

IN THE REPUBLIC OF UGANDA
IN THE CHIEF MAGISTRATE'S COURT OF NWOYA AT ATIAK
CIVIL SUIT NO. 013 OF 2024

[FORMERLY AMURU CIVIL SUIT NO. 19 OF 2023]

1. OLOYA JOSEPH
2. ONEK BOSCO :.....: PLAINTIFFS/ COUNTER-DEFENDANTS

VERSUS

1. ALIZA LATIM ALEX
2. ORYEM CHARLES
3. OKELLO CHARLES OCII
4. KILAMA PARTRICK
5. ODONG SIMON
6. LANEK GEOFFREY :.....: DEFENDANT/COUNTER-CLAIMANTS

*Before: His Worship Kyembe Karim ESQ
Magistrate G.I*

JUDGMENT

Background:

The plaintiffs severally and jointly brought this suit against the defendants severally and jointly seeking declarations of ownership, that the defendants are trespassers on customary land found at Lumule cell Luzira ward, Pabbo Town council, Amuru district measuring approximately 11 acres (*hereinafter referred to as the suit land*), orders for general damages and costs of the suit.

Plaintiffs' case:

In their plaint, the plaintiffs pleaded facts to the effect that; the suit land is customary land originally having been acquired by one, Mzee Enacito Ocaya Mulezi who was the uncle of the plaintiffs' father, a one Odoch Jackson awanyi who was son of a one, Alum Edisa who was the

biological sister of the said Mzee Enacito Ocaya, all of whom are now deceased and specifically, Odoch Jackson Awanyi (*father of the plaintiffs*) died in 2007; that the said Mzee Enacito Ocaya Mulezi, before his death gave the plaintiffs' father (Odoch Jackson Awany) the suitland measuring approximately 11 acres in the year 1987 in the presence of the LC1 (*sic*) and his executives who are the plaintiff's witnesses; that it in the year 2003 upon demise of Mzee Enacito Ochaya Mulezi that the defendants started disturbing the plaintiffs who hitherto had been in quiet enjoyment of their father's estate and in the year 2022, they forwarded their complaint to the area LC1.

Defendant's case:

In their defence, the defendants filed a joint written statement of defence denying the entire claim and filed a counter claim seeking declaratory orders of ownership, that the plaintiffs are the trespassers, general damages, eviction orders, interest and costs. They denied that the plaint discloses any cause of action against them and asserted that the plaintiffs' grandmother settled on the northern part of the land which is not disputed and that land is within the control of the Owor clan where the plaintiffs originated from and that is where the plaintiffs grew up from and settled. That the now disputed land does not belong to the plaintiffs but to the defendants, as it was originally given to the Pugwang growers cooperative society early, around 1977 until the year 2018 when the ownership distributed and transferred to various clans upon the said cooperative society ceasing operations.

Representation:

At the hearing, the plaintiffs were represented by M/S ODONG & CO. ADVOCATES, while the defendant was represented by M/S LEGAL AID PROJECT OF UGANDA LAW SOCIETY.

Issues:

At scheduling, 3 issues were framed for court's determination.

1. Who of the parties is the owner of the Suitland?
2. Whether the defendants trespassed on the suit land?
3. What remedies are available to the parties?

However, under **Order 15 rule 1(5), & 5 of the CPR** this court can frame or amend issues as will enable it ably dispose of a case expediently. Thus, court amended issue 2 to read:-

Who of the parties trespassed on the suitland?

The plaintiffs called a total of 5 witnesses while the defendants called 4 witnesses

Submissions:

Learned counsel for the plaintiffs submitted first on who bears the burden of proof in civil cases citing **S. 101(2) of the Evidence Act** and the cases of **Nsubuga vs Kavuma (1978) HCB 307 and Yakobo & others Vs Crensesio Mukasa C.A no.17 of 2014.**

He submitted that the plaintiffs led evidence to show that they are customary owners of the suitland having inherited the same from their father, a one Odoch Jackson Awanyi upon his demise and that the said father, Odoch Jackson Awany had been given the same in 1994 by a

one, Mzee Enacito Mulezi after demise of his sister, a one, Alum Edisa and that the plaintiffs family has been in possession and utilized the suit land ever since, save for the period of the LRA insurgency.

Learned counsel also cited for this court the decision of **Hon. Justice Steven Mubiru in Atunya Vs Okeny (Civil Appeal no. 51 of 2018) UGHCLD 69** for the proposition that:

“A person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific area or class of persons to which the customary rules apply and that the land was acquired in accordance with those rules”

CONSIDERATION BY COURT.

Issue 1: Who of the parties is the owner of the Suitland?

Issue 2: Who of the parties trespassed on the suitland?

For expedience, this court will consider the first two issues hand in hand since they are interconnected.

As the defendants filed a counter-suit, the same shall also be dealt with in resolution of the issues. It is trite that a counter-suit is a separate suit whose merits are determined separately, but the evidence has to be considered and analyzed as a whole in resolution of the two cross-disputes. But for expedience, I will continue to refer to the parties respectively as plaintiff and defendant.

Resolution of these issues in the favour of the plaintiff will result into grant of the plaintiff's prayer seeking declarations of ownership of the suit land while also resulting in dismissal of the counter-claimant's prayer for declaration of ownership of the same Suitland.

Similarly, a finding on these issues in favour of the defendant also results in grant of the counter-claimant's prayers while also resulting into dismissal of the plaintiffs' claim in the plaint.

Declarations of ownership will succeed upon proof of whom of the two, that is, plaintiff and defendant has a better title to the Suitland.

Although, not necessarily always, a declaration of ownership in favour of the plaintiff, will invariably attract resultant orders to the effect that the defendants are trespassers on the suit-land, if the defendants do not advance a legally acceptable justification.

The key elements of trespass are; proof of ownership or possession (*actual or constructive*) and that the defendant entered thereupon without permission of the plaintiff or other lawful excuse. Proof of damage or loss is not necessary before declaration of trespass. Mere trespass is already damage enough and is actionable per se'. The same considerations apply to the counter-claimants in proof of their counter-suit.

This court listened to the testimony of the 2nd plaintiff testifying as pw1 intently on cross examination by the defendants. He acknowledged the existence of the Pugwang cooperative society and its eventual collapse. He told court that at the moment, D2 cultivates maize on the suitland, D3 cultivates maize and beans, D5 cultivates cassava while a sister to D4 cultivates sorghum. That pw1 is not utilizing any portion of the suitland as he was actually chased away by D4. He told court that his family settled on the suitland since the year 1994 without interruption and on cross examination, he emphasized that when mzee mulezi was giving them the land, the LC1 and his executives were present and that at that time, he was 15 years of age.

Pw1 also told court that they have mango trees, a pit latrine of which they dug in the year 2008 upon return from the IDP camps.

Pw2 on his part told court that he was not the one who surveyed the suit land and in fact, that he was chased away during the exercise since he was not from the Pungwang clan.

That testimony was re-echoed by the rest of the plaintiffs' witnesses

In their defence, the defendants first called D1 who testified as Dw1. He told court that the suitland originally belonged to the elders of Pugwang who decided to give the land to the Pugwang cooperative society in the year 1965. That upon collapse of the Pugwang cooperative society, the land reverted back to the Lanyeko Binen Union which later apportioned the same to the three households; to wit; Ogobi, Orobi and Owor.

Learned counsel for the plaintiffs submitted that since Pw1 admitted on cross-examination to have been 3years of age in 1965, his testimony in regard to how the land devolved should be disregarded, since in his view, it was tainted with hearsay.

Dw2 on his part told court that they used to pay some rents to the said Pugwang cooperative society as the owners of the suitland until the year 2018 when they received notification that the land was being handed back to the original owners and he left after harvesting his crops.

Dw3 who is the current LC1 chairperson of the area testified that he received notification from Dw1-Aliza Latim of Pugwang clan requesting the society to hand back the suitland, upon which, he convened a

meeting constituted by his executives and they found that indeed the land belonged to the Owor, Orobi and Ogobi households.

Learned counsel for the plaintiffs questioned the credibility of Dw3, since the plaintiffs' witness- Pw4 who was the chairperson at the time in 2018 had earlier told court that the land that was handed back to the society was different from the suitland.

On his part, Dw4 –Obur William now aged 79 told court that in the year 1967, the elders of Pugwang gave the suitland to the society for cotton growing and development and later shifted to Amuru in the year 1980.

Learned counsel for the plaintiffs submitted and specifically pointed out for court that Dw4 confirmed that the said Ocaya Enacito Mulezi (*plaintiffs' uncle under whom they claim*) was also among the said elders and since Dw4 had shifted in 1980 to Amuru, he could not testify to the events that transpired on the suitland thereafter.

From the evidence before this court, it is uncontested that the defendants are in actual possession and physical occupation of the suitland, save for the portions whose size was unspecified which the defendants plead in the counter claim to be trespassed upon by the plaintiffs.

Both parties, besides seeking declaration of trespass against each other, they also seek orders enabling them to recover that portion of the Suitland allegedly being trespassed upon by the other party. A suit for recovery of land is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership of that land as the first step.

It is trite that an out-of-possession owner of land may on the basis of constructive possession, even with no physical contact with the land, recover for an injury to the land by a trespasser which damages the ownership interest.

In **Adrabo Stanley -VS- Madira Jimmy Civil suit no. 0024 of 2013**, Hon. Justice Mr. Mubiru Stephen discussed that:

“...where trespass is pleaded as part of a suit for recovery of land, it requires the plaintiff to prove either actual physical possession or constructive possession, usually through holding legal title.”

There must have been either an actual possession by the plaintiff at the time when the trespass was committed, either by himself or by his authorized representative, or a constructive possession with the lands unoccupied and no adverse possession.

In essence, an action for recovery of land is founded on trespass involving a wrongful dispossession. It is the mode by which conflicting claims to title, as well as possession, are adjudicated. Any person wrongfully dispossessed of land could sue for the specific restitution of that land in an action of ejectment.

In ***Bramwell v. Bramwell, [1942] 1 K.B. 370***, it was discussed that an action for the recovery of land is the modern equivalent of the old action of ejectment. It is action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title.

As the suit before me is one for both recovery of land and declarations of trespass, it was critical for the plaintiffs to prove the validity of their title

since actions for recovery of land are premised on proof of a better title than that of the person from whom the land is sought to be recovered.

Similarly, the defendants/counter claimants were duty bound to prove a better title to the suit land if their counter suit has to succeed.

This being a civil suit, the burden of proof lies with the plaintiff, as per **Section 101 of the Evidence Act.**

Burden of proof

Learned counsel for the plaintiffs cited for this hon. Court **Section 101 of the Evidence Act, cap 6** which is to the effect that *“he who alleges must prove.”*

To decide in their favour, the court has to be satisfied that the plaintiffs had furnished evidence whose level of probity is such that a reasonable man might hold that the more probable conclusion is that for which the plaintiffs contend, since the standard of proof is on the balance of probabilities / preponderance of evidence as discussed in ***Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345*** and ***Sebuliba v. Cooperative Bank Ltd [1982] HCB 130***).

In attempt to discharge this burden, the plaintiffs adduced leading evidence through testimony of the 2nd plaintiff testifying as Pw1, who, in a nutshell, told court that;

“...there existed the Pugwang cooperative society and it has since collapsed. Currently, the defendants are in occupation of the Suitland, D2 cultivating maize, D3 cultivating maize and beans, D5 cultivating cassava while a sister to D4 cultivates sorghum. That

pw1 is not utilizing any portion of the suitland as he was actually chased away by D4.

“...Pw1’s family settled on the suitland since the year 1994 without interruption and when mzee mulezi was giving them the land, the LC1 and his executives were present and at that time, he was 15 years of age. On the suit land, Pw1 has mango trees, a pit latrine of which they dug in the year 2008 upon return from the IDP camps”

From the evidence adduced by both parties, this court discerns, that both plaintiffs and defendants do not deny the existence of *the Pugwang cooperative society* which at some point owned land in the area.

The defendants assert that that land is the current suit land while the plaintiffs, while acknowledging the existence of the said *the Pugwang cooperative society and its possession of land*, they maintain that that was a different parcel from the one currently under dispute. The plaintiffs gave that evidence through Pw4.

On the 23rd September, 2024, this court visited the *locus in quo* to ascertain the evidence led in court. A sketch map was drawn and court made several observations.

With ocular observation, this court saw that the suitland is located between Pabbo-Apaa road towards the north, Muduk stream towards the south, Ayugi stream towards the West and a natural boundary line comprised of Opolok tree, Oywelo tree and Olam tree towards the east.

The contested portion is that which runs along Ayugi stream and Muduk stream while the rest of the suitland is fully occupied and cultivated by the defendants.

The first portion where the Ayugi stream meets the Pabbo-Apaa road is where the plaintiffs' banana plantation is located. The rest of the said disputed land is occupied by the 2nd defendant who is cultivating a banana plantation, while the rest is uncultivated.

Learned counsel for the plaintiffs submitted that the features mentioned in court such as mango trees, cassia trees and scattered banana plantations, a pit latrine and water wells were indeed found on the suitland and thus, the plaintiffs should be declared owners.

With the greatest respect, I disagree with learned counsel.

First, the impression this court found on the suitland is that the land is one whole piece of land demarcated by the natural boundaries of the Ayugi stream, Muduk stream Pabbo –Apaa road and the Opolok, Oywelo and Olam trees.

It is true, the plaintiffs have some banana plantation on the upper portion near the Pabbo Apaa road. But it looked to me more of an intrusion onto the suitland and not evidence of having been edged out as alleged.

I am alive to the fact that some of the features mentioned in court were also found on ground but this court was not satisfied as to the ownership of the same being claimed by the plaintiffs, who are now not in occupation.

The discomfort of this court with the plaintiffs' claim mainly arises from amongst others, but mainly, the testimony of pw4 vis-à-vis the pugwang cooperative union allegedly handing back to the defendants a parcel of land different from the suitland whereas at the same time, he did not point out to court which land was handed back to the defendants, yet he

told court that he was the LC1 chairperson then and also present during the hand over.

Both plaintiffs acknowledged the occupation of land by predecessors. The plaintiffs state it was their uncle whereas the defendants state it was the said pugwang cooperative union, of whom the plaintiffs elicited evidence on cross-examination of Dw4 to show that their said uncle, a one, Ocaya Enacito Mulezi was also among the elders who handed over the suitland to pugwang cooperative union.

This evidence appeared to me as showing that the plaintiffs are unsure of which predecessor to claim under. That is; whether under their said uncle, a one, Ocaya Enacito Mulezi or under pugwang cooperative union. It looked more of a fishing expedition.

As per defence evidence and also the plaintiffs' own evidence elicited in cross-examination of Dw4 to the effect that an disclosed number of elders (*including their said uncle, a one, Ocaya Enacito Mulezi*) handed over the suitland to the now defunct pugwang cooperative union, could it be possible that the plaintiffs are seeking recovery of the portion their said uncle, the said, Ocaya Enacito Mulezi contributed to the Pugwang cooperative society?

That seems so. Unfortunately, the number of the said elders was not certified to this court to determine the entitlement of each. I note that the defendants assert that the meetings held prior to court action determined that that suitland belongs to three households; that is; Ogobi, Orobi and Owor.

In their joint written statement of defence, the defendants acknowledge that the plaintiffs are from the Owor clan which is towards the north of

the suit land. The plaintiffs did not dispute that pleading and oral testimony.

If that is the case, this court is inclined to agree that the Owor clan (*of which the plaintiffs do not dispute to belong to*) is also entitled to a portion of the suitland. Unfortunately, the said owor clan is not party to these proceedings and this court has not seen evidence to show that the plaintiffs are duly authorized to claim on behalf of the entire Owor clan.

This court is not satisfied that the plaintiffs in their personal capacities are entitled to the portion, which, otherwise would be due to the Owor clan if the entire suitland was to be shared according to the sizes contributed by each elder to the Pugwang cooperative society. Neither are the defendants entitled to any portion in their personal names.

I say this, mainly because the plaintiffs instituted this suit in their own names and not on behalf of the Owor clan/community. Similarly, the defendants instituted their counter claim in their personal names whereas the suitland is evidently, communal land. I have also not seen any letters of administration to the estate of the plaintiffs' said uncle, the said, Ocaya Enacito Mulezi and apart from occasional reference to how they are related, I did not see them plead or lead evidence to show that they instituted the suit as beneficiaries.

Similarly, I have not seen evidence from the defendants to show that they instituted the counter claim on behalf of the rest of the households; that is Ogobi and Orobi.

Given all those circumstances, this court is unable to make declarations of ownership in favour of either the plaintiffs or the defendants who have

not shown that they bring their respective suits on behalf of the entire Ogobi, Orobi and Owor clan/ communities, of which, evidence points to be the rightful owners.

Under **S.46 of the Evidence Act** it is provided that:

“when a court has to form an opinion as to the existence of any general custom, or right, the opinions as to the existence of that custom or right of persons who would be likely to know its existence if it existed are relevant”

As earlier stated, the plaintiff bears the burden of proof to prove their claim under **Section 101 of the Evidence Act**.

For those reasons, I will evoke **Order 15 rule 1(5), & 5 of the CPR** to strike out **Issue 1** as any such declarations will defeat the ends of justice.

However, as pointed out in ***Ocean Estates Ltd v. Pinder [1969] 2 AC 19***, it was stated that:

“...if the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them...”

Issue 2: Who of the parties trespassed on the suitland?

In ***Salmond and Heuston on the Law of Torts, 19th edition (London: Sweet & Maxwell, (1987) at 46***, it is stated that trespass to land occurs

when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land.

Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry upon it. It is an invasion affecting an interest in the exclusive possession of property.

The cause of action for trespass is principally designed to protect possessory, not necessarily ownership, interests in land from unlawful interference.

Learned counsel for the plaintiffs, cited for this court the **Hulsbury's Laws of England at page 739** for the definition of trespass to mean any wrongful act done in disturbance of the possession of property of another against his will. That what constitutes trespass to land is ***“every unlawful entry by one person on land in possession of another.”***

Learned counsel for the plaintiffs also cited for this court the decision in **Tayebwa & Anor Vs Kagimu HCCS no. 8 of 2012[2019]** for the proposition that; *“trespass occurs when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere with another person's lawful possession of that land.”*

He also cited **Sheik Muhammed Lubowa vs Kitara Entreprises ltd C.A no. 4 of 1987** for the elements of an action in trespass to succeed as:

- a) The disputed land belongs to the plaintiff
- b) The defendant has entered thereupon
- c) The entry was unlawful
- d) The defendant has no claim of right or interest in the land

Similar holdings were given in the Supreme Court decision in **Justine EMN Lutaaya Vs Sterling civil engineering co. SCCA no. 11 of 2002** for the proposition that:

“trespass to land occurs when a person makes an unauthorized entry upon land and thereby interfering or potends to interfere with another person’s lawful possession of that land”.

I absolutely agree with those holdings and this court is also bound by the same.

In this case before me, the parties seek orders in respect of both ownership and possessory rights.

In the **Adrabo Stanley case**, supra, Hon. Justice Mubiru Stephen discussed further that:

“...ownership comprises of a number of rights, and among these rights one of the most significant right is possession of property...”

In **Ocean Estates Ltd v. Pinder supra**, it was stated that:

“...if the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them...”

Therefore, where questions of who has a better title to the land like in the instant case, the court is concerned only with the relative strengths of the titles proved by the rival claimants.

As none of the parties have been found to be proper owners, it goes without saying that no trespass has been proven.

It is trite that the plaintiff must succeed by the strength of his own title and not by the weakness of the defendants’.

Issue 3: *what remedies are available to the parties?*

Having found as I have, here above, I hereby make the following orders:

1. The plaintiffs’ suit is wholly dismissed.
2. The defendants counter-suit is wholly dismissed.
3. As no declarations of ownership have been made in favour of either party, it is the order of this court in accordance with the principles laid down in ***Ocean Estates Ltd v. Pinder supra*** that each party remains in the portion whereof they are in occupation until otherwise ordered by a competent court.
4. For the avoidance of doubts, none of the parties has been declared owner of the suitland.
5. Each party shall bear their own costs.

I so order.

Dated at Atiak this.....26th....day ofMarch.....2024



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H/W KYEMBE KARIM

MAGISTRATE G.1