

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
CIVIL SUIT NO. 55 OF 2012**

SENTONGO GODFREY:.....PLAINTIFF

VERSUS

MUKONO INDUSTRIES (U) LIMITED:.....DEFENDANT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

The plaintiff, Mr. Sentongo Godfrey, brought this action seeking to recover from the defendant a sum of US \$ 102,000 or its equivalent in Uganda shillings. He also sought for interest and costs of the suit. Mr. Sentongo contends that he is the beneficial owner of the land at Kyungu-Mukono, comprised in Block 115 Plot 743. He also claims to own two water tanks situate on that land.

It is alleged that without the plaintiff's authorization, the defendant made use of the plaintiff's said water tanks for its daily business and by so doing it has caused him economic loss and depreciation of the tanks. In addition he claims that the defendant's continued trespass has disabled him from selling off the land.

It is the defendant's case as stated in its written statement of defence (WSD) that the plaintiff has no cause of action at law. The defendant claims that the plaintiff is not the legal owner of the land and the fixtures thereon and as such has no *locus standi* to bring this action.

When this matter came up for hearing, Mr. Masembe Kanyerezi, counsel for the defendant raised a preliminary point of law arguing that the plaintiff does not have a cause of action to

sue for trespass because he is not the registered owner of the suit land. This ruling therefore arises from that preliminary objection.

According to counsel for the defendant, the foundation of the claim is based on ownership and admitted equitable beneficial ownership, the legal title being vested in somebody else. He referred to a search certificate annexed to the defence which confirmed that Andrew Kizito Mbwabwa is the legal owner of the property.

It was his submission that the beneficial owner of land and the fixtures thereon has no cause of action in trespass, conversion or implied contract as those rights are only vested in the legal owner. Thus the claim can only be brought by the registered proprietor. He referred to Sections 59, 64 and 50 of the Registration of Titles Act. He also cited the case of **Motokov v Auto Garage East Africa [1971] EA 541** to the effect that the right infringed must be vested in the plaintiff.

Learned Counsel for the plaintiff, Mr. Musoke Peter Allan, submitted that the plaintiff as a beneficial owner of the land could bring a suit against the defendant. He submitted that Mr. Sentongo owned the two tanks being used by the defendants for which he unsuccessfully demanded payments for their use. Furthermore, that upon locking the tanks the defendant forcefully used them presenting an action in trespass.

He relied on the case of **Israel Kaggwa vs Martin Banoba Musiga SCCA No. 52 OF 1995** where it was held that the plaintiff could sue as beneficial owner.

It was also his submission that the plaintiff's taking benefit from the land and actions arising there from do not require registration under the Registration of Titles Act. He cited a passage by J.T Mugambwa in his book, **General Principles of Land Law** thus;

“At common law, possession of land is the root of title. A person who is in possession has a title which is good against the whole world except a person with a better claim. If any person is not the owner or his or her duly authorized agent, interferes with the land the possessor may bring an action in trespass against him or her...”

He held the view that sections 50 and 59 of the RTA are inapplicable to the case at hand because the plaintiff was neither seeking to be registered nor have his trust registered in the register book.

In rejoinder Mr. Masembe submitted that the plaintiff being the beneficial owner of the land and two tanks should have brought the suit in the name of the legal owner. He relied on the case of **M/s Ayigihugi & Co. Advocates vs Mary Muteteri Munyakindi [1988-1990] HCB 161** for the position that a claim can only be sustained in the name of the legal owner.

The issue before this court is whether the plaintiff not being the legal owner/registered proprietor can found a cause of action in respect of the alleged trespass/conversion.

I have carefully considered the submissions of both counsel and all the authorities relied upon. I must observe from the onset that I did not find the authority of **Israel Kaggwa vs Martin Banoba Musiga (Supra)** useful in these proceedings because the issue therein was whether an administrator of an estate of an intestate has right to sue for trespass over the estate before obtaining letters of administration. That is not the issue at hand in this case since the plaintiff is not suing in the capacity of an administrator of an estate.

Similarly, I find the case of **M/s Ayigihugi & Co. Advocates vs Mary Muteteri Munyakindi [1988-1990] HCB 161** distinguishable from this case because it relates to the donee of a power of attorney suing in his own names.

I am also of the considered opinion that the provisions of the Registration of Titles Act referred to by counsel for the defendant are not applicable to this case of alleged trespass. An inference that can be drawn from the observation by Mulenga, JSC in **Justine E.M.N Lutaya vs Sterling Civil Engineering Company Ltd Civil Appeal No. 11 of 2002** is that a person in physical possession can sue for trespass even though another person holds absolute and indefeasible title to that land. He stated that:-

“Trespass to land 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. Needless to say, the tort of trespass to land is

committed, not against the land, but against the person who is actual or constructive possession of the land”.

In that case, the appellant who was the sole registered mailo owner of the suit land sued the respondent for trespass. The appellant’s capacity to sue was challenged by way of a preliminary objection at the trial court on the ground that she had ceased to be the registered owner of the suit land at the time of the alleged trespass. The issue as to whether the person holding a certificate of title has legal possession of that land was considered by the second appellate court. Mulenga, JSC alluded to the cardinal rule at common law that only a person in possession of the land has capacity to sue in trespass but hastened to add that for purposes of that rule possession does not mean physical occupation.

He referred to the case of ***Ofei v Danquah (1961) 3 All E.R. 596, at page 600*** where the Privy Council stated among other things that; “...Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances, the slightest amount of possession would be sufficient”.

The two leading authorities in East Africa on the issue of possession as stated by Mulenga, JSC in the case of ***Justine E.M.N Lutaya*** (supra) are ***Moya Drift Farm Ltd vs Theuri [1973] EA 114*** and ***United Cultivate Co. Ltd v Uganda Properties Ltd Civil Appeal No. 1 of 1983 (CA)*** (unreported) which both decided that *in the absence of any other person having lawful possession, the legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser.*

The import of the decisions in those two cases and that of ***Justine E.M.N Lutaya*** (supra) is that the right to sue for trespass to land first accrues to the person having lawful possession of that land. It only accrues to the person with legal possession if there is no any other person having lawful possession.

In view of this position of the law, the argument by counsel for the defendant that the beneficial owner of land and the fixtures thereon has no cause of action in trespass is misconceived and it is accordingly rejected.

In light of **Auto Garage & Others v Motokov (No. 3) [1971] EA 514**, if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then a cause of action has been disclosed and if any of those elements is missing, no cause of action has been shown.

For purposes of establishing whether or not the plaintiff in the instant case discloses a cause of action the plaintiff only needs to aver in the plaintiff that he enjoyed the right of possession of the land in dispute which has been violated by the defendant. How the right to possession accrued is a matter for trial to prove the plaintiff's claim on the merits and this court cannot delve into it at this stage.

The plaintiff averred in paragraph 4 (i) of the plaintiff in summary procedure that he is the beneficial owner of the land at Kyungu-Mukono, comprised in Block 115 Plot 743 and of two water tanks situate thereon with a carrying capacity of 300 cubic metres of water. It was further averred in paragraph 4 (ii) that the defendant without the plaintiff's authorization, made use of the plaintiff's said water tanks for its daily business.

In paragraph 2 (b) of the reply to the written statement of defence it was averred that the plaintiff is the beneficial owner and the person in possession of the suit land.

According to **Black's Law Dictionary 8th Edition**, "*beneficial owner is one recognized in equity as the owner of something because use and title belong to that person, although legal title may belong to someone else*". The author further states that the beneficial owner has standing to sue for infringement.

In view of the well established position of the law that a person in possession can sue for trespass and the averments in the plaintiff as indicated above, I find that the plaintiff has a cause of action.

In the result, the preliminary point of law raised by counsel for the defendant is overruled with an order that the suit be set down for hearing on the merits. The costs of the preliminary objection shall be in the main cause.

I so order.

Dated this 9th day of November 2012

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Peter Allan Musoke for the plaintiff and Mr. Masembe Kanyerezi appearing together with Mr. Bwogi Kalibala for the defendant whose Managing Director Mr. Hussein Mohammed was also present.

JUDGE

09/11/12