

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
LAND CIVIL SUIT NO. 049 OF 2021

DDAMULIRA ABDUL=====PLAINTIFF

VERSUS

MSS XSABO POWER LIMITED=====DEFENDANT

BEFORE: HON. JUSTICE OYUKO ANTHONY OJOK

JUDGMENT

BRIEF FACTS:

The Plaintiff filed this suit against the Defendant for recovery of land, the plaintiff prayed for orders of eviction of the defendant from the suit land, demolition of buildings and structures illegally erected on the suit land, general damages for trespass, interest on the decretal sum at the rate of 25% p.a computed from the date of Judgement until payment in full and costs of the suit.

It is the plaintiff's case that he is the lawfully registered owner of the land comprised in Mailo Register, Gomba Block 181 Plot 20 measuring 1.50 acres and plot 21 measuring 48.50 acres. Both Plots are situated at Katete Village, Kabulassoke Sub County in Gomba District.

That some time in year 2015 the defendant company entered upon the said land without his consent and set up thereon a solar power for supplying to Central, Southern and Western Uganda plus some parts of Northern Tanzania, Northern Rwanda and Eastern Congo.

That the actions of the Defendant on the suit land are unlawful and they constitute trespass on the said land. Hence this suit.

The defendant on the other hand denied trespassing on the suit land. They contended that the suit land was owned by one Kakomo Paul and that in 2015 they leased the suit land from the bibanja owners with the consent of Kakomo Paul whom they believed to be the owner of the Mailo title to the suit land.

Consequently, on the basis of the alleged leases which were concluded with the bibanja occupants the Defendant lawfully entered upon the suit land.

Representation

During the hearing the Plaintiff was represented by M/s Lutaakome & Co. Advocates while the Defendant was represented by M/s Makada & Partners Advocates and Solicitors. Both Counsel filed written submissions and made brief oral highlights in open court.

Issues for determination:

1. Whether the defendant is a trespasser on the suit land?
2. What remedies are available for the parties?

Submissions:

Plaintiff's Submissions:

Issue 1: Whether the defendant is a trespasser on the suit land?

It is the plaintiff's submissions that the suit land was originally comprised in Mailo Register, Gomba Block 181 plot 5 measuring 50.00 acres at Katete, Kabulassoke sub county, Gomba District owned by late Susana Nambi a paternal grand aunt to the plaintiff. That sometime in 1962 the said plot 5 was subdivided into two plots that is 20 and 21 at the instance of Susana Nambi. Plot 20 measuring 1.50 acres was leased to the defunct Uganda Electricity Board (U.E.B) for a period of 49 years which expired in 2011. Plot 21 measuring 48.50 acres remained without any encumbrance.

The mailo titles for both plots were in the name of Susana Nambi who passed away in 1999 and was survived by her sisters Mariam Ntabadde and Amina Nabbosa. The said siblings obtained Letters of Administration to the estate of late Susana Nambi. And the said plots were registered in their names.

Mariam Ntabadde donated the suit land to the plaintiff whereof Amina Nabbosa and herself signed transfer instruments for the suit land in favour of the plaintiff and they passed on to the plaintiff the Certificates of Title for the said plots 20 and 21.

The plaintiff became the registered owner of the suit land in 1997 and is therefore the legal owner of the same. He took possession of the suit land and set up several developments thereon.

That sometime in May 2010 the plaintiff discovered that both titles to the suit land were missing from his home. He reported to police theft of the said land titles. The Land Office at Kampala was also informed. Investigations revealed that one Kakomo Paul, is the one who had stolen the said land titles. The said Kakomo Paul, had caused the subdivision of plot 21 into plots 47, 48 and 49 which he registered in his name and fraudulently acquired certificates of title. On 25/5/2011 the plaintiff lodged a caveat on the said false certificates of title. The plaintiff then applied for a Special Certificate of title for plot 20 and it was issued to him.

The plaintiff filed against Kakomo Paul Civil Suit No. 603 of 2012 for cancellation of the fraudulent certificates of title on Gomba Block 181 Plots 47, 48 and 49 at Katete. The High Court in its Judgment of 14/6/2019 cancelled the land titles for plots 47, 48 and 49 which Kakomo had acquired through fraud. Plot 21 was reinstated.

It was further submitted for the plaintiff that sometime in 2014 the defendant through their Director, David Alobo, took interest in

leasing the suit land from the plaintiff. The plaintiff declined to enter any transaction with David Alobo in connection to the suit land until he had recovered the land titles from Kakomo. The plaintiff was surprised to find that sometime in 2015 the defendant decided to enter the suit land without his consent and established a Solar Power Generation Station thereon without his consent.

Counsel for the plaintiff added that DW2 Musisi claimed he had a kibanja on the suit land through succession to the estate of his late grandfather Yowana Mutale who died sometime in year 1949. That the alleged kibanja was claimed to have been inherited by Hannington Ssemanda the father to DW2. That DW2 claimed that Ssemanda paid rent ("busuulu") to Nambi but no rent payment tickets were exhibited. And that the kibanja was measuring 3 ½ acres but there was no proof to that effect.

That the receipts at pages 100 and 101 of the Defence Trial Bundle alleged to have been issued on 19/3/1956 are also false because by the said date Nambi did not own the suit land. Nambi was first registered on title to suit land on 13/1/1956.

Further, that the draft lease agreement which David Alobo gave to the plaintiff is of the same format, printout, wording and similar terms as the ones which the Defendant claim to have signed with the alleged kibanja holders, especially DW2 Francis Musisi. That David Alobo never came to court to refute the evidence of the plaintiff that he had declined to sign a lease agreement with the Defendant because of the fraud which Kakomo had committed on Plot 21. That if indeed Kakomo Paul existed he did not come to court to prove he owned land at Gomba Block 181 Plot 47 at Katete and whether he signed the agreement of 11/3/2015 with the defendant.

Counsel noted that for this honourable Court to be asked to honour the agreement of 11/3/2015 which the defendant signed with

Kakomo Paul would be asking it to confer validity on “fraud” which is a dishonest dealing in land. Counsel relied on the case of **Lazarus Estate Ltd v. Beasley (1956)1 Q.B 702** where it was stated that;

5 ***“No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No Judgment of a court no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.”***

10 Counsel went on to submit that the Defendant knew of the fraud which had been committed on the suit land by Kakomo Paul. If they believed that Kakomo was the lawful owner of the suit land they should have signed the lease with Kakomo instead of the alleged
15 bibanja occupants. Thus, there were no alleged bibanja occupants (including DW2) that had a right to allow the Defendant to enter the suit land without the consent of the plaintiff.

20 Consequently, the Defendant is a trespasser with impunity. That all the defendant’s actions on the suit land were illegal and constituted trespass on the suit land. They unlawfully deprived the Plaintiff of use of his land in respect of which the plaintiff had an ambitious plan of establishing a social entertainment center.

25 Counsel prayed that the Defendant be evicted from the suit land and ordered to remove their installations from the land. Or alternatively if the Defendant want to stay on the land they be ordered to negotiate suitable lease terms with the plaintiff within one month from the date of judgment and on failure to do so they be evicted from the land; pay
30 to the plaintiff general damages of 1 Billion to compensate the plaintiff for the losses suffered; interest on the decretal sum at the rate of 25% P.a computed from the date of Judgment until Payment in full.

Defendant's submission:

Issue 1: Whether the defendant is a trespasser on the suit land?

- 5 The defendant challenged the other two survey report claiming that they were illegal and made by unqualified persons and chose to reply on the survey report from Dynamic Land Projects Ltd as the authentic report.
- 10 Counsel noted that the basis of their reliance on this report is because Alaisa Baiga M proved her competence at the locus and even showed court her valid practicing certificate DEX 16.

15 Counsel admitted that the defendant occupies the portion of plot 21 as mentioned in the report of Baiga Alaisa M to the tune of 10.673 acres/ 4.3195 hectares which is not trespass and denied occupation of Plot. Counsel relied on the Supreme Court case of **Justine Lutaaya v. Stirling Civil Engineering Company Ltd SCCA No. 11 of 2002 attached as our authority No.3**, P. 8 on the definition of trespass

20 as;

25 ***“Trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere with another person’s lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of an unencumbered land has such capacity to sue, but a landowner, who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land. During the subsistence of the lease, it is the***

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lessee in possession, who has the capacity to sue in respect of trespass to that land.”

That Plot 21 a part of which the defendant is occupying, was subdivided by Kakomo Paul into Plots 47, 48 and 49. That PEX 2 which is the duplicate certificate of title to the current Plot 21, shows that Kakomo Paul was the registered proprietor from the 7th day of October 2006 to the 15th day of October 2019. Further evidenced by DEX 11, DEX 12 and DEX 13. That when the defendant occupied Plot 21 in 2015, the registered proprietor was kakomo Paul. His title was conclusive evidence of ownership under **Section 59** of the Registration of Titles Act. That DEX 3 shows Kakomo allowing those having kibanja to transact with the company if they so wanted.

Counsel quoted the Case of **Prof. Gordon Wavamuno v. Sekyanzi Sempijja CACA No. 240 of 2013**, which defines who a kibanja holder is and how it is proven as follows;

“A Kibanja holder is a lawful occupant who occupied land by virtue of the repealed Busuulu and Envujjo Law of 1928. This is normally proven through evidence of payment of Busuulu which is the rate payable to the mailo landlord prior to 1975 before it was abolished by the repealed Land Reform Decree 1975. Such evidence is normally in form of receipts or any other credible evidence acceptable to the court. The trial court and the first appellate court erroneously and interchangeably used the expressions ‘customary holding’ or kibanja as well as bonafide occupancy without due regard to their statutory meanings.”

That DEX 5, DEX 6, DEX 7, DEX 8 and DEX 9 are all busulu receipts from Musisi Francis’ predecessors in title proving that he had a kibanja on this suit land and that this was ever paid to Ali Luyillika, the agent of Nambi Susana, the plaintiff’s predecessor in title. For

clarity, in cross-examination, the plaintiff admitted that this Nambi Susana was his grandmother and predecessor in title.

That, again DEX 10 is a letter from Uganda Electricity Board to Hannington Semanda, Musiisi's father, asking for permission to pass
5 electricity poles in his kibanja. That this proves that he had a kibanja on the suit land. Musisi during the locus visit, showed court an old graveyard having his forefathers, grandfathers, father, among others buried in the suit land. He also showed the house of his father which he inherited and that of his brother. These were all old houses which
10 had been on the suit land for years.

Counsel argued that on the other hand, the plaintiff had only one grave in the suit land which was very new and Musisi explained to court that the plaintiff with other goons used force to bury that person and that this was done at night amid protest from locals and
15 Musisi himself.

Further, that the evidence of Bernards Okello and Wamwa Roberts all repeat these facts that the land was encumbered by bibanja owners who were all willingly compensated with the blessing of Kakomo the then registered proprietor. Okello has been with the
20 defendant running the company since 2013. Counsel relied on the case of **Uganda Posts and Telecommunication v. Lutaaya SCCA No. 36 of 1995**, which is to the effect that the proprietor of land takes it subject to all encumbrances and these include bibanja owners. So when Damulira recovered his title in 2019, he took this
25 title subject to the defendant who was on land before he got registered on it in 2019. That by 2015, both Kakomo Paul and the bibanja holders had the right to occupy this Plot 21. The two allowed the defendant to occupy this same Plot 21 for at least twenty years. This cannot be called trespass.

30 In regard to PEX 6, which is the injunction issued in 2014 specifically injuncting Gomba Block 181 Plot 20 and 21 counsel submitted that it did not injunct transactions on plots 47,48 and 48 which were

already in existence as evidenced by exhibit DEX 11, DEX 12 and DEX 13. That a suit over land cannot stop transactions on that land unless there be an injunction. And that injunction must be brought to the attention of the defendant who was not party to that suit from which the injunctive order was issued. (**See: JWR Kazoora v. MLS Rukuba SCCA No. 13 of 1992**).

Counsel added that a caveat prohibiting all kinds of dealings in land, including those not to change anything on the title deed, is not permissible in law and goes beyond what is necessary to protect one's proprietary interest as stated in **Mutual Benefits Ltd v. Patel and Another (1972) 1 EA 496**. Thus a caveat was meant to ensure that Kakomo Paul never sold the mailo interest to a third party who would then be registered on title. The caveat never forbade dealing in equitable interests like bibanja which were not going to change proprietorship on the certificate of title to the detriment of the caveator/plaintiff.

Counsel for the defendant further submitted that according to the survey report of Baiga Alaisa M. it is very clear that it is UETCL substation occupying Plot 20 to a tune of 0.6018 hectares/1.5 acres. That while at locus, the plaintiff admitted that he has a live suit against UETCL for trespassing on the land where the substation sits. So. it is UETCL sitting on Plot 20 and not the defendant which is separate and distinct from UETCL.

Issue 2: Remedies available to the parties

Counsel for the defendant submitted that, he who alleges must prove as provided in **Sections 100 and 101** of the Evidence Act. That the plaintiff mistakenly termed the defendant as trespassers. Thus the duty was on him to prove that indeed they are trespassers on a balance of probabilities. That he failed to do so. Counsel prayed that the suit be dismissed with costs to the defendant.

Rejoinder:

- Counsel for the plaintiff submitted that the court decisions especially the injunction of 3/12/2014 bind Kakomo and the Defendant as regards the suit property. That this is based on the common law principle of “Judgment in rem” a Judgment that determines the status or condition of property and that operates directly on the property itself. That the phrase denotes a Judgment that affects not only interests in anything but also all persons’ interest in the thing. That before entering into the agreement with Kakomo on 11/3/2015 the defendant was bound to make a search to verify whether Kakomo lawfully owned Plot 47 Gomba Block 181 and whether it was free from encumbrance.
- Counsel also argued that it is not even known whether the alleged Kakomo Paul who is claimed to have signed the agreement of 11/3/2015 exists because he never surfaced anywhere in Court to prove he signed such agreement.
- Further, that as regards the lease agreement claimed to have been signed with DW2 (Musisi Francis) apart from the failure of DW2 to exhibit such lease, if it all existed it is illegal. Counsel added that, if the Defendant had a lease as it claims it was under mandatory legal requirement to register the alleged lease and pay taxes as per **Section 40** of the Land Act (as amended) and **Section 54** of the Registration of Titles Act. That it is therefore, presumed that the Defendant company is not wholly owned by Ugandan Citizens and its articles do not prevent non Ugandans from taking shares in the company.
- That DW2 did not prove to Court that he signed the lease and also David Alobo did not prove to Court that he signed the lease with DW2. Therefore, no witness proved to court that he saw David Alobo signing the lease on behalf of the company. No resolution was exhibited in court to prove that the company authorized the execution of the

alleged lease with DW2. That there was no evidence to prove that DW2's grandfather, father and even DW2 himself owned a kibanja on late Suzana Nambi's 50.00 acres Plot of land at Katete and that she even allowed the said persons to settle on her land. So the Defendant cannot claim that DW2 had a kibanja which he could lease out.

On the Defendant's claim that they did not trespass on Plot 20, Gomba Block 181 at Katete that such allegation is false. That the plaintiff explained to court that U.E.B had erected a metal fence on the said Plot 20 where the electricity power machinery e.g transformers and generators were enclosed. That the Defendant also fixed their Solar Power Machinery and Power Transmission Posts and Cables on Plot 20 which was admitted by DW3. And that the survey Report issued by Ryan Consult Surveyors on 14/9/2020 also confirmed that the defendant trespassed on Plot 20 by an area of 0.10 of an acre.

Counsel further submitted that it is on record that the Defendant in collaboration with Uganda Electricity Transmission Company (U.E.T.C.L) which inherited assets and liabilities of the defunct U.E.B, entered the suit land sometime in 2015 and the Defendant started constructing its Solar Power plant on both Plots 20 and 21 without the consent of the plaintiff who is the only lawful registered owner of the suit land. That these acts constitute trespass on the plaintiff's land.

Resolution of issues

Sections 101 and 102 of the Evidence Act provides inter alia 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 when a person is bound to prove the existence of any fact the burden of proof lies on that person who would fail if no evidence at all were given on either side. **(See:**

Ipolito Semwanga v. Kwizera Buchana Paul & Others HCCS No. 61/2005).

In the instant case, the burden of proof lies on the Plaintiff it being his case.

- 5 The plaintiff brought this suit against the defendant for eviction of the defendant from the suit land and an order to remove their installations from the land or alternatively if the defendant wants to stay on the land they be ordered to negotiate suitable lease terms with the plaintiff within one month from the date of judgement,
10 general damages of UGX 1,000,000,000/= as compensation to the plaintiff for loses suffered and interest from date of judgment until payment in full.

Issue 1: Whether the defendant is a trespasser on the suit land?

- 15 The defendant contested two of the survey reports contending that they were drafted by persons who had no valid practicing certificates therefore were not qualified to do the work and their reports were therefore invalid.

- Section 19(3)** of Surveyor's Registration Act forbids any person from engaging in or carrying out the
20 practice of surveying, by whatever name called, unless he or she is a holder of a valid practicing certificate granted to him or her on that behalf under the Act. This court will not entertain illegalities, it will only consider a valid survey report made by a registered surveyor.

- 25 There are three survey reports on record; one by Tumugumeho Aldas, another by Nabeeta Brian and finally by Alaisa M. Baiga.

- During cross examination DW4 Tumugumeho Aldas admitted that he is not a licensed surveyor. DEX 15 and DEX 16 also proved that Tumugumeho Aldas was not a registered surveyor, the same applied to Nabeeta Brian who failed to provide his Practicing Certificate
30 during locus or prove its existence.

This court will rely on the survey report drafted by Alaisa M. Baiga which shows that the defendant is in occupation of 10.673 acres of land in Gomba Block 181 Plot 21.

5 Counsel for the plaintiff submitted that the Plaintiff is the registered owner of the land comprised in Gomba Block 181 Plot 20 Measuring 1.50 acres and Plot 21 measuring 48.50 acres situated at Katete Village Kabulassoke Sub County in Gomba District.

10 He further submitted that the plaintiff sometime in 2010 realized that both Certificates of title to the above land were missing from his home and he reported to police and the land office.

15 On 25/5/2011 he lodged a caveat on Plots 47, 48 and 49 which had been fraudulently subdivided from land plot 21 by a one Kakomo Paul who happens to be a registered proprietor on Gomba Block No.181 Plot 21 since 7th October, 2006 to 15th October, 2019 when the land was reinstated to the plaintiff.

This was admitted by the plaintiff during cross examination. He further stated that on 3/12/2014 a temporary injunction was issued against Kakomo Paul to restrain him from entering into a transaction or dealing with the suit land.

20 This was exhibited at pages 21 and 22 of the plaintiff's Trial Bundle. During cross examination the plaintiff also admitted that a temporary injunction was issued against Kakomo Paul. That the defendant has never been registered on the suit land and he did not know if the defendant ever bought the land from Kakomo Paul.

25 Counsel for the defendant agreed to the submission of the plaintiff that since 7th day of October, 2006 to 15th October, 2019 Kakomo Paul was the Registered Proprietor of the Suit land.

30 The defendant further submitted that they acquired equitable interest in the suit land having bought the same from Musisi Francis, Kyaligamba Henry, Muzuula Moses who were bibanja holders in the

suit land with the consent of Kakomo Paul who was then the registered proprietor of the land. All these were exhibited through DEX 1, DEX 2 and DEX3.

During cross examination Musisi Francis DW2 claimed that he had been on the land as a kibanja holder since 1957 when he was born and had been paying busuulu to Nambi who was the former proprietor of the land and personally started paying rent in 2000 through Ronald Mpungu and he had last paid rent in 2021.

Receipts of payment were also exhibited as DEX 5, DEX6, DEX7, DEX8 and DEX 9. A letter DEX 10 was also exhibited which proves that he and his family have been utilizing that land.

During the Locus in quo visit, Francis Musisi showed court old graves of his late father and grandfather among other family members on the suit land which proved that he had been on that land for a long time.

The plaintiff on the other hand showed court, a Cinema Hall and few structures recently built by him on the land and one grave that he allegedly forcefully and stealthily buried on the suit land.

Section 29(1) of the Land Act defines a lawful occupant as a person occupying land by virtue of the repealed Busuulu and Envujjo Law of 1928, Toro Landlord and Tenant Law of 1937, Ankole Landlord and Tenant Law of 1937, a person who entered the land with the consent of the registered owner, including a purchaser or a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

According to the evidence as adduced by the parties this court finds the defendant to be a Lawful occupant on the land.

Section 31(1) and (9) of the Land Act provides for security of a tenant by occupancy on registered land and that for avoidance of doubt, the security of tenure of a lawful or bona fide occupant shall not be prejudiced by reason of the fact that he or she does not possess a certificate of occupancy.

Section 34(1) and (2) clearly states that a tenancy by occupancy may be inherited and that a tenant by occupancy may, in accordance with this section, assign, sublet, pledge, create third party rights in, subdivide and undertake any other lawful transaction in respect of the occupancy with the consent from the owner of the land.

It is not disputed that Kakomo Paul was the Registered Proprietor of the Land during the period the defendant acquired interest in the suit land and having obtained the lease from the Bibanja holders with the consent of the registered proprietor. The plaintiff having reinstated back his interest in the land in 2019, he undertakes the land with all the equitable interests in the land including the bibanja holders.

As per the holding in the case of **Justine E.M.N. Lutaaya v. Stirling Civil Engineering Company Ltd, Civil Appeal No.11 of 2002**, trespass to land occurs when person makes unauthorized entry upon the land and thereby interfere with another person's lawful possession of the land which is not the case in this suit.

From this finding and the defendant's interest in the land remains in force until its expiry or termination and they are therefore not trespassers on the suit land.

Issue 2: remedies available to the parties.

The plaintiff prayed that this court issues orders evicting the defendant from the suit land, an order to remove their installations from the land or alternatively if the defendant wants to stay on the land they be ordered to negotiate suitable lease terms with the plaintiff within one month from the date of judgement, general damages of UGX 1,000,000,000/= as compensation to the plaintiff

for loses suffered and interest from date of judgment until payment in full.

From the above findings under issue 1, all the plaintiff's prayers fail. The defendant's equitable interest in Gomba Block 181 Plot 21 remains in force until its termination. After the expiry of the lease the suit land will revert back to the bibanja holders/leasee, thereafter the plaintiff may make arrangements with the bibanja holders under **Section 34** of the Land Act as amended on how to deal with the suit land.

The bibanja holders on the suit land are hereby ordered to pay their rent to the plaintiff or his agent from the date of this judgment.

Each party bears their own cost.

Right of appeal explained.

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HON. JUSTICE OYUKO ANTHONY OJOK
JUDGE

Judgment read in the presence of both Counsel for the Plaintiff and the defendant.

Dated this 8th day of November, 2021.

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HON. JUSTICE OYUKO ANTHONY OJOK
JUDGE