

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 458 OF 2012

KIWALABYE STEPHEN.....PLAINTIFF

VERSUS

KIFAMBA JOHN MUSOKE.....DEFENDANT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The plaintiff instituted this suit for an order of eviction of the defendant and or his agents, servants and employees from the suit kibanja, a permanent injunction, general damages for inconvenience and costs of the suit.

The plaintiff's case is that he is the grandson and beneficiary to the estate of the late Zabiya Ndagire who died in 2001 leaving a will in which she bequeathed the suit kibanja located at Konge Upper Zone to the plaintiff. The deceased had entrusted the care of the kibanja with the defendant who refused to vacate the same in favour of the plaintiff.

The defendant did not file any defence though he was served and acknowledged service of court process, as per the affidavit of service of Mulondo Abdu on record. The Registrar of this court, on application by the plaintiff, entered a default judgment against the defendant on 16th October 2012 and referred the matter to this court for formal proof. The defendant was served with a hearing notice of the case as per the affidavit of Mayanja Abu a process server of this court, and formal proof of the matter proceeded *ex parte* against the defendant.

The plaintiff produced three witnesses including himself, who gave oral testimonies on oath before this court for formal proof of his case. He also tendered in court three exhibits, namely the will of Zabiya Ndagire together with its English translation (exhibit **P1**), and two lists (exhibits **P2** and **P3**) showing payment of busuulu by Ndagire. Counsel for the plaintiff was allowed to file written submissions within time schedules set by this court.

The plaintiff testified as PW1 that his grandmother the late Zabiya Ndagire left a will exhibit **P1** where she bequeathed to him the suit kibanja located at Konge. The will was given to him by his cousin brother Albert Mayanja PW2. The defendant who was looking after the kibanja refused to give it to him despite various attempts he made to get it from him which included involving his lawyer and the Local Council executive. The defendant also chased him away with a panga.

Kakkika Mayanja PW2 confirmed the plaintiff's testimony by identifying exhibit **P1** as the will of the late Zabiya Ndagire which he used to keep. Exhibit **P1** reads in paragraph 7(iii) that the plot of land (kibanja) located at Konge was bequeathed to her grandson Kiwalabye Stephen. Bwabye Asaph Isaac PW3 testified that his late father was the chief who used to collect tax for the King of Buganda (Kabaka), and that the records left by his late father, exhibits **P2** and **P3**, indicate the late Zabiya Ndagire to have been a tenant who paid tax (busuulu) in respect of the suit kibaja.

In his submissions, learned Counsel Sulaiman Musoke for the plaintiff reiterated the evidence as adduced by the plaintiff and his witnesses. He contended that the late Zabiya Ndagire had the legal capacity to bequeath the suit kibanja to the plaintiff under section 129 of the Succession Act, and that the plaintiff is entitled to the remedies sought.

Though this suit was for formal proof and it proceeded *ex parte* the law is that whether a suit proceeds *ex parte* or not, the burden of the plaintiff to prove his/her case on the balance of probabilities remains. See **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**.

The evidence adduced by the plaintiff proves that he is the beneficial owner of the suit kibanja which was bequeathed to him by his grandmother Zabiya Ndagire in a will. Under section 129 of the Succession Act a testator may bequeath part of his/her property. Zabiya Ndagire was a recognized kibanja holder on Kabaka's land, as evidenced by her payment of busuulu during the years 1965 and 1966 in exhibits **P2** and **P3**. She therefore had the legal capacity to bequeath the land to the plaintiff. There is also evidence adduced that the defendant who was a caretaker of the land in question has refused to hand over the land to the plaintiff despite the latter's attempts to get it from him.

Order 9 rule 10 of the CPR provides that where the 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. There are also case decisions that a party who has not filed a defence is deemed to have admitted the allegations in the plaint. See **Eridadi Ahimbisibwe V World Food Programme & Ors [1998] IV KALR 32**. In addition, the evidence as adduced by the plaintiff has neither been denied nor rebutted.

The plaintiff also prayed for general damages for the inconvenience he suffered. His Counsel submitted that since the defendant breached the trust the deceased put in him, he should pay the damages to the plaintiff.

It is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental stress, pain and suffering. General damages must be pleaded and proved. See **Kampala District Land Board & George Mitala V Venansio Babweyana SCCA 2/2007; Assist (U) V Italian Asphalt & Haulage & Another HCCS 1291/1999; Moses Kizige V Muzakawo Batolewo [1981] HCB**.

In the instant case the plaintiff cannot be without the remedy of an award of general damages where it has been proved to this court that he has been denied his land by the defendant who was supposed to be a caretaker of the same. He must have clearly suffered inconvenience in terms of being dispossessed of his property and trying to claim it. The plot (suit kibanja) is located in Konge, Makindye division in Kampala district where the demand for real property is high. I would in the premises, award the plaintiff general damages of U. Shs. 15,000,000/= (fifteen million).

In the premises, I am satisfied that the plaintiff has formally proved his claim against the defendant to the required standard of proof. I enter judgment against the defendant for the following orders:-

- a) An order of eviction of the defendant and or his agents, servants and employees from the suit land.
- b) A permanent injunction.
- c) General damages of U. Shs. 15,000,000/= (fifteen million).
- d) Costs of this suit are awarded to the plaintiff.

Dated at Kampala this 4th day of March 2013.

Percy Night Tuhaise

JUDGE.