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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT No. 0150 OF 2019**

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**ALOKIT ANN RACHEL ..... PLAINTIFF**

**VERSUS**

**1. TURINOMUJUNI NARCICIO**

**2. KYARIKUNDA ANNET T/A ST. ANNA NURSERY AND PRIMARY DAY &  
BOARDING SCHOOL**

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**3. POST BANK UGANDA LIMITED ..... DEFENDANTS**

**BEFORE: HON. LADY JUSTICE SUSAN ABINYO**

**JUDGMENT**

Introduction

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The Plaintiff brought this suit against the Defendants jointly, and severally for recovery of land, seeking the following reliefs: - declarations of joint ownership of land; that the suit land constitutes part of the family land; that the 1<sup>st</sup> Defendant's sale of the suit land to the 2<sup>nd</sup> Defendant is illegal; that the 2<sup>nd</sup> Defendant is a trespasser; that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants illegally and fraudulently mortgaged the suit land to the 3<sup>rd</sup> Defendant; and orders for damages, vacant possession and or eviction, a permanent injunction to restrain the Defendants, and their agents from further trespassing on the suit land or in any other way interrupting the Plaintiff's use, and enjoyment of the suit land, interest, and costs of the suit.

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Facts

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The brief facts are that on the 19<sup>th</sup> day of July, 2008, the Plaintiff and the 1<sup>st</sup> Defendant celebrated, and solemnised their church marriage at St Augustine Chapel Makerere, where the two later had three issues(Children). That on 4<sup>th</sup> October, 2011, the Plaintiff and the 1<sup>st</sup> Defendant jointly acquired land measuring approximately 15 acres situate at Nyairongo Village, Kaseeta Parish, Kabwoya

5 Sub County, Hoima District (now Kikube District) by way of purchase from Mr. Adidas Asiimwe with clearly known neighbours.

That upon purchase, the Plaintiff and the 1<sup>st</sup> Defendant took immediate possession, cultivated and planted crops, bananas, trees, constructed a residential house thereon, enjoyed quiet use without interference from anyone  
10 until 2013, when the Plaintiff found a school in the name of St Anna Nursery and Primary Day and Boarding School, being operated on land measuring approximately 5 acres, which formed part of the family land without her consent.

That the Plaintiff also found out in 2017, that the 1<sup>st</sup> Defendant had sold off the suit land measuring 5 acres to the 2<sup>nd</sup> Defendant without her consent. That the 2<sup>nd</sup>  
15 Defendant was informed of the illegal occupation of the suit land but the 2<sup>nd</sup> Defendant refused or neglected to heed to the request. That later, the Plaintiff discovered that the suit land had been fraudulently and illegally mortgaged by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> Defendant, who had advanced a loan to them.

20 The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were served with summons however, they failed, and or refused to file a defence within the prescribed time, and upon an application by the Plaintiff, a default judgment was entered by the Learned Deputy Registrar on 24<sup>th</sup> June, 2019 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The 3<sup>rd</sup> Defendant filed its written statement of defence, and later entered into a  
25 settlement with the Plaintiff, upon which a consent judgment was entered between the Plaintiff and the 3<sup>rd</sup> Defendant by the Learned Deputy Registrar on 19<sup>th</sup> September, 2019.

### Representation

The Plaintiff was represented by Counsel James Kiiza of M/S Mugisa, Namutale &  
30 Co. Advocates. The 3<sup>rd</sup> Defendant was represented by M/S Crimson Associated Advocates.

### Issues for determination

The issues for Court's determination were set out in the Plaintiff's scheduling notes however, in accordance with Order 15 Rule 5(1) of the Civil Procedure Rules SI 71-  
35 1, this Court amended the issues as follows: -

1. Whether the suit property constituted family land? If so whether the sale of the suit property to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant was unlawful?
2. Whether the 2<sup>nd</sup> Defendant is a trespasser on the suit land?

- 5           3. Whether the mortgage of the suit property to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup>  
            and 2<sup>nd</sup> Defendants was unlawful?  
            4. What are the remedies available to the parties?

10 Counsel for the Plaintiff filed the Plaintiff's witness statement, which was adopted  
by this Court during the hearing proceedings as the evidence in chief for the  
Plaintiff. The said evidence will be evaluated hereunder.

Issues 1, 2, and 3 will be resolved concurrently, and issue 4 separately as below.

- 15           1. Whether the suit property constituted family land? If so whether the sale of  
            the suit property to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant was unlawful?  
            2. Whether the 2<sup>nd</sup> Defendant is a trespasser on the suit land?  
            3. Whether the mortgage of the suit property to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup>  
            and 2<sup>nd</sup> Defendants was unlawful?

Counsel for the Plaintiff submitted that under Article 31 of the Constitution of  
Uganda, married couples enjoy equal rights therefore, their interests in land are  
protected especially when they have jointly acquired the land.

20 Counsel relied on the definition of the phrase "family land" under section 38A of  
the Land Act, Cap 227 (as amended), to submit that the suit property constitutes  
family land.

25 Counsel argued that the sale of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup>  
Defendant was void for lack of spousal consent by the Plaintiff, and that the  
subsequent mortgage of the suit land to the 3<sup>rd</sup> Defendant by the 2<sup>nd</sup> Defendant  
was fraudulent, and illegal.

### Evidence

30 Alokita Ann Rachel (PW1) stated that on the 19<sup>th</sup> day of July, 2008, the 1<sup>st</sup>  
Defendant and herself celebrated, and solemnised their church marriage at St  
Augustine Chapel Makerere, where the two later had three issues(Children). A  
certificate of marriage(PE6) was adduced by the Plaintiff to prove the said  
marriage.

35 PW1 further stated that on 4<sup>th</sup> October, 2011, the Defendant and the Plaintiff  
jointly acquired land measuring approximately 15 acres situate at Nyairongo  
Village, Kassite Parish, Kabwoya Sub County, Hoima District (now Kikube District)  
by way of purchase from Mr. Adidas Asiimwe with clearly known neighbours.

5 A copy of the purchase Agreement dated 4<sup>th</sup> October, 2011 (PE7) was adduced by the Plaintiff to prove that the suit property was purchased jointly by the Plaintiff, and the 1<sup>st</sup> Defendant.

In addition, that upon purchase, the Plaintiff and the 1<sup>st</sup> Defendant took immediate possession, cultivated and planted crops, bananas, trees, constructed  
10 a residential house thereon (photographs were exhibited, and marked as "PE1"), enjoyed quiet use without interference from anyone until 2013, when the Plaintiff found a school in the name of St Anna Nursery and Primary Day and Boarding School, being operated on land measuring approximately 5 acres, which forms part of the family land without her consent.

15 PW1 contended that she also found out in 2017, that the 1<sup>st</sup> Defendant had sold the suit land measuring 5 acres to the 2<sup>nd</sup> Defendant without her consent. That the 2<sup>nd</sup> Defendant was informed of the illegal occupation of the suit land (letter was marked as "PE2") but the 2<sup>nd</sup> Defendant failed or refused to heed to the request. That later, the Plaintiff discovered that the suit land had been fraudulently  
20 and illegally mortgaged by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> Defendant, who had advanced a loan to them. That the Plaintiff, and the 3<sup>rd</sup> Defendant entered into a settlement, upon which a consent judgment was entered.

PW1 further contended that the she has suffered untold anguish, discomfort, inconvenience, and economic loss for which, she seeks general damages.

25 Decision

The term unlawful means not authorised by law. **(See Black's Law Dictionary 9<sup>th</sup> Edition pg. 1678)**

Article 31(1) (b) of the Constitution of the Republic of Uganda (as amended) provides for equal rights of spouses at and in marriage, during marriage, and at  
30 its dissolution.

The proposition of the law is that, whoever alleges a given fact, and desires the Court to give judgment on any legal right or liability dependent on the existence of any fact, has the burden to prove that fact unless, it is provided by law that the  
35 proof of that fact shall lie on another person. **(See sections 101 and 103 of the Evidence Act, Cap 6, and Jovelyn Barugahare Vs Attorney General SC Civil Appeal No. 28 of 1993[1994] KALR 190)**

5 It's a well-established principle that even when the Plaintiff either proceeds  
exparte or in default of the Defendant to file a defence, the burden of proof still  
remains on the Plaintiff to prove his or her case to the required standard, which is  
on a balance of probabilities. **(See Yoswa Kityo Vs Eriya Kaddu [1982] HCB 58)**

10 Section 39 of the Land Act, Cap 227(as amended) provides for restrictions on  
transfer of family land as follows: -

(1) No person shall—

(a) sell, exchange, transfer, pledge, mortgage or lease any family land;

15 (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.  
[Emphasis is mine]

20 In the instant case, the Plaintiff's evidence that she found out in 2017, that the 1<sup>st</sup>  
Defendant had sold the suit property measuring 5 acres to the 2<sup>nd</sup> Defendant  
without her consent as a spouse, and that the mortgage of the suit property to  
the 3<sup>rd</sup> Defendant by the 1<sup>st</sup>, and 2<sup>nd</sup> Defendants with the purported consent of  
the 2<sup>nd</sup> Defendant as a spouse to the 1<sup>st</sup> Defendant whereas not, was  
25 uncontroverted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

For the foregoing reasons, I find that the Plaintiff has discharged the burden of  
proof to the required standard, which is on a balance of probabilities against the  
1<sup>st</sup> and 2<sup>nd</sup> Defendants that their acts are unlawful.

30 Accordingly, I find issues 1, and 3 in the affirmative, and further find that the 2<sup>nd</sup>  
Defendant is a trespasser on the suit property.

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

Having found issues 1, 2, and 3 above in the affirmative, this Court further finds  
that the following remedies sought for by the Plaintiff are available.

35 It's settled law that an award of general damages is at the discretion of Court  
which, should be exercised judiciously. **(See Crown Beverages Vs Sendi S.C.C.A  
No. 1 of 2005).**

5 In the case of **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305**, the factors to be considered by the Courts when assessing the quantum of general damages are enunciated as follows: - the value of the subject matter; the economic inconvenience that the Plaintiff may have been put through, and the nature and extent of the injury suffered.

10 Following the guidance in **Uganda Commercial Bank Vs Kigozi** above, I find that the sum of UGX 30,000,000 (Uganda Shillings Thirty Million only) in general damages, will suffice for the Plaintiff, who has proved that she has suffered economic loss, untold anguish, discomfort, and inconvenience, as a result of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants unlawful acts.

15 Its trite law that interest should be awarded on damages from the date of Judgment until payment in full. **(See Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd No.2 [1970] EA 469)**

Accordingly, interest is awarded on the sum of UGX 30,000,000 (Uganda Shillings  
20 Thirty Million only) in general damages to the Plaintiffs as above at the rate of 6% per annum from the date of judgment till payment in full.

This Court has taken into consideration the provision of the law under subsection 1 of section 27 of the Civil Procedure Act, Cap 71 on costs and the decision in **Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) HCB 35** where Justice Manyindo (as he then was) held that:

25 “A successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit”

I find no reason to deny the Plaintiff costs and accordingly, the Plaintiff is awarded costs of this suit.

30 Accordingly, Judgment is hereby entered for the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the following terms:

1. A declaration of joint ownership of land by the Plaintiff, and the 1<sup>st</sup> Defendant, and that the suit property constitutes part of the family land.
2. A declaration that the 1<sup>st</sup> Defendant's sale of the suit property to the 2<sup>nd</sup>  
35 Defendant was unlawful.
3. A declaration that the mortgage of the suit property to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was unlawful.
4. A declaration that the 2<sup>nd</sup> Defendant is a trespasser.
5. An order for vacant possession, and or eviction.

- 5           6. An order for a permanent injunction to restrain the Defendants, and their  
              agents from further trespassing on the suit property.
7. An order for delivery of the original sale agreement in possession of the 3<sup>rd</sup>  
              Defendant, in accordance with the consent judgment.
8. General damages of UGX 30,000,000(Uganda Shillings Thirty Million only)
- 10          9. Interest on (8) above at the rate of 6% per annum from the date of  
              judgment till payment in full.
- 10.Costs of the suit.

Delivered electronically this 27<sup>th</sup> day of September, 2023.

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SUSAN ABINYO

**JUDGE**

**27/09/2023**

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