

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO. 570 OF 2017

MUHAMMADI MWANJE :::PLAINTIFF
(Administrator of the estate of the late Arajabu Kibembe Omulangira)

VERSUS

1. SEKISENYI GEOFFREY
2. SEKAJJA JACKSON
3. FRED SEBUKALU
4. NSIMBE ROBERT
5. SEKASIKO GODFREY } :::DEFENDANTS

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. This judgment is in respect of a suit brought by ordinary plaintiff against the defendants for: i) a declaration that the defendants are trespassers on land comprised in Buruli Block 124, Plot 48, land at Kyamutengo, Nakasongola district (“suit land”); ii) an order for vacant possession against the defendants from the plaintiff’s land; iii) general damages; and iv) costs of the suit.

Background:

2. According to paragraph 4 of the *plaint*, the plaintiff’s cause of action arose as follows:

a) The plaintiff is the administrator of the estate of the late Arajab Kibembe Omulangira and is in possession of a certificate of title for the suit land;



- b) That in 2009, the defendants forcefully and without any lawful excuse trespassed on the suit land, and started building houses, grazing cattle and carrying out other forms of farming on the suit land;
 - c) That since 2016, the plaintiff ordered the defendants to vacate his land but they refused until 2017 when the plaintiff and the defendants entered into an agreement wherein it was agreed that the defendants purchase their bibanjas at a cost of UGX 1 million for each acre of land; and
 - d) That the defendants have since failed to honour the agreement.
3. The defendants did not file a written statement of defence nor did they appear to defend the suit at the hearing.

Representation:

4. The plaintiff was represented by *Mr. Gad Batala*. The defendants did not file a written statement of defence despite service of court process. At the hearing held on the 30th day of September 2021, court ordered the hearing of the suit to proceed ex parte under the provisions of ***Order 9 rules 10 & 11*** of the ***Civil Procedure Rules***.

Issues:

5. The plaintiff proposed the following the issues for determination:
- i) Whether or not the defendants are trespassers on the suit land.
 - ii) What are the remedies available to the parties?

Consideration and determination of the issues:

6. Counsel for the plaintiff filed written submissions which I have considered in arriving at my decision.

Issue No. 1: Whether or not the defendants are trespassers on the suit land

Locus in quo visit

7. On the 8th December 2022, I carried out a locus in quo visit to the suit land located at Kazwama, Nakasongola District, in the presence of the plaintiff and counsel for the plaintiff. As soon as I arrived at the location of the suit land, I was shown a house belonging to the 4th defendant (Nsimbe Robert) that sits on the suit land.
8. As I was preparing to visit the residences of the rest of the defendants, who according to the information that I gathered from the locus visit also own residences on the suit land, a one Byabagambi Fred, who introduced himself as the chairperson of Kazwama Town Council arrived at the scene, and strongly objected to the proceedings of the locus in quo, saying that the area residents were not given advance notice of the locus visit. As a result of this, I stopped the proceedings of the locus in quo owing to the hostility and resistance to the visit by the chairperson of Kazwama Town Council.
9. Although during the locus in quo visit, Mr. Byabagambi Fred, chairperson of Kazwama Town Council appeared to have information regarding the history of the suit land, and how the defendants settled on the land, I did not allow him to

testify because he was not a witness in the case and had not testified in court, and according to the *Court of Appeal of Uganda* in the case of ***Bongole Geofrey & 4 Others v Agness Nakiwala (Civil Appeal No. 0076 of 2015) [2018] UGCA 27***, it is irregular to allow persons who were not witnesses in the case, and had not testified in court, to give evidence at the locus.

Trespass to land

10. According to the *Supreme Court of Uganda* in the case of ***Justine E. M. N. Lutaya v. Stirling Civil Engineering Company Ltd, Civil Appeal No. 11 of 2002 (per Mulenga, J.SC)***:

“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass [...] Where trespass is continuous, the person with the right to sue may [...] exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended [...] For purposes of the rule, however, possession does not mean physical occupation. The slightest amount of possession suffices [...] legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser [...] by virtue of her certificate of title, the appellant had

legal possession of the suit land, and therefore, the capacity to sue in trespass [...]”

11. In the case before me, the plaintiff holds a certificate of title of the suit land in his names. As per *Ex. P2*, the plaintiff was entered as the registered proprietor of the suit land in 2016, vide Instrument Number BUK 143514 as the administrator of the estate of the late Kibembe Arajabu Omulangira, as per cause No. HCT-00-FD-AC-557 of 2015.
12. I am satisfied that the plaintiff is the registered proprietor of the suit land, and by virtue of that status, he has legal possession of the suit land, and therefore capacity to sue in trespass.

Burden of proof

13. The plaintiff has a burden of proof to adduce evidence on the balance of probabilities, that the defendants are trespassers on the suit land. *Sections 101, 102, 103 & 106 of the Evidence Act (Cap 6)* provide that:

“101. Burden of proof

(1) 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.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

106. Burden of proving, in civil proceedings, fact especially within knowledge

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.”

14. The *Supreme Court of Uganda* in the case of ***Senkungu & 4 Ors v. Mukasa (Civil Appeal 17 of 2014) [2017] UGSC 14 (per Augustine S. Nshimye, J.S.C)*** held that:

“In civil trials, the burden of proof is the obligation to present evidence on the subject of the law suit; that is, to prove or disprove a disputed fact.”

15. To discharge the burden of proof, the plaintiff adduced the following evidence to prove his case: Two witnesses (PW1 – Muhammadi Mwanje; and PW2 – Fred Luyima), as well as Exhibits P1 (statement of search of the suit land); P2 (certificate of title for the suit land); P3 (probate for the administration of the estate of the late Kibembe Arajabu Omulangira); and P4 (Minutes of the meeting with the defendants held on the 10th January 2017).

16. The evidence relevant to the defendants being trespassers on the suit land is contained in *paragraphs d, e, f, g, h, i, j & k* of the statement of *PWI (Muhammadi Mwanje)*, in which the witness states:

“d) That in the year 2009, the defendants forcefully and without any lawful excuse trespassed on the suit land and started building houses among other things, grazing cattle on the suit land and other forms of farming [...].

e) That since 2016, I ordered the defendants to vacate the suit land but in vain.

f) That it was not until the 10th day of August, 2017 the defendants and I entered into an Agreement in relation to the suit land [...].

g) That it was agreed that the defendants were to pay for the surveying services so as to the defendants could get to know the sizes of their bibanjas.

h) That each defendant was to pay Uganda shillings one million (Ugshs. 1,000,000) for each acre of land.

i) That Uganda shillings two million five hundred (Ugshs. 2,500,000) was for surveying services and each of the defendants was to pay the above amount to me not later two (2) months from the date of the Agreement.

j) That the two (2) months within which the defendants were supposed to have fulfilled the above terms expired on the 13th day of March 2017.

k) That the defendants are trespassers on the suit land and have never paid me any rates for the use of the suit land.”

(underlining is mine for emphasis)

17. According to *paragraph 3 of Ex. P4* (Minutes of the meeting with the defendants held on the 10th January 2017):

“The landlord [plaintiff] will take the balance of the land and use it as he wishes at least 60 acres out of 120 acres or whichever will be the balance or residue on the above land.”

18. I have carefully considered the evidence adduced by the plaintiff, and it proves that the defendants have an interest in the land which is recognised by the plaintiff. In particular, according to *paragraph 3 of Ex. P4* (Minutes of the meeting with the defendants held on the 10th January 2017), the plaintiff agreed with the defendants that he will surrender 60 acres of the suit land to the defendants. This proves that the plaintiff acknowledges that the defendants have an interest in the suit land. As a matter of fact, during the locus in quo, the plaintiff showed me a house on the suit land, owned by the 4th defendant (Nsimbe Robert). In view of this acknowledgement, I do not see how the plaintiff can turn around and claim that the defendants are trespassers on the suit land.

19. The case before me is one where the defendants did not file a written statement of defence and never entered appearance at all. However, the default by the defendants to enter appearance does not in any way diminish the cardinal obligation of the plaintiff to prove his case on the balance of probabilities. Having regard to the evidence before me, and being aware of the fact that the defendants did not defend this matter nor did they adduce any evidence, I am not satisfied that the evidence adduced by the plaintiff is sufficient to shift the burden of proof and place it on the defendants. This is because of what I have

observed above that the plaintiff, in signing an agreement with the defendants admitting that they are entitled to 60 acres of the suit land (*Ex. P4*), cannot be the same person to condemn the defendants as trespassers.

20. This being a suit regarding trespass, and as per the decision in ***Justine E. M. N. Lutaaya (supra)***, the plaintiff had a burden to prove that the defendants made an unauthorised entry upon the suit land, and that burden was not discharged. In light of *Ex. P4 (Minutes of the meeting with the defendants held on the 10th January 2017)*, the plaintiff cannot claim that the defendants made an unauthorised entry upon the suit land, when in fact, in the said *Ex. P4*, the defendants' interest in the suit land is fully acknowledged.

21. *Issue No. 1* is therefore answered in the negative.

Issue No. 2: What are the remedies available to the parties?

22. According to the plaint, the plaintiff prayed for: a declaration that the defendants are trespassers on the plaintiff's land; an order for vacant possession against the defendants from the plaintiff's land; general damages; and costs of the suit.


23. Since I have answered *Issue No. 1* in the negative, it is my decision that the plaintiff is not entitled to any of the reliefs claimed.

24. Regarding costs of the suit, I decline to award costs of the suit to the defendants since they did not enter appearance to defend the suit.

Conclusion:

25. In conclusion, I dismiss this suit with no orders as to costs.

I SO ORDER.


BERNARD NAMANYA
Ag. JUDGE
27th January 2023