

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 201 OF 2014**

HARRIET NAGAWA (*suing through lawful Attorney*)

THERESA MUYINGO ::: **PLAINTIFF**

VERSUS

ESTHER NAMBOGGA ::: **DEFENDANT**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT:

THERESA MUYINGO, the lawful attorney of Harriet Nagawa (*hereinafter referred to as the “plaintiff”*) brought this suit against *ESTHER NAMBOGGA* (*hereinafter referred to as the “defendant”*) for trespass to land comprised in *Kibuga Block 9 Plot 491 at Kagugube* (*hereinafter referred to as the “suit land”*). The plaintiff seeks orders for the recovery of the suit land, a permanent injunction against the defendant, vacant possession, and costs of this suit.

The defendant was duly and effectively served with summons to file a defence but she did not file any defence to the suit at all. Court thus proceeded *ex parte* under **Order 9 r.10 CPR** as if the defendant had filed a defence, and the case was set down for formal proof of the claim by the

plaintiff. Ms. Atim Florence of M/s. Muganwa, Nanteza & Co. Advocates, Counsel for the plaintiff, filed a Scheduling Memorandum on court record which this court adopted pursuant to **Order 12 CPR**.

The plaintiff adduced evidence by filing a witness statement of Harriet Nantale as PW1. The statement is on court record and I need not to reproduce it but I will premise my evaluation of the evidence on its contents to arrive at a decision in this case. Counsel for the plaintiff argued the case by filing written submissions which I have taken into account in the resolution of the issues in this case. Two issues were framed for the determination as follows;

1. Whether the defendant trespassed on the suit land.

2. Whether the plaintiff is entitled to the remedies prayed for,

Resolution of Issues:

Issue No.1: Whether the defendant trespassed on the suit land.

In her evidence in paragraph 4 of the witness statement, PW1 stated that the plaintiff is the registered proprietor of the suit land comprised in Kibuga Block 9 Plot 491 land at Kagugube Road. As proof of ownership, she attached a copy of the certificate of title of the said land as *Annexure "A"*. According to the said copy of the certificate of title, it is clear that the plaintiff got registered on the suit land on the 24.02. 1972. It is also the

unchallenged evidence of the plaintiff that she has since her registration enjoyed a quiet possession on the suit land.

Under **Section 59** of the **Registration of Titles Act (Cap.230)** a certificate of title is conclusive evidence of ownership of land by the person named therein as proprietor. For ease of reference, I quote the provision fully below;

“59. Certificate to be conclusive evidence of title.

***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.*” (Emphasis added).**

The provisions above have similarly been applied and amplified in the case of *Kampala Bottlers (U) Ltd vs. Damanico (U) Ltd, SCCA No.22 of 1992*; and *Hariprasad Ramabai Patel vs. Babubhai Kalidas Patel [1992 – 1993] HCB 139*, wherein it was held to the effect that a certificate of title is conclusive evidence of ownership of the suit property, and that no submission of oral evidence can be called to vary the certificate of title unless fraud, lack of consideration or illegality is proved. In the instant case, possession of the certificate of title by the plaintiff is evidence of ownership of the suit land in absence of any other evidence to the contrary.

In the witness statement in paragraph 6, PW1 stated that the plaintiff relocated to California in the United States of America where she is currently residing. In paragraph 7, PW1 also stated that the plaintiff seldom returns to Uganda to visit her relatives, among other things. PW1 further stated, in paragraph 8 and 16 that that in 2012 the plaintiff established that the defendant was occupying the suit land in a deliberate act and attempt to dispossess the plaintiff of the suit land. Further, that the defendant unlawfully, without a bona fide claim of right trespassed on part of the suit land in violation of the plaintiff's interest. Furthermore, that the defendant was warned of the plaintiff's interest in the suit land but that she ignored the notice. The plaintiff also states, in paragraph 14, that she has never

authorised the defendant to occupy the suit land nor has she ever acquiesced to the defendant's actions.

The question that arises is whether the facts disclosed in the evidence about the defendants' actions amount to trespass in law? In the case of ***Justine E.M.N Lutaaya vs. Stirling Civil Eng. Civ.Appeal No. 11 of 2002 9***; in which the Supreme Court of Uganda cited with approval ***Moya Drift Farm Ltd. vs. Theuri (1973) E.A 114*** per Spry V-P at page.115; it was held, inter alia, that trespass to land occurs when a person makes an unauthorised entry upon another's land and thereby interfering with another person's lawful possession of the land. In the same case it was also held that possession does not only mean physical occupation but also includes constructive possession. A similar position was taken in the case of ***Shiek Mohammed Lubowa vs. Kitara Enterprises Ltd HCCA No. 4 of 1987***; that trespass to land to is constituted where the entry onto the land by the defendant was without the consent of the owner and where the initial entry is unlawful in that there was no consent of the owner.

I can only add that even where the entry on to the land could have been lawful with the consent of the owner, if the consent ceases and the continued stay is unauthorized by the owner it would in law amount to

trespass. The operative word in the tort of trespass is “unlawfully” being on or coming on to the land of another.

In the instant case evidence was adduced showing that there was no consent or authorization from the owner that gave the defendant a right to occupy the suit land. After the acts of the defendant’s trespass came to her attention, the plaintiff instructed her agents to have the defendant peacefully leave the suit land or be evicted but the efforts have failed, and the defendant has adamantly continued to use and stay on the suit land.

In ***Abraham Katumba vs. Uganda Posts & Telecommunications Corporation, HCCA No. 395 of 1991***, it was held that trespass is a continuing tort from which the injured party can sue from the date of the cessation of the wrong. In the instant case the wrong has not even ceased. There is absolutely nothing to indicate that the defendant entered on the suit land with the knowledge or permission of the plaintiff. It would follow logically that the entry and stay of the defendant on to the suit land amounts in law to a tort of trespass. Issue No.1 is answered in the affirmative.

Issue No. 2: Whether the plaintiff is entitled to the remedies a prayed for.

Having found that the defendant is a trespasser on the plaintiff’s land, it would entitle plaintiff to the remedies, inter alia, that ordinarily accrue upon

trespass to the injured party. In the case of *Placid Weli vs. Hippo Tours & 2 O'rs HCCS No. 939 of 1996*, which relied on *Halbury's Laws of England, 3rd Edition, Vol.38, para 1222*, it was held that trespass is actionable parse even if no damage was done to land. Further, that a plaintiff is entitled to recover damages even though he or she has suffered no actual loss, but that where trespass has caused the plaintiff loss, the plaintiff is entitled to receive such an amount as will compensate him or her for the loss.

The plaintiff sought for a declaratory order that the defendant is a trespasser on the suit land. This has indeed been found to be the case in Issue No.1 above. Accordingly, the defendant declared a trespasser. Following logically upon being found to have trespassed on to the suit land, an eviction order doth issue against the defendant to vacate the suit land including the removal of all the defendant's structures from the suit.

Furthermore, a permanent injunction doth issue against the defendant, her agents, administrators, executors, successors in title, trustees, legatees, lessees, mortgagees, assignees, transferees, estate, beneficiaries and any other parties/persons deriving any interest/claim of right from the defendant from further on the suit land.

The plaintiff also prayed for general damages. The position of the law is that the award of general damages is in the discretion of court and is always as the law will presume to be the natural consequence of the defendant's act or omission. See: **James Fredrick Nsubuga vs. Attorney General HCCS No. 13 of 1993**. It was also held in **Robert Cuossens vs. Attorney General SCCA No. 08 of 1999** that the object of the award of damages is to give the plaintiff compensation for the damage, loss or injury suffered. Having found that the plaintiff suffered injury as a result of the defendant's trespass, the plaintiff is awarded general damages.

In the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the inconveniences that the party was put through at the instance of the opposite party, and the nature and extent of the breach. See: **Uganda Commercial Bank vs. Kigozi [2002] 1 EA. 305**.

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the injury/damage. See: **Charles Acire vs. Myaana Engola H.C.C.S No. 143 of 1993; Kibimba Rice Ltd vs. Umar Salim, SCCA No. 17 of 1992**.

In the instant case, PW1 adduced evidence showing the extent of defendant trespass on the suit land and the prejudice it has occasioned to

her interests therein. The plaintiff stated that she cannot use the suit land for her own developments because of the defendant's activities illegally being carried out the suit land. The plaintiff further stated that she has been denied of the enjoyment of their right to the suit land by the defendant's continued acts of trespass.

Taking into account all the factors and the circumstances of the case, I award general damages to the plaintiff. However, the plaintiff gave no indication as to the quantum that would fairly and adequately compensate her for the wrongs of the defendant.

It is trite law that the party claiming general damages is expected to lead evidence or give the indication that to what damages should be awarded on inquiry as the quantum. See: ***Robert Cuossens vs. Attorney General, SCCA No. 08 of 1999; Ongom vs. Attorney General [1992] HCB 267.*** In ***Bhadelie Habib Ltd vs. Commissioner General, URA [1997 – 2001] UCL 2001,*** a similar situation arose where no indication was given by the plaintiff as to what quantum of general damages ought to be awarded. Ogoola PJ (as he then was) held that in a situation where court was left on its own devices, it would judicially apply its discretion to arrive at the quantum. Similarly in the case of ***Fred Kamugira vs. National Housing & Construction Co. Ltd., HCCS No. 127 of 2008,*** no indication was given by

the plaintiff as to the quantum of damages, and the court applied its discretion to award the amount it judicially considered to be the natural and probable consequence of the defendant's breach in the circumstances. Given the particular circumstances of this case, I would consider the sum of Ug.Shs.10 million to be fair and adequate, and award the same to the plaintiff as general damages.

On the issue of costs to the suit, **Section 27(2) Civil Procedure Act (Cap.71)** is to the effect that costs shall follow the event unless for good reason court directs otherwise. See: **Jennifer Behange, Rwanyindo Aurelia, Paulo Bagenze vs. School Outfitters (U) Ltd. CACA No. 53 of 1999 (UR)**. The plaintiff has succeeded in the suit and she is awarded costs of this suit. Accordingly, it is declared and ordered as follows;

- 1. The defendant is a trespasser on the suit land.**
- 2. An eviction order doth issue against the defendant to vacate the suit land and to remove all of her structures therefrom.**
- 3. A permanent injunction doth issue restraining the said defendant, her agents, administrators, executors, successors-in-title, trustees, legatees, lessees, mortgages, assignees, transferees, estate beneficiaries, and any other party/person**

deriving an interest/claim of right from her from further trespassing on the suit land.

4. The plaintiff is awarded general damages of Ug. Shs.10 million with an interest rate at 8% per annum from the date of this judgment until payment in full.

5. The plaintiff is awarded costs of the suit

**BASHAIJA K. ANDREW
JUDGE
10/11/2015**

Mr. Adams Byarugaba holding brief for Ms. Florence Atim Counsel for the plaintiff present.

Plaintiff absent.

Mr. Tumwikirize Godfrey Court Clerk present.

Ms. Hasipher Nansera Transcriber present.

Court: Judgment read in court.

**BASHAIJA K. ANDREW
JUDGE
10/11/2015.**