THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.2398 OF 2021

(Arising out of Civil Suit No. 970 of 2020)

1. **ELIZABETH LUWEDDE KASULE**
2. **EVAL SSEZIBWA *(Suing through their Lawful Attorney BISASO EDITH* GLADYS)::APPLICANTS**

VERSUS

1. **THE BOARD OF GOVERNORS/DIRECTORS OF CALTEC ACADEMY MAKERERE**
2. **REGISTERED TRUSTEES OF THE NATIVE AFRICAN BROTHERS OF CHRISTIAN INSTRUCTION:::RESPONDENTS**

Before: Justice Alexandra Nkonge Rugadya.

RULING

The applicants brought this application by way of Notice of Motion under ***Section 33 of the Judicature Act Cap.13, Section 98 of the Civil Procedure Act Cap.71, Order 13 rule 6 and Order 52 rules 1, 2 & 3 of the Civil Procedure Rules SI 71-1*** for orders that;

1. ***That judgement be entered on the admission of the respondents in respect of their encroachment to the plaintiffs' land comprised in Block 3 plots 859 and 860 Land at Makerere;***
2. ***That the respondents' encroachment structures be demolished, and in the alternative the respondents compensate the applicants to a tune of Ugx 800,000,000/= for the area encroached upon;***
3. ***Costs of this application be provided for.***

Grounds of the application.

The grounds upon which the application is based are stated in the affidavit in support of **Ms. Bisaso Edith Gladys,** the applicants' lawful attorney where in she states that the applicants filed ***Civil Suit No.970 of 2021*** against the respondents for among others a declaration that the respondents were trespassers on the applicants' land comprised in ***Block 3 plots 859 & 860 lant at Makerere*** and that in *paragraph 7 (5)* of their joint written statement of defence.

The respondents admitted that between 2011 & 2015, they undertook development of the school by constructing a perimeter wall that encroached onto part of the plaintiffs' land as well s the former access road to the ***Block 3 plots 859 & 860 lant at Makerere.***

That the respondents further stated that they were willing to make arrangements to compensate the plaintiffs for their unlawful acts of encroachment by purchasing the plaintiffs' entire land at a proposed purchase price of ***Ugx. 3,000,000,000/= (three billion shillings only)*** but they have never acted upon the same and that when the suit was filed, the parties opted for mediation where the respondents agreed to pay the sum of **Ugx. 300,000,000/=** as compensation for the encroached area and even requested to know the actual size of the encroachment for each plot.

In addition, that upon conducting boundary opening of the plots by ***M/s Redeem Consults Ltd,*** a survey firm to measure the actual size of encroachment on each plot as well as the former access road, it was established that the total are of land encroached upon was 0.081Ha to wit; ***plot 859*** and ***plot 860*** had been encroached on by 0.006Ha/0.02 acres and 0.015Ha/0.04 acres respectively, while the access road had been encroached on by 0.06Ha/0.14 acres and that the survey report was shared with the respondents in a bid to have the matter concluded but they did not show any act of willingness which resulted in failed mediation.

That for over 11 years, nothing has been done to correct the wrong despite the numerous admissions by the respondents who keep enjoying and benefitting from the applicants' land to their detriment which has resulted in the applicants being unable to carry out any development, or even sell the land which has no clear demarcations and without a clear access road thereby causing financial constraint and loss.

That it is just, fair and equitable that judgement be entered against the respondents on their own admissions of trespass onto the applicants' land and that the respondents be directed to either demolish the encroaching structures or compensated the applicants in the sum of ***UGX. 800,000,000/=*** for the encroachment of over 10 years.

Respondents' reply.

The respondents opposed the application through the affidavit in reply of **Brother Tamale John Paul,** the 1st respondent's principal and a member of the 2nd respondent, who objected

to the application on grounds that the application is incompetent because there is no pending suit since ***Civil Suit No.970 of 2020*** from which it arises abated because the applicants failed/did not take out summons for directions within the 28 days from the date of the last reply to the respondents' written statement of defence as required.

That the alleged admission was not only conditional and unclear, but also ambiguous and that when the dispute first arose, the respondents in a bid to resolve the same amicably offered to buy the applicants' plots of land at **Ugx. 2,000,000,000/=** but the applicants counter offered them the land at **Ugx. 3,000,000,000/=**, which the respondents could not afford.

That the parties negotiated and agreed to enter into a consent settlement under which the respondents agreed to pay the applicants compensation of **Ugx. 300,000,000/=** in final settlement of all the claims and that while the applicant alleged in the main suit that the respondent's had encroached on their plots of land as well as the only access road, it was agreed in the settlement that each applicant would provide their respective certificates of title for the areas encroached on and that a new access road to ***plot 859*** measuring the same as the old access road would be curved out of ***plot 860*** which belongs to the 2nd applicant.

Further, that a survey of the land was taken to determine the measurements of the alleged area of encroachment on each of the plots and upon further scrutiny of the survey report, it was established that the alleged area of encroachment was 0.021 hectares/0.0518 acres and not 0.064 hectares/0.1581 acres as claimed in the impugned suit but the same has not been rectified to date.

That during the last mediation session, the applicants also failed to present documents relating to the subdivision and creation of the certificates of title in respect of the land as had been agreed upon under ***clause 10*** of the final consent settlement and that upon the applicants' failure to rectify the measurements of the area of alleged encroachment and present documents that they emailed the mediator requesting him to close mediation on grounds that the same had failed.

That the respondents are not only waiting for the applicants to fulfill their part of the bargain under the draft consent settlement, but they are also willing to settle the matter amicably in order to conclude the dispute and that the parties have been engaging each other with the view of finding an amicable settlement.

Further, that while the land has been vacant since 1970, the respondents have with the full knowledge of the applicants always used the land as part of the school's playground for sports activities and the applicants have never informed them of any intended development or sale of the same.

That while an order to pay ***Ugx. 800,000,000/=*** as compensation is unconscionable and is an attempt by the applicants to unjustly enrich themselves through court process, the respondents shall be prejudiced if the application is granted since the main suit abated and because the main subject matter of dispute is still unclear and contested.

Applicants' rejoinder.

In rejoinder, the applicants filed an affidavit in reply wherein it was stated that by law, a suit cannot abate on grounds of failure to take out summons of directions when the same has been referred to a mediator before summons for directions have been taken out and because the main suit herein had been referred to mediation which went from March to September, 2021 when the plaintiffs/applicants opted out of negotiations and requested for mediation to be closed, ***Civil Suit No.970 of 2020*** did not abate and is still pending.

That while the admission by the respondents was very clear and there is nothing like unconditional encroachment, it is not true that the terms proposed by the respondents in the consent were agreed upon which is the reason as to why the same was never executed and that although the applicants agreed to be compensated **Ugx. 300,000,000/=** for encroachment in a bid to settle the 10 year long dispute, the damage, inconvenience and financial loss suffered by the plaintiffs were not put into consideration.

That the respondents are deliberately ignoring the encroached area on the access road on the plaintiffs' land measuring approximately 0.06 hectares, which if added to the encroached are of 0.0061 hectares on ***Plot 859*** and 0.015 hectares on ***plot 860,*** would add up to 0.08 hectares which is not far from the total area of encroachment of 0.064 hectares stated in the plaint.

In addition, that upon consultation with ***Mr. Patrick Sevume*** of ***Redeem Consult Limited*** who conducted the survey, the applicant was informed that land measurements are always approximated and an allowance of 0.02 hectares is always factored in which explained why the survey report indicated that the total area accroached upon was 0.08 hectares in the later report contrary to the 0.064 hectares indicated in the earlier report authored by a different firm.

In reply to the respondents' averments that the applicants failed to present documents relating to the subdivision and creation of titles in respect of the encroached are as agreed in clause 10 to the consent settlement, it was stated that the said clause was never agreed upon by the applicants who have since spent money on conducting 3 different surveys of the same land and could not inject any more money to carry out subdivisions for the benefit of the respondents who are guilty of encroachment on the land without receiving compensation or signing the purported consent and that the applicants could not risk signing transfer forms before being compensated.

Further, that the applicants did not at any one time fail to rectify the total area of encroachment since there was nothing to rectify and that the parties failed to agree on the terms of the purported consent since the same was unfair which is why it was never signed owing to the frustration by the unfair demands by the respondents and their failure to compensate the applicants for the area encroached on, or to comply with the applicants' request for the demolition of the structures hence the closure of mediation.

That the applicants have lost patience for the overstretched negotiations for over 10 years as the respondents are not interested in settling the matter and that the mere admission that the applicants counteroffered them a sale price of **Ugx. 3,000,000,000/=** implies that the land was on sale and that if the respondents are not willing to compensate the applicants to a tune of **Ugx. 800,000,000/=** they have the option of demolishing their structures and developments since they already admitted to the encroachment and are merely making excuses without any merit as there is no contention as to the subject matter.

Representation

The applicants were represented by ***M/s KMA Advocates*** while the respondents were represented by ***M/s A Mwebesa & Co. Advocates.***

In the interest of time, both counsel filed written submissions in support of their respective client's cases as directed by court.

Consideration by Court.

This application is for entering a judgment on admission under ***order 13 rule 6 of the civil procedure rules*** against the respondents.

The main issue for determination by this court is whether or not there are grounds that warrant the issue of a judgment on admission.

I have carefully read the submissions of counsel, the details of which are on court record and which I have taken into consideration to determine whether or not this application merits the prayers sought.

The respondents in their affidavit in reply and submission raised a preliminary objection to the effect that the instant application is incompetent on grounds that ***Civil Suit No.970 of 2020*** abated because the applicants/ plaintiffs failed to take out summons for directions within the statutorily stipulated 28 days under ***Order XIA rule 2 of the Civil Procedure Rules***.

Counsel relying on the case ***Asaba Charles & another V Kafeero Andrew & another Miscellaneous Application No.2004 of 2021*** argued that this application cannot arise from ***Civil Suit No.970 of 2020*** since the same abated.

In his submissions in rejoinder, counsel for the respondents referred court to the provisions of ***Order XIA rule 4 (e) of the Civil procedure Rules*** which provides an exception to the effect that where an action has been referred to an official referee or arbitrator, the matter does not abate.

In the instant application, the applicants filed ***Mediation Cause No.944 of 2020*** on 26th November, 2020 and to a total of 7 sessions conducted between 5th March, 2021 and 4th October, 2021. The respondents in their affidavit in reply relied on the mediation proceedings and draft consent settlement which is a confirmation of the fact that the matter was indeed under mediation.

In the circumstances, I am inclined to agree with counsel for the applicants that the suit between the parties had not abated since the same had been referred to arbitration and the provisions of ***Order XIA rule 2 of the Civil Procedure Rules*** do not apply to the main suit.

Accordingly, this preliminary objection is overruled.

Now to the merits of the application.

The Law.

O.13 r.6, CPR provides that;

> ***"Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such Judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties and the court may upon the application make such order, or give such judgment as the court may think just"***

In the case of ***Excel Construction Ltd Vs AG. HCCS No. 3007***, where the gist of the holdings was that;

> ***" (i) An admission of facts be made either on the pleadings or otherwise.***
>
> ***(ii) the rule applies to any party to the suit whether the plaintiff or the defendant."***

For judgment to be entered on admission, such an admission must be explicit and not open to doubt. Apart from the foregone, once an admission of facts is made, court may upon application make such order or file such judgment. ***(See: John Peter Nazareth Vs Barclays Bank International Ltd., E.A.C.A. 39 of 1976 (UR), African Insurance Co. Vs Uganda Airlines [1985] HCB 53; Mohamed B.M. Dhanji Vs Lulu & Co. [1960] E.A. 541.)***

In ***Momayi v. Hatim and another [2003]2 EA*** where it was held that

"admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they must result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must have no room for doubt."

In the instant case, that the defendants in their joint written statement of defence at *paragraph 7 (5) & (6)* categorically stated that in 2011 to 2015, they undertook development of the school structure by constructing a perimeter wall that encroached onto the plaintiffs' land as well as the former access road to ***Block 3 plots 859 & 860*** and that upon discovering the same, a meeting was held to find a permanent solution thereto.

It is my understanding that the meetings and attempts to resolve the dispute between the parties are not in dispute and respondents have not deposed to show anything to the contrary. Likewise, the Written Statement Defence does not set out a clear defence on what the plaintiffs allege in the plaint.

Admissions can be express or implied either on the pleadings or otherwise. An admission has to be plain and obvious as plain as a pikestaff and clearly readable because they must result in judgments being entered. ***(Choitram vs nazari [1976-1985] EA.52.***

In light of the above findings and principles, this court is satisfied with the evidence on record and circumstances surrounding the whole case that this is proper case to exercise its discretion to enter judgment on admission. What remains outstanding is the confirmation of the total area of encroachment and actual amount payable as compensation.

In consideration of the above, the applicants are entitled to claim a judgment for compensation of value for the area of encroachment to the land comprised in ***Block 3 plots 859 and 860, land at Makerere.***

Accordingly:

1. ***The final determination of the actual area and size of the encroachment shall be determined through a survey to be conducted by the KCCA survey department.***

2. ***Each applicant would provide their respective certificates of title for the areas encroached on and that a new access road to be mapped out measuring the same as the old access road.***

3. ***The total amount of compensation payable to the applicants is to be assessed by the Chief Government Valuer.***

4. ***The said amount shall be paid within a period of 6 months, after the assessment is made; and upon failure to meet that obligation an eviction shall be carried out against the respondents.***

5. ***Each applicant would provide their respective certificates of title for the areas encroached on and that a new access road to be mapped out measuring the same as the old access road.***

6. ***Costs of this suit; and of the survey and assessment of the value shall be met by the respondents.***

Civil Suit No. 0970 of 2020 is hereby concluded.

Delivered by email
Nkonge
14/7/2022.

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Alexandra Nkonge Rugadya

Judge.

14th July, 2022.