

**REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBARARA**  
**HCT-05-CV-CA-008-2008**

**BANYANKOLE KWETERANA**

**CO-OPERATIVE UNION LTD. ....: PLAINTIFF**

**VERSUS**

**VOLCANOES LTD. ....: DEFENDANT**

**BEFORE: THE HON. MR. JUSTICE BASHAIJA K. ANDREW**

**JUDGMENT.**

BANYANKOLE KWETERANA CO-OPERATIVE UNION LTD. (*hereinafter referred to as “the Plaintiff”*) brought this suit against VOLCANOES LTD. (*hereinafter referred to as the Defendant*), seeking for, *inter-alia*, a declaration that the suit parcels of land belong to the Plaintiff, orders for the eviction of the Defendant from the said land, and a permanent injunction against the Defendant, its agents and workmen, general damages for trespass, plus costs of the suit.

***Background.***

The Plaintiff claims that the Defendant Company encroached on the parcels of land; one being comprised in **Plot No.4 Bunyaruguru LRV 811 Folio 19** measuring two hectares, and another one held under customary tenure. Both parcels of land are situate at Kyambura, in present day Rubirizi District. The registered land had been mortgaged with M/s. Co-operative Bank Ltd. (in liquidation) and when the Plaintiff failed to repay the mortgage, the Bank of Uganda, as the Liquidator, compelled the Plaintiff to sell the land. A sale agreement was concluded between the Plaintiff and the Defendant for an agreed purchase price of Shs.28, 00,000/=, out of which the Defendant deposited Shs.2, 800,000/= leaving an outstanding balance of 25,200,000/=, which was to be paid in accordance with the terms sale agreement tendered in evidence as *Exhibit P.1*.

The Plaintiff contends that the Defendant did not pay the balance, but occupied the land, and that efforts to remove the Defendant from the land have failed. The Defendant for its

part denied all the allegations and put forward a counterclaim that the outstanding balance was duly paid and receipted, and that it lawfully owned the suit land.

The Defendant neither appeared at the trial nor was it represented, although the pleadings indicate that it was represented by M/s Byenkya, Kihika & Co Advocates. The Plaintiff was represented by M/s Mwene-Kahima Mwebesa & Co Advocates. The court proceeded *ex- parte* on 08/12/2010 after it was satisfied that the Defendant was duly served with hearing notice and had acknowledged service. Two issues were framed for determination, and submitted upon in writing only by Counsel for the Plaintiff. They are:-

1. *whether the suit land belong to the Plaintiff*
2. *What remedies are available for the Plaintiff?*

***Evidence.***

The Plaintiff adduced evidence of three witnesses. The first two are Tom Karuhanga (PW1) the General Manager, and Benson Tayebwa (PW2) a member of the Board of Governors of the Plaintiff, who was also Chairman of the said Board in 2001 when the sale agreement (*Exhibit P.1*) was executed. PW3 is a one Hillary Besekya a resident of the area.

PW1 and PW2 testified in similar terms that the Plaintiff has, or had two parcels of land, one registered under the ***Registration of Titles Act (Cap 230)***, and the other held under customary tenure.

The registered land was mortgaged with M/s. Co-operative Bank, but that on failure to repay the bank debt, a sale agreement was entered into (*Exhibit P.1*) but that it was breached by the Defendant, who failed and/or refused to pay the outstanding balance but proceeded to occupy; not only the land it had purported to purchase but also the customary holding, and that efforts to remove the Defendant from the land have proved futile.

PW3 Hillary Besekya, a bee-keeper and resident of Bunyaruguru, Rubirizi District testified that he has known Plaintiff since 1969, when it bought land in the area at that time, at Kyambura village, where they built stores and houses for workers. Further, that he knows the land very well and that it is over twenty - five hectares; out of which about only two hectares are surveyed and registered with a land title. PW3 also stated that he

knows the dealings with between the two parties because he is the one who identified the land for Defendant after being approached by a one Pravin Moman, its Managing Director.

PW3 went to testify that he also knows that the Defendant agreed to purchase the registered land of the Plaintiff, and also knows the particular piece of land the Defendant purchased. He further testified that the Defendant is, however, now occupying both parcels of the Plaintiff's land which he has fortified with fences and guards.

### **Resolution.**

Both parties acknowledge, as an undisputed fact, the existence of a sale agreement (*Exhibit P.1*) as between them for the land comprised in **Plot No.4 Bunyaruguru LRV 811 Folio19**, measuring two hectares. There is, however, controversy, as to whether or not, the Defendant completed payment of the purchase price of Ushs.28, 000,000/= after making the initial payment of Ushs.2, 800,000= leaving the outstanding balance of Shs.25, 200,000/=. The balance was supposed to be paid to the Bank of Uganda, as Liquidator for M/s. Co-operative Bank Ltd. in six monthly instalments commencing November 2001.

The Plaintiff avers that it revoked the sale agreement, citing breach of contractual terms in that the Defendant never paid the contractual balance and that, as such, the land should be regarded as having reverted back to the Plaintiff.

Another point of contention is that the Defendant is alleged to have taken over all the parcels of the Plaintiff's land, whereas it would be entitled to only the registered portion, in event it complied with the contractual terms of the sale.

### **Submissions.**

Counsel for the Plaintiff stated - correctly so - the law regarding the burden of proof citing the case of *Choitram v. Hiranad Ghamshamas Dadlani [1958] EA 641 at p.645* where their Lordships quoted *Phipson On Evidence (9<sup>th</sup> Edition) p.34* that:-

***“It may (burden of proof) shift constantly accordingly as one scale of evidence or the other preponderates ... it rests, after evidence is gone into, upon the party whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced.”***

Counsel also cited the *locus classicus* in *Miller v. Minister of Pensions* [1947] 2 ALL ER 372 where Lord Denning, J. (as he then was) stated:-

***“The degree of agency ... required to discharge a burden in civil cases ... is well settled. It must carry a reasonable degree of probabilities but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”***

For its part, the Defendant in its written statement of defence averred that it paid all the outstanding monies as required under the sale agreement (*Exhibit P.1.*) Annexed thereto are payment slips, which the Plaintiff did not traverse in its reply to the counterclaim, but only gave (under paragraph 3) thereof, a general denial that the alleged payments are irrelevant as the same have never been applied to the Plaintiff’s account. To buttress its contention, the Plaintiff attached a photocopy of its Bank Statement (*Exhibit P.3*) with M/s. Co-operative Bank Ltd. which was under liquidation.

However, as evidenced from the sale agreement (*Exhibit P.1*) relied upon by both parties, the terms of payment under *paragraph 2, Item 2.1.3* thereof, stipulate that payment of the balance of the purchase price “*shall be to be paid to M/s. Bank of Uganda – as Liquidator for the Co – operative Bank Ltd.*”, the Plaintiff’s Bankers, and not to, or on the Plaintiff’s account held with the Co-operative Bank Ltd. which was under liquidation.

The receipts by the Defendant annexed to its written statement of defence and the counter-claim (*collectively marked as “Annexure “E”*) reflect the above position that payment amounting to the outstanding balance was actually made to; received and acknowledged by the Bank of Uganda. A caveat hitherto lodged on the title was then lifted by the Bank of Uganda in document *Annexure “G”* to the defence of the Defendant. *Annexure “G”* under paragraph 2 states as follows:

***“WE, BANK OF UGANDA of P.O.Box 7120, Kampala in our capacity as Liquidator of the CO-OPERATIVE BANK LTD (IN LIQUIDATION) of P.O. Box 6021, Kampala, Uganda in consideration of Shs.28,00.000/ (Twenty eight million) having been paid to the CO-OPERATIVE BANK LTD (IN***

***LIQUIDATION), the receipt of which we acknowledge hereby RELEASE AND WITHDRAW the said caveat registered in the said Folio (LRV 811 Folio 19)."***

Unless, the Plaintiff proves to the contrary that the acknowledgments by Bank of Uganda and payment slips are fraudulent, I am unable to find that the Defendant actually ever defaulted on the terms of the sale agreement. On the contrary, there is ample evidence that the Defendant fully discharged its obligations under the contract, and as such, is the lawful owner of the land mentioned in the sale agreement; in as far it relates to the property comprised in ***Plot No. 4 Kyambura, Bunyaruguru*** comprised in ***LRV. 811 Folio 19, Bushenyi***.

Apart from the above described land, if there is any other land of the Plaintiff comprised in the customary holding, which is being utilized by the Defendant as alleged, then that land does not constitute part of the sale transaction between the two parties under *Exhibit P.1*. It follows that such extra customary land holding is property of the Plaintiff.

The second issue concerns the remedies available to the parties. Based on the above findings, it is ordered that the Defendant be evicted from any excess land it is occupying, which is, or was the customary land holding of the Plaintiff, other than that comprised in ***Plot No.4 Kyambura, Bunyaruguru*** in ***LRV. 811 Folio 19 Bushenyi***.

Further, an order for a permanent injunction is issued restraining the Defendant, its agents and workmen from further occupying the said customary land holding of the Plaintiff.

It is also declared that the Defendant is the lawful owner of all that registered land comprised in ***Plot No.4 Kyambura, Bunyaruguru*** in ***LRV. 811 Folio 19 Bushenyi***. An order for a permanent injunction is issued against the Plaintiff or its agents restraining them from interfering with the Defendant's enjoyment of quiet possession of the described registered land.

Regarding the claim for general damages for trespass by the Plaintiff, it is usually awarded at the discretion of court. The discretion should, however, be exercised judiciously, and based on sound principles. ***Section 11*** of the ***Evidence Act (Cap 7)***, stipulates as follows:-

***“In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.”***

Apart from listing the failure to utilize the land and inconvenience in the “*Particulars of the General Damages*”, no evidence was adduced by the Plaintiff, that could enable the court to determine the quantum of damages to be awarded. It is essential to note that both parties lay claim to ownership of the property in issue, and as such, it should not attract penalty in damages for trespass for any of them.

Concerning the claim of *mesne* profit by the Plaintiff courts are, invariably, guided by the principle that the burden of proving the profit received lies on the one who claims it was received; and not on the one in adverse possession. It was, therefore, incumbent upon the Plaintiff to establish; not only the existence of its right, but also the extent of the profit received. It failed to do so. There is no basis to award such a claim.

Both parties prayed for costs, but have each partly succeeded in their respective claims. It is ordered that each party bears its own costs of this suit.

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**BASHAIJA K. ANDREW**  
**JUDGE**  
**21/09/2012.**