



According to the plaint, the plaintiff's case is that:-

- (a) The plaintiff is the registered proprietor of the suit land which she bought from Hajji Abubaker Sebalamu Ganya. The plaintiff is in possession of a certificate of title.
- (b) On purchase of the suit land, the plaintiff first checked in Lands Office, Kampala and found no encumbrance on the land, and it was free from any squatters or occupants.
- (c) On or about the 14/02/2007, the defendant trespassed on the land and deposited building materials with an intention of building thereon and erected a fence on the land.

Pursuant to Order 12 rule 1 of the Civil Procedure Rules, this suit was conferenced interparties. At first, the parties exhibited positive signs to settle this suit amicably. However, towards to the drafting a consent judgment, the parties changed their minds. The parties failed to agree. The suit, wherefore, had to proceed on a full trial. The plaintiff called one witness, herself only; and the defendant called three witnesses, himself inclusive.

In her evidence in chief, the plaintiff testified that even when restrained from trespassing on and developing the land, the defendant claimed to have bought it from Aisha Nassanga and Aminah Namaato and he set up thereon a permanent house until he was stopped by Court Order after he erected thereon other buildings. The plaintiff further testified that as a consequence of the said trespass and litigation in Court, she was prevented from developing her land for about 4½ years and lost about 30 days' business time by coming to Court as on 8<sup>th</sup> May 2009. She estimated financial loss at Shs. 15,000,000/= (fifteen million Shillings only) by then.

On the other hand, the defendant as DW1 testified that he bought the suit land in November, 2005 from Aisha Nassanga Nantega and Aminah Namaato who were to give him a Certificate of Title within five (5) months. That the land they sold was their late father's estate, yet they had no title to that land. That after purchase, he fenced off the land which attracted claimants for their interests who were Serena Nakityo and Leo

Kaggwa whom he compensated for their crops thereon. The latter two persons gave evidence in Court as DW2 and DW3 respectively in favour of the defendant.

The defendant further testified that after compensating the Bibanja holders, he started erecting buildings on the suit land until he was told that some other people had bought the land, which he later confirmed after making the search and that when attempts were made for a settlement out of Court, he was arrested and imprisoned for disobedience of Court Order. That he stopped construction but lodged a caveat and later obtained a Certificate of Title.

The defendant conceded that the title he obtained did not include the suit land which already had its separate title with the plaintiff as the proprietor. The defendant further testified that he approached Abubaker Sebalamu Ganya who gave him an alternative land where he would relocate the plaintiff and he made an agreement to that effect with one Abdu Ssozi.

At that point as he failed to sustain his case against the plaintiff, the defendant changed and testified that he is a Kibanja holder on the suit land because the title holder thereof is the plaintiff and he pleaded to pay ground rent in that capacity.

In cross-examination, the defendant stated in evidence as follows:-

- (i) That before he bought the suit land, he never bothered to establish who the registered owner was, as he relied on the assurance of Local Council officials that the vendors had beneficial shares on the suit land.
- (ii) That the gate and fence captured in the photographs annexed to the plaint is his.
- (iii) That he erected building structures on the suit land.
- (iv) Conceded that in his written statement of defence, he pleaded that at that time he bought the suit land, it was vacant.
- (v) That he did not think it was necessary to include in the compensation agreement he made with tenants by occupancy that there were food crops on the suit land.
- (vi) That one of his option prayers is that he be compensated for developments he made on the suit land and money he paid to Kibanja holders.
- (vii) That he instructed his Counsel to file a Counter claim any time.

- (viii) That at the time of buying the suit land, he was told that the registered proprietor was Abdu Ssozi but he did not ask him.
- (ix) That he was also told that Ganya Sebalamu was a care-taker for the land but he did not ask him.
- (x) That he was to get a title from the vendors.

DW2 and DW3 were persons who testified to have sold their bibanja interests to the defendant. But both in cross-examination failed to prove that they were tenants by occupancy on the suit land as provided for under the Land Act and further that they were entitled under law to sell their interests to a third person, the defendant, without giving first option to the registered owner of the suit land or the reversionary owner in terms of section 35 (1) and (3) a of the Land Act. Section 35(1) and (3) thereof provides:-

**“(1) A tenant by occupancy who wishes to assign the tenancy shall, subject to this Section, give the first option of taking the assignment of the tenancy to the owner of the land.**

**(2) .....**

**(3) An offer made under this Section shall be on a willing buyer willing seller basis.”**

None of the said witnesses, too, knew who the registered owner of the suit land was as at the time they purportedly sold their interests to the defendant in 2005 and did not even know the plot number on which their bibanja were standing when they were put to task during cross-examination.

DW2 claimed to have inherited the kibanja from her brother when he died in 1973 and yet that the deceased died intestate and had left children and nobody obtained Letters of Administration to distribute deceased’s property. When questioned by Counsel for the plaintiff whether he had ever paid busulu before their abolition in 1975, she replied that he had but tickets were eaten by rats. But most importantly on this, it is noted that she did not even know who the registered proprietor was.

The DW3 purported to have obtained the kibanja by purchase from his brother. He did not possess the agreement of the alleged vendor to him to prove ownership that could be transferred to him, the witness.

From the pleadings and the parties' evidence, the following are the issues for the determination of the dispute between the parties:-

- (1) Whether the plaintiff has a cause of action against the defendant.
- (2) Whether or not the defendant trespassed on the suit land.
- (3) Whether or not the plaintiff is entitled to the reliefs being claimed in the plaint.

On Issue 1, whether the plaintiff has a cause of action against the defendant. From the evidence on record, it is not in dispute that the plaintiff is the registered proprietor of the suit land which is comprised in private Mailo Busiro Block 463 plot 56, Land at Maya. It is, therefore, my holding that the plaintiff has registered legal interests in the suit land.

In defence, the defendant pleaded that he bought the suit land in 2005 from Aisha Nassanga Nantenza and Amina Namato and that as such he is a bonafide purchaser for value. According to Exhibit D1 (the sale agreement) Hajji Abubaker Ssebalamu Ganya sold the suit land to Aisha Nantume Tifu, on 15<sup>th</sup> March 2006. Yet, according to Exhibit D2 (the sale agreement) Hajati Nassanga Aisha Nanteza and Aminah Namato sold the suit land to Ddamulira James, the defendant, 20 acres of land at Shs. 54,000,000/= on 9/11/2005. These two agreements do contradict each. Hajji Abubaker Ssebalamu Ganya sold the suit land to the people that sold the suit land to the defendant on 20<sup>th</sup> July, 2008 according to Exhibit D5, then what is the relevance of the sale of the suit land to the defendant on 9/11/2005? The land that was sold by Hajjati Nassanga Aisha Nanteza and Aminah Namato to the defendant according to Exhibit D2 has no description of the suit land. The defendant adduced evidence through Exhibit D6 which is the Memorandum Agreement between Hajji Abdu Ssozi and the defendant signed on 15/01/2008 whereby it provides:-

**Item 1-**

**In consideration of Shs. 30,000,000/= the 1<sup>st</sup> party undertakes to relocated the registered proprietor of plot 56 to an agreed new site on plot 81.**

**Item 2-**

**The 2<sup>nd</sup> party pays the 1<sup>st</sup> party Shs. 15,000,000/= advance payment to enable the 1<sup>st</sup> party proceed with the above arrangement which monies the 1<sup>st</sup> party acknowledges receipt thereof.”**

Further, the evidence of defendant through Exhibit D5, entered into by Hajji Abubaker Sebalamu Ganya, and the Ddamulira James Kitale (the defendant) on 20/07/2008, item 2 is that: \_

**“2.0 Payment of the consideration**

**2.1. The purchaser has already paid to the vendors the said consideration of Ug. Shs. 54,000,000/= in cash to the vendors and at the execution of these presents, receipts of which the vendors acknowledge by signing hereto hence ratifying the agreement made between Aisha Nanteza and Aminah Namato on 9/11/2005”**

The evidential value of Exhibit D5 and Exhibit D6 which were entered into by the defendant in 2008 long after the filing of this suit against him is a clear indication that the defendant was on a fishing journey of evidence to defeat the interests of the registered proprietor (the plaintiff) of the suit land. The defendant had realized the difficulties he was in as far as his case is concerned and started gathering evidence. It is in evidence that all along the defendant wanted to have the plaintiff relocated to Block 463 plot 81 or compensated, it then defeats logic when during the trial he wants the plaintiff's suit dismissed. The defendant is recognizing the plaintiff as the owner of the suit land. Such actions amount to defeating justice. In the circumstances, the plaintiff having pleaded in the plaint and gave evidence that was never challenged by the defendant in cross examination that the plaintiff has a superior title, it was incumbent upon the defendant to prove that he had a better title to the suit land than the plaintiff. This to me, the defendant failed to discharge that burden of proof.

During the trial, the defendant gave evidence that he is a bonafide occupant, having derived his customary interests from Hajjati Aisha Nanteza and Aminah Namato on 09/11/2005, who are the beneficiaries of the suit land. The defendant gave evidence that he compensated some bibanja holders on the suit land. At one point in his testimony, the defendant changed and testified that he is a kibanja holder on the suit land because the title holder thereof is the plaintiff and that he made a prayer to pay ground rent to the

plaintiff in that capacity. He even, testified that at the time of buying the suit land, it was vacant.

All the aforesaid, the defendant did not plead them in his written statement of defence; and I hold that, that evidence adduced by the defendant during the time of hearing the suit is a departure from his pleadings. Such defence is inconsistent with the law. My finding on this point is supported by Order 6 rule 7 of the Civil Procedure Rules, which provides that:-

**“No pleadings shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.”**

In **Gonstan Enterprise Ltd vs John Kokas Ouma SSCA No. 8 of 2003, Justice Alfred Karokora** in his lead judgment stated that:-

**“it is a well settled principle that no decision must be made or granted by any Court of law on a ground which was not pleaded. See the case of Candy vs Cospair Air Charter Ltd (1956) EACA 139 at page 140 was cited where Sir Ronald Sindair VP, stated that: “The object of pleadings is of course to secure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given”.**

Also in case of **Kasifa Namusisi and 2 others vs Francis MK Ntabaazi Supreme Court, Civil Appeal No. 4 of 2005 at page 15 and 16**, the case of **Akisoferi W. Biferemo vs Damascus Munyand 2a Situma (SCC Appeal No. 15 of 1991(unreported))** was cited with approval that a party who departs from his pleadings and gives evidence contrary to his pleadings would be lying.

Further in the case of **James Fredrick Pool Nsubuga vs Attorney General (KRL) (1990-91) 11 at page 91**, it was held that:-

**“ a defence not pleaded in the written statement of defence is inadmissible”.**

Therefore, the defendant’s evidence of change from being a legal owner to being a tenant by occupancy is untenable in law and departure from his pleading in his written statement of defence which he is bound to.

Furthermore, Counsel for the plaintiff attacked seriously the submissions by Counsel for the defendant, that the latter submitted that:

**“the defendant can also qualify to stand as an equitable owner considering that he genuinely purchased the suit land from the beneficiaries which transaction was duly ratified by the same person who sold to the plaintiff, that is, Hajji Abubaker Sebalamu Ganya.”**

Counsel for the plaintiff submitted in reply that such submission and evidence were also a departure from the defendant’s pleadings and that such arguments have no basis in law. I hold the same view. Counsel for the defendant appeared in that regard to be adducing evidence from the bar.

I have considered the evidence on record and the submissions of the defence, and there is no evidence to show that Hajjati Aisha Nassanga Nantenza and Aminah Namato had Letters of Administration to the estate of their late father. In that regard such beneficiaries to a deceased’s intestate property had no legal right to deal with the suit land. My finding on this point is supported by Section 191 of the Succession Act, Cap. 162, Laws of Uganda, which provides that:-

**“Except as hereafter provided, but subject to Section 4 of the Administrator General’s Act, no right to any part of the property of a person who has died intestate shall be established in any Court of Justice, unless Letters of Administration have first been granted by a Court of competent jurisdiction.”**

Wherefore, assuming that the defendant bought the suit land from Hajjati Aisha Nassanga Nankya and Aminah Namaato, the latter two persons had no right in the property (suit



land) to pass to the defendant. The said sale transaction was a nullity in case of a dispute like this one cannot be enforced by the defendant.

In the result and for the foregoing reasons given hereinabove, issue 1 is answered in the affirmative.

I now turn to deal with issue 2: **whether or not the defendant committed trespass on the suit land.**

It is the submissions by the defendant's Counsel that the defendant did not commit any act of trespass on the suit land which is his. At the same time, it is the evidence of both parties that the defendant entered onto the suit land and that he is still occupying the suit land. It is also clear in evidence on record that the plaintiff did not give permission to the defendant to enter on to her land. This means that the defendant is on the suit land without permission of the registered proprietor.

According to the case of **Justine EMN. Lutaya v Sterling, Civil Engineering Co. Ltd SCCA No. 11 of 2002** (attached), it was held that:

**“trespass to land occurs when another person makes an authorized entry upon land and thereby interferes or portends to interfere with other person's lawful possession of that land. .... it is trite law that in the absence of any person having lawful possession, a person holding a certificate of title to the land has sufficient legal possession of the land to support an action of trespass against a trespasser wrongly on the land”.**

The defendant in this instant case, failed to prove that his entry onto the suit land was with the consent of the owner, the registered proprietor who is the plaintiff. I have already, hereinabove on issue No.1 made a finding that the sale agreement between the defendant as the purchaser and Hajat Nassanga Nanteza and Aminah Namato as vendors of the suit land was invalid since they had no title to pass as they did not have letters of administration in respect to the bibanja interests on the suit. And according to the law cited and the evidence on record, the defendant is on the suit land unlawfully. The

defendant has no claim of right on the suit land. And as a consequence, the defendant is a trespasser on the suit land.

Furthermore, the action for trespass, it is the position of the law that, it relates to an unlawful entry on the land of another person. In the case of **Sheikh Muhammad Lubowa v Kitara Enterprises Ltd (1992) v KALR 126**, it was held that:-

**“trespass to land is constituted where entry onto the land by the defendant was without the consent of the owner. That where there is a valid sale agreement there is no trespass”.**

The above cited two authorities do not favour the defendant. The plaintiff’s title and interests in the suit land must be respected and protected. Accordingly, I answer the issue No. 2 in the affirmative.

**Finally, on issue No. 3: Whether or not the plaintiff is entitled to the reliefs being claimed in the plaint.**

The prayers/reliefs specified in the plaint depended on the resolution of the issues Nos. 1 and 2 above. Therefore, since issues Nos. 1 and 2 have been resolved in favour of the plaintiff, certainly the plaintiff is entitled to the reliefs being sought in the plaint, a part from the prayer of general and exemplary damages.

Counsel for the plaintiff, on the matter of general and exemplary damages submitted that in specific reference to relief (e) above, regard is made to the plaintiff’s written statement on oath in evidence Exhibit “P1” par. 8, 9 and 10 on her testimony that she lost approximately 30 days’ period of her business to attend Court which she valued at about 15,000,000/= (fifteen million Shillings) then and considering expenses to go to the Local Council for interventions before filing of the suit and as well suffering stress and her prevention by the defendant from developing her land for all the period the defendant has unlawfully been in possession of it for over 4 ½ years, the plaintiff defendant now claims 40,000,000/= (forty million shillings) as general damages.

In reply on the same matter, Counsel for the defendant submitted that general and exemplary damages are within the Court’s discretion depending on the facts and

circumstances of each case. The arguments advanced by the plaintiff's Counsel for general and exemplary damages are not backed up anywhere by evidence from the plaintiff. To argue that the plaintiff "lost approximately 30 days" period of her business to attend Court which she valued at about 15,000,000/= (fifteen million shillings only) is incredible. That we have rules of taxation where such a claim can be catered for under the item "attendance of court". That the rules provide for a cost of Ushs. 50,000/= per court's sitting. Likewise the claim for Ushs 40,000,000/= (forty million shillings only) is not tenable. It has no any direct evidence on the record, he submitted.

Considering the submissions of both Counsel, the expenses incurred by the plaintiff to a tune of Shs. 15,000,000/= are not backed up by evidence on record. In any cases, such expenses are claimed under the item of costs of the suit. Further, the assertions by the plaintiff that she was prevented to develop the suit land for a period of 4 ½ years by the defendant, too, are not supported by evidence. The evidence on record is that the plaintiff bought the suit land in 2006. In that year 2007, the plaintiff brought this suit against the defendant. Immediately, thereafter the plaintiff applied for a temporary injunction which was granted pending the determination of this suit. Therefore, I hold that the defendant did not prevent the plaintiff from developing the suit land. The Court order of a temporary injunction just maintained the status quo. Hence, there is no way the way the defendant could be faulted in that regard. Wherefore, the claim of Shs. 40,000,000/= as exemplary damages is not tenable. In the end result, the plaintiff's claim of general and exemplary damages fails.

All in all, and for the reasons given hereinabove in this judgment, I hold that the plaintiff proved all the raised issues to the satisfaction of the court. Accordingly, judgment is entered in favour of the plaintiff in the following terms and /or orders; that:-

- (a) The plaintiff is the rightful owner of the suit land.
- (b) The defendant is a trespasser on the suit land.
- (c) The defendant gives vacant possession of the suit to the plaintiff within thirty (30) days from the date of this judgment.
- (d) A caveat lodged by the defendant is vacated.
- (e) A permanent injunction is issued against, the defendant restraining him from trespassing on the suit land.

- (f) A Consequential order directing the Register of titles/Commissioner Land Registration to immediately remove the caveat that was lodged by the defendant on the certificate of title of the suit land is issued.
- (g) Costs of the suit are awarded to the plaintiff.

Dated at Kampala this 12<sup>th</sup> day of January, 2011.

Signed.

**JOSEPH MURANGIRA**

**JUDGE**