

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
LAND DIVISION  
CIVIL SUIT NO. 259 OF 2010**

**NOAH BUKENYA..... PLANTIFF**

**VERSUS**

**1. MUGENYI FRANCIS  
2. KAKOOZA CHARLES .....DEFENDANTS  
3. M/S GLOBAL CREDIT MANAGEMENT CO. LTD**

**JUDGMENT**

**BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA**

This suit was brought by the plaintiff against the defendants for a declaration that land comprised in Kibuga Block 13 Plot 1068 Najjanankumbi measuring approximately 0.037 hectares (hereinafter referred to as the suit land) belongs to the plaintiff, was not validly mortgaged to the 3<sup>rd</sup> defendant and was fraudulently sold to the 2<sup>nd</sup> defendant. However, the plaintiff failed to prosecute the suit and prove this claim. The suit was accordingly dismissed by this court for want of prosecution on 2/10/12. On the other hand, the 2<sup>nd</sup> defendant raised a counter claim in his written statement of defence filed on 24/9/2010 praying for orders for:-

- a) An eviction order and an order of vacant possession.
- b) Special damages in the sum of Shs. 3,512,500/-.
- c) Payment of mesne profits of Shs. 1,000,000/= per month with interest at the prevailing commercial rate from the date of filing till payment in full.
- d) General damages.
- e) A permanent injunction restraining the plaintiff/ defendant to the counter claim, his agents and/or servants from any further or future interference with the counter claimant's possession and quiet enjoyment of the suit land.
- f) Costs of the counter claim.

The plaintiff/defendant in counterclaim did not reply to the counter claim and neither did he or his counsel appear in court to rebut the allegations raised in the counter claim. Following the dismissal of the suit, the 2<sup>nd</sup> defendant (counter claimant) was allowed to proceed on his claim *exparte*.

## **Facts of the Counter Claim**

By his pleadings, the 2<sup>nd</sup> defendant is the counter claimant and registered proprietor of the suit land having acquired the same by purchase from the 3<sup>rd</sup> defendant under a mortgage sale. That the counter claimant learnt about of the sale of the suit land from a firm of brokers called Loka & Associates who showed him an advert of the sale in the Daily Monitor. He was also shown a copy of the duplicate certificate of title of the suit land and a duly registered mortgage deed entered into between the plaintiff and the 3<sup>rd</sup> defendant. Using that information, the counter claimant conducted a search in the land registry in order to verify the status of the land and confirmed that there was a legal mortgage in favour of the 3<sup>rd</sup> defendant. Further, the counter claimant inspected the suit land and also went to the suit land with the 1<sup>st</sup> defendant whom he came to know as the managing director of the 3<sup>rd</sup> defendant (mortgagee) and found the same to be vacant.

That having verified the status of the suit land; the counter claimant purchased it from the 3<sup>rd</sup> defendant and took immediate possession of the same by erecting a fence around it. However before he could complete the fencing, he was forcefully evicted by persons in military uniform and the RDC of Lubaga Division who were all acting on the instructions of the plaintiff. That the building materials that were on the suit land were confiscated and access to the suit land was blocked. The plaintiff then decided to institute the head suit against the defendants alleging *inter alia* to be the owner of the suit land but the suit was dismissed for want of prosecution.

Hearing of the counter claim preceded by written statements filed on the record by the counter claimant (PW1) and Mugenyi Francis (PW2) on 29/11/13. Counsel for the counter claimant presented written submissions.

### **Counsel for the counter claimant raised the following issues for resolution:-**

1. Whether the counter claimant is the rightful owner of the suit land?
2. Whether the plaintiff/ counter defendant has interest in the suit land?
3. Whether the counter claimant is entitled to the remedies sought?

### **Issue One:-**

#### **Whether the counter claimant is the Rightful owner of the suit land?**

In paragraph 3 of his witness statement, the counterclaimant stated that that he is the registered owner of the suit land having lawfully acquired it by purchase for valuable consideration from the 3<sup>rd</sup> defendant through a mortgage sale. The sale agreement and a copy of the title deed which is registered in his name were admitted in evidence as Exhibit “D1” and “D2” respectively. The counter claimant then fully articulated in his witness statement the process he undertook before he made the decision to buy the suit i.e. he carried out due diligence at the land registry and even

inspected the suit land to confirm that it was vacant before he purchased it. In support of those facts, his counsel cited **Section 59 of the Registration of Titles Act** and the case of **Lawrence Kitts Vs. Bugisu Co-operative Union SCCA No. 15/2004**. Counsel argued that upon the counter claimant presenting cogent and uncontroverted evidence of ownership of the suit land, the evidential burden shifted to the counter defendant to adduce credible evidence in contravention, which was not done. On this point he cited **Bamwine J** (as he then was) in **Dr. Vincent Karuhanga T/A Friends Poly Clinic Vs. NIC and URA [2008] HCB 151**.

Additional evidence in support of the counter claimant's case was given by PW2 (the 1st defendant) who also filed a witness statement in which he stated that the 3<sup>rd</sup> defendant agreed to advance to the plaintiff, a sum of Shs. 42,000,000/= which the plaintiff received and in return, to pledge the suit land as security. He further stated that the mortgage was registered on the suit land and that, upon default by the plaintiff, the 3<sup>rd</sup> defendant sought to exercise its rights to foreclose and the suit land was thereby advertised in the Daily Monitor Newspaper. Attempts by the plaintiff to avert foreclosure failed when he neglected to prosecute HCCS No. 135 of 2009 and Misc Application No. 254 of 2009 which was dismissed on merit. The 3<sup>rd</sup> defendant received offers to purchase the suit land including that of the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant proceeded and sold the suit land to the 2<sup>nd</sup> defendant and executed a transfer in his favour that resulted into registration of the plaintiff on the suit land.

Counsel in submission concluded that the counter claimant acquired legal possession of the suit land which would entitle him to evict any persons purporting to take forceful possession and regain vacant possession. He cited the case of **Justine E.M.N. Lutaya Vs. Stirling Civil Engineering Company Ltd SCCA No. 11 of 2002**. He also argued rightly in my view, that, where averments made by a party are not controverted by the opposite party, the presumption is that they were admitted by that party as true facts. See; **Lugazi Progressive School and Immaculate Matuta Vs. Serunjogi and Ors HC Mbarara Civil Revision Order No. 0006/2001**. The counter claimant's evidence is uncontroverted and is deemed to be admitted by the counter defendant as the true facts that the counter claimant is the registered proprietor and rightful owner of the suit land. However, going by the authority of **DCB Vs Iga Bukunya t/a Ney Mars Wave House Misc. App. No.26/92** cited with approval in **Abednego Absolom Ongom Vs Amos Kaheru (1995) III Kalr 7**, the court is still mandated to find proof that *"...the evidence lead is such that, without contradiction by the defendant, it is sufficient to prove the claim"*.

**Section 59 of the RTA** stipulates that;

*"No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register"*

*Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of, or having any estate or interest in or, power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.”*

In the instant case, the counter claimant is named in the certificate of title of the suit land comprised in Kibuga Block 13 Plot 1068 Najjanankumbi as the registered proprietor. *Prima facie*, his title is indefeasible except for example, where it is proven that he acquired registration through fraud or someone else holds a similar previously registered certificate of title. Apparently there is no evidence of that sort in this case.

The counter claimant also proved to this court both in his pleadings and evidence that he acquired the suit land free from any encumbrances and followed all the steps required prior to registration. It was shown that the counter claimant was approached by land brokers who showed him an advert for the sale of the suit land in the Monitor news paper. He then contacted the concerned bailiffs who showed him the certificate of title to the suit land and a signed mortgage deed between the plaintiff and the 3<sup>rd</sup> defendant. The counter claimant conducted a search in the land office and also inspected the suit land physically with the 1<sup>st</sup> defendant. Only after that process, did the counter claimant go ahead to purchase the suit land and took physical possession by erecting a fence. This in the mind of the court, in the case of **Justine E.M.N. Lutaya Vs. Stirling Civil Engineering Company Ltd (supra)** is sufficient evidence of even the slightest amount of possession for the Justices in that case were of the view that suffices. I do agree with that finding.

According to **Section 106 of the Evidence Act**; *“in civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person”*. In the case in point, the counter claimant proved to this court that he is the registered proprietor and rightful owner of the suit land for which he at one time obtained legal possession. Therefore, actions by the counter defendant or his agents against him were illegal and unfounded since at that time; it has been proven that the former owner had ceased to have an interest in the suit land which he lost through a mortgage sale. To fortify my finding, I again rely on S.110 of the Evidence Act which stipulates that *“when the question is whether any person is the owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner.”* Further, in the case of **Dr. Vincent Karuhanga T/A Friends Poly Clinic Vs. NIC and URA (supra)** that was cited by counsel for the counter claimant it was held that;

*“In law, a fact is said to be proved when the court is satisfied as to its truth. The evidence by which that result is produced is called proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof; that is, his allegation is presumed to be*

*true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on the balance of probabilities...”*

There was no response to the counter claim and as such, the counter defendant failed to adduce any evidence to rebut the clear evidence of ownership by the counter claimant. In short, the counter defendant is presumed to have admitted to all the averments made by the counter claimant. I am therefore satisfied and hold that the counter claimant is the rightful owner of the suit land.

### **Issue Two:-**

#### **Whether the plaintiff/counter defendant has interest in the suit land**

Learned counsel for the counter claimant submitted that the burden to prove an interest in the suit land lay on the counter defendant who wished court to decide in his favour. He pointed out that the counter defendant opted not to appear in court to prove his interest in the suit land. That the evidence on record is that the counter defendant was initially the registered proprietor of the suit but out of his own volition, decided to pledge the same to the 3<sup>rd</sup> defendant as security for a loan facility of Shs. 42,000,000/= which he failed to pay. That exercising their rights under the mortgage deed, the third defendant served both a demand notice and a statutory notice upon the plaintiff and proceeded to advertise the suit land for sale. That responding to that advert, the counter claimant lawfully purchased the land. Counsel concluded in his submissions that, although the plaintiff is duly aware of the dismissal of the head suit, he has never sought to challenge its dismissal. In his view, the plaintiff does not have any interest in the suit land and his agents became trespassers on the suit land and are liable to be evicted.

I do agree with those submissions. Indeed, I have already resolved the first issue in favour of the counter claimant. The evidence on record which was not challenged by the counter defendant clearly indicates that the counter defendant's rights and interest in the suit land, ceased when he failed to pay the loan extended to him by the 3<sup>rd</sup> defendant. His suit to assert his interest in the suit land was also dismissed and never reinstated. I therefore agree and hold that the plaintiff/counter defendant has no interest in the suit land.

### **Issue Three:-**

#### **Whether the counter claimant is entitled to the remedies sought**

##### **a) Eviction and Permanent Injunction**

Having found that the counter claimant is the rightful owner of the suit land and the counter defendant has no valid interest, therein, the counter defendant is liable to eviction from the suit land. I thereby move to issue an order of eviction against the plaintiff/counter defendant and/or his agents and in addition, issue a permanent injunction restraining the plaintiff/counter

defendant, his agents and/ or agents from any further or future interference with the counter claimant's possession and quiet enjoyment of Block 13 Plot 1068, Najjanankumbi.

#### **b) General Damages**

The guiding principle in assessment of general damages was stated in the case of **Dr. Denis Lwamafa vs. AG CS No. 79 of 1983 [1992] KALR 21** where it was held that the plaintiff who suffers damages due to the wrongful act of the defendant must be put in the position he would have been had he not suffered the wrong. The counter claimant also cited the case of **Eric John Watanta Vs. Bugisu District Administration [1975] EA 164** where it was held that the assessment of general damages depends on the status of the plaintiff and the degree of pain and suffering incurred. The counter claimant averred in his witness statement and pleadings that he has been subjected to mental and psychological torture as a result of the plaintiff's interference with his quiet possession and utilization of the suit land. Counsel for the counter claimant in his submission prayed for Shs. 30,000,000/= as general damages. The counter claimant has been deprived of use of the suit land since August 2010, which would be a period of about 4 years. That, and in addition, to the psychological pain suffered I award a sum of Shs.25million as general damages.

#### **c) Special Damages**

It is trite that special damages must be strictly pleaded and proved. In paragraph 4 of the written statement of defence and counter claim, the counter claimant pleaded *inter alia* for the losses he incurred for the destruction of his boundary wall and building material destroyed. He did fully enumerate the property destroyed and in addition, he stated to have incurred certain costs in labour all of which he claimed a sum total of Shs.3,512,500/-. I noted however, that, no documentary or other evidence was availed to support those claims. In my view, it was not enough to give a mere enumeration of the loss and therefore, the counter claimant did not strictly prove those damages to the standard required by the law. Hence, I make no award of special damages.

#### **d) Mesne profits**

According to S.2 Civil Procedure Act mesne profits of property are described as "..... those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it together with interest on those profits ....." The counter claimant averred in paragraph 5 of the written statement of defence and counter claim that the plaintiff denied him use of the suit land which would entitle him to an award of mesne profits. He prayed for a sum of Shs 1,000,000/= per month as the projected rental income for the suit land with interest at the prevailing commercial rate from the date of filing the suit till payment in full. I do agree that there was no contest to the mesne profits. However, in my new, this case was even formal proof and the counter claimant was again under an obligation to show how he came to that proposed entitlement, the Supreme court in **Edward Rurangaranga Vs**

**Mbarara Municipal Council & Ors SCCA 10/96 (reported in 1997) Kalr at 138** was of the view that as claimant for loss of rent should not just make that claim, they should prove it. Therefore, the court finds no evidence upon which to base this claim, and is not granted.

In conclusion, the counter claim succeeds upon the orders given. The counter claimant is in addition awarded costs of the dismissed suit and counterclaim.

I so order.

**EVA K. LUSWATA**  
**JUDGE**  
**18<sup>th</sup> August, 2014**