

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.1861 OF 2022

(Arising from 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 LUWEDDE
OF CALTEC ACADEMY MAKERERE**

2. REGISTERED TRUSTEES OF THE NATIVE

AFRICAN BROTHERS OF CHRISTIAN

INSTRUCTION:.....RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

Introduction

The applicants brought this application under the provisions of **Section 82 (a) of the Civil Procedure Act cap.71-1 and Order 46 rules 1 (1) & 8 of the Civil Procedure Rules SI 71-1** for a review by this court of the ruling and orders of this court in **Miscellaneous Application No.2398 of 2021** for this court to pronounce itself on the issue of general damages, mesne profits and interest prayed for in the main suit.

It also seeks an award of general damages of **Ugx. 500,000,000/- (Uganda Shillings five hundred million only)**, mesne profits, interest on the award of general damages at a commercial rate from the date of encroachment, and costs of the application.

Grounds of the application.

The grounds of this application are contained in the affidavit in support thereof deponed by Ms. Bisaso Edith Gladys, the applicants' lawful attorney who stated *inter alia* that the applicants filed **Civil Suit No.470 of 2020** in this court seeking among
5 others a declaration that the respondents were trespassers on the suit land comprised in **Block 3 plots 859 & 860**; an order of vacant possession; general damages; mesne profits; and interest.

That while the respondents jointly filed a defence wherein they admitted that between the year 2011 and 2015, they undertook development of the school structure by
10 constructing a perimeter wall that encroached on the applicants' land and access road, it is upon that background that the applicants applied to this court vide **Miscellaneous Application No.2398 of 2021** for a judgment on admission.

That upon consideration of the evidence, this court found that the applicants were entitled to claim a judgment for compensation for the value of the area of
15 encroachment on the suit land and that while it is evident that this court acknowledged the encroachment or trespass by the respondents, instead of setting down the main suit for the determination of the remaining issues in regard to general damages, mesne profits, interest or pronouncing itself on the same, this court concluded the suit which according to the applicants' lawyers was an error on the
20 record since the applicants had other prayers for determination by this court.

That the ruling of this court in **Miscellaneous Application No.2398 of 2021** clearly indicates that the trial judge's intention was that the respondents only buy off the encroached upon piece of land or be evicted upon failure to do so but it also disregarded the fact that the respondent's encroachment had not only caused a lot
25 of inconvenience to the applicants but had also deprived the applicants their right to utilize the land for over 11 years and blocked the access road thereby denying the applicants access to their land which can only be compensated for in general damages.

Furthermore, that while general damages is an exercise of court's discretion, this
30 court's failure to pronounce itself on the prayers for general damages, *mesne* profits, and interest which were specifically prayed for in the plaint is an error apparent on the face of the record which this court is empowered to rectify by reviewing its ruling and granting the said prayers.



In addition, that the applicants averred in their plaint that the respondents have deliberately and adamantly refused to deliver up vacant possession while they run a profitable business which entitles the plaintiffs to mesne profits thus there is sufficient cause for grant of this application and that it is in the interest of justice
5 that this application should be granted and the applicants awarded general damages, mesne profits and interest as prayed for.

The application remains unopposed by the respondents, despite being duly served with the application, submissions in support thereof as well as the directives of this court. Their failure to respond was perceived as acknowledgment that they had no
10 defence in respect to this application.

Representation.

The applicant was represented by ***M/s Kabayiza Kavuma Mugerwa & Ali Advocates.*** Counsel for the applicants filed written submissions in support of the application, as directed by this court.

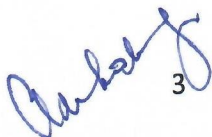
15 **Resolution by court.**

I have carefully read and considered the pleadings and submissions of counsel on the principles to be considered by court in granting a review.

Section 82 of the Civil Procedure Act cap. 71 provides that any person considering himself or herself aggrieved by a decree or order for which an appeal is allowed but
20 from which no appeal has been preferred or by a decree or order from which no appeal is allowed can apply for a review of the judgement to the court which passed the decree or made the order and the court may make such order as it deems fit.

Order 46 rules 1 & 2 of the Civil Procedure Rules SI 71-1 further provides for review in circumstances where an aggrieved makes discovery of a new and important
25 matter of evidence which after the exercise of due diligence, was not within his or her knowledge or could not be produced at the time when the decree was made. Court can also allow a review of its own decree or order if it is satisfied that sufficient reasons exist to merit a review.

In ***Re Nakivubo Chemists (U) Ltd HCB 12*** it was held that an aggrieved person is
30 one who has suffered a legal grievance, which has wrongly deprived him of something, or right. The first question for determination therefore is whether or not the applicant falls within the definition of an aggrieved person.


3

The applicants in this case was a party to **Civil Suit No.970 of 2020** and **Miscellaneous Application No.2398 of 2021** by which this court entered judgment in favour of the applicants under the terms below:

1. **The final determination of the area of encroachment and size 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; upon failure to meet that obligation an eviction shall be carried against the respondents;**
-
5. **Costs of the 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.

The applicants being dissatisfied filed this application for review on grounds that this court did not pronounce itself on the applicants' prayer for general damages, and mesne profits.

It is against this backdrop that the applicant contends that upon entering judgment in their favour, court ought to have made further orders in respect of general damages and mesne profits.

This court has indeed noted that in *paragraph 13 (f) and (g)* of the plaint, the reliefs sought included *mesne* profits and general damages, which this court did not consider when making the above orders which obviously was an error on the face of the record.



To that extent therefore, the applicants are aggrieved parties and are entitled to a review of the above orders of this court.

Decision of court:

5 General damages are such as the law will presume to be the direct natural or probable consequence of the act complained of. They arise by inference of law and need not, therefore be proved by evidence. (***See: Justice Stephen Mubiru in Civil Appeal No.31 of 2012 Maisha Vicky vs Madraa Emily; Principles Governing the award of Damages in Civil Cases – A paper presented by Hon. MR. Justice Bart M. Katureebe on 18th June 2008***)

10 It is trite law that general damages are awarded at the discretion of court, to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. (***Refer to Luzinda v. Ssekamatte & 3 Ors (Civil suit No. 366 of 2017)***)

15 General damages are meant to be restitutive in nature that is, to put the injured party back into the position they would have been had they not suffered the wrong by the party against whom the damages are claimed. ***See for example Charles Acire Vrs Myaana Engola HCCS No. 143/1993.***

In the case of ***Kibimba Rice Co. Ltd versus Umar Salim 119921 V KALR 17***, Court held that;

20 ***“a party is entitled to general damages even without proof of the same as they are presumed to have naturally resulted from the breach of duty”***

25 In the circumstance of this case, it is natural to presume that the applicants were inconvenienced by the respondent's actions. As such, they are entitled to general damages.

While assessing general damages, the court should mainly be guided by the value of the subject matter, the economic inconvenience that the respondent may have been put through and the nature and extent of the injury suffered. (***see Uganda Commercial Bank vs. Deo Kigozi (2002)1 EA 305***)

30 It was the finding of this court that the respondents herein interfered with the applicant's quiet enjoyment and possession of the suit land, and even blocked off



their access road. The applicants prayed for damages of **Ugx. 500, 000,000/- (Uganda Shillings five hundred million only)**.

This court is cognizant of the fact that the suit land is located in the heart of Kampala and the respondents have been conducting business thereon. The applicants however led no proof of the extent of the economic inconvenience, leaving court to base its decision on the economic realities of the real estate industry.

Considering all the relevant factors, the extent of breach, and principles, this court awards the applicants **Ugx.50,000,000/= (Uganda shillings fifty million only)**, as general damages.

Mesne profits:

The applicants also set out a claim for *mesne* profits from July 2011 for the encroached area of 16 decimals. They contended that this court ought to have considered the same, as pleaded.

Mesne profits are defined in **section 2(m) of the Civil Procedure Act** as ‘those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession.’

In ***Busiro Coffee Farmers & Dealers Ltd versus Tom Kayongo & 2 ors, HCCS No. 532 of 1992***, it was held that;

“Where a defendant remains in wrongful possession, he is liable to pay mesne profits to the person entitled to possession, hence for a claim of mesne profits to accrue, a Defendant must be in wrongful possession of the suit property as against the Plaintiff and deriving profits from the property”.

(See also: *Kyalimpa versus Nassozi Civil Suit No. 794 of 2016*)

The calculation of *mesne* profits is based on the profits that the defendant in wrongful possession has actually received or could have received with ordinary diligence, rather than on the losses incurred by the owner due to the deprivation of possession.

It is not in dispute that the respondents are in wrongful occupation of the suit land and this being a prime area the applicant could have obtained substantial profits, but for the actions of the respondent.



I would therefore allow **Ugx 150,000,000/=** at a rate of **Ugx 15,000,000/** per year, from 2012 to the year when the main suit was filed.

In the circumstances, the orders of this court are reviewed to take into consideration the prayers sought for mesne profits and damages.

5 Accordingly, the application succeeds in the following terms:

1. The applicants are awarded general damages of Ugx. 50,000,000/= (Uganda Shillings fifty million only);

2. Mesne profits of Ugx 150,000,000/=;

10

3. Interest of 15% per annum payable in respect of (1) and (2) above from the date of filing the main suit till payment in full;

4. No orders made as to costs.

15

I so order.



.....
Alexandra Nkonge Rugadya.

20 **Judge**

12th June, 2023

Delivered by mail
Ambeg
13/6/2023