

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO.371 OF 2011

KAKOOZA GEORGE WILBERFORCE:..... PLAINTIFF

VERSUS

1. MUHOOZI SAM

2. NTAMBI

3. ENOCK KAKEMBO:.....DEFENDANTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff brought this suit against the Defendants jointly and severally for orders that;-

- i) A permanent injunction restraining the Defendants from trespassing on the land comprised in LRV 2548, Folio 10 Plot 16,
- ii) An eviction order and demolition order,
- iii) General and special damages for trespass to land,
- iv) *Mesne profits* and;
- v) Costs of the suit.

It was the Plaintiff's case that he has at all material times been the registered proprietor of the suit land while the Defendant is a registered proprietor of the adjacent plot of land comprised in Block 541 plot 23, which is part of the waters of the adjacent river Mayanja. That without the Plaintiff's permission, the 1st Defendant on or about August 2009, encroached on the Plaintiff's 200 acres of land valued at shs. 65,000,000/- only (*sixty five million shillings*). That the Defendants put down his fence, chased his tenants, employees and he settled about 100 heads of cattle. That he also cut and sold the Plaintiff's timber and trees. That the 1st Defendant without the Plaintiff's permission, allowed the 2nd and 3rd Defendants to trespass or encroach on the suit land by settling thereon and are using the land for their commercial and business benefits to which they are liable to mesne profits. That the Plaintiff reported the Defendants' unlawful occupation to the RDC (*Resident District Commissioner*) and the Presidential Land Task force, who all advised that he had a right to enjoy his land without any interference and also recommended that in case of any dispute, he was to hire a surveyor to verify the boundaries.

The Plaintiff avers that while the survey exercise was being done in the presence of representatives of both parties, the Defendant callously, arrogantly and deliberately stopped and threatened the surveyors from continuing with their work to ascertain the boundaries of each party.

The Plaintiff further contends that, his rights and interests in the land are constitutionally protected and that the Defendant's development and occupation without his consent amounts to actionable trespass for which he claims general damages, he also claims general damages for anguish, uncertainty, embarrassment and anxiety as a result of the Defendant's actions.

The Plaintiff went on to give the particulars of special damages in paragraph 13 of his plaint. To prove his averments, the Plaintiff attached a copy of a certificate of title as *Annexure 'A'*, and also attached letters from the RDC and Presidential Land Task Force marked *Annexure 'B* and *B1'*, *Annexure 'C'* a copy of the report from the surveyors.

The Defendants in their joint Written Statement of Defence state that the Plaintiffs' and the Defendant's pieces of land are two separate entities all of which have titles and that the alleged

trespass is untenable since the report of the surveyor is inconclusive and that the Plaintiff's suit is merely speculative.

That the 1st Defendant is the registered proprietor of the land adjacent to the Plaintiff's land vide Block 541 Plot 23 which is properly surveyed and marked and that he has all the right and authority to utilize his land as he so wishes. They contend that before the land title was procured, the Area Land Committee visited the land and all surveys were done to determine its boundaries and that the Plaintiff was aware of the whole process.

The Defendants denied any trespass to the Plaintiffs' land and instead avers that it is the Plaintiff who wants to take a portion of the 1st Defendant's land by his attempts to bring surveyors without the Defendant's approval and prior consent. That he bought the land without any encumbrances, the land is clearly marked and no part of it is in the river as claimed by the Plaintiff.

The Defendants attached a copy of a land title marked Annexure 'A', copies of the area land committee and relevant authorities marked *Annexure 'B'*. When the matter came-up for further hearing on the 24th May, 2018, the Defendants did not appear though there was proof of service on record. Court then by O.9 r20 of the Civil Procedure Rules granted the Plaintiff leave to file submissions and to proceed *ex parte*, which submissions are on Court record. He introduced 3 witnesses to prove his case who includes; -

1. Musoke Gideon as PW1,
2. George Kakooza as PW2 and;
3. Waswa Wilson as PW3

According to the joint scheduling memorandum, the following were the agreed issues.

- i. Whether the Defendants trespassed on the Plaintiff's land?
- ii. What remedies are available in the circumstance?

Resolution of the issues.

- i. Whether the Defendants trespassed on the Plaintiff's land

It was PW1's evidence (a District Surveyor Kiboga) that by a Court order, he opened the boundaries of Block 541 Plots 23 and 24 formerly plot 16. That he wrote to both parties to be present to witness the exercise. A date was set, but only PW2 came and the other party did not attend.

That plot 24 belongs to PW2 and it is 100 Hectares while plot 23 which is registered in the names of Muhoozi Sam could not be accessed on ground because it is occupied by River Mayanja. That on completion of his survey exercise, he found that plot 24 was cultivated and there was a settlement which PW2 informed him that the developments were for the owner of plot 23. That the cultivated area was approximately 74.326 Hectares (183.66 Acres).

On this issue, PW2 who is the Plaintiff herein testified that he has 301 hectares of land in Kiboga which he got through his father in 1980 and got a lease of 45 years in 1997. That around 2009, the 1st Defendant and his friends went to his land and cut his barbed wire fence and started using part of the land without his consent. That the 1st Plaintiff chased away PW2's tenants and occupied his land where there were natural trees and grazing area and that the 1st Defendant took over 200 acres of land.

PW3; the are LC I chairman who has been a resident on the village since 1974 testified that the 1st Defendant cut off a chunk of PW2's land which had many trees of different types including 'Musizi'. That he used some of the trees for timber and others, charcoal burning and he went ahead and gave the land for rent to other people.

Section 101 (1) of the Evidence Act Cap 6 provides that; "*Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist*".

The case of ***Sebuliba versus Co-operative Bank Ltd [1982] HCB 129*** considered the above sections and it held that;-

"The burden of proof in civil proceedings lies upon the person who alleges, therefore, to prove the alleged trespass, the burden of proof was squarely on the Plaintiff".

In *Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4 Of 1987*, the East African Court of Appeal noted that;-

“In order to prove the alleged trespass, it was incumbent on the Appellant to prove that the disputed land belonged to him, that the respondent had entered upon that land and that the entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land”.

To prove ownership, Counsel for the Plaintiff submitted that the Plaintiff is a registered proprietor of land comprised in LRV 2548 Folio 10 plot 16 measuring approximately one square mile. Further that the Plaintiff has been in possession and occupation of the suit land having procured the same from Alfred Mandala; the Administrator of the estate of the late Zebuloni Kakeeto.

On his part, PW2 tendered in Court a certificate of title which was marked as PEII and it shows that the PW2 is registered on 301 Hectares of land. The certificate of title was not challenged by the Defendants nor did they lead evidence to the contrary.

I find that ownership has been proved on the balance of probabilities.

To prove the unlawful entry, it was PW1's evidence that plot 24 belongs to PW2 and it is 100 hectares which makes it different from the hectares evidenced on the certificate of title.

PW1 further told Court that a big portion of plot 24 has a settlement and cultivation which are owned by the 1st Defendant, where *he attached a survey report which is marked PEI*. The index diagram shows the area encroached on plot 24 which is the Plaintiff's land. PW2 confirms that the 1st Defendant has trespassed on over 200 acres of his land. PW3 testified that the 1st Defendant entered upon PW2's land and cut down his trees and settled on it his people. Therefore, this goes without saying that the Defendants entered upon the Plaintiff's land without his knowledge and approval.

The Supreme Court in the case of Justine *E.M.N Lutaaya vs. Stirling Civil Eng. Civil Appeal No. 11 of 2002*, held that;

“Trespass to land occurs when a person makes an unauthorized entry upon another’s land and thereby interfering with another person’s lawful possession of the land. Article 26 of the Constitution protects persons from deprivation of property”.

The evidence available on record proves on the balance of probabilities that the Defendants trespassed on the Plaintiff’s land, I accordingly answer this issue in the affirmative.

Issue 2.

What remedies are available in the circumstance?

Having found that the Defendants trespassed on the Plaintiff’s land, judgment is found in favor of the Plaintiff with the following orders.

- The Plaintiff prayed for a permanent injunction restraining the Defendants from trespassing on the land comprised in LRV 2548, Folio 10 Plot 16.
- An eviction order and demolition order. Given the circumstances of this case and the time taken to get these orders, this remedy is subject to a survey being done by the Plaintiff through the authors of PE1; that is the District Staff Surveyor of Kiboga for purposes of making and indicating the Plaintiffs’ land in the presence of the Defendants, area land committee, Civil leaders and stakeholders.
- The boundaries as marked shall entitle the Plaintiff to vacant possession thereof in his own right with full rights to evict anybody found in encroachment therein.
- General damages.

In the case of *Takya Kushwahiri & Another versus Kajonyu Denis CACA 85 of 2011* it was held that;-

“General damages should be compensatory in nature in that they should restore same satisfaction as far as money can do it, to the injured Plaintiff”.

In *Uganda Commercial Bank versus Kigozi [2002]1 EA 35;*

“Court gave guidance on how to assess the quantum of damages that the consideration should mainly be the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered”.

PW2 testified that he lost his natural forest which the Defendants destroyed and got timber, his tenants were chased away from the suit land, and that he was stopped from keeping cows which used to be about 200 heads. He claims to have also suffered enormous loss, financial expenditure, anguish, uncertainty, embarrassment and anxiety of which he prayed for general damages.

Taking into account the circumstances of this case as enshrined in the evidence of the Plaintiff, I find that the Plaintiff has made out a case for the grant of general damages. The Plaintiff is also awarded costs of the suit.

Special damages for trespass to land.

The principle of law is that;

“Special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example by evidence of a person who received or paid or testimonies of experts conversant with the matters”. *See Gapco (U) Ltd versus A.S. Transporters (U) Ltd CACA No. 18/2004*

Arising from the evidence on record, Court allows the Plaintiff special damages at a rate of shs. 720,000/- (*seven hundred twenty shillings*) only, proved in Court for the lost earning, compensated and proved to shs. 2,880,000/- only (*two million, eight hundred eighty eight*

thousand shilling, further and shs. 3,800,000/- (three million, eight hundred thousand shillings) is allowed for transport and feeding. All totaling to shs. 6,880,000/- only (six million, eight hundred eighty eight thousand shilling). The rest of the claims were not proved.

In the plaint under paragraph 13, the Plaintiff prayed for special damages which totaled to 67,980,000/- only (*sixty seven million, nine hundred eighty thousand shillings*).

Mesne Profits.

Mesne profits are defined in Section 2(m) of the Civil Procedure Act as ‘those profits which the person in wrongful possession of the property, actually received or might receive with ordinary diligence have received from it, together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession not proved’. In ***Busiro Coffee Farmers & Dealers Ltd versus Tom Kayongo & 2 ors, HCCS No. 532 of 1992*** cited with approval from the case of ***Kyalimpa versus Nassozi CS. No. 794 of 2016***, it was held that;

“Where a Defendant remains in wrongful possession, he is liable to pay mesne profits to the person entitled to possession, hence for a claim of mesne profits to accrue, a Defendant must be in wrongful possession of the suit property as against the Plaintiff and deriving profits from the property”.

I find no evidence of the profits which the occupants of the suit land have actually received. Mesne profits can therefore not be granted.

General damages are in the discretion of Court. Given the evidence that there was destructions of crops and trees, though values were not proved, Court on basis of the evidence given in Court, allows Plaintiff;

- a) Shs. 10,000,000/- (*ten million shillings*) for lost cows,
- b) Shs. 5,000,000/- only (*five million shillings*) for lost crops and trees, hence shs. 15,000,000/- (*fifteen million shillings*), for general damages
- c) Costs of the suit are allowed to the Plaintiff.

I so order.

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Henry I. Kawesa

JUDGE

25/04/2019

25/04/2019:

Otim Paul for Plaintiff (brief for Mudola)

Plaintiff absent.

Defendant absent.

Court:

Judgment delivered to parties.

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Henry I. Kawesa

JUDGE

25/04/2019

Right of appeal explained.

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Henry I. Kawesa

JUDGE

25/04/2019