

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT No. 361 of 2017

5 **KAGGWA -NKAMBWE:.....PLAINTIFF**

VERSUS

WAMALA FRED:.....DEFENDANT

Before: Lady Justice Alexandra Nkonge Rugadya

10 **JUDGMENT**

Introduction:

The plaintiff, Mr. Kaggwa Nkambwe filed this suit: **Civil suit No. 361 of 2017** seeking to recover a portion of land comprised in **Bulemezi Block 19 Plots 1280 and 1297** situate at Kyampisi.

15 Among the orders sought under the plaint were an eviction order against the defendant from the plaintiff's land, *a permanent injunction restraining the defendant, his agents and other persons lawfully claiming under him from interfering with the plaintiff's land rights; a demolition order against the defendants' development on the suit land; in the alternative an order of compensation to the plaintiff for his property on the current market price; general damages; mesne profits; costs of the suit and interest.*

20 The defendant, Mr. Wamala Fred did not file a defence despite attempts to serve him, upon which the plaintiff applied for a judgment in default, which was granted by this court.

Background:

The plaintiff is the registered proprietor of land comprised in **Bulemezi, Block 19 Plots 1280 and 1297** situate at Kyampisi (suit land).

25 **Issues for determination:**

The following were the issues for determination:

1. Whether the suit land belong to the plaintiff.

2. ***Whether the defendant is the trespasser.***

3. ***What are the remedies available.***

I will deal with the first two issues jointly since they are interrelated.

Issue No. 1 :Whether the Suit land belong to the plaintiff;

5 **And**

Issue No. 2 Whether the defendant is the trespasser.

Analysis of the law:

10 Trespass to land would occur when a person makes an unauthorized entry upon land and thereby interferes, or portends to interfere, with another person's lawful possession of land. Needless to say, the tort of trespass is committed, not against the land, but against the person who is in actual or constructive possession of land. (***Justine E.M.N Lutaaya Vs Stirling Civil Engineering Company Ltd- Civil Appeal No.11 of 2002***).

15 As provided clearly in ***section 59 of RTA***, absolute ownership of land is vested in the registered proprietor of land, together with all rights and privileges belonging or appurtenant thereto. Thus in ***Patel Vs Patel (1992-93) HCB 137*** it was acknowledged that a certificate of title is conclusive evidence of ownership and no submission or oral evidence can be called to vary the certificate of title, except where there is evidence of fraud, lack of consideration or illegibility.

20 Furthermore, ***Article 237*** read together with ***article 26(1) of the Constitution of Uganda*** guarantee a person's right to ownership and use of his/her property.

Analysis of the evidence:

25 The plaintiff testifying as ***PW1*** relied on ***PExh 1***, a certificate of title as proof that he was registered proprietor of land comprised in ***Bulemezi Block 19 Plot 1297*** situate at Kyampisi, the subject of this suit. It showed that he had obtained registration of the land on 18th August, 2015. The original owner was Kaaya Cranemer Nkambwe, a son and administrator of the estate of the late Edward Nkambwe.

30 The principle under ***section 101 of the Evidence Act, Cap. 6*** is 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. That principle would still apply where the defence may fail to show up in court.

The burden of proof thus lies with the plaintiff who has to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. (***Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.***)

- 5 In the present case the defendant's refusal to file a defence and enter appearance implied that he had denied court his version of what was known to him to have transpired. By implication, he had admitted his illegal occupation of the suit land, thus leaving the plaintiff's claims of ownership uncontroverted.
- 10 He admitted the claim that he had settled on the plaintiff's land without his consent, and without any explanation; and from 2009 had failed to pay *busuulu* to him. It was also not in dispute that he plaintiff had filed a complaint to the Area Land committee of Kalagala Sub County. Both had appeared before the committee where a failed attempt at settlement had been made between the two parties.
- 15 The plaintiff had made an offer to him of 2.2 acres out of 6.7 acres to the defendant, together with a title over that land. The defendant however rejected the offer on the basis that he had no money.

As per the contents of the committee report dated 27th February, 2017, (***PExh 3***), the total area occupied by him was 6.7 acres. During the negotiations which had not yielded any results, the plaintiff was only willing to give up only 2.2 acres while the defendant maintained he wanted 3 acres, which he however could not pay for. He not only failed to pay his dues but also stubbornly refused to vacate the land.

25 In submission, it was pointed out that the defendant had at all times accepted to pay *busuulu* and was a recognized occupant until the year 2009. That upon such failure to pay *busulu* on his own volition, in accordance with ***Sec. 31 of the Land Act***, he ousted himself from the protection of the law and therefore became a trespasser to land as the plaintiff's consent to remain on the land had accordingly been withdrawn.

30 The above findings indicate the plaintiff's efforts to exhaust all levels of dealing with the defendant to settle the dispute, having offered him a portion of the land and its title, which offer had been made in the presence of the area land committee.

Thus on account of his failure to pay *busuulu* for more than eight years, his status changed to that of a tenant at sufferance and remained on that land therefore at the mercy of his land lord.

The plaintiff has all in all therefore discharged the burden to prove that the defendant had committed acts of trespass. This court is also able to come to the conclusion that the defendant lost the status of a tenant lawfully in occupation and one who by virtue of that status derives protection of **section 29 of the Land Act, Cap.227**. He accordingly remained a trespasser on part of that land.

Issue No. 3: Whether there are remedies available

The plaintiff in his pleadings sought orders for, among others: *an eviction order against the defendant from his land, a permanent injunction restraining the defendant, his agents and other persons lawfully claiming under him from interfering with the plaintiff's land rights; a demolition order against the defendants' development on the suit land; in the alternative an order of compensation to the plaintiff for his property on the current market price; general damages; mesne profits; costs of the suit and interest.*

His counsel in submission on the other hand sought additional reliefs, with due respect, disregarding the well-established principle that parties are bound by their own pleadings. He submitted that general damage ought to ensue to atone for the loss of the plaintiff's property and physiological torture to the plaintiff.

I could not agree more on that point since it is not in dispute that the plaintiff holds the legal title, and that the defendant made no effort to put up any defence against the allegation raised against him, it therefore justified the plaintiff's claim for damages.

General damages:

In **Robert Caussens v Attorney General SCCA No.8 of 1999** it was stated that the object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered.

Therefore in the assessment of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and extent of the breach. **(Uganda Commercial Bank V Kigozi [2002]) 1 EA 305**. A plaintiff who suffers damage for the wrongful act of the defendant must be put in the position he or she would have been in, had he or she not suffered the wrong.

Court in **Assist (U) Ltd Vs Italian Asphalt And Hanlage Limited HCCS No.1291 of 1999** acknowledged the principles attributed to **Mc Gregor on Damages Sweet and Maxwell 17th**

Ed.2003 that damages for trespass to land will largely depend on the nature of occupation on the land.

Special Damages;

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Special damages represent the plaintiff's quantifiable financial loss. These ought to be specifically proved. Since however no specific amount was stated in the plaint, I have no clear basis upon which to determine what to give to the plaintiff as specific damages.

10 Bearing the above principles in mind, I accordingly grant the orders in the terms below:

1. *An order to compensate the plaintiff which he prayed for in the alternative would be an order made in vain since the defendant had made it clear right from the start that he could not afford to meet the cost of securing land and title for himself.*

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2. *Since the plaintiff initially recognized the defendant as his tenant and had been willing to offer 2.2 acres to him, an order of eviction issues against the defendant for any land occupied by him beyond the 2.2 acres.*

20 3. *The plaintiff is entitled to general damages of a compound figure of **Ugx 50,000,000/=** (to include the total amount of the unpaid busuulu), with interest at 10% from the date of delivering this ruling, till payment is made in full.*

25 4. *A permanent injunction issues, restraining the defendant, his agents and other persons lawfully claiming under him from interfering with the plaintiff's land rights.*

5. *Costs of the suit.*

I so order.

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Alexandra Nkonge Rugadya

Judge

35 **4th May, 2021**