

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL SUIT NO. 062 OF 2017

KABAKUMBA LABWONI MASIKO PLAINTIFF

VERSUS

JESSE KASAIJA & 254 OTHERS DEFENDANTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

RULING

- [1] In this suit, the plaintiff sued the defendants for inter alia;
- a) A declaration that the plaintiff is the owner of the suit premises comprised in **FRV 12, Folio 17 land situated at Bujenje Estate, Masindi District.**
 - b) A permanent injunction restraining the defendants, their authorized servants and/or agents from interfering in any manner with the plaintiffs' ownership, possession, use or occupation and enjoyment of the suit land.
 - c) A declaration that the purported acquisition of the suit property by the defendants is null and void and of no legal consequence.
 - d) A declaration that the defendants are trespassers on the suit land and that the plaintiff is therefore entitled to vacant possession.
- [2] At the commencement of the hearing of the suit, counsel for the defendant **Mr. Waiswa Ceaser** raised a preliminary objection to the effect that:
- 1. That plaintiff's plaint does not disclose a cause of action against the defendants in trespass as alleged by the plaintiff.**
- [3] He submitted that a plaint is said to disclose a cause of action when the facts contained therein reflect that a plaintiff enjoyed a right which right was violated and the defendant is liable. That in this case, the plaintiff's plaint does not disclose the fact that the plaintiff enjoyed the right to sue in trespass at the time the defendants allegedly entered

onto her land therefore negating the rest of the other ingredients of the cause of action.

[4] Counsel submitted further that by the plaintiff stating in **paragraph 4(d)** of her plaint that

“without permission of the former controlling authority entered onto the suit land”,

it implied that the defendants entered onto the land when it was under management of **DAPCB** and not after the plaintiff had acquired either actual possession of the land or possession by a certificate of title. That a right to sue in trespass only accrues to a person who is in possession; **Odyeki & Anor Vs Yokonani & 4 Ors H.C.C.A No. 9/2017, Gulu**. That trespass is a violation of a person’s right to exclusive possession of land and it is a tort against a person not the land and therefore, in this case, no such violation was committed by the defendants against the plaintiff. It was the Departed Asian’s Custodian Board (**DAPCB**), the entity which was in possession when the defendants purportedly entered on the land. In the result, that the plaintiff’s plaint lack a cause of action in trespass for want of a right as a person in physical possession or possession by title at the time the defendants allegedly unlawfully entered onto the land.

2. The plaintiff’s plaint also offends the provision of O.7 r.11 (e) CPR.

[5] **O.7 r.11 (e) CPR** provides that a plaint shall contain facts constituting a plaintiff’s cause of action and when it arose. That the present plaintiff’s plaint does not disclose anywhere when the trespass occurred.

[6] In **Auto Garage Vs Motokov No.3 [1971] E.A 514 at 519D**, Spry V.P held;

“If a plaint shows that the plaintiff enjoyed a right, the right has been violated, and that the defendant is liable, then a cause of action has been established and any omission or defect may be amended.”

The question of whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it; **Kebirungi Vs Road Trainers Ltd & 2 Ors [2008] HCB 72**.

- [7] In the instant case, the plaintiff pleaded, and it is not in dispute that the plaintiff is the registered owner of the suit land. It has been variously held that a person holding a certificate of title has, by virtue of that title, legal possession and, can sue in trespass; **See Justine E.M.N Lutaaya Vs Stirling Civil Engineering Co.Ltd S.C.C.A No.11 of 2002** where court also relied on **Moya Drift Farm Vs Theuri (1973) E.A 114.**
- [8] Trespass to land is a continuous tort, i.e, trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrong doer, and giving rise to actions *de die in diem* so long as it lasts; **Winterbourne Vs Morgan (1809),1.1 East 395 at 405,103 E.R.1056** and also **Erisafani Vs Wilberforce Kuluse (1994) 111 KALR 10.** It follows therefore that maintenance of that action is available to a person in possession irrespective of when the alleged illegal entry occurred. With the tort of trespass to land, the courts treat the unlawful possession as a continuing trespass for which an action lays for each day that passes; **Konskier Vs Goodman Ltd [1928]1KB 421.**
- [9] It follows therefore that even if the alleged unlawful entry occurred before the plaintiff acquired registration, an action of trespass is still maintainable by the plaintiff for the trespass continued from the alleged unlawful entry and stay on the suit land to date.
- [10] In the premises, I find that the plaintiff's pleadings do disclose a cause of action against the defendants in trespass. As to whether or not the defendants' entry and stay on the suit land was or is unlawful, whether or not the plaintiff had or has possessory interest in the suit land and whether or not the defendants have any interest in the suit land are matters for trial that shall require evidence to be adduced by the parties during trial. Any other defects in the plaintiff's pleadings may be cured by amendment.
- [11] In the premises, the instant preliminary objection is found to have no merit and as a result, it is accordingly overruled.
- [12] Lastly, as regards the 2nd preliminary objection, trespass to land being a continuous tort and in a case like the present one where there are many defendants who may have entered onto the suit land at various

times and periods, the date when the cause of action arose is implied in trespass itself and therefore it is not fatal for the plaintiff's failure to have indicated the date when the trespass commenced as required by **O.7 r.11 CPR**.

[13] The 2nd preliminary objection is also found to have no merit. All in all, therefore, the 2 preliminary objections have no merit. I accordingly overrule and dismiss them with costs to the plaintiff. This suit should to be heard on its merits.

Signed, dated and delivered at Masindi this **26th** day of **August, 2022**.

Byaruhanga Jesse Ruyema
JUDGE.