

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO 298 OF 2011

1. **JAMNADAS VASANJI LODHIA**
2. **KUNAL JAMNADAS LODHIA**
3. **WINDSOR GOLF APARTMENTS LTD** } **PLAINTIFFS**

VERSUS

1. **KAMPALA DISTRICT LAND BOARD**
2. **LOGIC REAL ESTATES & DEVELOPERS LTD.....DEFENDANTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The plaintiffs instituted this suit against the defendants for declarations that the procurement and or making the suit land lease title was done fraudulently, and that the suit land is an easement by necessity for the use of the applicants; and for orders for cancellation of the lease title for the suit land, a permanent order of injunction restraining the defendants from ever interfering with the suit land, punitive damages and costs of the suit.

The plaintiffs' case is that they are the registered proprietors of land comprised in FRV 317 Folio 24 Plot 6, FRV 317 Folio 23 Plot 8 and FRV 317 Folio 25 Plot 10 Makindu Lane Kyadondo, Kampala District. Prior to the purchase of the plaintiffs' land the suit land was known to be the only road accessing the plaintiffs' land and the surrounding plots. In December 1998 the plaintiffs applied to Kampala City Council, now Kampala City Council Authority (KCCA) to

have the suit land included or annexed to their land for purposes of a jogging or walking track. The land could not be developed because of a sewer passing through their land. As a result they requested for a letter of No Objection from National Water And Sewerage Corporation in respect of getting permission to use the land without obstructing their activities. In November 1999 the City Council of Kampala accepted the plaintiffs' request and allowed the annexation of 0.088 hectares of the suit land to the plaintiffs' land. It was later established that the suit land is now registered in the names of the 2nd defendant having been leased to it by the 1st defendant, and the 2nd defendant claims he wants to develop the same. The plaintiffs allege that the leasing of the land was done fraudulently.

The record indicates that the defendants were duly served with court process. There is an affidavit of service to that effect. The defendants did not file a defence within the stipulated time. A default judgment was consequently entered against them by the Registrar of this Court and the matter was set down for formal proof.

During the *ex parte* hearing this court heard the sworn evidence of one witness, namely **Kumal Jamnadas Lodhia** the 2nd plaintiff. In his testimony he stated that he is a shareholder and Director with the 3rd plaintiff and that the plaintiffs own plots 6, 8 and 10 Makindu Lane. That there was a time the defendants approached them to sell plot 1 Makindu Lane adjacent to their land. They showed them the Deed Plan which was in the names of the 2nd defendant. They had eight years ago asked the City Council to sell them the same plot of land and the City Council had no objection to it. The plaintiffs wanted plot 1 for landscaping and for an access road but not for developing. That plot 1 is the only reserve they use to access the land and without plot 1 they cannot access their land.

Learned Counsel for the plaintiff, Kagoro Friday Robert submitted that the plaintiffs' having been on the land since 1998 qualifies them to have an equitable interest in the same and any allocation should have been made to them and not the 2nd defendant under section 4 of the Land Amendment Act 2010. He contended that the allocation of the suit land by the 1st defendant to the 2nd defendant was void and fraudulent since it had knowledge of the existence of the plaintiffs on the said land, more so, since the same had already been allocated to the 3rd plaintiff. He also submitted that the right of way is an inherent right against the property of another. He cited **Barclays Bank D. C. O V Patel, Court of Appeal of Kenya** to support his position.

I have perused the pleadings and their annexures, and analysed the witness evidence together with the submissions of Counsel on the matter.

On the issue of the Defendant not filing a defence, Order 9.r.11(2) of the CPR provides that:-

“Where the time allowed for filing a defence or, in a suit in which there is more than one Defendant, the time allowed for filing the last of the defences has expired, and the Defendant or Defendants, as the case may be, has or have failed to file his or her or their defences, the Plaintiff may set down the suit for hearing ex parte.”

There are court decisions to the effect that in such circumstances the defendant will not be allowed to participate in the proceedings though he/she could be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37** court held that since the appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 171**.

Order 9 rule 10 of the CPR also provides that where a defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence. Case decisions on this point are to the effect that a party who has not filed a defence is deemed to have admitted the allegations in the plaint. Also see Lugayizi J in **Eridadi Ahimbisibwe V World Food Programme & Ors. [1998] IV KALR 32**.

In this case the plaintiffs’ unchallenged evidence is that at one time the defendants approached the plaintiffs to sell plot 1 Makindu Lane adjacent to their land. They showed them the Deed Plan which was in the names of the 2nd defendant. They had eight years ago asked the City Council to sell them the same plot of land and the City Council had no objection to it, as evidenced by annexure **E** to their plaint. The plaintiffs’ evidence is that plot 1 is the only reserve they use to access the land and that without plot 1 they cannot access their land. It is also their evidence that when the 1st defendant allocated the land to the 2nd defendant, it had knowledge of the existence of the plaintiffs’ interest on the same, since the said land had already been allocated to the 3rd plaintiff. Annexure **A** to their plaint shows that they had been on the land since 1998.

The functions of a District Land Board, as spelt out under section 59(1)(a) of the Land Act as amended by the Land (Amendment Act) 2010, include holding and allocating land which is not

owned by any person or authority. The amendment to the same section is to the effect that if the said provision is contravened, the transaction shall be void.

In this case there is evidence that the plaintiffs had expressed interest in plot 1 and Kampala City Council had not objected to the same. Thus they had an equitable interest in the said land before the said City Council allocated the same to the 2nd defendant. The allocation of the said land should therefore have been made to the plaintiffs and not the 2nd defendant. In my opinion, the allocation to the 2nd defendant when there was a prior equitable interest was a void transaction under section 59 of the Land Act as amended by the Land (Amendment Act) 2010. In addition, in view of the plaintiffs' evidence that plot 1 was the only access to their land, they were entitled to a right of way on the said land. The right of way is an inherent right against the property of another. In **Barclays Bank D. C. O V Patel, Court of Appeal of Kenya**, it was held that a way of necessity arose by operation of law and continues to exist for as long as the necessity exists notwithstanding that it was not referred to in the certificate of title to the servient tenement.

The plaintiffs also prayed for punitive damages. **Black's Law Dictionary, sixth edition** defines punitive damages also known as exemplary damages as damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, fraud, wanton or wicked conduct on the part of the defendant. They are intended to solace the plaintiff for mental anguish, laceration of feelings, shame, degradation, or other aggravations of original wrong, or else to punish the defendant for his evil behaviour, or to make an example of him, for which reason they are called punitive, or exemplary, or vindictive damages. Unlike compensatory or actual damages, punitive or exemplary damages are based on entirely different public policy considerations – that of punishing the defendant, or setting an example for similar wrongdoers.

In **Ahmed Ibrahim Bholm V Car General Ltd Civil Appeal No. 12 of 2002**, Tseekoko JSC, in his lead judgment stated that it is now recognised that the courts in East Africa can award punitive/exemplary damages in tort and in contract. The principles set down in numerous case decisions when deciding whether or not to award exemplary damages to a plaintiff who seeks them are purely used as punishments and deterrents to prevent a similar situation from arising in tort. It is desirable to plead them in the plaint so as to give the defendant adequate notice for defending the claim, but they are given entirely without reference to any proved actual loss

suffered by the plaintiff. They will not be awarded in any breach of contract unless the breach has occasioned an action in tort. This in effect would mean punitive damages are awarded in respect of the tort and not the breach of contract *per se*. They are awarded where the defendant's conduct is oppressive, arbitrary, high handed or unconstitutional, if done by servants of the government. They can also be awarded where the defendant's conduct has been calculated by him/her to make profit for himself/herself which may well exceed the compensation payable to the plaintiff. The plaintiff cannot recover them unless he/she is the victim of the defendant's punishable behaviour. They are not intended to enrich the plaintiff but to punish the defendant and deter him/her from repeating his wrongful conduct. See **Ongom & Another V AG & Others [1979] HCB 267; Kyambadde V Mpigi District Administration [1983] HCB 45; James Nsaba Butuuro V Munnansi Newspaper [1982] HCB 134; Mubiru V AG 7 Another [1984] HCB 46; Davies V Shah [1957] AC 352.**

In this case there is evidence that the 1st defendant acted arbitrarily and unfairly when it disregarded the plaintiffs' interest which they had knowledge of, and went ahead to allocate it to the 2nd defendant. Being a public body which is statutorily charged with the duty of allocating land within its jurisdiction equitably, it ought to have exercised its functions objectively and within the requirements of the law, but it did not. For those reasons, I would award punitive damages against the 1st defendant payable to the plaintiff, in the amount of Uganda Shillings one million.

In the premises and on the foregoing authorities, I am satisfied that the plaintiffs have satisfied their claim against the defendants. Accordingly, judgment is entered for the plaintiffs against the defendants for the following declarations and orders:-

- (i) The procurement and or making the suit land lease title was done fraudulently.
- (ii) The suit land is an easement by necessity for the use of the applicants.
- (iii) The lease title for the suit land should be cancelled
- (iv) A permanent order of injunction is issued restraining the defendants from ever interfering with the suit land.
- (v) Punitive damages of U. Shs. 1,000,000/= (one million) against the 1st defendant.
- (vi) Costs of the suit.

Dated at Kampala this 8th day of November 2012.

Percy Night Tuhaise.

JUDGE.