

UGANDA / JUDGMENT

# Rwabigongi and Another v Kyomugisha (HCT-05-CV-CS 14 of 2020) [2025] UGHC 66 (20 February 2025) [2025] UGHC 66

## COURT

High Court of Uganda

## BEFORE

Allan Nshimye, J

## CASE / FILE NUMBER

HCT-05-CV-CS 14 of 2020

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## THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA HCT-05-CV-CS-0014-2020

- 1. TEERA VIOLET RWABIGONGI
- 2. NKAMUSHABA DAVID ----- PLAINTIFFS

## VERSUS

KYOMUGISHA JANE ----- DEFENDANT

BEFORE: Hon. Justice Nshimye Allan Paul M.

## 15 JUDGMENT

### REPRESENTATION

The Plaintiffs were represented by Adv. Daudi Balinda from M/s Mugisha, Balinda & Co. Advocates, while the Defendant was represented by Adv. Jadison Agaba from M/s Ahimbisibwe & Agaba Co. Advocates.

## BACKGROUND

This is a conflict about land wherein the 1st plaintiff (Rwabigongi Teera) is the mother-in-law of the defendant (Kyomugisha Jane), and 2nd plaintiff (Nkamushaba David) is a stepson of the defendant.

The Plaintiffs commenced this suit against the Defendant by way of an ordinary plaint filed on 30th January 2020. The plaintiffs claim against the Defendant is for a declaration that the land currently registered in the names of the late Tayebwa Steven and described as FRV MBR 453 Folio 17 herein after referred to

30 as suit land should not form part of the estate of the deceased among other claims. The plaintiffs claim that the suit land belongs to the 1st plaintiff (\*see paragraph 4 of the plaint)\*

The plaintiffs sought orders that the certificate of title of the suit land 35 registered in the names of the Tayebwa Steven, be canceled and a declaration that the plaintiff is the true owner of the suit land, and general damages among other orders. (\*see paragraph 14 of the plaint\*)

The Defendant filed a written statement of defence on 18th March, 2020 wherein she averred that the suit land belongs to her husband (the late Tayebwa Steven) and she has never chased the Plaintiffs away from the suit land, but only cleared a part of it of thickets to create adequate grazing ground

- 5 for her cattle. She added that at Tayebwa's death, the certificate of title of the suit land was not yet out but was in the process of issuance (\*See paragraph 13 (a),(d),(e) of the WSD\*).
- The defendant then sought orders that the certificate of title of the suit land 10 was lawfully acquired, that the suit land belonged to her late husband and not the 1st plaintiff among other orders sought. (\*See paragraph 14,15 & 16 of the WSD\*).

## ISSUES

- The parties filed a joint scheduling memorandum on 19th 15 July, 2022 wherein the following issues were framed for determination;
- 1. Whether the suit is time barred.
- 2. Whether the Defendant's late husband (Tayebwa Stephen) obtained the certificate of title comprised in FRV MBR 453 FOLIO 17 by fraud?
- 20 3. Who of the parties is the rightful owner of the suit land?
- 4. Whether the late Rwabigongi Edward only left the suit land?
- 5. What remedies are available to the parties?

## SUBMISSIONS

25 The parties filed written submissions, which this court has considered.

## WITNESSES

The plaintiffs relied on PW1 Rwabigongi Teera Violet, PW2 Nkamushaba David, PW3 Kusasira Anna, PW4 Kabandize Esau. The defendant relied Juliet 30 Kyasiimire, DW2 Komigisha Jane, DW3 Jolly Kasamari, DW4 Muguma sam and DW5 Rwigomba Kosia.

## DETERMINATION

It is a cardinal principle that the burden of proof lies with the person who 35 makes an allegation desiring court to decide in his favour. The guiding law is in **SECTIONS 101, 102 & 103 OF THE EVIDENCE ACT CAP 8**.

## ISSUE 1

### Whether the suit is time barred

40 In principle the law stipulates that no action shall be brought to recover land after the expiry of twelve years after the date the cause of action arose as is stipulated in **SECTION 5 OF THE LIMITATION ACT CAP 290**.

The evidence on court record shows that the plaintiffs are seeking orders that the suit land belongs to the 1st plaintiff and that the certificate of title comprised in FRV MBR 453 FOLIO 17 ought to be cancelled (see \*paragraph 14\*

- 5 \*of the plaint).\* I have studied PEX3, the certificate of title of the suit land comprised FRV MBR 453 Folio 17 block 15 plot 90 and I note that that it was registered into the names of Tayebwa Stephen on 04/10/2017, so considering that the plaint in this suit was filed on 30th January 2020, it implies that that the suit was filed three years after the certificate of title of the suit land was
- 10 registered in the names of Tayebwa Stephen. I therefore find that the suit is not time barred.

### I will now handle issue 2, 3 & 4 together since they are interrelated.

15 It is trite law that facts that have been admitted by the parties need not be proved as is stipulated in **SECTION 57 OF THE EVIDENCE ACT CAP 8** and, it should also be noted that parties are bound by their pleadings.

I will start by listing the salient common areas of agreement by both parties.

- 20

- 1. That the defendant has not attempted to chase the plaintiffs from the suit land or prevent them from using the suit land (\*see paragraph 5 (e) of the plaint , paragraph 12 (d) of the WSD, the evidence in paragraph 22 of the defendant's witness statement while testifying as DW2, paragraph\* 25 \*29 of the Mugume sam's witness statement while testifying as DW4, and the sketch map drawn by the court at the locus visit showing the plaintiffs homestead next to that of the defendant.\* )
- 2. That the late Edward Rwibigongi, Katotera and Mwesigye owned land together \*(see paragraph 5 (a) & (b) of the plaint, paragraph 4 of the\* 30 \*WSD and the evidence in PEX1 and PEX2 that shows that Rwabigongi, Katotera and Mwesigye applied for 520 Ha)\*
- 3. That the land of the late Edward Rwabigongi was distributed to beneficiaries (\*see paragraph 5(d) of the plaint , paragraph 7 of the WSD and the evidence in PEX4(a) & PEX4(b) that show a sharing document in\* 35 \*which 12 children of the late Edward Rwabigongi, who included Stephen Tayebwa shared his land\*).

I will now list the areas of disagreement.

1. The 1st plaintiff claims that she brought the land interest of Mweisgye

40 kosiya in 1986 for a consideration of 27 cows and shillings 2000/- . Shas did not produce any agreement to back up the claim. (\*See paragraph 5(c) of the Plaint, the evidence in paragraph 8, 11, 16 of 1st plaintiffs'\*

\*testimony while testifying as Pw1, Paragraph 2&3 of Anna Kusasira's witness statement while testifying as PW3, Paragraph 2&3 of Esau Kabandize's witness statement while testifying as PW4,\*

\*2.\* The defendant claims that her husband the late Stephen tayebwa 5 purchased part of the land that belonged Mwesigye Kosiya. She did not produce any agreement to back up the claim \*(See paragraph 14 (d) of the WSD. The evidence in Paragraph 9 of Juliet Kyasiimire's witness statement while testifying as DW1, Paragraph 10 of defendant's witness statement while testifying as Dw2, Paragraph 8 of Sam Mugume's\* 10 \*witness statement while testifying as DW4)\*

It is now a settled position of the law that obtaining of a certificate of title in order to defeat an unregistered interest of another person amounts to fraud as was held in **KAMPALA DISTRICT LAND BOARD & CHEMICAL DISTRIBUTORS V. 15 NATIONAL HOUSING AND CONSTRUCTION CORPORATION, SCCA 2 OF 2004.**

**The law in SECTION 12 (1) OF THE LAND ACT CAP 236 provides:**

\*"12. Procedures for application for freehold tenure\*

\*(1) The committee shall, subject to this section, in respect of an\* 20 \*application made under section 9 or 10, comply with all the procedures set out in section 6."\* (bold emphasis mine)

The law in **SECTION 6 (1), (2) & (3) OF THE LAND ACT CAP 236** that is supposed to be adhered to as mentioned in section 12 (1) of The Land Act CAP 236 25 requires the chairperson of the committee to ensure procedures are followed, and that all persons with claims on the land be specified. This enables the land committee to hear and determine all claims as specified in section 6 (3) of the land Act cap 236. The applicant for conversion of land from Customary tenure to free hold has an obligation to complete FORM 4 truthfully to guide the area 30 land committee in execution of its mandate to interrogate all claims on the land.

It is also a legal requirement that all occupants of land that is subject to an application for grant for freehold have to be stated in the application (\*See Form\* 35 \*4 in the first schedule of the Land Regulations 2004\*). The applicant while completing FORM 4, has to fill in the answers to the questions in paragraph 6 of the FORM which are:

| | "6. a) Is the land occupied? YES/NO | |

|---|-----|---|

| | b) If occupied, by whom? | |

| 40 | c) Claims of occupiers " | |

The evidence on court record contained in FORM 4 exhibited as DEX4, which is an APPLICATION FOR CONVERSION FROM CUSTOMARY TENURE TO FREEHOLD TENURE/GRANT OF FREEHOLD shows that;

- 5 1. An application was made by Tayebwa Stephen aged 45 years and it was signed on 14 July 2015.
- 2. The applicant states in the application that the land is occupied by him and there are no claims by occupiers. (see DEX3)
- 10 In my analysis of the above evidence in DEX3, the applicant, Tayebwa Stephen omitted to state that his mother (1st plaintiff) had structures on the land and that she was also occupying the land he was applying for, yet the evidence on court record in paragraph 3 of Pw4 Esau Kabandize's witness statement is that he (PW4) stayed with the 1st plaintiff on the suit land in 1986. This means that the 1st 15 plaintiff is an occupant on the suit land.

The evidence of PW4 is corroborated by both the plaintiffs and defendants as can be seen in paragraph 5 (e) of the plaint, paragraph 12 (d) of the WSD, the evidence in paragraph 22 of the defendant's witness statement while testifying 20 as DW2, paragraph 29 of the Mugume Sam's witness statement while testifying as DW4, and the sketch map drawn by the court at the locus visit showing the plaintiffs homestead is next to that of the defendant\*.\*

DW3 Jolly Kasamari who was a member of the area land committee testified in in her witness statement that they interfaced with the 1st 25 plaintiff who told them the land was for Tayebwa. This evidence is NOT contained in the Area land committee report on FORM 4 as it should have been noted.

The most fundamental thing is that when Stephen Tayebwa was completing 30 FORM 4 he omitted to state on the form that the land was also occupied by the 1st plaintiff, so, in that regard FORM 4 exhibited as DEX4 contains falsehoods made by Stephen Tayebwa, which amounts to fraud since it was intended to mislead the Area Land Committee and defeat an unregistered interest of the 1st plaintiff.

I therefore find that Stephen Tayebwa committed fraud in the processing of the land now registered in FRV MBR 453 Folio 17 block 15 plot 90 measuring 93.9 Ha.

40 I now must interrogate the ownership of the land that was put together in the land that was finally comprised in FRV MBR 453 Folio 17 block 15 plot 90 measuring 93.9 Ha.

The plaintiffs and defendant all agree that the land of the late Edward Rwabigongi was distributed to beneficiaries as is stated in paragraph 5(d) of the plaint and paragraph 7 of the WSD.

The evidence in PEX4(a) & PEX4(b) shows a sharing document in which 12 children of the late Edward Rwabigongi, who included Stephen Tayebwa shared land that was owned by their father the late Edward Rwabigongi.

10 The late Edward Rwabigongi owned 173 Ha out of the 520 Ha that was owned by Rwabigongi, Katotera and Mwesigye (\*see paragraph 5 (a) & (b) of the plaint, paragraph 4 of the WSD and the evidence in PEX1 and PEX2 that shows that Rwabigongi, Katotera and Mwesigye applied for 520 Ha\*). PEX1 confirms that out of the 520 Ha, the late Edward Rwabigongi owned 173 Ha. The 12 children

15 of the late Edward Rwabigongi, who included Stephen Tayebwa each got 14.4 Ha (35.5 acres). This means that the 14.4 Ha that Stephen Tayebwa's got as a share from his father's land is also part of the 93.9 Ha in FRV MBR 453 Folio 17 block 15 plot 90, when this is deducted from the land in the title (93.9Ha-14.4 Ha = 79.5Ha) you get 79.5Ha which all sides claim was purchased from 20 Mwesigye Kosiya.

The 1st plaintiff claims that she brought land from Mwesigye kosiya in 1986 before he left the area for a consideration of 27 cows and shillings 2000/, She did not produce any agreement to back up the claim. The 1st plaintiff's claim 25 that she brought land from Kosiya Mwesigye is supported by the evidence contained in Paragraph 2&3 of Esau Kabandize's witness statement while testifying as PW4 and Paragraph 2&3 of Anna Kusasira's witness statement while testifying as PW3, wherein she states that she was around when the cows for payment were being sorted out of the kraal.

On the other hand, the defendant also claims that her husband, the late Stephen Tayebwa purchased part of the land that belonged Mwesigye Kosiya. She did not produce any agreement to back up the claim. Her claim is supported by the evidence contained in Paragraph 8 of Sam Mugume's witness

35 statement while testifying as DW4 and the evidence in Paragraph 9 of Juliet Kyasiimire's witness statement while testifying as DW1, wherein she states that "that I know that the suit land was sold by my late husband Kosia Mwesigye to one Tayebwa Stephen in the 1980's" (emphasis mine)\*

In my analysis of the above evidence in respect to the alleged purchase of Mwesigye's land. I note;

- 1. That both the 1st plaintiff and the defendant, claims to have purchased land from Kosiya Mwesigye are not backed by any written agreement 5 but are both supported by the oral evidence of two witnesses on each side.
- 2. That Mwesigye migrated from suit land in 1985 to Bulemezi in Ngoma (\*see paragraph 7 of PW1's witness statement, paragraph 5 of PW4's witness statement\*).
- 10 3. That Mwesigye sold the land in 1985 before migrating to Ngoma in Bulemezi (\*see paragraph 8 of PW1's witness statement, paragraph 2 of PW2's witness statement, paragraph 9 of Dw1's witness stateme\*nt).
- 4. That in FORM 4 exhibited as DEX4, which is an APPLICATION FOR CONVERSION FROM CUSTOMARY TENURE TO FREEHOLD 15 TENURE/GRANT OF FREEHOLD the applicant Tayebwa Stephen competed on 2015, he stated therein that he was 45 years of age and signed the application on 14th July 2015 confirming the information therein. This means that if he was 45 years of age in 2015, then he was born in 1970 (2015 – 45 = 1970).
- 20

Having considered the above evidence, I have noted that Mwesigye sold his land in 1985 and migrated to Ngoma in Bulemezi, this would mean that if Tayebwa was the one who brought the land from Mwesigye, he (Tayebwa) must have been 15 Years of age considering that having been born in 1970 he

- 25 was 15 years old in 1985 when Mwesigye sold the land. I find that Stephen Tayebwa was still a child in 1985, without capacity to contract. He was staying on the land with his mother who is the 1st plaintiff (\*see PW1's cross examination testimony)\*
- I am therefore convinced that it is the 1st 30 plaintiff that purchased land from Mwesigye in 1985 because she would have been an adult with means rather than Stephen Tayebwa that was still a child aged 15 years staying with his mother, and possibly with little or no means to purchase the land from Mwesigye who was in his late father's age bracket.
- 35

The 1st plaintiff while testifying as PW1 stated in paragraph 14 of her witness statement that;

"That the suit land belongs to me but I discovered that the late Tayebwa\* 40 \*being my own son whom I had instructed to process the title in both our names registered the title in his names only and excluded mine"(emphasis mine)\*

The 1st plaintiff while testifying as PW1 stated in paragraph 26 of her witness statement that;

5 "That it is my prayer that the title of land comprised in FHRV MBR FOLIO 17 should have my name included as tenants in common"(bold emphasis mine)\*

I find that the 1st plaintiff instructed the son Tayebwa Stephen to process the 10 land title in both their names and she still desires that their names be on the title as tenants in common as she avers in paragraph 26 of her witness statement as PW1. This would imply that Tayebwa and the 1st plaintiff would own equal shares in the land that was got from Mwesigye. That is 39.75 Ha each, for Tayebwa Stephen and Rwabigongi Teera Violet.

In regard to the claim for cows, the evidence adduced on court record is insufficient to support the claim.

## ISSUE 5

### 20 What remedies are available to the parties?

In principle the High Court has Powers to direct cancellation of certificate or entry in certain cases as is provided in **SECTION 161 OF THE REGISTRATION OF TITLES ACT CAP 240**, which states that;

25 "161. Powers of High Court to direct cancellation of certificate or entry in certain cases\*

\*Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the\* 30 \*Registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the Registrar shall give effect to that order\*."

35 The law also grants the High Court power to grant remedies to resolve controversy between the parties as is provided in **SECTION 37 OF THE JUDICATURE ACT CAP 16**.

I note that this is conflict between close family members, the 1st plaintiff 40 (Rwabigongi Teera) who is the mother of the late Stephen Tayebwa, is also the mother-in-law of the defendant (Kyomugisha Jane). The 2nd plaintiff

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(Nkamushaba David) is a stepson of the defendant, having been the son of the late Stephen Tayebwa, the husband of the defendant.

The 1<sup>st</sup> plaintiff and the defendants are all widows, who are victims of the actions or omissions of the late Tayebwa Stephen the son and husband of the  $\mathbf{1^{st}}$  plaintiff and defendant respectively.

I find that from my analysis discussed above out of the suit land comprised in FRV MBR 453 Folio 17 block 15 plot 90 measuring 93.9 Ha, the 1<sup>st</sup> plaintiff has 39.75 Ha (the 50% share from Mwesugye's land), while the defendant has 54.15 Ha (The 50% share of the Mwesigye land totalling 39.75Ha plus 14.4 Ha that Stephen Tayebwa's got as a share from his father's land).

Considering that PW1 stated in paragraph 26 of her witness statement that; "That it is my prayer that the title of land comprised in FHRV MBR FOLIO" 15 17 should have my name included as tenants in common" (emphasis mine)

I find that this is a case in which cancelation of the title may just cause further hardship within the family members, it is this appropriate that court grants a \$20\$ remedy under SECTION 37 OF THE JUDICATURE ACT CAP 16, that will include changes in the entry of the proprietorship under SECTION 161 OF THE REGISTRATION OF TITLES ACT CAP 240.

- In conclusion I find for the plaintiffs and order that; 25
- 1. The Commissioner Land Registration cancels the entry of Tayebwa Stephen as the proprietor of FRV MBR 453 Folio 17 block 15 plot 90 and replace it with Tayebwa Stephen (54.15 Ha) and Teera Violet Rwabigongi (39.75 Ha) as Tenants in Common with Tayebwa Stephen owning 57.7% of the land and Teera Violet Rwabigongi owning 42.3% of the land.
- 2. The defendant shall register the grant of letters of administration she obtained to the estate of the late Tayebwa Stephen Vide HCT-05-CV-AC-146-2019 after the Commissioner Land Registration registers Tayebwa Stephen (54.15 Ha) and Teera Violet Rwabigongi (39.75 Ha) as Tenants in Common of FRV MBR 453 Folio 17 block 15 plot 90 as ordered in (1)
- 3. The defendant shall pay costs of the suit to the  $1^{st}$  plaintiff.

Musson NSHIMYE ALLAN PAUL M. JUDGE 20.02.2025

$\mathbf{S}$

above.

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