

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL SUIT NO. 63 OF 2006**

**UGANDA MUSLIM WELFARE ASSOCIATION ::::::::::: PLAINTIFF  
VERSUS**

**SAUDI MARBLE CO. LTD ::::::::::: DEFENDANT**

**BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO**

**JUDGMENT**

**Introduction**


The Plaintiff filed this suit against the Defendant seeking for general, exemplary damages for trespass, compensation, a permanent injunction restraining the defendant, its agents or any other person claiming under it from further acts of trespass, interest and costs of the suit.

**Background**

The Plaintiff alleges that on the 1<sup>st</sup> day of December 1996, the Defendant entered into an agreement with the Forestry Department under the Ministry of Natural Resources wherein it was granted a license to plant trees on 2400 hectares on part of the land in the South Busoga Forest Reserve of the then Iganga District and now Mayuge District. That the Defendant was given the option to sublease part of the said land to any party for purposes of financing the forestry planting. The Plaintiff was thereby offered 80 hectares on the 11<sup>th</sup> January, 1999 of part the land allocated to the Defendant company with the option of more land if this so far allocated was effectively used.

That the Plaintiff took immediate possession of the said 80 hectares and planted trees without any interference from the Defendant. That on the 20<sup>th</sup> February, 2002, the Plaintiff was allocated more land measuring 160 hectares by the Defendant company making a total of 240 hectares on which it took possession by planting trees thereon without any interruptions.

The Plaintiff alleges that during the month of February, 2006, the Defendant's agents or servants while in the course of their employment, acting for and on behalf of the Defendant company entered onto the Plaintiff's land and felled down its planted trees or forest which were cut down and or commercially sold by the



Defendant's agents. This was brought to the attention of the Defendant to stop its agents' acts which was neglected hence this suit for the loss suffered, damages and inconvenience.

The Defendant filed its written statement of defence wherein it denied all allegations made by the Plaintiff in its plaint and stated that the suit does not disclose a close of action as against the Defendant.

The Defendant further stated that the purported donation of hectares of land as alleged is/ was illegal null and void, of no consequence as it was done, if at all without a board resolution and authority of the company which was ultra vires and in contravention of the express provision of the company's memorandum and articles of association.

The Defendant also stated that the Plaintiff was registered around May/June 2003 following its registration as an NGO in February 2003 and could not have received and/ or planted trees on the said land when it was non-existent at the material time.

### **Representation**

At the hearing, the Plaintiff was represented by Mr. Kakeeto Mohamood while Mr. Ojambo Robert appeared for the Defendant.

The parties filed their joint scheduling memorandum wherein they raised two issues for determination;

1. Whether the Plaintiff has any valid claim of right over land measuring 240 hectares and if so whether the Defendant has trespassed on the same.
2. What remedies are available to the parties.

Parties filed written submissions as per the timelines set by court and these were taken into consideration in resolving the issues.

### **Resolution:**

**Issue 1: Whether the plaintiff any valid claim of right over land measuring 240 hectares and if so whether the defendant has trespassed on the same**

I have carefully gone through all the evidence on court record. The law of evidence is in effect premised on the legal burden of proof. In civil matters, the



burden of proof is on the balance of probability. **The Evidence Act under sections 101-103** is in essence to the effect that he who alleges to a fact has the burden to prove. (See: **Jovelyn Bangahare-vs- Attorney General S.CCA No. 28 of 1993**) The burden to prove all the allegations in the plaint lies on the Plaintiff and the evidence counsel discusses was weighed by court.

It is not in dispute that the Defendant obtained a lease of 2400 hectares of land from the National Forestry Department under the Ministry of Natural Resources with the authority to sublease the land for purposes of financing forestry tree planting.

The Plaintiff's claim of trespass is based on the claim of ownership of the suit land measuring approximately 240 hectares that was a donation to the Plaintiff by the Defendant between the period of 1999- 2002 respectively. The Plaintiff alleges that at the time of the first donation of land measuring approximately 80 hectares, it was an NGO known as the Uganda Moslem Welfare Association and at the time it was received 160 hectares, it had changed status and thereby incorporated into a company limited by guarantee under the name of Uganda Muslim Association Ltd; the Plaintiff herein.

A Non-Governmental Organization incorporated under section 3 of the Non-Governmental Organisations Act of 2016 may be a private voluntary grouping of individuals or associations established to provide voluntary services to the community or any part, but not for profit or commercial purposes; not a body corporate under the law. As such, it is an association of persons, an unincorporated body which has no legal entity. See: **Campbell vs Thompson [1953] ALL E.R 831**)

It is trite law that unincorporated organizations have no legal existence of their own and cannot institute, maintain or on defend a suit. See **Uganda Freight Forwarders & Anor vs The Attorney General & Anor, Constitutional Petition No. 22 of 2009**. In the case of **Daudi Abdul vs Ahmed Suleiman (1946) 3 EACA 54**, court held that:

"Members of unincorporated association should sue or be sued in their personal names unless it can be shown:

- a) All members of the class had a common interest.
- b) They all had a common grievance.
- c) The relief claimed was in its nature beneficial to all of them which when representative action may be taken".



From the pleadings and the evidence on court record, it is clear that the Plaintiff's claim against the Defendant is for the 240 hectares of land that was given to Uganda Muslim Welfare Association in 1999 and 2002 by Abdul Gaffar Nour for purposes of tree planting.

However, a careful scrutiny of the pleadings clearly shows that the Plaintiff before this court is Uganda Muslim Welfare Association Ltd which is a company limited by guarantee and duly incorporated under the laws of Uganda. In law, the Plaintiff is a body corporate and going by the principle laid down in the authority of **Salmon vs Salmon (1897) AC 22**, it enjoys a corporate personality and can sue or be sued in its name. This corporate personality is one that cannot be enjoyed by an NGO or association as discussed above.


In the circumstance, the question would be; does the plaintiff have a cause of action as against the Defendant for the claim of land measuring approximately 240 hectares? I believe the answer to this question would be no. Court in the case of **Auto Garage vs Motokov No.3 1971 E.A** stated three elements that should be disclosed in a plaint to establish a cause of action to include;

- a) That the plaintiff enjoyed a right,
- b) That the right was violated by the defendant and
- c) That the plaintiff has suffered loss or damage.

The Plaintiff herein claims trespass and compensation by the Defendant on its land measuring approximately 80 and 160 hectares that was donated to the Uganda Muslim Welfare Association in 1999 and 2002 respectively. From the testimonies of Plaintiff witnesses PW1, PW2, PW5 and PW6, it is very clear that the Plaintiff was only incorporated around 2003 and before that, there was only the existence of the Uganda Muslim Welfare Association. The Plaintiff could therefore not have been gifted any land at the time as it was nonexistent.

PW1 testified that at the time of the transaction, the company was not limited by guarantee and was only registered later in 2003 as such. He stated that land to the association was a donation by the Defendant by way of letter. It is trite that a company comes into existence for the objects stated in its memorandum and articles of association. This was after all the condition for its incorporation and existence.

I believe that if a company is not incorporated in Uganda as it is alleged to be in this case at the time of the donation in 1999 and 2002, then, that means that it does not exist in Uganda as a body corporate. In the case of **The Fort Hall**



**Bakery Supply Co. vs Fredrick Margay Wangoe [1959] EA 474**, the Plaintiffs brought an action for the recovery of a certain sum of money from the Defendant. During the hearing, evidence disclosed that the Plaintiffs were not registered under the Registration of Business Names Ordinance and it was submitted by the Defendant that the action was therefore not properly before the court. The court held that the Plaintiffs could not be recognized as having any legal existence, were incapable of maintaining an action and therefore court could not allow the action to proceed thus striking it out with no order to costs as the Plaintiff did not exist in law.

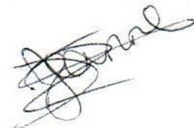
In the circumstances of this case, at the time of the alleged donation, the Plaintiff was a not incorporated in Uganda thus it was a non-existent person. From the testimonies of the Plaintiff witness, it is very clear that the Plaintiff was only incorporated in 2003 and was non-existent at the time of the alleged donation. Thereby, a non-existent entity cannot be said to have been gifted with property.

It therefore goes without saying that the Plaintiff did not and could not enjoy any right in respect of the alleged 80 and 160 hectares of land that were donated to the Uganda Moslem Welfare Association in 1999 and 2002 since it was non-existent and as such, cannot claim any right that was violated by the Defendant in respect of the said land and thereby any loss or damage suffered. A claim in respect of the said land can only be sustained in a suit filed by the members of the organisation (NGO) as discussed above if at all there is any claim or interest on the land.

Counsel for the Plaintiff submitted that the plaintiff sued as NGO having first registered as such and as a company limited by guarantee to which it was later incorporated in 2003. The Plaintiff also contended that the status of an NGO is almost the same as that of a company limited by guarantee.

For the defence, counsel submitted that the Plaintiff was non-existent in 1999 and 2002 when the offer alleged was made and could therefore not have planted any tress as alleged. Counsel further submitted that Uganda Muslim Welfare Association is not a legal person but an association that has no capacity to sue in its name but in the name of its members unlike Uganda Muslim Welfare Association Limited which submission I agree with as discussed above.

I therefore find that the Plaintiff has no cause of action as against the Defendant in respect of the claims made in its plaint.

A handwritten signature in dark ink, appearing to be 'Daniel', is written over a circular stamp that is mostly illegible.



Be as it may, the Defendant at the time of the purported donation was a company with a memorandum and articles of association, Exh.P42 that clearly provided for the course of running it. Under Article 96 thereof, it is stated that the directors may only purchase, sell and acquire or dispose of any immovable property with prior consent of the company given by way of ordinary resolution.

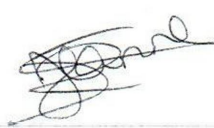
It should be noted that the Defendant is a company and thereby an artificial person under the law which therefore can own its property. From the reading of Article 96 of its constitution, it is very clear that immovable property, in these circumstances, the suit land could only be dealt with by the consent of the company by way of ordinary resolution. The Plaintiff did not produce any resolution that was made by the Defendant for any donation of the purported 240 hectares of land for tree planting but rather indicated that the same was gifted by way of letter by the Col. Abdul Gaffar Nour.

This donation if at all, was clearly outside the scope of Col. Abdul Gaffour Nour who acted in his personal capacity on behalf of the company something that illegal and void. This act in excess of the authority conferred by law was/ is *ultravires* and therefore invalid.

The Plaintiff in the plaint under para 4 (c) and (d) pleaded that the Defendant company through its president col. Abdul Gaffar Nour donated 80 hectares and 160 hectares of land to the Plaintiff company in 1999 and 2002 for planting trees. PW1, Imaam Sam Ahmed Ssentongo testified before this court that the land to the association was a donation and gifted by Col. Abdul Gaffar Nour by way of letter.

He also stated during his cross examination that the letter did not show that the land was given as reward and neither did it specify this reason but showed the organisation. This was corroborated by the evidence of PW6, Imaam Iddih Ibban Kasozi who testified that he saw and read the letter that gave the donation to the association.

I therefore find that the said donation to the association was improper, illegal and void as the company as clearly indicated under Article 96 of the Article of Association could only deal with its property by way of ordinary resolution which was never presented before this court. In the case of **Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor Civil Appeal No. 4 Of 1981** it was held that;



“A court of law cannot sanction what is illegal, and illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon.”

Furthermore, the law on evidence is very clear that he who alleged must prove. The Plaintiff has not brought before court any proof of donation of the suit land by the defendant before this court.

The law does not recognize a verbal gift of land. Regarding registered land, a gift *inter vivos* of the same is completed when the donor signs the transfer forms in favour of the donee.

The known principle is that in equity a gift is complete as soon as the donor has done everything that the donor has to do, that is to say, as soon as the donee has within his control all those things necessary to enable him to complete his title. Thus a gift of registered land becomes effective upon execution and delivery of the transfer. It cannot be recalled after that, even though the donee has not yet been registered as proprietor. See: ***The Registered Trustees Anglican Church of Kenya Mbeere Diocese vs The Rev. David Waweru Njoroge Civil Appeal No 108/2002; Pennington V Waine [2002] 1WLR 2075; Snell's Equity 29 edition page 122.***

In this case, the Plaintiff through its witness PW1 testified that the land was given as a donation by Col. Adbdul Gaffar Nour by way of letter. It is very clear that the said land had been leased by the National Forest Authority under the Ministry of Natural Resources to the Defendant for purposes of tree planting. He testified that upon the donation, he started planting trees on the said land.

The Plaintiff was not put in a position of control such as to enable it complete its title and could not in the circumstances where the land was leased, perfect its claims to the land even in equity. If the donor had done all in its power to vest the legal interest in the property in the donee, the gift would not fail even if something remained to be done by the donee; the Plaintiff herein or some third person. Thus the gift/ donation of this leased land was not complete to be recognized even under equity. It would have been so recognized if the Defendant and association had signed a sub-lease agreement and registered the same.

A person purporting to have been given a gift or donation of land should not come to court to invoke equity or ask for an order to complete his title as a gift is complete if the donee has everything necessary to complete his title without any further assistance from the donor, that is, signed transfer forms; and that a gift of registered land becomes effective upon execution (signing) and delivering





of the transfer to the donee. Equity will not perfect an imperfect gift. This maxim has been recognized as the strict rule that apply to the area of law related to the transfer of a gift. See: **Milroy v Lord [1862] 45 E.R. 1185**

I therefore find that the Plaintiff did not acquire any interest or right of claim over the suit land since at the time of the alleged donation, it was a nonexistent person and could not receive any donation. Further still, the donation so made to the association if at all by the said Col. Abdul Gaffar Noor was illegal, null and void as he did not have the authority to act for and on behalf of the company which has the capacity to act on its own through its company resolutions.

The Plaintiff in its pleadings claimed that the defendant, its agents and servants thereby trespassed onto its suit land. The law on trespass to land was clearly stated in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)**. In that case, Mulenga JSC held:

“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 in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass.... Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land.” (*emphasis mine*)

From the above, it is clear that trespass occurs when a person makes unauthorized entry upon land, and thereby interferes, or pretends to interfere, with another person's lawful possession of that land. However, as discussed above, the Plaintiff did not have any lawful possession of the suit land and therefore failed to satisfy the elements for trespass.

PW1 in his witness statement under para. 13-20 stated that the Defendant's officers encroached on the Plaintiff's forest, cut down trees and sold them without any rightful authority around 2006. However, PW1 also testified that he was planting trees for both the Plaintiff and the Defendant.



PW2, Isaac Lubega Kapalaga also testified during his cross examination that is was aware that the Plaintiff did not have any permit from the National Forestry Authority to plant trees which the Defendant had. He also stated that he was aware that the permit was not transferrable and transferring the same would be illegal as it had special conditions attached to it. He also stated that the Authority authorised usage of the land through a license. PW5, Ahmed Kawesa Sengendo further corroborated PW2's evidence on the Plaintiff having a permit to plant trees on the said land. He also stated that the employees were working for both the Defendant and the Plaintiff.

From the evidence on record, the Plaintiff did not have any permit whatsoever to plant trees on the suit land. It had not been licensed by the NFA to plant trees on the suit land. Furthermore, it did not adduce any evidence to show that it had lawful possession of the suit land.

I do not find any instances of trespass as alleged by the Plaintiff. I am therefore inclined to agree with the submissions of counsel for the Defendant that is pertinent for the Plaintiff to claim and further prove ownership of the suit property for the issue of trespass to arise.

I therefore find that the Plaintiff has no claim as to its interest and/ or right to the suit property and thereby no claim on trespass in the circumstance.

## **Issue 2: What remedies are available to the parties**

The Plaintiff claimed orders for permanent injunction, general damages, exemplary damages, compensation for the trees cut, interest and costs thereof.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the Defendant's actions.

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***



10 | Page