

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
MISCELLANEOUS APPLICATION NO. 57 OF 2019
(Arising from Civil Suit No. 22 of 2016)

5 1. BRIDGE LIMITED
 2. KYOHAIRWE CHARLOTTE
 3. NDIDE ROBERT KABURONGA
 4. COMMISSIONER FOR LAND REGISTRATION

}APPLICANTS

VERSUS

10 1. BYABAGABO FRANCIS
 2. MICHAEL MULO MULAGUSI

}RESPONDENTS

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK, JUDGE

Ruling

15 The applicants brought this application by way of Notice of Motion under **Order 52 Rule 1** and **Order 6 Rule 29** of the Civil Procedure Rules against the respondents seeking the following order;

1. The suit by the 1st plaintiff/respondent against the 2nd defendant/applicant be dismissed with costs.

20 The application is supported by an affidavit sworn by the 2nd applicant and the grounds briefly are as follows;

1. The 1st respondent's plaint does not disclose a cause of action against the 2nd applicant and the suit is frivolous and vexatious contrary to **Order 7 Rule 11(a)** and **(e)** of the Civil Procedure Rules.
- 25 2. The 2nd applicant is an employee of the Government of Uganda and was acting in the course and scope of her employment, with full instructions from her office and she is therefore wrongly sued.

3. That it is fair and just that the 1st respondent's suit against the 2nd applicant be dismissed.

The application is opposed by an affidavit in reply sworn by the 1st respondent and the pertinent paragraphs are as follows;

- 5 5. That my father, the late Kakwaya Edward Muzibe formerly of Luteete Buganga, died testate in June 2013 and thereafter I was installed as his heir. He left a number of properties which include the suit land. In his will he bequeathed the suit land to me to hold on behalf of our family. My father left the will with Reverend Nsamba George who brought it and read it during the burial.
- 10 13. That by the time my father bought and occupied the suit land, the registered proprietor of the mailo interest was Yowana Mulo Mugwanya and my father used to pay the Busuulu to the heir of the landlord one Mugwanya Kabuusu through a care taker one Nsubuga.
- 15 20. That in 2015, I received a call from Nakalema Resty the wife of my late brother Bugingo informing me that there were people who had come with the LC's together with Rogers Ssejemba and told the villagers that they are inspecting the area as the Government wanted to construct a high way thereon.
- 20 22. That I travelled to the land and found out that the land had been surveyed without my knowledge and I did not know the extent of the survey. No one came to compensate me but I knew sooner or later Government would contact me for compensation in case they really wanted the land for construction of the high way.
- 25 23. That surprisingly, I found one Rogers Ssejemba cultivating maize in my young eucalyptus forest. I approached the LC.1 Mr. Abudu Lubyongo to explain to me what was going on. He invited Rogers Ssejemba and we scheduled a meeting at Kayabwe. We agreed with Rogers to stop trespassing on my land and that I let him harvest only one season of his maize he had planted. However, after the harvest, Rogers continued with fresh planting of other crops in my eucalyptus forest.
- 30 25. That I later came to learn that Ndidde was the "Land Lord" for whom they cultivated the land. Investigations were made and the case file was later forwarded to Mpigi Police Station. At Mpigi Police Rogers revealed that Ndidde the landlord had sold the suit land to some Ethiopians who owned a company known as Bridge Limited. He revealed the company was the new owner of the land.

26. That the Police requested Rogers to bring Ndidde and the 1st defendant but he managed to bring the Ethiopians and Rogers himself claimed to be the representative of Ndidde.

27. The Ethiopians produced the sale agreement between them and Ndidde as well as the Certificate of Title.

33. That on 23rd December 2015 I received a letter from state house dated 21st December 2015 written by the 2nd applicant condemning me unheard as a land grabber and in the same letter it was ordered that Bridge Limited should access their land and fence it off. The same letter stated that the office of the president was investigating the matter and that a team of their officers was to visit the locus on the 8th/01/2016 at 11:00am.

35. That when the 2nd applicant visited the locus, Bugingo's wife called and informed me what was taking place. I was told that the 2nd applicant was flanked by the RDC Mpigi District, DPC Mpigi Mr. Kimera, District CID Natukunda, LCI Chairperson of the Village, Rogers Ssejemba, LCII Chairperson and other persons who are not known in the area. They convened a meeting where the 2nd applicant ordered that my eucalyptus trees and other crops be uprooted from the suit land. That without further ado, a group of people who had escorted the 2nd applicant uprooted my trees and the crops in the presence of the locals.

36. That a week later, I returned from my travels and indeed found my over 30,000 eucalyptus trees that had been occupying 30 acres of land destroyed. I had bought the seedlings transported them, dug pits and planted them. Then the herbicides, insecticides, manure among others. I estimate the project to have been in the regions of ninety million.

37. That I complained to the state house about the acts of the 2nd applicant upon which they decided to schedule another meeting on the suit land this time through another officer Mr. Ochieng who came with the DPC, RPC, LC1, the 1st, 2nd and the representative of the 3rd defendants. I was also present together with the 2nd respondent, Leonard Mugwanya, Yusuf Kintu, Mr. Musitwa of Entebbe and other people plus residents. The RDC did not attend as he was said to have lost a relative.

38. That when I arrived on the suit land for the meeting, I found a tractor destroying more of my crops. Mr. Ochieng from state house tried to stop it but

the driver refused which prompted Ochieng to order for his arrest but he ran away leaving the tractor behind.

40. That Mr. Ochieng told the representatives of the 1st applicant to cease disobeying the court order emanating from H.C.C.S No. 227 of 2015 Family division and to stop further destruction of the crops on the suit land. He advised that we should await the outcome of the H.C.C.S No. 227 of 2015.

41. That to my astonishment the following day my people called me to say that the 1st applicant had resumed destruction of the crops and was fencing off the land.

42. That at that point I realized the 1st applicant was not ready to leave my land neither was she ready to obey the orders of court, Police directives and other orders. I also noted that Police was afraid to take away the tractor to the Police Station. I instructed my lawyers to institute a civil suit for the recovery of my Kibanja.

47. That in specific reply to paragraph 5 thereto, I personally spoke with Madam Gertrude Njuba of State House Directorate of land matters and she told me that the 2nd applicant was never at any one time sent to work on this particular case and that she went on her own motion.

48. Furthermore, that in the event she had been sent to work on the particular complaint, the role of state house directorate of land matters is strictly to mediate between the parties and where that fails, they refer people to court for further assistance. That they do not engage in extra judicial under hand methods such as destroying of property and illegal evictions.

49. That in response to paragraphs 6, 7 and 8, there was no investigation whatsoever in this matter. The investigation report by the 2nd applicant is tainted by shallow, un-researched, pre-meditated and doctored findings.

50. Furthermore, my lawyers advise me that;

a. Whereas the 2nd applicant alleges to have been instructed by the office of the president/Directorate of land matters in this matter, the impugned report does not indicate anywhere the terms of reference.

c. The report says that Ndide Robert Kaburonga is the owner of the land comprised in Block 328 Plot 141. However, in spite of overwhelming allegations

of fraud and a pending civil suit challenging his authority to deal with the land, the report does not address the issue of how Ndide came to own the said land. Otherwise, if the 2nd applicant had not been conflicted and moved by personal interest, she should have realized that Ndide had no authority to transact the way he did on the land.

d. The botched report does not address the issue of the ability of the 1st applicant to own a mailo interest under the laws of Uganda. The 2nd applicant challenges my former lawyers to uphold a high standard in the way they do their work but even after the same lawyers raised the issue of inability of the 1st applicant to own mailo land, she went ahead to uphold the 1st applicant's illegal ownership of mailo interest something that is quite unpatriotic given the office she works for. This can only be done by a person who is acting for her own selfish interests.

f. The 2nd applicant in her report takes sides when she defends the sale and transfer of land by the 3rd applicant to the 1st applicant as being free of fraud yet she does not tell the reader what justifies such a finding. Given the court order that was in force at the time the transfer occurred, it is apparent that when the 2nd applicant ordered the 1st applicant to re-take possession of the land, she was compromised and acting in self-interest.

g. Any prudent investigator like the 2nd applicant who actually professes to be an advocate of the High Court, upon realization that this was a highly contentious matter involving questions of law, he or she ought to have referred the stakeholders to courts of law rather than constituting herself into one, passing judgment and enforcing the same. The 2nd applicant single-handedly led to institutional failure when she failed to follow due process and basic principles of natural justice in this matter because of selfish interests.

h. That the 2nd applicant knew that the compensation agreement of my brother Bugingo Samuel was in respect of 2 acres of land yet the 1st applicant decided to occupy over 30 acres of land. That they took the extra acreage under the pretext that it was a wetland and therefore government land which was not the case since it is not gazetted as such. That in any case, my brother was not the proper party to deal with in respect of that kibanja. Furthermore, if it is a wetland, Bridge Limited should not have occupied the wetland that they evicted us from.

i. The 2nd applicant knew that the 1st applicant claims to have compensated people in respect of 24 acres yet the company occupies around 169 acres of land. One wonders how they got into possession of the balance.

52. That in specific response to paragraph 8, the 2nd applicant has not availed a copy of the minutes of the said meeting in which the said unanimous agreement was made. Furthermore, given the RDC's Police statement that shows how he tried to stop the 2nd applicant from destroying my trees and the call I received from Bugingo's widow on the same day, it is doubtful if such a decision was reached. The circumstances point to a pre-meditated move of destruction of my property. Besides, the office of the president is not in the business of evictions.

55. That I have been advised by my lawyers that the present application is incompetent, frivolous, vexatious and a waste of court's time in as far as the 2nd applicant purports to assert that I do not have a cause of action against her since she is an employee of the Government of Uganda who was acting in the course of her employment, and that I should therefore have sued the Attorney General instead of herself.

57. That my lawyers advise me that the 2nd applicant has capacity to sue and be sued in her own right. Furthermore, that she can take out a third party notice and serve the same on the Attorney General.

59. That the acts and omissions by the 2nd applicant complained of in the statement of claim were done in her personal capacity, an outright abuse of her responsibilities and due process, calculated to serve personal and selfish interests. This is buttressed by her own statement in paragraph 6 (ii) of the affidavit in support that she was sent to attend to the complaint, verify what was happening and make a report. She was not sent to destroy property nor evict people. If indeed she was sent by state house, hers was a fact finding mission and later make a report for further action by her employers. There are institutions mandated to do the actions that she took.

Representation:

Mr. Urban Tibamanya appeared for the respondents and Mr. Wamina Andrew appeared for the 1st and 3rd applicants while, Mr. Davis Ndyomugabe represented the 2nd applicant. The 2nd applicant and 1st respondent filed written submissions.

Resolution of the application:

Counsel for the 2nd applicant submitted that it was admitted by the 1st respondent that the 2nd applicant was an employee of state house and as a state house employee working in the course and scope of her employment, she cannot be

personally liable for actions/omissions committed in the course and scope of her duties however, erroneously, wrongly, deliberately or wantonly, negligently or criminally done. The liability is vicariously carried out by the employer. (See: **Muwonge v. Attorney General [1967] 1 E.A 17**).

5 That the 2nd defendant/applicant is an employee of state house, an advocate of the High Court working as an Assistant Private Secretary/Land Matters, to His Excellency the President of the Republic of Uganda. That the applicant in the course and scope of her duties received instructions from her boss, Ms. Gertrude Njuba, the Assistant Senior Presidential Advisor/Political Affairs and Head of the
10 Department of Land Matters at State House, that the applicant should immediately attend to the suit lad matter in Mpigi comprised in Mawokota Block 328, Plot 157 at Lutete where it had been alleged by the 1st plaintiff that 108 families including the 1st plaintiff had been evicted from their homes.

15 Counsel added that this was a grave and serious matter that threatened the peace, law and order of the State and the Office of the President is jealousy defending the peace and security of the citizens, the applicant acted lawfully in the course and scope of her employment.

It was further argued for the 2nd applicant that she had no personal interest in the suit matter and was a merely acting in the course and scope of her duties as
20 Government employee, she is not personally liable and therefore the suit does not disclose any reasonable cause of action against her. That if her actions are actionable, it is the Attorney General as the Government's legal representative who should have been sued since she went to work as an agent for and on behalf of the principal. (See: **Hon. Okupa Elijah v. Attorney General & Others [2018] UGHCCD 10**).

25 Counsel for the 1st respondent on the other hand submitted that the suit against the 2nd applicant be heard and determined on its merits as she appears to have committed cases bordering on tortuous and criminal acts that invite personal liability. The 1st respondent's suit does disclose a cause of action against the 2nd
30 applicant. That the 1st respondent's right to the suit Kibanja was violated and by the 1st, 2nd and 3rd defendants through a series of events masterminded partly by the 2nd applicant. These include but are not limited to the destruction of the 1st respondent's property and trespass on the suit Kibanja.

Specifically, the 2nd applicant directed a group of people to uproot the 1st
35 respondent's eucalyptus trees. This was a true observation by the RDC of Mpigi

Hajji Swaibu Lubega Waggwa, when he gave his statement to the Uganda Police at Mpigi on 20th/06/2016 which was not rebutted by the applicant. That the directive to destroy the plaintiffs' property, in particular to uproot the plaintiff's eucalyptus trees, without a court order amounted to an act that tends to be
5 criminal as per **Section 19** and **51** of the Penal Code Act. That the 2nd applicant masterminded the destruction of the 1st respondent's property, plants and mature eucalyptus trees. That the 2nd applicant further encouraged the 1st applicant to enter upon and continue trespassing on the respondents' kibanja. That the 2nd applicant as an employee of government exceeded her authority as an
10 employee/agent of the government while in the course of her employment.

Counsel noted that the 2nd applicant did not show court where in her contract of employment she was authorized to conduct investigations, make judgment and execute the judgment by herself without a court order. That she acted as prosecutor, judge and executor which cannot be said to be within the scope of
15 her employment or even from any instructions of her principals.

Further, that the applicant clearly described her role in paragraphs 6(ii) and 6 (iii) of her affidavit but then went way beyond the same by ordering destruction of property and abetting trespass by the 1st respondent. That what the 2nd applicant did in this case was not what she was employed to carry out.

20 Counsel added that under common law, it is the agent's duty to act in the best interest of the principal. Particularly, the duty to act in the best interests of the principal requires the agent to use his due diligence and skill to negotiate terms of a transaction on behalf of his principal with a third party to the greatest advantage of his principal in the circumstances.

25 Furthermore, that had the 2nd applicant skillfully done her due diligence, she would have found out that the 1st respondent enjoyed an equitable right to the suit kibanja as son and heir of Kakwaya Edward Muzibe, who was a bonafide occupant that paid his busulu to Wilfred Mugwanya Kabusu from as far back as 21st February 1974 to as recent as 28th November 2015. That the 2nd applicant
30 indeed found out that there were other bibanja holders who had voluntarily surrendered their bibanja interests and voluntarily sold them. That they had agreed to sell and be compensated by the 1st applicant under the terms of a "willing buyer and willing seller agreement." That the 1st respondent was never consulted on any sale of his Kibanja which resulted in the violation of his right to
35 the suit kibanja by the applicants. And that the 2nd applicant would have found

out that the 1st applicant had shareholders being foreigners of Ethiopian descent. The legal effect being that foreigners could not at the time acquire mailo land as the 1st applicant did. Let alone displace citizens from their holdings.

Counsel cited **Section 160 (1)** of the Contracts Act, 2010 which addresses the liability of the principal where an agent exceeds their authority. It states that;

“Where an agent does more than he or she is authorized to do and a part of what the agent does is within his or her authority, can be separated from the part which is beyond his or her authority only what the agent does within his or her authority shall be binding between the agent and the principal.”

Counsel concluded that the 2nd applicant during the course of her work went beyond her authority when she “instructed a group of people to uproot the trees” and put the 1st defendant into occupation of the 1st respondent’s land.

Analysis of court:

I have carefully considered the submissions of both parties and the evidence as adduced. In the instant case the 2nd applicant states that she was wrongly sued and that she acted in the course of her duties while she visited the land which the 1st respondent has interest in. That she has no interest in the suit land what so ever and that if anything it should be the Attorney General that is sued and not her. That she only did what she was mandated to do in the course of her employment and if anything the Attorney General is variously liable for her acts. The principal of vicarious liability was described by **Salmond** in his 1907 text *Law of Torts* as follows;

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment.”

Salmond went on to say that it was deemed to be done in the course of his employment if it was either:

- A wrongful act authorized by the master;
Or
- A wrongful and unauthorized mode of doing some act authorized by the master.

In the instant case the 2nd applicant went to the suit property and while there ordered that the 1st respondent's eucalyptus trees be uprooted. The 2nd applicant made the orders where in essence she constituted herself into a court as there was no court order to that effect. The 2nd applicant in her line of duty would have visited the suit property made her investigations and made a report.

In the instant case and from my understanding of the vicarious liability principle, the 2nd applicant went beyond her line of duty and thus cannot be said to have wrongfully executed her duty.

Counsel for the 1st respondent cited **Section 160** of the Contracts Act to guide court on the agent principal liability and indeed where an agent acts beyond what they are authorized to do during their course of employment the employer is not liable for the employee's acts. In this case the 2nd applicant acted over and above her duties thus, the employer cannot be held liable. The directive to destroy the plaintiffs' property, in particular to uproot the plaintiff's eucalyptus trees, without a court order amounted to an act that tends to be criminal as per **Section 19 and 51** of the Penal Code Act. The 2nd applicant's acts cannot be said to have constituted her line of duty, in my view she went over and above and this should be desisted from by any agents.

The 2nd applicant in her affidavit in support of the application particularly under paragraph 6 (ii) stated that and I quote;

"That our office instructed me to personally attend to the complaint and verify what was happening and make a report thereof."

The 2nd applicant was therefore was not sent to destroy property nor evict people, hers was a fact finding mission and later make a report for further action by her employers.

I accordingly find and hold that the 2nd applicant went over and above her line of duty while at the suit property by ordering the uprooting of the eucalyptus trees belonging to the 1st respondent and therefore the employer cannot be held vicariously liable for her actions.

Thus, the 1st respondent has a cause of action against the 2nd applicant which should be determined on its merit.

This application is accordingly dismissed for lack of merit with costs. I so order.
Right of appeal explained.

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5 OYUKO ANTHONY OJOK
JUDGE
07/07/2022

Obiter:

10 If the 2nd applicant still feels that the Attorney General should be liable for her actions, she may take out a third party notice and serve the same on the Attorney General.

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15 OYUKO ANTHONY OJOK
JUDGE
07/07/2022