subject to the plaintiffs' Kibanja interest; iv) a declaration that the actions of the defendants of forcefully entering, and occupying part of the plaintiffs' Kibanja, and destroying the plaintiffs' crops, boys' quarters (4 rooms), and a church thereon amounts to trespass; v) a permanent injunction restraining the defendants from evicting the plaintiffs from their Kibanja; vi) general damages; and vii) costs of the suit.

- 57. I have made a finding that the defendants own a title interest in the land while the plaintiffs own a Kibanja interest in the same land. Both of these interests in the land are lawful. The defendants cannot therefore be called trespassers on land they legally own and have valid certificates of title.

Page 20 o/23

- 58. The defendants however, have a legal obligation to respect the Kibanja interest of the plaintiffs, and I grant a declaration to that effect to the plaintiffs.
- 59. I am satisfied by the evidence adduced that the plaintiffs are under a threat of eviction, and I accordingly grant an order of permanent injunction restraining the defendants, their agents, servants, workmen or any other persons who have acquired legal interest in the suit land from the defendants, from evicting the plaintiffs from the Kibanja situated on the suit land, measuring approximately 2 acres.
- 60. The defendants have caused suffering, mental anguish, and devastation to the plaintiffs by attempting to evict them from the suit land. The defendants ought to have known that the Kibanja interest of the plaintiffs is jealously protected by the land laws of Uganda. I consider that an award of general damages of Ushs 30,000,000 to the plaintiffs is fair and reasonable.
- 61. Costs are awarded to the plaintiffs in accordance with *section 27 of the Civil Procedure Act.*

Final order of the court:

- 62. In the result, I enter judgment in favour of the plaintiffs, and order as follows:
- i). That the plaintiffs own a Kibanja interest measuring approximately 2 acres on land comprised in in Kyadondo Block 200 Plots 216 (now 1595, 1594, 1803 and 1804) and Plot 305 Land at Kawempe, and the defendants and/ or any other persons, including those that are not parties to this suit, who are registered owners of the suit land, or who derived their interest from the defendants, have a legal obligation to respect the Kibanja interest of the plaintiffs.

Page 21 o/23

- ii). That a permanent injunction issues restraining the defendants, their agents, servants, workmen or any other person deriving legal interest in the suit land from the defendants, from evicting the plaintiffs from the Kibanja measuring approximately 2 acres situated on the suit land.
- iii). That the defendants shall pay general damages of Ushs 30,000,000 (Uganda shillings thirty million) to the plaintiffs.
- iv). That the counterclaim by the \$1^{st}\$ and \$2^{nd}\$ defendants is dismissed with costs.

- v). That the defendants shall pay costs of the suit to the plaintiffs.

IT IS SO ORDERED.

\$cancu\$;

BERNARD NAMANYA JUDGE 28 July 2023

28 July 2023 at 9:06am.

Francis Nyakoojo Counsel for the defendants absent Both plaintiffs are in court All the defendants are absent Allena Kire

Counsel for the plaintiffs

Court Clerk

Francis Nyakoojo:

We are ready to receive the Judgment.

Court:

Judgment delivered in open chambers.

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BERNARD NAMANYA JUDGE 28 July 2023

Page 23 of 23

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