

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT NAKAWA

MISC.APPLICATION NO. 590 OF 2013

(ARISING FROM MISC.CAUSE NO. 01 OF 2012)

MUKISA MPEWO ENTERPRISES LTD----- APPLICANTS

VS

KAMPALA CAPITAL CITY AUTHORITY -----
RESPONDENT

Before: HON. MR. JUSTICE WILSON MASALU MUSENE

RULING

The Applicant, Mukisa Mpewo Enterprises Ltd brought this Application against the Respondent Kampala Capital City Authority seeking Orders that this Court assesses the compensation payable to the Applicant as the alternative remedy granted on 18th day of July, 2012.

The Application was filed under Section 34 and 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 50 Rules 1, 2, and 3 of the Civil Procedure Rules. The Application was supported by an affidavit sworn by Lawrence Kabanda, the Operations Manager of Mukisa Mpewo Enterprises LTD.

The brief background to this Application is that the Applicant filed Misc.Cause No.1 of 2012 under Article 50 of the Constitution seeking to enforce its property rights in respect of Plot 1 Spring Road.

On 18th day of July, 2012, my Predecessor, Hon. Lady Justice Faith Mwendha as she then was, allowed the Application and Ordered Kampala Capital City Authority to implement minute No.WPP.20/147/2003 of the City Council of Kampala to lease Plot 1 Spring Road to the Applicant. It was further ordered that in case of noncompliance, the Respondent pays prompt and adequate compensation to the Applicant in respect of the said property.

The Applicant now comes to this Court to assess the compensation as an alternative remedy as the Respondent is said not to have fully implemented the Order for lease.

Under paragraphs 7 and 8 of the supporting affidavit, the Respondent, Kampala Capital City Authority is said to have failed to give vacant possession of the land. It is further a vered that merely signing of the lease agreement without enjoyment of the property is not enough as possession is an essential requirement of the lease.

It was submitted by Counsel for the Applicant that the Applicant's complain is that the Respondent has failed to give vacant possession of the land. Under Paragraph 7 of the Affidavit in support it is stated that the Respondent executed a lease in favour of the Applicant but has failed to fully implement it by giving vacant possession of the land. Paragraph 8 further provides the Applicant's Advocates wrote to the Respondent on 4th July, 2013 asking that the land be rid of trespassers but no response was received.

Counsel for the Applicant quoted Section 3 (5) (c) of the Land Act, Cap 229 specifically which provides that under leasehold tenure, one person, namely the landlord or lessor, grants or is deemed to have granted another person, namely the tenant or lessee, **exclusive possession of land** usually but not necessarily for a period of defined, directly or indirectly, by reference to a specific date of commencement and a specific date of ending.

He added that, in every lease agreement, there is an implied covenant for quiet enjoyment, under which the tenant is entitled to be put in possession of the premises which are let to him at the outset of the tenancy. He made reference to **Halsbury's Laws of England, Volume 27(2), Paragraph 511.**

Counsel for the Applicant, M/S Nambale, Nerima & Co. Advocates quoted the case of **A M Dharas & Sons LTD VS Elys LTD (1963) 1 EA 573** where it was held that failure by the

Plaintiff to deliver possession of a part of the demised premises, (the stores) to the Defendant was a breach of implied covenant for quiet enjoyment which would entitle the Defendant to sue for damages.

Counsel for the Applicant further submitted that, the Respondent's affidavit in reply does not answer controvert the fact that it has failed to give vacant possession of the land. They added that the Respondent merely claims that it signed a lease but is silent on the issue of possession. And therefore, the Respondent accepts that it has not given the Applicant possession of the leased land.

Counsel for the Applicant reiterated that, if facts are sworn to in an affidavit are not denied or rebutted by the opposite party, the presumption is that such facts are accepted. They referred to the case of **Massa Samwiri VS Rose Achen (1978) HCB 297**

The Respondent was represented by the Directorate of Legal Affairs of Kampala Capital City Authority .They submitted that in compliance with the Court Order, it entered into a lease agreement with the Applicant on the 3rd day of October, 2012. That there was an entry of the Applicant's interest on the Respondent's certificate of Title. Counsel for the Respondent contended that that the Respondent also granted the Applicant permission to construct a chain link fence around the suit property on Plot 1 Spring Road.

They added that, there is no willful refusal by the Respondent to grant vacant Possession to the Applicant and that the Applicant has not placed before Court evidence of willful refusal on the Respondent's part. Counsel for the Respondent further submitted that the case of **A.M Dharas and Sons Ltd VS Elys Ltd (1963) EA 573** relied upon by the Applicant is distinguishable from the facts of the present case.

Counsel for the Respondent further submitted that by executing the lease agreement, on the 3rd October, 2012 the Applicant approbated the Ruling of Justice Faith Mwendha and as such they are stopped from seeking an alternative remedy by way of compensation. They contended that the Applicants remedy should lie in a separate suit for specific performance of the lease agreement.

Counsel for the Respondent also submitted that by signing the lease agreement, the Applicant made an election from which it cannot resile since he has taken a benefit of title arising out of the lease agreement which he first pursued and with which his present conduct is inconsistent. Counsel quoted the case of **Banque Des Marchands de Moscou (Koupetschesky) (In Liquidation) VS Kindersley and Another (1950) 2 ALLER 549 at 552** to support their submissions.

They further submitted that it is the Respondent's case that the claim for compensation by the Applicant as an alternative remedy is premature since the parties have entered into a formal lease agreement whose registration was also concluded by the Commissioner Land Registration. Further that the persons the Applicant claims are third parties on the land and are there without the Respondent's endorsement and as such are mere trespassers who the Applicant as the registered proprietor of a valid leasehold interest is entitled to evict.

Counsel for the Respondent further submitted that the cost of evicting the third parties (truck drivers) the Applicant alleges are on the land is very minimal compared to the UGX 5,200,000,000= that it now seeks to recover from the Respondent. And it is the Respondent's contention that the Applicant has not taken any reasonable steps to obtain possession of the suit land save for its writing of a letter informing the Respondent that there are truck drivers on the suit land. They added that this notwithstanding, the Respondent has not, in any way, interfered with or even blocked the Applicant from accessing the suit land given the fact that the Respondent is not even in possession of the same.

Regarding the procedure adopted by the Applicant, Counsel for the Respondent submitted that Misc. Cause No. 1 of 2012 Mukisa Mpewo VS Kampala Capital City Authority, having been concluded, the presen Application cannot be sustained since the Court is now *functus officio*. That a claim for compensation should have been brought by way of an ordinary but not under the pretext of execution proceedings. Counsel for the Respondent further submitted that the Application as it stands is incurably defective and ought be struck out.

This Court has carefully considered the submissions by both sides in this matter. I find and hold that whereas Counsel for Respondent's submissions are that the Applicant should have brought an Ordinary suit for compensation, they at the same time claim that the Applicant should have

commenced execution proceedings. In my humble view, the Applicant could not file a fresh suit for compensation because the remedy was already provided for in Miscellaneous Application No. 01 of 2012, notably:-

“(c) In case of non compliance, the Respondent does pay prompt and adequate compensation to the Applicant for the property!! I therefore agree with learned Counsel for the Applicant that the procedure adopted of seeking to enforce the alternative remedy, was proper as to file another suit for compensation would amount to Resjudicata.

Secondly, the Applicant could not commence execution proceedings against Kampala Capital City Authority when the amount of compensation has not been assessed by the Court. **And neither could the Applicant evict the current occupants who are third parties and were never privy to Miscellaneous Cause No. 01 of 2012 which was between Mukisa Mpewo Enterprises LTD and Kampala Capital City Authority.**

In my view, Kampala Capital City Authority, having lost in Misc. Cause No. 01 of 2012 was either to give vacant possession to the Applicant on top of a lease or to pay prompt and adequate compensation which is being sought now.

And that is in conformity with the provisions of Section 33 of the Judicature Act. For avoidance of doubt, Section 33 provides:-

“The High Court shall, in the exercise of Jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or a matter is entitled to in respect of any legal or equitable claim, property brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

So it would amount to a multiplicity of legal proceedings to file a fresh suit for compensation when that remedy had already been granted as an alternative. And whereas Counsel for the Respondents’ submissions are that by execution a lease agreement on 3rd day of October 2012, there is no willful refusal to grant vacant possession, they have not at the same time disputed the fact that there are third parties on the premises. So the Court Order by Hon. Lady Justice Faith

Mwondha, (as she then was), has not been complied with. Kampala Capital City Authority has not evicted the current occupants for purposes of handing over to the Applicant.

I now turn to the Remedies. Since the Respondent has failed to fully implement the Court Order by leasing and giving the Applicant vacant possession of the land in question, then the Applicant is entitled to the alternative remedy of compensation as ordered by Court.

And I agree with the learned Author, **MC Creagor on damages at page 877** as quoted by Counsel for the Applicant that when a buyer is evicted from property, the normal measure of damages is the market value of the land. **And as stated under footnote 71,18 a third party is in possession at the time of conveyance, the purchaser can be taken to have been “evicted”, although never in possession.**

Similarly, in the instant case, the land was in possession of a third party at the time the lease was executed and that has remained the position up to now. The Applicant I therefore, entitled to full value of the land.

I am therefore inclined to refer to Annexure”c”to the affidavit in support of the Application, notably valuation report prepared by one Mugisha Turyahikayo a duly licenced registered valuation surveyor. At page 2 of the Report, he puts the compensation value of the land at UGX 5,200,000,000= (Five Billion Two Hundred Million Shillings).

Whereas Counsel for the Respondent’s submissions are that the cost of evicting third parties (truck drivers) is very minimal, the Respondents have not given the alternative valuation. I have studied the detailed valuation report and I have no doubt that the same is scientific and accurately prepared. Under 2.4 of the said report-

“2.4 ENVIRONMENTAL CONCERNS: The parcel and its immediate neighbourhood comprise an established predominantly medium density Industrial area of Kampala along a fairly lever terrain. There are no foreseeable environmental concerns to which the site and its sorroundings are prone”. However, the property is situated in an industrial area neighbouring a railway line, a sewage treatment plant as well as an electricity plant in close proximity”.

When it comes to valuation considerations under 5.0 of the report, and 5.1.1.1 (use and zoning), the property is described as a midst a former industrial zone of Kampala that has experienced user succession to office use and semi- retail use for specialized sectors such as ware housing, Vehicle bonds and workshops. The conclusion is that the lease would be granted for industrial use for the erection of a modern workshop and parking yard.

Under 5.2, neighbourhood characteristics, it is stated that the Kampala Industrial area is an established commercial cum industrial suburb of Kampala within close access and proximity to all social amenities and infrastructural services from the city. This Court further Notes 5.4, **Appreciation potential** of the valuation report. It is stated that with the well planned and developed nature of the neighbourhood, nature of the terrain, proximity to the city centre as well as the prominent centre of Bugolobi, that the area of spring road continues to command a high demand for both sale and rental properties with unlimited sales evidence and high rental and capital values.

In the premises, given such a detailed valuation report which was never challenged by the Respondents and with no alternative valuation, I find and hold that the same represents an accurate compensation land value of UG.SHS.5,200,000,000=. I however in the exercise of this Courts powers under Sect 98 of the Civil Procedure Act, decline to allow the loss of Rent value from January 2004 todate which is put at Ug.shs. 3,846,623,642=. The same is speculative and would indeed strain the Respondent Kampala Capital City Authority in the rendering of effective services to the city dwellers.

In conclusion therefore, I do hereby award the compensation value of Ug.shs. 5,200,000,000= (Five Billion Two Hundred Million Shillings) to the Applicant, Mukisa Mpewo Enterprises LTD.

I also award the Applicants costs.

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WILSON MASALU MUSENE

JUDGE

28/03/2014