

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. HCT-00-LD-CS-0755-2016**

**1. KASIM BAGENDA
2. HOUSING FINANCE BANK LTD::: PLAINTIFFS**

VERSUS

SSENYONGA RONALD::: DEFENDANT

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. The plaintiffs brought this suit against the defendant for, recovery of land and property comprised in Kyadondo Block 111 Plot 1434 at Lubata (hereinafter called “the suit property”); declaration that the suit property belongs to the 1st plaintiff and was properly mortgaged to the 2nd plaintiff; declaration that the defendant is a trespasser on the suit property; special, general and punitive damages; mesne profits; an eviction order; and a permanent injunction.

2. The 1st plaintiff’s case is that he purchased the suit property at Ushs 85,000,000 from the vendor, Faith Mbabazi to whom he paid Ushs 30,000,000 and obtained a mortgage facility of Ushs 55,000,000 from the 2nd plaintiff which he paid to the vendor as the final balance of the purchase price. A mortgage deed between the 1st and 2nd plaintiffs was accordingly executed. After the purchase, the 1st plaintiff took possession, and was registered as the owner of the suit property, with the 2nd plaintiff as a mortgagee. On the 16 September 2016, without the plaintiffs’ consent or any claim of right, the defendant entered onto the suit



property; evicted the tenants, and took possession of the suit property. To date, the defendant occupies the suit property. The defendant denies any wrong doing. He asserts that he is the lawful owner of a Kibanja (customary holding) interest in the suit property, having acquired the same from Ms. Agnes Kabaziba, at a consideration of Ushs 55,000,000.

Representation:

3. Mr. Wanok Conrad of M/s KRK Advocates appeared for the 1st plaintiff while Mr. Bwayo Richard of M/s Nangwala, Rezida & Co Advocates represented 2nd plaintiff. The defendant was represented by Mr. Kigunddu Paul of M/s Imran Advocates.

The 1st plaintiff's evidence:

4. The 1st plaintiff led evidence of five witnesses: PW1 (Kasim Bagenda), PW2 (Faith Mbabazi), PW3 (Kizito Edward Semwogerere), PW4 (Mulindwa Yowasi), and PW5 (Christine Nazimuli). The 1st plaintiff relied on the following exhibits:
 - Exh.P1 – Search statement dated 16 June 2016;
 - Exh.P3 – Report and Valuation of the suit property by SM Cathan;
 - Exh.P4 – Sale Agreement of the suit property between the 1st plaintiff and Mbabazi Faith;
 - Exh.P5 – Bank Statement for the 1st plaintiff's personal account;
 - Exh.P6 – Receipt of certificate of title issued by the 2nd plaintiff; and
 - Exh.P7 – Certificate of title for the suit property.
5. The 2nd plaintiff called one witness, PW6 (Luzige Joseph). The 2nd plaintiff relied on the following documents:



- Exh.P8 – Mortgage application form;
 - Exh.P9 – Special powers of attorney;
 - Exh.P10 – Letter of offer for the mortgage;
 - Exh.P11 – Mortgage deed; and
 - Exh.P12 – Statement of account for the 1st plaintiff issued by the Bank.
6. The defendant led evidence from two witnesses: DW1 (Nabukalu Rose), and DW2 (Ssenyonga Ronald) who gave evidence via video link. The defendant relied on the following documents:
- Exh.D1 – Sale agreement between the defendant and Kabaziba Agnes;
 - Exh.D2 – National Identity Card for Mbabazi Faith;

Issues to be determined by Court:

7. The parties agreed on the following issues for court's determination:
- i). Who is the rightful owner of the suit property?
 - ii). Whether or not the defendant is a trespasser on the suit property?
 - iii). What are remedies available to the parties?
8. I shall consider the issues 1 and 2 concurrently, and conclude with Issue No.3.

Issues No.1 & 2:

9. The 1st plaintiff asserts that she is the lawful owner of the suit land, and bears the burden to prove so. See sections 101, 102, 103 & 106 of the Evidence Act (Cap 6). See also the Supreme Court of Uganda case of Senkungu & 4 Other v. Mukasa (Civil Appeal 17 of 2014) [2017] UGSC 14. The 1st plaintiff adduced evidence of five witnesses to prove his case.



10. PW1 (Kasim Bagenda) testified that in 2015, with the help of a broker, Kizito Edward, he identified the suit property which was on sale. That he met the owner, Mbabazi Faith, and they agreed on the purchase price of Ushs 85,000,000. That he paid Ushs 30,000,000 to the vendor, and applied to the 2nd plaintiff, for a loan of Ushs 55,000,000 to cover the balance of the purchase price. That the two parties executed a sale agreement, which was witnessed by Agnes Kabaziba, his distant relative. That the vendor introduced him to 7 tenants who occupied the rental units in the same compound as the main house where the vendor lived. The vendor also introduced him to the local council chairman, a one Mulindwa. That the 2nd plaintiff paid the vendor, the balance of the purchase price (through the Bank), and the vendor handed over the suit property, which he took possession of, put a tenant in the main house, and maintained the tenants in the 7 rental units. He relied on several documents including a photocopy of a search report for Block 111 Plot 1434 dated 16 June 2015 (Exh.P1), a photocopy of a certificate of title in his name (Exh.P7) and a Valuation Report (Exh.P3), sale agreement dated 23 June 2015 (Exh.P4) and a Housing Finance Bank Personal Account Statement (Exh.P5). The 1st plaintiff adequately proved that he was entered as the registered owner of the suit property on the 24 July 2015 under Instrument Number WAK00055832.
11. PW2 (Faith Mbabazi) testified in favour of the 1st plaintiff, and confirmed selling the suit property to the 1st plaintiff. She testified that she previously owned the legal/title interest in the suit property, and not a Kibanja.
12. PW3 (Edward Kizito Semwogerere) testified that Mbabazi Faith sold the suit property to the 1st plaintiff. That he was the broker/land agent between the two



parties, and witnessed the sale agreement. He corroborated the evidence of the 1st plaintiff.

13. PW4 (Mulindwa Yowasi) the local council 1 chairman also gave evidence that the suit property was sold to the 1st plaintiff by Faith Mbabazi.
14. PW5 (Christine Nazimuli), Legal Manager with Housing Finance Bank (the 2nd plaintiff) testified that she knows the 1st plaintiff as their client who applied for a house purchase mortgage of 55 million in June 2015. That he presented a certificate of title, and on conducting a search at the land office, the title was in the name of Mbabazi Faith. That the Bank's valuers and surveyors inspected the land, opened boundaries, and conducted all the procedures for disbursement of a loan and registration of a mortgage. That the duplicate certificate of title was received at the Bank from Faith Mbabazi, and that the suit property is currently mortgaged to the Bank. She referred court to the Mortgage deed (Exh.P11).
15. Having regard to the evidence before me, I am satisfied that the 1st plaintiff is the registered owner of the suit property. I am equally satisfied that the 2nd plaintiff lawfully registered a mortgage on the suit property.
16. The production of a certificate of title is conclusive proof of ownership. Section 59 of the Registration of Titles Act (Cap 230) provides that:

“Certificate to be conclusive evidence of title

No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every



certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.”

17. In the case of *Kampala Bottlers Ltd v. Damanico (U) Ltd, Supreme Court Civil Appeal No.22 of 1992 (coram: S.W.W. Wambuzi, C.J., A. Oder, J.S.C., H. Platt, J.S.C)* it was held that

“[...] production of the certificate to title in the names of the appellant is sufficient proof of ownership of the land in question unless the case falls within the provisions of section 184 of the Registration of Titles Act.”

18. Before I consider the defendant’s case, I wish to warn myself on the burden of proof. In the case of *Greenland Bank (In Liquidation) v. Richard Ssekiziyivu t/a Global General Auctioneers, High Court (Commercial Division), Civil Suit No.501 of 2001 (per Justice Yorokamu Bamwine (as he then was))*, it was held that:

“When [a] party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof, that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption.”

See also the Supreme Court of Uganda case of *J.K Patel v. Spear Motors Limited, SCCA No.4 of 1991*

19. Accordingly, the burden of proof now shifts to the defendant, and pursuant to sections 101, 102, 103 & 106 of the Evidence Act (Cap 6), the defendant, having asserted ownership of a Kibanja on the suit land, he bears the burden to prove that he legally acquired the Kibanja.

20. In the case of Owembabazi Enid v. Guarantee Trust Bank Limited, High Court (Commercial Division), Civil Suit No. 63 of 2019, Justice Stephen Mubiru defined a Kibanja as follows:

“A Kibanja is a form of land holding or tenancy that is subject to the customs and traditions of the Baganda, characterised by user rights and ownership of developments on land in perpetuity, subject to payment of an annual rent (busuulu) and correct social behaviour, distinct and separate from ownership of the land on which the developments are made and in respect of which the user and occupancy rights exist.”

21. In the instant case, the defendant claims to have acquired a Kibanja on the 13 July 2016, and he bears the burden to prove that it was acquired in accordance with the applicable law at the time. The applicable law was the Land Act (Cap 227) which provides in section 34(1), (2) & (3) as follows:

“34. Transactions with the tenancy by occupancy

(1) A tenant by occupancy may, in accordance with the provisions of this section, assign, sublet or subdivide the tenancy with the consent of the land owner.

(2) A tenancy by occupancy may be inherited.

(3) Prior to undertaking any transaction to which subsection (1) refers, the tenant by occupancy shall submit an application in the

prescribed form to the owner of the land for his or her consent to the transaction.”

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) No transaction to which this section applies shall be valid and effective to pass any interest in land if it is undertaken without a consent as provided for in this section, and the recorder shall not make any entry on the record of any such transaction in respect of which there is no consent.”

22. The first point to note is that the defendant failed to adduce evidence to prove that Kabaziba Agnes who allegedly sold him the Kibanja had title to pass onto him. Whereas the defendant asserted that on the 23 June 2015, Kabaziba Agnes purchased the suit property from Faith Mbabazi; the defendant failed to produce the alleged purchase agreement. A copy of the alleged purchase agreement dated 23 June 2015 was included in the defendant’s trial bundle, but during the hearing of the case, the defendant failed to produce the original, and it was not admitted in evidence. The defendant also failed to produce the said Kabaziba Agnes to give evidence on how she acquired the Kibanja from Faith Mbabazi. The alleged seller of the Kibanja to Kabaziba Agnes is Faith Mbabazi but she denied ever selling a Kibanja to Kabaziba Agnes. PW2 (Faith Mbabazi) gave evidence, and denied selling her land to Kabaziba Agnes on 23 June 2015. She testified that on that day, she only sold land to the 1st plaintiff. She denied signing a sale agreement between Kabaziba Agnes and herself. PW3 (Edward

Kizito Ssemwogerere) also denied that a sale took place between Faith Mbabazi and Kabaziba Agnes. The inevitable conclusion is that the defendant, who bears the burden of proof, failed to prove that Faith Mbabazi sold a Kibanja to Kabaziba Agnes, and therefore, Kabaziba Agnes had no Kibanja to sell to the defendant. The legal rule that “nemo dat quod non habet (no one can give what they do not have) is applicable to the alleged transaction between Kabaziba Agnes and the defendant. See the case of Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA). Since Kabaziba Agnes never acquired a Kibanja on the suit property, the alleged sale agreement between the defendant and Kabaziba Agnes (Exh.D1), is a nullity. The defendant never acquired a Kibanja on the suit property.

23. Secondly, and most importantly, for a transfer or assignment of a Kibanja from one holder to another to be valid under the law, the registered owner of the land must render his or her consent. Therefore, according to the law, the sale of a Kibanja without the consent of the registered owner of the land is null and void. This is the effect of the holding by the Court of Appeal of Uganda in the case of Jennifer Nsubuga v. Michael Mukundane & Another, Court of Appeal Civil Appeal No. 208 of 2018 (Coram: Madrama, Mulyagonja & Mugenyi, JJA), where Justice Monica K. Mugenyi, JA held that:

“My construction of sections 34(3) and 35(1) of the Land Act is that they are couched in mandatory terms. In any case, sub-section (9) unequivocally clearly states that no transaction to which section 34 applies shall be valid to pass any interest in land if it is undertaken without a consent as provided for. In a nutshell, therefore, a kibanja holding on mailo land is demonstrated by proof of consent by the

landlord or mailo owner for the occupation of his/ her land, or proof of succession to the kibanja holding in accordance with applicable customary practices, which would in itself require proof of the envisaged customary practices. Once the existence of such interest has been established, any assignment thereof would be subject to the consent of the mailo owner. In any event, s/he or would be entitled to the first option of assignment.”

24. DW1 (Nabukalu Rose), a wife to the defendant testified that her husband bought the suit property on the 13 July 2016. That he paid 50 million shillings, and after some time they took possession of the house, and are currently staying in the said house.
25. DW2 (Ssenyonga Ronald) testified that on the 13 July 2016, he purchased a Kibanja on the suit property from Ms. Agnes Kabaziba at Ushs 50,000,000. He relied on Exh.D1, a sale agreement between the two parties. The defendant further testified that Ms. Agnes Kabaziba had previously acquired the Kibanja interest from Ms. Faith Mababazi. In her evidence, PW2 (Faith Mbabazi) denied knowledge of the defendant; stating that “I do not know Ssenyonga Ronald”. PW2 (Faith Mbabazi) further testified that she knows Ms. Agnes Kabaziba but that she did not sell the suit property to her.
26. According to the law, the defendant can only prove ownership of a Kibanja on the suit property, if he can prove that the registered owner at the time of the purchase, consented to the transaction. The defendant claims to have acquired a Kibanja on the 13 July 2016, and the registered owner at the material time, according to Exh.P7, the certificate of title of the suit property, was Kasim

Bagenda, the 1st plaintiff, who was entered on the certificate of title on the 24 July 2015. Before him, the registered owners of the suit property were Faith Mababazi (entered on the title deed on the 25 April 2014) and Adrian Kasasa (entered on the title deed on the 15 November 2013). There is no evidence, that any of these registered owners of the suit property (both current and previous), have ever consented to the transaction for the purchase of the Kibanja. On the contrary both Kasim Bagenda (current registered owner) and Faith Mbabazi (previous registered owner) dispute claims by the defendant that he owns a Kibanja interest in the suit property.

27. There is adequate evidence for me to conclude that the transaction, pursuant to which the defendant claims to have acquired a Kibanja interest in the suit property, was never consented to by the registered owner of the land. Consequently, in view of the lack of consent of the registered owner of the land to the alleged Kibanja transaction, it my decision that the defendant did not legally acquire a Kibanja on the suit property. The defendant is not a lawful occupant within the meaning of section 29(1)(a) of the Land Act (Cap 227). Accordingly, the defendant has no security of occupancy under the provisions of section 31 of the Land Act (Cap 227). The defendant's possession of the suit property is illegal, and he should be evicted.
28. To conclude on Issues No.1 and 2, it is my decision that the plaintiff, Kasim Bagenda is the lawful owner of the suit property. The 2nd plaintiff was lawfully registered as a mortgagee on the suit property. The transaction for purchase of a Kibanja between the defendant and Ms. Agnes Kabaziba is null and void for lack of consent from the registered owner of the land. The defendant is accordingly, a trespasser on the suit property. See the case of Justine E. M. N.



Issue No.3: What remedies are available to the parties?

29. The 1st plaintiff prayed for the following reliefs: that he is rightful owner of the suit property; a declaration that the defendant is a trespasser on the suit property; an eviction order; a permanent injunction; special, general, and punitive damages; mesne profit; and costs of the suit.
30. Special damages must be specifically pleaded and proved. Strict proof does not however mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example, by evidence of a person who incurred the expense. See the case of Haji Asuman Mutekanga v. Equator Growers (U) Ltd, Supreme Court Civil Appeal No.7 of 1995. In the instant case, I am satisfied that the 1st plaintiff is entitled to special damages of Ushs 580,000 being transport costs incurred as a result of the unlawful actions of the defendant.
31. The 1st plaintiff claimed mesne profits on account of the defendant's wrongful possession of the suit property. Section 2(m) of the Civil Procedure Act (Cap 71) provides that:
- “mesne profits” of property means 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”*

32. Mesne profits are a mode of compensation that can be claimed against a person in unlawful possession of property. Such person is liable to pay a reasonable sum to the aggrieved party for the wrongful possession of property. See the case of Inverugie Investments Ltd v. Hackett [1995] 1 WLR 713.

33. Counsel for the 1st plaintiff claimed mesne profits of Ushs 46,480,000 for the 83 months that the defendant has been in unlawful possession of the suit property since September 2016. The evidence of the 1st plaintiff is that when he bought the suit property, he put a tenant in the main house and maintained the 7 tenants in the rental units. PW2 (Faith Mbabazi) confirmed this fact and stated that the tenants were each paying Ushs 80,000 as monthly rent. The plaintiff testified that the tenants on the suit property were evicted on 16 September 2016 by the defendant who took possession of the whole property which he still occupies to date. I earlier found that the defendant is a trespasser on the suit property, and his continued usage of the suit property and the developments thereon for his benefit, entitles the 1st plaintiff to an award of mesne profits. The total monthly rent from the units would be Ushs 560,000 per month. The defendant has been in illegal occupation of suit property for 83 months. No evidence was led on the rent collected from the main house. The defendant shall pay the 1st plaintiff mesne profits of Ushs 46,480,000.

34. The award of general damages is at the discretion of the court in respect of what the law presumes to be a natural and probable consequence of the defendant's act or omission. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong. See the case of Kibimba Rice Ltd v. Umar Salim, Supreme Court Civil Appeal No.17 of 1992. Counsel for the 1st plaintiff asked

court to award the 1st plaintiff, general damages of Ushs 40,000,000, but I consider the claim to be excessive. I award general damages of Ushs 20,000,000 to the 1st plaintiff.

35. Punitive damages are awarded to punish, deter, and express outrage of court at the defendant's malicious, vindictive, oppressive or malicious conduct. See the case of *Ahmed El Termewy v. Hassan Awdi & Others, HCCS No.95 of 2012*. Counsel for the 1st plaintiff prayed for punitive damages of Ushs 50,000,000 while counsel for the 2nd plaintiff prayed for punitive damages of Ushs 10,000,000. The basis for award of punitive damages in the instant case is that the defendant unlawfully and forcefully took possession of the suit property, and yet he has no proof of ownership whatsoever. There is evidence of high handedness in the conduct of the defendant. In order to discourage such conduct, I find that the plaintiffs have proved the case for the award of punitive damages. The 1st plaintiff is awarded Ushs 10,000,000 in punitive damages, while the 2nd plaintiff is awarded Ushs 10,000,000.
36. According to *section 27 (2) of The Civil Procedure Act (Cap 71)*, costs of any action follow the event unless Court for good cause orders otherwise. The plaintiffs being the successful parties in this case are entitled to costs of the suit.

Final order of the court:


37. I enter Judgment in favour of the plaintiffs with the following declarations and orders:
- 1). That the 1st plaintiff, Kasim Bagenda, is the lawful registered owner of the suit property comprised in Kyadondo Block 111 Plot 1434 at Lubata measuring 0.0390 Hectares.



- 2). That the defendant, Ssenyonga Ronald, is a trespasser on the suit property.
- 3). That the defendant, Ssenyonga Ronald, shall vacate the suit property within 3 (three) months from the date of this judgment, in default of which, he shall be evicted in accordance with *The Constitution (Land Evictions) (Practice) Directions, 2021.*
- 4). That a permanent injunction issues restraining the defendant, his agents, servants, workmen and all those claiming under him and/or deriving authority from him from trespassing, encroaching, interfering and/or in any way dealing with the suit land.
- 5). That the defendant shall pay special damages of Ushs 580,000 (Uganda shillings five hundred and eighty thousand) to the 1st plaintiff.
- 6). That the defendant shall pay mesne profits of Ushs 46,480,000 (Uganda shillings forty six million four hundred and eighty thousand) to the 1st plaintiff.
- 7). That the defendant shall pay general damages of Ushs 20,000,000 (Uganda shillings twenty million) to the 1st plaintiff.
- 8). That the defendant shall pay punitive damages of Ushs 10,000,000 (Uganda shillings ten million) to the 1st plaintiff.
- 9). That the defendant shall pay punitive damages of Ushs 10,000,000 (Uganda shillings ten million) to the 2nd plaintiff.
- 10). That the defendant shall pay costs of the suit to the 1st and 2nd plaintiffs.



IT IS SO ORDERED.


BERNARD NAMANYA
JUDGE
13 September 2023

Delivered by E-mail:

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