

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CV-LD-004 OF 2015

UGANDA MUSLIM SUPREME COUNCIL ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. NAMUBIRU MARY

2. COMMISSIONER LAND REGISTRATION :::::::::::::::::::::::DEFENDANTS

BEFORE: HON. JUSTICE VINCENT EMMY MUGABO

JUDGMENT

The Plaintiff brought this suit against the defendants jointly and severally for a declaration that the suit land comprised in Kyaka Block 60 Plot 5 at Kyegegwa (the suit land) belongs to the plaintiff, a declaration that the 1st defendant was fraudulently registered as proprietor of parts of the suit land, an order cancelling the 1st defendant's certificates of title for land comprised in FRV 1083 Folio 4 Kyaka Block 60 plot 40 and FRV 1083 Folio 5 Kyaka Block 60 plot 41 at Kyegegwa and register the same in the plaintiff's name, an eviction order, a permanent injunction, general damages and costs of the suit.

The claim of the plaintiffs is that the land described as Kyaka Block 60 Plot 5 at Kyegegwa measuring approximately 11.3 acres was surveyed as a native mailo belonging to Kyegegwa Muslim Community and have been in occupation of the same since the 1920s. The first mosque thereon was built by the late Musa Rutangi who also had homes thereon. That the 1st defendant, well aware that the land belongs to the muslim community fraudulently processed and acquired two certificates of title to wit, FRV 1083 Folio 4 Kyaka Block 60 plot 40 and FRV 1083 Folio 5 Kyaka Block 60 plot 41 at Kyegegwa on part of the plaintiff's land.

A joint survey was carried out by the District Staff Surveyor Kyegegwa in March 2021 to open boundaries of the parties' respective pieces of land and it was established that plots 40 and 41 claimed by the 1st defendant were not traceable on the ground yet the 1st defendant was purportedly in occupation of the plots. The plaintiff stated that the 1st defendant is a trespasser on the suit land.

In her written statement of defence, the 1st defendant contended that from the 1900s, her parents and grandparents have been uninterruptedly using the suit land and developed the same with residential houses, gardens, coffee plantation and have their graveyard thereon. There has never transpired any land wrangles until 2007. That after the passing of her father in August 2008, her brothers Rwatooro Zaidi, Ismail Rutangi and Sadiki Rutangi started claiming that the Kibanja where their father was buried and the other Kibanja on which their father was cultivating belonged to their father whereas not. She gave a history of how the land she claims was occupied and used over the years and how she came to own the same. In October 2007, the 1st defendant applied for conversion of the two pieces of land from customary tenure to freehold and the same were titled as FRV 1083 Folio 4 Kyaka Block 60 plot 40 and FRV 1083 Folio 5 Kyaka Block 60 plot 41 at Kyegegwa in the 1st defendant's name.

It is the 1st defendant's contention that her land contained in the aforementioned titles of plots 40 and 41 do not cross over to plot 5 that is claimed by the plaintiff and that she lawfully acquired the same after taking all the requisite steps and paying the required fees.

By way of counterclaim, the 1st defendant claimed that the plaintiff was guilty of trespass when it interfered with the quiet possession of her land

by erecting boundaries that are not in line with the gazette boundaries and entering her land without authority.

Representation and hearing

The plaintiff is represented by Mr. Mugabe Robert of Mugabe-Luleti & Co. Advocates. The 1st defendant is represented by Mr. Albert Kyeyune of Mukiibi & Kyeyune Advocates. The 2nd defendant is unrepresented.

The plaintiff led evidence of four witnesses. Rwatooro Zaidi as PW1, Tumusiime Monious, the District Staff Surveyor Kyegegwa as PW2, Fredrick Rwabuhoro as PW3 and Bacwa Aston as PW4.

The 1st defendant led evidence of three witnesses. Namubiru Mary the 1st defendant as DW1, Rutangi Abasi as DW2 and Birungi Albert as DW3. The hearing proceeded by way of witness statements and cross examination. Thereafter, court conducted the locus in quo on 2/12/2022, made observations that have also been considered herein. Both counsel have also filed written submissions which have been considered herein.

At scheduling, the following issues were raised for determination by court:-

- 1. Who owns the suit land?***
- 2. Whether the 1st defendant acquired the certificates of title for the suit land fraudulently***
- 3. Who of the parties is trespassing on the suit land?***
- 4. What remedies are available to the parties?***

Burden and Standard of proof

The burden of proof is upon the Plaintiff to prove his case on a balance of probabilities. **Section 101, 102 and 103 of the Evidence Act** provide that he who asserts a fact must prove it. Whoever desires any court to give the

judgment as to any legal rights or liability dependent on the existence of the fact which he or she asserts must prove that fact exists.

The court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that, the more probable conclusion is that for which the Plaintiff contends, since the standards of proof is on the balance of probabilities /preponderance of evidence (see ***Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345*** and ***Sebuliba Vs Cooperative Bank Ltd (1982) HCB130***)

Court's determination

Issues 1 & 3: who owns the suit land? Who of the parties is guilty of trespass?

As gathered from the parties' pleadings and evidence that the land in contention involves three plots of land in Kyegegwa. Kyaka Block 60 Plot 5 at Kyegegwa claimed by the plaintiff, FRV 1083 Folio 4 Kyaka Block 60 plot 40 and FRV 1083 Folio 5 Kyaka Block 60 plot 41 at Kyegegwa claimed by the 1st defendant. Either party accuses the other of trespass. It is the plaintiff's claim that the 1st defendant's plots extend to the plaintiff's land and that the 1st defendant fraudulently obtained certificates of title to the same. It is my considered opinion that evidence that was adduced to determine the boundaries of the respective plots is more relevant in determining this matter. Since the three plots were surveyed and neither party is claiming the plot of the other, it is important to determine if any of the plots was wrongly surveyed as to interfere in the boundaries of another.

PW1 stated that the suit land included part of plot 5 and the neighbouring land beyond plot 5, collectively known as mosque land. He described the neighbours to the land. He stated that the late Musa Rutangi stayed on the mosque land and allowed his sisters Saidah Nyanjura and Nabuuso Kaliija

to stay on the same. The pieces of the land they occupied are the ones the 1st defendant claims. Musa Rutangi died in 1981 after he had relocated to a different place. He also states that the 1st defendant acquired certificates of title over the suit land without the knowledge of the plaintiff and neighbours. Further that when the district staff surveyor opened the boundaries for plots 40 and 41, he concluded that the survey of the said two plots was controlled on plot 5 which is land belonging to the plaintiff.

During cross examination, PW1 stated that the late Kalijja was buried on the suit land like many other muslims who were staying on mosque land.

Before the commencement of the hearing, it was found proper that the boundaries of the respective pieces of land be opened to ascertain whether any of the parties' land encroached on another's. The parties agreed to **PW2**, the district staff surveyor Kyegegwa. He carried out the boundary opening and submitted a report (**Pexh7**) on which he was cross examined. In his report, he concluded that during the survey of plots 40 and 41, the field surveyor ought to have realised that the two plots fall within the already surveyed area of plot 5. During cross examination, PW2 stated that plots 40 and 41 overlap plot 5 on the ground. At locus, he stated that the coordinates of plots 40 and 41 cannot be traced on the ground and it is possible for coordinates to be wrong but a person is given a certificate of title. He also admitted that he did not conduct the boundary opening for plots 40 and 41.

PW3 stated that he is a neighbour to the suit land but that he was never informed as a neighbour when the 1st defendant was processing the certificates of title for plots 40 and 41.

PW4 stated that the suit land belongs to the plaintiff and that the 1st defendant's father the late Yunus Mukasa knew this fact before he died.

When he was purchasing his land that neighbours with the suit land, Yunus Mukasa could not sign on the agreement as a neighbour because the mosque land did not belong to Mukasa even when he was staying there on. Instead, the Imam of the mosque signed on behalf of the plaintiff as neighbour. During cross examination, PW4 admitted to have signed the inspection report when the area land committee was inspecting the 1st defendant's land for titling.

In her evidence, DW1 (the 1st defendant) gave a long history of how the land was transferred from her great grandparents to her grandparents, parents and eventually herself. She stated that her lineage occupied the land from the 1900s and were uninterrupted until 2007. That before the death of her father the late Yunus Mukasa, she had applied for a conversion of the land bequeathed to her by her grandmother Kaliija Nabuuso in a will dated 17th November 1995 (**Dexh3**). This kibanja formed the present plot 41. That the present plot 40 was a kibanja bequeathed to her late father by his mother who died in 1996 and all buried on the same land.

During cross examination, she stated that when a joint boundary opening was ordered, she did not agree with the findings of the district staff surveyor and she contracted a private surveyor to open the boundaries.

DW2 stated that plot 5 claimed by the plaintiff is different from plots 40 and 41 claimed by the 1st defendant. He also gave a history of how the land in plots 40 and 41 was owned by the great grandparents, grandparents and parents of the 1st defendant and eventually the 1st defendant. He, the Chairperson LC1, Mugisa Buruhani and other members of the Kyegegwa muslim community were present when the 1st defendant was surveying plots 40 and 41 for titling. He referred to **Dexh23**. During cross

examination, DW2 stated that Omukama of Tooro donated 11 acres to the Kyegegwa muslim community which now forms plot 5.

DW3 is the surveyor that was contracted by the 1st defendant to do the boundary opening on her behalf. He detailed the procedures he took to conduct the boundary opening of plots 40 and 41. He found that both plots exist on the ground and were surveyed in accordance with the practice and approved by Ministry of Lands. His boundary opening report was admitted as **Dexh33**. During cross examination, he noted that neither plot 40 nor 41 encroach on plot 5 but share a boundary.

As stated earlier, the dispute between the parties is more of a survey dispute than that of trespass. Both parties agree that they own distinct pieces of land. The plaintiff claims that plots 40 and 41 belonging to the 1st defendant encroach on plot 5 belonging to the plaintiff. Two surveyors that carried out different boundary opening exercises on the suit land and came up with different results. The 1st defendant did not agree with the results of the joint surveyor (PW2) and conducted her own. During the hearing of the defence case, counsel for the plaintiff objected to the evidence of DW3, a surveyor employed by the 1st defendant to carry out the boundary opening on her behalf. The objection was on the ground that at the time he conducted the survey, his membership was not renewed with the Institution of Surveyors of Uganda. His membership identity card was also expired in June 2019.

With respect to the competence of DW3, counsel for the 1st defendant referred to all manner of documents to indicate that DW3 is a member of Institution of Surveyors of Uganda and therefore competent to carry out a field survey. The documents included the expired ID, the practicing

certificate for his supervisor Henry Ssembajjwe, journals of the Institution of Surveyors of Uganda all tendered as **Dexh35**.

The objection from counsel for the plaintiff goes beyond the competence of DW3 as a witness. In my considered opinion, it also involves the question as to whether DW3 could competently and professionally carry out a survey or boundary opening at the time when his membership in the Institution of Surveyors of Uganda had expired and with no valid practicing certificate as a licensed surveyor. Competence of a witness deals with whether the witness is able to understand the nature of the evidence he or she is giving, is alluding to facts that are within his or her knowledge and is able to reasonably respond to questions that may be put to him or her. Professional witnesses ought to additionally justify that they are professionally competent to allude to technical evidence.

Where an expert opinion report is written and is sought to be relied on by court to make a determination of the substantive rights of parties, it is proper that the expert is called to testify and prove that they are qualified and competent to give expert opinion evidence in the field of specialization. **Section 19(3) of the Surveyors Registration Act Cap 275** prohibits any person from carrying the practice of surveying unless he or she is a holder of a valid practicing certificate. Being a member of the institute of surveyors is one thing. A person must additionally acquire the certificate to practice for them to be able to professionally undertake survey work. The absence of a practicing certificate leaves court in guesswork as to the reasons the same was not procured for DW3 in the present case.

Courts and the general public rely on legal accreditation of professionals to determine whether a person is legally fit to professionally execute works under the field in question. Without these, we would be taking

professionals at face value and can only rely on hope that they know what they are doing.

In this case, it is common ground that DW3 did not possess a valid practicing certificate for surveyors as at the time he undertook the boundary opening of the 1st defendant's land. Therefore, by virtue of **section 19(3) of the Surveyors Registration Act** he had no legal capacity to 'engage in or carry out the practice of surveying, by whatever name called.' That prohibition is as broad as it is unequivocal. Surveying is defined in **Chamber's Twentieth Century Dictionary** as 'the art of ascertaining the boundaries and superficial extent of any portion of the earth's surface. It follows, therefore, that DW3 had no legal capacity to ascertain or measure the boundaries and scope of any piece of land. See ***Nsubuga Vs Mukundane & Another (CACA No. 208 of 2018)***. His report as well as evidence is therefore expunged without further inquiry into the merits of the same.

The above analysis leaves court with only the report of PW2 in as far as the boundaries of plots 5, 40 and 41 are concerned. His report concludes that the coordinates of plots 40 and 41 were not traceable on the ground. He also concluded that plots 40 and 41 overlap plot 5. The survey of plots 40 and 41 falls within the already surveyed area of plot 5.

Since only Kyaka Block 60 Plot 5 at Kyegegwa was traceable on the ground and the same had been surveyed in favour of the Kyegegwa native Mohamedan mosque in 1924 (Dexh9), it would be easier to conclude that the plaintiff is the lawful owner of the suit land that includes Kyaka Block 60 plots 5, 40 and 41 at Kyegegwa. Issue 1 is resolved as such.

Having found as above, it would be wrong to say that the plaintiff is a trespasser on its own land. The reverse is true for the 1st defendant. The 1st defendant would therefore be guilty of trespass on the plaintiff's land.

Issue 2: Whether the 1st defendant acquired the certificates of title for the suit land fraudulently

Counsel for the plaintiff relied on Section 190 of the Registration of Titles Act Cap 230 (RTA) to argue that If any person wilfully makes any false statement or declaration in any application to bring land under the operation of this Act...commits an offence...and any certificate of title, entry, erasure or alteration so procured or made by fraud shall be void as against all parties or privies to the fraud. Counsel referred to **Dexh17** which is a general receipt of money purportedly paid by Yunus Mukasa (the 1st defendant's father) in 2009 during the titling process for plots 40 and 41 when the said Mukasa had long died. Counsel also submitted that the 1st defendant forged the will of the late Kaliija Nabuuso that purportedly appointed her as heir of the said Nabuuso and acquiring the title over the land that was formerly occupied by the said Nabuuso was therefore fraudulent.

Counsel for the 1st defendant relied on the case of ***Kampala Bottlers Ltd Vs Damanico (U) Ltd SCCA No. 22 of 1992*** to argue that fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Counsel notes that none of the definitions of fraud have been proved against the 1st defendant. Counsel notes that a formal application for conversion of the land was submitted to the district land board, fees were paid, inspection of the land was made in the presence of neighbours to the land, a survey was conducted and all steps required to lawfully convert customary tenure were followed by the 1st defendant.

In the particulars of fraud, the plaintiff pleaded that the 1st defendant is guilty of connivance with her surveyor who is undisclosed to alter the survey information after finding out the her purported plots fell within the already surveyed area of plot 5.

In the case of **Fredrick J. K Zaabwe v. Orient Bank & 5 O'rs, S.C.C.A. No. 4 of 2006**, Justice Katureebe JSC (as he then was), relied on the definition of fraud in Black's Law Dictionary, (6th Ed) page 660 which states as follows; "*An intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right... It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another*" Fraud in land transactions has to be attributable to the transferee or beneficiary of the land transaction either directly or by implication. (See: **David Sejaaka Vs Rebecca Musoke, Civil Appeal No. 12 of 1985**) The transferee or beneficiary must be guilty of some fraudulent act or must have known of such act by somebody else and participated in it or taken advantage of it.

A few things stand out as regards the process undertaken by the 1st defendant to acquire the certificates of title for plots 40 and 41. First, with respect to plot 41. The 1st defendant contended that that was land owned and occupied by her late grandmother Kaliija Nabuuso. She relied on **Dexh3** which is the purported will of the said Kaliija Nabuuso wherein the land is bequeathed to the 1st defendant. The said will is clearly not properly executed in accordance with the provisions of **Section 50 of the Succession Act**. She confirms the same in her cross examination. One would wonder whether such a will would make a valid bequest of property to her.

Secondly, the application for conversion of plot 40 was commenced by the 1st defendant's father Yunus Mukasa who passed away mid process. It is unclear how the same application was changed to the 1st defendant's name in the absence of letters of administration and title granted in her name in disregard of the interest of the possible other beneficiaries to the estate of her late father.

Going by the boundary opening report of PW2, is clear that the survey information of the plaintiff's plot 5 was altered in the land office to create demarcations for the 1st defendant's plots 40 and 41. Whether this was within her knowledge at that time or not may not be very relevant considering the fact that the process was within her purview and she was the ultimate beneficiary of the same.

Upon perusal of the pleadings and evidence, I need to note that the 1st defendant took almost all the legal steps to acquire the certificates of title for plots 40 and 41. However, her conduct as stated above is far from being considered as bona fide.

It is my finding that the 1st defendant fraudulently acquired certificates of title to the suit land and I so hold.

Issue 4: Remedies

The plaintiff prayed for several declarations, general damages, an eviction order and costs of the suit.

It is hereby declared that the land comprised in Kyaka Block 60 plots 5, 40, and 41 at Kyegegwa belongs to the plaintiff and the 1st defendant fraudulently obtained certificates of title over the same.

The 2nd defendant is directed to cancel the 1st defendant's name from the certificates of title for lands comprised in FRV 1083 Folio 4 Kyaka Block 60

plot 40 and FRV 1083 Folio 5 Kyaka Block 60 plot 41 at Kyegegwa and register the same in the plaintiff's name.

General damages

Counsel for the plaintiff argued that the plaintiff is entitled to general damages for the inconvenience and embarrassment caused by the defendants when they dragged the plaintiff to court.

From the pleadings and evidence of the parties, it is quite clear that some of the 1st defendant's former relatives occupied the suit land for a long time with consent of the plaintiff. Over time, they could have unintentionally altered and fortified a claim to the suit land. I am inclined to decline this prayer.

Consequent to the resolution of the issues above, this suit therefore succeeds with the following orders;

- a. It is hereby declared that the land comprised in Kyaka Block 60 plots 5, 40, and 41 at Kyegegwa belongs to the plaintiff and the 1st defendant fraudulently obtained certificates of title over the same.
- b. The 2nd defendant is directed to cancel the 1st defendant's name from the certificates of title for lands comprised in FRV 1083 Folio 4 Kyaka Block 60 plot 40 and FRV 1083 Folio 5 Kyaka Block 60 plot 41 at Kyegegwa and register the same in the plaintiff's name.
- c. A permanent injunction is issued against the 1st defendant and anyone claiming under her restraining them from dealing with the suit land except with the consent of the plaintiff
- d. The 1st defendant is directed to give vacant possession of the suit land to the plaintiff
- e. Costs of this suit are awarded to the plaintiff.

It is so ordered

Dated at Fort Portal this 31st day of May 2023. .



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties



Vincent Emmy Mugabo

Judge

31st May 2023.