

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVI SUIT NO. 713 OF 2016

KENNETH LUBEGA ::::::::::::::::::::::::::::::::::: PLAINTIFF
VERSUS

UGANDA NATIONAL ROADS AUTHORITY:::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

JUDGMENT

The Plaintiff's claim against the Defendant is for; a declaration that the defendant trespassed and continues to trespass on the Plaintiff's land Plot 1651, Block 230, a declaration that the defendant's continuous holding of the plaintiffs title is illegal and unlawful, an order directing the Defendant to return the Plaintiffs Certificate of Title for land comprised in Kyadondo, Plot 1651, Block 230 land at Kamuli (hereinafter referred to as the "Suit land"); an award of special damages; an award for general, punitive and exemplary damages, an award of Mesne profits; costs and interest to the suit.

CVS
12/11/21 The Plaintiff's claims that the Defendant trespassed on his Land-Plot 1651, Block 230 land at Kamuli and that the Defendant represented that a portion of his land measuring 0.23 Acres was subject to expropriation having been affected by the

Kampala Northern Bypass Project, whereas not. It is the Plaintiff's case that acting on this representation, he had undertaken various conditionality's demanded by the Defendant, inter alia, the handing over his suit land title, mutation form, clearance of encumbrances, to his detriment, believing a portion of the suit land was liable for expropriation and that the Defendant is culpable for misrepresentation.

The Defendant averred that the suit land belongs to the Plaintiff and that various meetings were held to resolve the matter amicably. In January 2010, the Plaintiff brought a civil suit No. 004/2010 against the Defendant in the Chief Magistrate Court at Nakawa for trespass on the suit land which was withdrawn later on 18th November 2016.

The defendant instructed UGASURV surveying and Mapping Consultants Limited to establish whether the Plaintiff's property was within the right of way. On 21st April 2011, UGASURV Surveying and Mapping Consultants Limited notified the Defendant/Counter Claimant that the Plaintiff/Counter Defendant's property comprised in Block 230 Plot 1651 which is one of the plots subdivided from Block 230 Plot 518 was affected by the road project by approximately 0.23 acres. On 1st June 2011 based on the information provided by UGASURV, the Defendant informed Plaintiff that the suit land was affected by the road project. On 11th April 2012 the Plaintiff/Counter Defendant handed over his Duplicate Certificate of title to the Defendant/Counter Claimant for purposes of assessing compensation and registration of the right of way.

CRS
12/11/21
In November 2012, a resurvey of Kyadondo Block 230 Plot 1651 by UGASURV Surveying and Mapping Consultants Limited revealed that the total acreage of the Plot 1651 was 0.688 hectares and not 0.810 hectares as reflected on the title deed.

The Consultant prepared and filed an Amending Area Statement to correct the error in the acreage of Plot 1651. On 12th August 2015, the Counter claimant paid to the Counter Defendant the assessed compensation sum of UGX. 65,837,500/= for 0.229 acres of land believed to be affected by the road construction project.

However, in July 2019, the Defendant carried out a fresh boundary opening survey exercise to ascertain the area affected by the road project and discovered that the Plaintiff's property is entirely outside the right of way. Subsequently in a letter dated 16th August 2019, the Defendant notified the plaintiff of the outcome of the boundary opening exercise and the resultant erroneous payment of compensation of UGX. 65,837,500/=.

The Defendant's counter claim is for an order for refund of UGX. 65,837,500/= (Sixty-five million eight hundred thirty- seven thousand five hundred shillings) being money had and received by the Counter Defendant in error in respect to land comprised in Kyadondo Block 230 Plot 1651 at Kamuli, General damages, Interest on compensation and general damages at commercial rate of 24% from the date of the Counter Claim till payment in full, and Costs of the counterclaim.

Issues

At scheduling, the following issues were agreed upon by the parties for determination by this court;

1. Whether the Defendant trespassed on the Plaintiff's land comprised in Kyadondo Block 230 Plot 1651 at Kamuli?
2. Whether there is misrepresentation on the part of the Defendant?
3. Whether the Plaintiff suffered loss as a result of the Defendant's actions and or omissions?

4. Whether the Counter-claimant is entitled to a refund of UGX 65,837,500 from the Counter-Defendant?
5. What remedies are available to the Parties?

Representation

The Plaintiff/Counter Defendant was represented by M/s Enoth Mugabi Advocates & Solicitors. The Defendant/Counter claimant was represented by the UNRA Directorate of Legal Services.

Witnesses

The Plaintiff led 3 witnesses to wit; - Kenneth Joseph Lubega as PW1, Dr. Albert Richard Otete as PW2 and Patrick Kizito as PW3 who proceeded by way of witness statements. The Defence/Counter claimant led one witness Nyombi Arthur as DW1.

RESOLUTION

Issue 1: Whether the Defendant trespassed on the Plaintiff's land comprised in Kyadondo Block 230 Plot 1651 at Kamuli?

Section 101 of the Evidence Act 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 and the burden of proof lies on that person.

CVS
12/11/21
In the case of *Sebuliba versus Co-operative Bank Ltd [1982] HCB 129*, the court 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.

The Supreme Court while defining trespass as per the case of Justine E. M. N Lutaaya versus Stirling Civil Eng. Civ. 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'*.

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"

Hon. Mr. Justice Henry I. Kawesa in the case of KATENDE V UGANDA LAND COMMISSION (CIVIL SUIT-2015/573) [2019] UGHCLD 9 (20 MARCH 2019)2; citing Onega Obel & Anor vs. The Attorney General & Anor HCCS 006 of 2002 held that for the Plaintiff, therefore to succeed on trespass to land, he must prove the following;

- a) That the suit land belonged to him;
- b) That the Defendant had entered upon it, and
- c) That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the suit land.

CS
2/11/24 Counsel for the plaintiff submitted that PW3 (the caretaker of the suit land) testified that the Defendant's officials forcefully went on the suit land and pulled down

concrete poles that had been erected and that this was done unlawfully without the consent of the plaintiff. Further that the Defendant had held on to the certificate of title of the defendant after confirming that the land was due for expropriation only to return it to the Plaintiff later after a period of eight years.

Counsel for the defendant submitted in reply that it was an agreed fact by the parties that the Plaintiff is the registered proprietor of the suit land comprised in Kyadondo Block 230 Plot 1651 at Kampala. The Defendant contends that at all material times it did not take possession of the land/or enter any part of the Plaintiff's land thus never trespassed on the Suit land. Further that the evidence adduced in Court shows that the Plaintiff was always in control and/or in physical possession of the suit land as confirmed by PW1 and PW3 during cross examination. Counsel for the defendant submitted that the plaintiff witness on the site could not describe in detail the particulars of the Identity cards or vehicle of the persons alleged to be UNRA officials.

CKS
12/11/21
The testimony of PW1 who testified that he had to re-construct destroyed concrete poles at the borders of the suit land was put in doubt by DW1 who in his testimony stated that when he visited the suit land during the boundary opening exercise there were no concrete poles on the suit land. I am not convinced by the evidence of PW1 and PW3 that officials of the Defendant unlawfully entered onto the suit land in 2009 and have continued the trespass given that the Plaintiff instituted a civil suit No. 004/2010 against the Defendant for trespass and later withdrew it in 2016. The Plaintiff has also attached evidence of a proforma invoice dated 14th January 2011 showing the cost of replacement of the concrete poles of UGX 6.5m (PEXh. 6(8) however this did not bear any linkage to the suit property.

I also do not agree with the submission by counsel for the Plaintiff that the Defendant's holding of the title amounted to an act of trespass since there is evidence that the title was handed over willingly by the Plaintiff and even thereafter the suit land was not under appropriation of physical possession by the defendant at any given time.

Issue No.1 is answered in the negative.

Issue 2: Whether there is misrepresentation on the part of the Defendant?

Both counsel relied on the definition on **Black's Law Dictionary, Tenth Edition at page 1152** and defined Misrepresentation as follows;

- a) *The act or an instance of making a false or misleading assertion about something usually with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.*
- b) *The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts."*

Counsel for the Plaintiff submitted that in the case of **Hon. Mr. Justice B. Kainamura, in AZK Services Ltd V Crane Bank Ltd (Civil Suit-2016/334) [2018] Ugcommc 63(07 August 2018)**³; held:

"The Law dictionary (@ the Law.com) defines Misrepresentation as an intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally; also: an act or instance of making such a representation."

CKS
12/11/29

A misrepresentation is a false statement of fact or a false statement of fact and law. Once it has been established that a false statement has been made it is then necessary for the representee to demonstrate that the false statement induced them to enter the contract (See Horsfall Vs Thomas [1862] 1 H&C 90). If the representee does an act to adopt the contract, or demonstrate a willingness to continue with the contract after becoming aware of the misrepresentation they will lose the right to rescind (See Long Vs Lloyd 1958] 1 WLR 753).

Counsel for the Plaintiff submitted that they pleaded the particulars of the misrepresentation under Paragraphs 6 iii, iv, vi and vii of the Amended Plaint which included the Defendant engaging the Plaintiff in various meeting for expropriation of the suit land, making various correspondences, taking the plaintiffs certificate of title, causing the plaintiff to remove incumbrances at his expense and deliberately holding onto the certificate of title.

CS
12/11/24
Counsel for the Defendant submitted that the Defendant did not by any of its actions knowingly make false or misleading assertions with intent to deceive the Plaintiff in respect to the suit property. That it was following the filing of the civil suit No.004/2010 by the plaintiff that the Defendant engagements with the Plaintiff in an attempt to resolve the claim and settle the suit. That among the requirements for compensation was the need for the claimant to submit a copy of the title and it was only after verification of the title that the Defendant established errors in the land area. Further that the Defendant acted in good faith with the belief that 0.23 acres of the suit land was affected by the road project and wanted to settle the civil suit by processing and paying the Plaintiff the assessed compensation amount of UGX 65,837,500. That it was only after the Boundary Opening exercise in 2019 that it

was established that the suit land was not affected by the Kampala Northern By-Pass Road project.

It would appear from the evidence led by both parties that this dispute arises from surveying errors as well as miscommunication. The original survey for the Northern By-Pass Project to identify the affected properties for expropriation for the project was done way back in 2003, which survey identified the land comprised in Kyadondo Block 230 Plot 518 at Kamuli. However, subsequently in 2006, Block 230 Plot 518 was subdivided into various plots to create other plots including Block 230 Plot 1651 that belongs to the plaintiff.

In 2011 the Defendant contracted UGASURV Surveying and Mapping Consultants Ltd (hereinafter referred to as UGASURV) to complete the land acquisition process for the Northern By-Pass Project. In a letter dated 21st April 2011, UGASURV notified the Defendant that the Plaintiff's land comprised in Block 230 Plot 1651 which had been subdivided from Block 230 Plot 518 was affected by the road project by 0.023 acres. The Defendant communicated this to the Plaintiff who was advised on the steps to be taken to have the affected portion of 0.23 acres expropriated from his certificate of title before the Defendant could compensate him for the affected land. These steps included signing of mutation forms, assessment/valuation by the Chief Government Valuer, signing of transfer form and removal of encumbrances.

12/11/21
From the documents submitted by the Defendant, it is clear that in 2012 UGASURV re-surveyed the Plaintiff's land comprised in Block 230 Plot 1651 and discovered that there was an error with regard to the land area indicated on the certificate of title. That the stated area of 0.810 hectares on the title was an error and that on the ground it was actually 0.688 hectares. This error was corrected as per the Amending

Area Statement Form dated 23rd November 2012. However, this amendment was done on the Deed print and not on the certificate of title.

Notwithstanding this error, UGASURV proceeded to recommend compensation to the Plaintiff who was eventually paid UGX 65,837,500 on 12th August 2015. However, it is noted that the Plaintiff submitted his Duplicate certificate of title for the suit land to the Defendant in April 2012 before UGASURV had noted the error on the title and before the Amendment of the Area Statement in November 2012.

The evidence of DW1 is that in 2016 the Defendant's Department of Land Acquisition under the Directorate of Roads and Bridges took over all pending titling and compensation process from the Consultants (UGASURV). This resulted in the boundary opening exercise which revealed that the suit land was not affected by the road project. An excerpt from the Boundary Opening Report for Block 230 Plot 1651 on page 1 (Brief Background) states as follows-

"Plot 1651 Block 230 is located at Kamuli, Kyadondo Mengo along Kampala Northern By-Pass currently registered under Kenneth Joseph Lubega. It was formerly Plot 518 and affected by the construction of the Kampala Northern By-Pass registered under Vincent Kiwanuka. The title is said to have been 2.1312 Hectares according to the area schedule obtained from Wakiso drawing office as on 8th May 2014.

A subdivision process was carried out following the need to curve off the Right of Way on Plot 518. Three new plots and one residue were created; Plot 1651, 1652 and 1653, 1654 being created as Residue Land title. Of the four plots 1653 falls in the Right of Way with an area of 0.092 Hectares. After the subdivision process, there was an error realized in the Title Deeds whereby Plot 1651 was processed having wrong dimensions and wrong area

(0.810Ha) as opposed to what it would actually be according to the strip map (0.688Ha). An area amendment was performed to correct this on the print but not on the title certificate”

I therefore agree with the Defendant’s counsel that the mistaken assumption that the suit land was affected by the road project and subsequent engagements of the Plaintiff by Defendant was due to the errors arising from the sub-division process of the former Block 230 Plot 518. Further, these errors were reflected on the certificate of title given by the Plaintiff to the Defendant on which the compensation was based.

Both parties were therefore under the mistaken impression that the area indicated on the certificate of title was accurate whereas it was not. Section 17 of the Contract Act provides that: -

- 1) where both parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, consent is obtained by mistake of fact and the agreement is void*
- 2) A contract is void where one of the parties to it operates under a mistake as to a matter of fact essential to the contract.*
- 3) An erroneous opinion as to the value of the things which form the subject matter of an agreement shall not be deemed a mistake as to a matter of fact.*

MS
12/11/21 From the evidence adduced by the parties, it is evident that there was a mistake in respect to the acreage of the suit land unknown to both parties at the time when discussions for compensation were commenced. This shows that indeed both parties relied on a mistake and there was never any intention to defraud each other as the plaintiff relied on the land area indicated on title of the suit land and the Defendant relied on the same title to effect compensation.

Since there was a common mistake between the parties it is clear that there was no misrepresentation that can be said to have been intended by the Defendant to defraud the Plaintiff.

Issue No.2 is answered in the negative.

Issue 3: Whether the plaintiff has suffered loss as a result of the defendant's actions and or omissions.

Counsel for the Plaintiff submitted that the PW1 (the Plaintiff) and PW2, (Dr. Albert Richards Otete), testified that the Plaintiff suffered consequential losses as evidenced by PEX39 - page 26 thereof, placing his total loss at UGX 2,715,673,942. The list of consequential losses suffered by the Plaintiff as listed by PW2 at Page 6 of PEX39 (Page 26 of Plaintiff's Trial Bundle Volume II), are the following;

- i) Concrete Poles uprooted and destroyed.
- ii) Fixed deposit income due to accelerated Tropical Bank loan repayment-on account of time value for money.
- iii) Missed/Frustrated Build & Sell Residential Estate Business opportunity margin lost - on account of PW1's title being held. He could have used the proceeds from his land title in his real estate business.
- iv) Hire of professionals.
- v) Penalty interest.
- vi) General damages.
- vii) Opportunity cost of fixed deposit interest for 8 years.

Counsel further submitted that the Plaintiff was never compensated within six (6) months as promised by the Defendant in PEX3. That the Defendant completely

disregarded his rights as registered proprietor for which he has suffered losses. That it was only on 15th October 2020 that the Plaintiff secured return of the suit land title; and this was against the various demands starting as early as 2012 requesting for updates on the progress of the compensation process and later in 2018 till 2020 to be given back the residue certificate of title. (See PEX38, PEX39 read together with PEX19, PEX20, PEX21, PEX23, PEX26, PEX28, PEX31 and PEX37).

In reply, the Defendant's counsel submitted that the Plaintiff's claim in respect to the alleged consequential losses suffered is misconceived and merely a ploy to defraud the Government of colossal sums of money. The Defendant further submitted that DW1's testimony and DEX6 & 7 demonstrated that the Plaintiff handed over to the Defendant his certificate of title for subdivision of 0.23 acres and that the Defendant subsequently paid to the Plaintiff the sum of UGX. 65,837,500=.

That DEX7 further shows that the suit land was established as entirely outside the right of way and was not affected by Kampala Northern Bypass and that the Defendant did not expropriate or acquire any part of the Plaintiff's land for the road project thus returning the certificate of title to the Plaintiff. (PEX 40 & PEX 41)

CS
12/11/21
With regard to the claim for the cost of fencing (100 concrete poles) alleged to have been uprooted by the Defendants staff and agents in 2009, Counsel for the Defendant submitted PEX 6 (8) shows a Proforma Invoice issued to the Plaintiff for a sum of UGX. 6,500,000= in respect to concrete poles, support sections, concrete rooting & labour but that the details on this invoice do not make any reference to the suit property, and there was no receipt exhibited to prove any payments made by the Plaintiff in respect to that invoice. The findings of this court under Issue No.1, found that the Plaintiff did not prove the claims of trespass by the Defendant's officials or

that they destroyed the concrete poles erected. I therefore find that the Plaintiff has proved this as a loss suffered as a result of the Defendant's actions.

With regard to the Plaintiff's claim that he lost an opportunity of raising capital for a project of Build and sell/ Rent Apartments in Ntinda due to lack of his title as security UGX. 1,231,4428,207=per annum as indicated in PEX5, it is noted that the residential real estate "Build and Sell" business model for residential apartments shows the project loan collateral as LRV 634, Folio 3 Plot 72, Muteesa II road, Ntinda, Kampala as well as personal guarantees and life insurance by the Plaintiff. There was no reference to the residue certificate of the suit land and no other solid supporting evidence of the project such as architectural drawings were attached.

Hon. Justice Oder in the case of *Robert Coussens Vs Attorney General SCCA No. 8 of 1999* observed that in cases of pecuniary loss, such as claimed in the present, the exact or approximate amount can be proved and, if proved, will be awarded as special damages. But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss of the opportunity cost of raising capital for the residential real estate "Build and Sell" business model cannot be claimed as special damages because it has not been sustained at the date of the trial.

CMS
12/11/21
With regard to the Plaintiff's claim for fixed deposit income lost due to the accelerated Tropical Bank loan repayment, counsel submitted that PW1 testified that he lost earnings on a fixed deposit interest in order to immediately raise money to clear the encumbrances as demanded by the Defendant. In reply, Counsel for the Defendant submitted that the Plaintiff's transactions in respect to his loan obligations and the refinancing thereof, were purely private business between him and the Bank

and any alleged financial loss arising therefrom should not be attributed to the Defendant.

Counsel for the Plaintiff submitted that, PEX6 which was adopted with modifications by PW2 in his report reveals at page 11 that the Plaintiff was forced to immediately, and on an emergency basis, refinance the UGX.701 million loan he had taken from Tropical Bank in order to clear all encumbrances on the suit land as requested by the Defendant. Further that this unplanned and abrupt outflow of personal cash significantly reduced on the Plaintiff personal cash available for investment in fixed deposits.

It is noted that the Defendant's lawyers in a letter dated 21st July 2011 to the Plaintiff cited the requirement that the Plaintiff presents a certificate of title free of encumbrances. However, a Search Report (PE24) by the Defendant dated 8th December 2014 revealed that the suit land comprised in Block 230 Plot 1651 still had an encumbrance of a mortgage by Tropical Bank registered on 3rd July 2007. It was only four years later that Plaintiff cleared the loan of Tropical Bank as per the Release of Mortgage dated 12th February 2015. It is therefore not true as was claimed in the letter by the Plaintiff's lawyers dated 11th April 2012 that all encumbrances had been cleared on the suit land by then.

CVS
12/11/21
It is further noted that the Plaintiff did not attach any other documentation to prove the particulars of the Plaintiff's loan obligations with Tropical Bank at the material time, so as to arrive at the sum claimed. The reference in the Report to Appendix 7 for related Tropical Bank documentation was not attached. No further evidence of loan documentation from other banks was exhibited by the Plaintiff. The additional loan documentation submitted by the Plaintiff was in relation to a DTB letter of

Enhancement Offer to the Plaintiff dated 16th March 2015 but it makes reference to other securities that had existing charges and there is no direct correlation to the suit land.

The learned Justice Oder JSC in the case of *Robert Coussens (supra)* further stated that it is important that to prove pecuniary loss evidence should be given to the Court of as many solid facts as possible. One of the solid facts that should have been proved by the Plaintiff was the amount of loan obligation due to Tropical Bank under the mortgage on the suit property, its duration and payment terms which was not done.

With regard to the opportunity cost of fixed deposit interest, Counsel for the Plaintiff submitted that PW2's testimony was that the Plaintiff had been investing in fixed deposits in the past and that if had the defendant compensated him in time, that money would have been invested in fixed deposits. However, there was no evidence whatsoever exhibited by the Plaintiff's witnesses in respect to the Plaintiff's previous or current investments in Fixed deposits. Under cross examination, PW1 could not point to any documentation in respect to his alleged fixed deposit accounts or investments. PW2 also testified during cross examination that he did not review any documents in respect to the Plaintiff's fixed deposit investments/income.

CKS
12/11/2018
With regard to the professional fees claimed by the Plaintiff it is noted that the Valuation Report by M/s Bageine in respect of the suit land on behalf of the Plaintiff was superfluous given that the Defendant had made it clear in the letter dated 1st June 2011 that the compensation would be based on the value of the affected suit land as assessed by the Chief Government Valuer and not a private valuer. The Plaintiff's evidence of the valuation expenses incurred by Bageine & Company in

the sum of UGX. 6,500,000/= in respect professional fees for valuation of Block 230 Plot 1651 was therefore not as a result of the Defendant's actions.

Under the Professional fees, there was a claim for the payment of the valuation fees of UGX. 2,500,000/=as stated in PEX39 to J. Samuel Richards for the revisions to the initial Loss Consequential Loss Quantification Report. It is noted the Report by J. Samuel Richards dated 7th October 2020 made revisions to the Consequential Loss Quantification Report dated 25th May 2016 prepared by M/s D. Craven Consulting Ltd. Whereas M/s Craven Consulting Ltd had recommended the sum of UGX 4.6bn, the revised Report made by Dr. Richards Otete recommended the sum of UGX 2.7bn. However, it is evident that these Reports were all based on sweeping assumptions and speculations that were not supported by any direct evidence presented by the Plaintiff in court. I therefore conclude that the consequential losses quantified in these Reports cannot in any way be taken as a direct consequence or result of the Defendants actions or omissions.

This court therefore finds that the economic/pecuniary losses as claimed by the Plaintiff are not supported by evidence, are anticipatory or speculative in nature while others accrued due to existing obligations owed by the Plaintiff to a third party.

CRS
12/11/20 However, the court recognizes that the Plaintiff suffered mental anguish and inconveniences during the long wait for the completion of the compensation exercise as well as the delays in returning to his certificate of title for the suit land.

Issue No.3 is answered partly in the affirmative only in respect of the general damages claimed.

Issue 4: Whether counter-claimant is entitled to a refund of UGX 65,837,500 from the counter-defendant

Section 54 of the Contract Act provides that: -

- 1) *Where an agreement is found to be void or when a contract becomes void, a person who received any advantage under that agreement or contract is bound to restore it or to pay compensation for it, to the person from whom he or she received the advantage.*
- 2) *Where a party to a contract incurs expenses for the purposes of performance of the contract, which becomes void after performance under section 25(2), the court may if it considers it just to do so in all the circumstances—*
 - a) *allow the other party to retain the whole or any part of any advantage received by him or her;*
 - b) *discharge the other party, wholly or in part, from making compensation for the expenses incurred; or*
 - c) *make an order that the party recovers the whole or any part of any payments, discharge or other advantages not greater in value than the expenses incurred.*

CKS
12/11/24 This principle on unjust enrichment as set out in the India case of **Mahabir Kishore & Madhya Pradesh 1990 AIR 313**, the requirements are: -

“First that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the plaintiff and thirdly that the retention of the enrichment is unjust”

This principle has long been adopted and accepted in Uganda as in the case of Dr. James Kashugyera Tumwine & Anor Vs Sr. Willie Magara & Anor. Bamwine J (as he then was had this to say: -

“Money which is paid to one person which rightfully belongs to another, as where money paid by A to B on a consideration which has wholly failed, is said to be money had and received by B to the use of A. It is recoverable by action by A. The paying of A to B according to the Learned Author of A Concise Law Dictionary by P.G Osborn 5th Edn 9th P. 212 becomes a quasi-contract an obligation not created by but similar to that created by contract and is independent of the consent of the person bound.... The other view is that in the action for money had and received liability is based on unjust enrichment i.e the action is applicable whenever the defendant has received money which in justice and equality belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff”

It is an agreed fact that the Plaintiff/ Counter-Defendant received a sum of UGX 65,837,500 from Counter-Claimant. Evidence was adduced by the Defendant of an UNRA Government of Uganda Payment Advice showing an EFT payment dated 12th August 2015 showing the payee as Kenneth Lubega with Account No. 0100140754900. The Plaintiff admitted under cross examination that the bank account belonged to him although it was one of his dormant accounts

CKS
12/11/21
Counsel for the Plaintiff submitted that the Plaintiff's Advocates had always made a claim for compensation for both Plots 1651 & 1653 and that evidence has been led showing a payment separately undertaken by the Defendant of PEX35/D6 towards solely payments for Plot 1653 and not jointly for Plots 1653 & 1651. That it was

explicit that Plot 1653 fell in the "right of way" and was due for compensation, hence a sum of UGX 28,750,000 while Plot 1651 fell outside the "right of way" and was not due for compensation, hence the refundable sum to the Defendant was only for UGX 37,087,500.

In reply, counsel for the defendants submitted that the Counterclaimant is entitled to a refund of UGX. 65,837,500= being money had & received from the Counter Defendant. The Counter claimant's claim is for refund of UGX. 65,837,500/= (Uganda Shillings Sixty-Five Million Eight Hundred Thirty-Seven Thousand Five Hundred Shillings) being money had and received by the Counter Defendant in error, in respect to land comprised in Kyadondo Block 230 Plot 1651 at Kamuli. The Counter Claimant's evidence shows that the Counterclaimant paid the UGX. 65,837,500/= (Uganda Shillings Sixty-Five Million Eight Hundred Thirty- Seven Thousand Five Hundred Shillings) for 0.23 acres of the suit land which was mistakenly believed to be affected by the Kampala Northern Bypass project.

From the evidence on record, it is clear that the claims by the Plaintiff were only in respect of Plot 1651 Block 230 for which he is the registered proprietor. Similarly the correspondence from the Defendant to the Plaintiff was with regard to his title for Plot 1651 which was handed over for purposes of assessment of compensation. The document (PE33) referred to by the Plaintiff which had a purported breakdown of the compensation amount into two different plots 1651 and 1653 is not signed by the Compensation assessment authority i.e the Chief Government Valuer nor the Paying authority i.e the Defendant. In any case the Search Report in respect of Plot 1653 Block 230 dated 8th December 2014 (PE25) is registered under the names of one Vincent Kiwanuka and not the Plaintiff. I therefore find that the compensation sum of UGX. 65,837,500= was paid to the Plaintiff in respect of Plot 1651 Block 230 only.

The evidence in PEX 40 also shows that the Certificate of title for the suit land was returned to the Plaintiff with no subdivisions. This evidence demonstrates that there was total failure of consideration as no land or any part thereof was expropriated by the Counter Claimant. Counsel submitted that the Counter Defendant's retention of the said sum of when the suit land was not expropriated by the Counter Claimant, would tantamount to an act of unjust enrichment.

Section 20 of the Contracts Act is to the effect that in instances where there is failure in consideration, the contract executed is void, given that there was total failure of consideration in respect to the contract between the parties to this suit, the contract entered into is void and taking into consideration the provision under Section 54 of the contract Act, the court finds that the Plaintiff shall compensate the Defendant the full sum paid of UGX. 65,837,500=.

Issue No. 4 is answered in the affirmative.

Issue 5: Remedies available to the parties

OK
12/11/21
The Plaintiff prayed a declaration that the defendant trespassed and continues to trespass on the Plaintiff's land Plot 1651,Block 230, a declaration that the defendant's continuous holding of the plaintiffs title is illegal and unlawful, an order directing the Defendant to return the Plaintiffs Certificate of Title for land comprised in Kyadondo, Plot 1651,Block 230 land at Kamuli, the purported compulsory acquisition of the Plaintiff's land was unlawful, an order for compensation by the Defendant, an award of special damages as pleaded paragraph 7, an award of general, punitive and exemplary damages for trespass, inconvenience and economic loss, Mesne profits, Interest on (f),(g),(h) above at the prevailing commercial banks rate from the date of judgement till payment in full and costs of the suit.

The Defendant's counter claim is for an order for refund of UGX. 65,837,500/= (Sixty-five million eight hundred thirty- seven thousand five hundred shillings) being money had and received by the Counter Defendant in error in respect to land comprised in Kyadondo Block 230 Plot 1651 at Kamuli, General damages, Interest on compensation and general damages at commercial rate of 24% from the date of the Counter Claim till payment in full, and Costs of the counterclaim. The Counter Claimant avers that it has demanded for the refund of the said sum of UGX. 65,837,500/=from the Counter Defendant who has been adamant and refused to refund the same, to the Counter Claimant's inconvenience and depriving the Counter Claimant/ government of utilizing the refund to compensate other project affected persons.

Given the findings of this court, the specific prayer by the Plaintiff to order the Defendant to return the certificate of title is over taken by events since it was conformed that the Defendant returned the Plaintiff's title to him on 15th October 2020.

CKS
12/11/21 This court has found that the Plaintiff is entitled to general damages. In the assessment of general damages, the court should be mainly guided by the nature and extent of the injury suffered. General damages are not intended to better the position of the claimant as was held in the case of **Uganda Commercial Bank v. Kigozi [2002] 1 EA 305**. In the instant case, the actions of the Defendant particularly of delays in responding to various reminder letters by the Plaintiff and not informing him when they had effected the compensation sum into his account was unprofessional and occasioned inconveniences to the Plaintiff.

The circumstances of each case determine the quantum of the award of general damages as held in the case of **Fredrick Zaabwe Vs Orient Bank Ltd SCCA No.4 of 2007**. In the instant case, recognizing the need for the Defendant to professionally execute their statutory mandate in order not to infringe on the right to property of hard working citizens, I will accordingly award UGX 30,000,000 (Thirty million shillings) as general damages as reasonable in the circumstances.

The plaintiff had further claimed aggravated damages as well as punitive / exemplary damages. The rules for the award of aggravated, punitive and exemplary damages require that they are pleaded and proved. In the instant case, there were no aggravating factors that were proved and this court has taken into consideration even that both parties were acting under mistakes of fact with regard to the affected land area contained in the certificate of title for the suit land. The evidence on record does not show that the Defendant engaged in any oppressive or arbitrary acts. The Plaintiff's claim for aggravated and exemplary/punitive damages is thus denied.

The plaintiff had prayed for interest at a commercial rate in respect of the general damages. The guiding principle on interest under Section 26 (2) of the Civil Procedure Act is that it is at the discretion of court which must be exercised judiciously taking into account the circumstances of each case. I find that the commercial interest is on the higher side. Consequently, I will award 15% interest on the general damages from the date of judgment until payment in full.

12/11/21 The court has found that the Plaintiff should refund to the Defendant the compensation sum of UGX. 65,837,500= . The Defendant/Counter claimant had prayed for general damages and interest on the compensation sum. However, it is noted that the Counter claimant had adamantly held onto the certificate of title even after various requests by the Plaintiff and it was only handed over during the hearing

of this suit. For these reasons, the general damages and interest prayed by the Counter claimant are denied.

With regard to costs, these follow the event under Section 27(2) of the Civil Procedure Act. Given that both parties have succeeded partially under the suit and counter suit respectively each party is ordered to meet their costs.

Accordingly, in light of the findings above, Judgment is made with the following orders;

1. A declaration that the Plaintiff is the registered owner of the suit land comprised in Kyadondo Block 230 Plot 1651 at Kamuli subject to the amendments in the land area as reflected in the Deed Print.
2. The Defendant is to pay the Plaintiff general damages of UGX 30,000,000.
3. Interest is awarded on the above general damages at the rate of 15% per annum from the date of judgment until payment in full.
4. The Plaintiff is to refund to the Defendant the compensation sum received of UGX. 65,837,500=.
5. Each party shall bear its own costs.

It is so ordered.

CORNELIA KAKOOZA SABIITI

JUDGE

Date: 12th November 2021