

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

HIGH COURT CIVIL SUIT NO. 0715 OF 2019

SUNDAY ALLAN KAKUMILIZI::::::::::::::::::::::::: PLAINTIFF

VERSUS

NANKYA LYDIA:::::::::::::::::::::::::::::::::DEFENDANT

BEFORE:HON. MR. JUSTICE TADEO ASIIMWE

JUDGEMENT

The Plaintiff sued the Defendant for trespass on his land comprised in Kyadondo Block 189 Plot 152 measuring 3 acres at seta, Nangabo Wakiso District (hereinafter referred to as the suit land) seeking for a declarations that the defendant is a trespasser on the plaintiff's land comprised in Kyadondo Block 189 Plot 152, land at Seeta Wakiso District, that the plaintiff is the owner of the suit land and that the defendant has no interest in the said land, that the defendant's entry onto the plaintiff's land



comprised in Kyadondo Block 189 Plot 152, land at Seeta, Nangabo Wakiso District as well as use of the same without the plaintiff's consent and or authority in unlawful and constitutes trespass, an order for general, punitive and exemplary damages, an order for vacant possession of the suit land against the defendant, permanent injunction and costs.

The facts of the case are that the Plaintiff is a registered proprietor of the suit land comprised in Kyadondo Block 189 Plot 152, land measuring 3 acres at Seeta, Nangabo Wakiso District having bought it from Hajji Abubaker Sebalamu Ganya in 2001 after he had compensated all the squatters.

That the Defendant trespassed on the suit land whereupon in August 2016 claiming a kibanja of her late husband one Sendagire who was not known by neither the plaintiff nor the landlord. That the defendant forcefully constructed a pit latrine on part of the suit land and destroyed the plaintiff's crops to the detriment of the plaintiff.

To that end, the Defendant denied the plaintiff's case counterclaimed that she is a lawful occupant of the suit land which is registered in the name of Nulu Kampi contending that registration of the plaintiff was fraudulent.

At scheduling, the following issues were agreed for determination by this Court;

1. Whether the Defendant is a trespasser to the suit land.
2. Whether the parties are entitled to any remedies sought.

At the hearing the plaintiff was represented by Counsel Katumba Chrisestom and Nalule Mariam while the defendant was represented by Atim Evelyne.

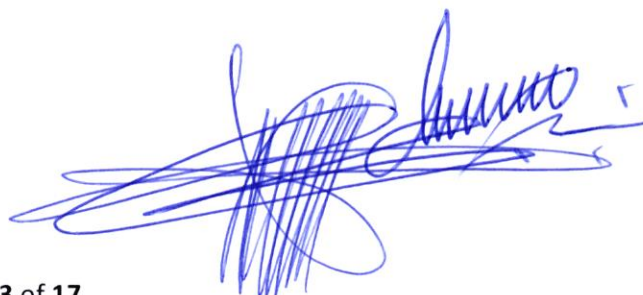
Both counsel filed written submissions which I shall consider.

THE LAW

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

In Miller V Minister of Pensions [1947]2 ALL E R 372 Lord Denning stated:

“That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not.”



It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

In a bid to proof their case, the plaintiffs led evidence of four witness and closed while the defendants called also four witnesses.

Evidence.

PW1 Sarah Kuteesa an Attorney of the plaintiff testified that the plaintiff is the lawful and registered proprietor of the suit land measuring 3 acres having bought the same in 2001 from Hajji Abubaker Sebalamu Ganya the then the registered owner of the land. That at the time of purchase the plaintiff was known as Patrick Katabula Kubiriza which names he later changed to Sunday Allan Kakumilizi in 2015 through a Deed Poll. That before the purchase her father conducted due diligence by carrying out physical search on the land from one Tebandeke Kennedy and the Chairman LCI who confirmed that indeed the land belonged to Hajji Abubaker Sebalamu Ganya. That the said Abubaker Sebalamu Ganya promised to remove squatters which he did before the purchase including the family of Sekaggo through Kangave Datson a son to William Sekaggo from whom the defendant's late husband derives her interest. That all the squatters were paid in the process of acquiring certificates of title from the seller and compensation for the crops. That the suit property at the time of purchase had a small house which

belonged to Sekaggo family but was vacated upon compensation allowing the plaintiff to start utilizing the suit land in 2007. That to her surprise in 2016, the defendant came and occupied the small house which had been purchased by the plaintiff in the suit land and constructed a pit latrine by destroying the plaintiff's food crops on part of the land hence a trespass which forced her father to obtain a temporary injunction from this Court which was defied by the defendant.

That the plaintiff has never known any Kasirye Sendagire to have owned any Kibanja interest on the suit land that the defendant's activities are injurious to her father's right in the suit land. That her father reported criminal cases against the defendant vide CRB 332 of 2017 and 658 of 2018 which cases were concluded against the defendant. That the defendant's unlawful actions have caused psychological and mental torture to the plaintiff for which he seeks general damages.

In cross-examination she confirmed that the suit land is in respect of Plot 152 and that clause (d) of the agreement shows that the compensation was done and that the agreement is not a forgery. That by the time of agreement, the landowner had already demarcated his plots. That when the Kibanja owner passed away, the people behind immediately left and their crops which were paid later. He confirmed that the agreement talks of her remaining on part of her land. That Paragraph (d) - Agreement says Sekago was compensated but PID4 was made after the agreement in PEX1 was made. That PID5- was that Enock was buying his interest

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He further stated that he has no agreement for compensation of Sekago family because they said they have no copy of agreement. That he is aware that the Sekaggo family got 63 decimals from the landlord Haji Abubaker Ganya. That he doesn't know how many got compensated save Sekaggo William.

the evidence of PW2, PW3 and PW4.

On the other hand, DW1, Mukasa Joseph Sendagire testified that he is a biological son of late Kasirye Sendagire Mbogga a son of late Herbert Edward Lutwama Mbogga. That the defendant is her mother and both parents were employed in UPDF who were constantly posted upcountry and therefore grew up with the grandfather. That he was born in Seeta Kasangati, Nangabo Sub County in home of his grandfather Edward Herbert Lutwama Mbogga. That he owned a kibanja in the said village measuring five (5) acres. That he had informed him that he had inherited the same from his father the late William Sekaggo (Senior). That the land had an old house that belonged to Sekaggo (Senior), family grave yards and a huge garden.

In cross-examination he stated that he had never seen the will of late Lutwama Herbert Mbuga but it was shown to him by a lawyer although he did not know the contents of that Will. That he stayed in Kasangati land since 1995 to date on his grandfather's land which was given to his father in 1995 as a donation. That they tried to measure the kibanja in 2015 after their father's death but was resisted by the Attorney of the

plaintiff alleging to have purchased it. That their father died at Kasangati and he stays in the same place with my mother. That DE2 is his father's document made on 11/5/2010 and it shows an address of Mukono. That According to DE3, the grant was issued in Mukono because she (appellant) was residing in Mukono.

The defendant testified as DW3 and stated that she is a retired UPDF and a widow of late Kasirye Sendagire and an administrator of his estate. That her late husband owned a kibanja/unregistered interest in the suit land measuring 2 acres which he inherited from his late father, Edward Herbert Lutwama Mbogga. That they have been in possession of the said kibanja since 1995 using it for banana plantation and they have known the family of Ganya to be the landlord. That in 2006 the plaintiff purchased a mailo interest to the suit land without consulting her. That in 2007 the plaintiff built his house next to her kibanja and fenced it off and has been attempting to evict her from her husband's kibanja through her Attorney Sarah Kuteesa (PW1). That her husband passed way in 2014 and thereafter criminal trespasses were commenced against her after demolishing a pit latrine and cut down her trees and she was never helped by police when she was forced to vacate the land by the plaintiff. That she was imprisoned for a case of threatening violence and taken to prison only to return when her land a kibanja had been fenced off by the plaintiff. And when their children cut the barbed wires they were also arrested and charged with malicious damage. That she was eventually served with



Court papers in this case and there are 3 other criminal charges pending in Kasangati Court despite the fact that she is the owner of the kibanja in disputed of which she prayed for Court to stop her eviction and penalize the plaintiff for terrorizing her.

In cross-examination, she confirmed that she was brought to the suit land in 1995 by her late husband Kasirye. That Kasirye got the suit land from his grandfather William Ssekago. She however later stated that she does not know how Kasirye got the suit land. That she knows William (Junior) as her in-law, who claims no interest in the suit land. That DE12 is a travel document of her late husband. That it shows he was a resident in Mukono, because in Mukono they resided in the barracks as soldiers. That the Grant of letters of administration was in Mukono court. That in the application I indicated the place of abode to be Mukono because that's where the deceased worked worked. That her landlord is Sebalamu Ganya Abubaker but no Busulu payment to date. That she has never searched in land office to know the true landlord and that she does not know the true landlord currently.

To support her case, she called DW1, DW2 and DW4 to confirm her ownership of the kibanja in issue.

Determination.

According to the pleadings, the evidence and written submissions on record, it appears that both parties claim trespass on the suit land against each other which is the crux of the first issue.

According to the authority of Justine E.M.N. Lutaaya vs Starling Civil Engineering Co. SCCA No.11 of 2002, trespass to land is premised upon interference with the possession of land. I must to mention that one's physical presence on the land or use or de facto control of it does not amount to possession sufficient to bring an action of trespass as one is required to have had an interest in the subject land.

In the case of John Katarikawe versus William Katwiremu [1977] HCB 210 at 214, it was observed by Byamugisha J., (as she then was) that interests in land, in particular, include registered and unregistered interests. In the instant case, whereas the Plaintiff's claim in the suit land is based on a registered interest, that of the Defendant is based on an unregistered interest. Byamugisha J., further observed in the case of Ojwang versus Wilson Bagonza CACA No.25 of 2002, that for one to claim an interest in land, he or she must show that he or she acquired an interest or title from someone who previously had an interest or title thereon. Whereas the Defendant does not dispute that the Plaintiffs are the registered owners of the suit land, the Plaintiff deny that the Defendants has a Kibanja interest thereon.

Counsel for the Defendant sought to defeat the Plaintiffs' title by raising an allegation of fraud against the Plaintiff when he argued that the Plaintiffs' interest was registered so as to defeat that of the Defendant whom they found already occupying the suit land. In doing so, Counsel relied on the cases of Kampala District Land Board & Anor versus Venansio Babweyaka & Ors SCCA No.2 of 2007, Kampala District Land Board & Anor versus National Housing & Construction Corporation CA No.2 of 2004 and John Katarikawe versus William Katwiremu [1977] HCB 210 at 214.

Whereas I do agree with the propositions of law as regards to fraudulent registration of title in the cases cited by Counsel for the Defendant, in this case, the Defendant's counterclaim was not premised on allegations of fraud. It also appeared that the Defendant by his pleadings does not seek to challenge or impeach the Plaintiff's title in the suit land save for claiming a Kibanja interest thereon which; in my view, can co-exist with the Plaintiffs' legal interest in view of Section 3(4)(b), 29(1)(b) Land Act, Cap 227 and Section 3(b) Land (Amendment) Act 2010. Given the above, I will proceed to investigate the Defendant's claim of Kibanja interest in the suit land.

According to the evidence on record, it is the defendant's claim that her late husband a one Kasirye obtained the Suitland from his late grandfather

William Sekajugo who had given it to kasirye's father. On the other hand, the plaintiff's claim is that he purchased the suit land from Abubaker sebalamu Ganya and that all Bibanja holders were compensated.

As earlier stated it is pertinent to determine the defendant's interest in the suit property stemming from her husband Kasirye who was given the suit land by his father Herbert Edward Mbogga who had inherited it from sekajugo William.

In my view, the defendants interest stems from a gift intervivos.

In the case of **The Registered Trustees of Kampala Archdiocese v Nabitete Nnume Mixed Co-operative Farm Limited (HCCS NO. 1559/2000) [2017] UGHCLD 4;**

A gift inter vivos was defined in Black's Law Dictionary 8th Edition at page 710 as;

"...a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property." Following the decision in Joy Mukobe vs. Willy Wambuwi HCCA No. 55 of 2005, the court held that;

"...for a gift intervivos to take irrevocable root, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift.



Delivery of the gift must be actual or constructive made during the donor's lifetime in a manner that depicts that the donor has stripped themselves of all dominion over the gift. And to illustrate that point further, Todd & Watts in Cases & Materials on Equity & Trusts 3rd Ed at 130 states as follows; -

For a gift to be perfect, the donor must actually complete the disposition of the subject matter in favour of the intended donee or execute a formal "deed of gift". Only then can a volunteer or donee enforce it. Intention not to be mistakenly inferred, must be joined by action.

Suffice to note, the defendant testified as DW3 and confirmed in cross examination that she does not know how her husband acquired the suit land. That her husband only used to tell her that his father gifted him the suit land which he had also inherited from his grandfather.

PE14 the will of the late Edward Lutwama Mbogga shows that the plaintiff's husband Kasirye was given land at kasawo Mukono district where he lived with his family until his death in 2014. It is therefore not surprising that both the letters of administration (PE11) in the estate of the late Kasirye and a provisional document form of the late Kasirye from UPDF (PE13) show that the place of a bode of the defendant's husband was Mukono as opposed to the location of the suit land at Nangabo seta in Wakiso District.

Further PE12, the application for letters of administration in the estate of the late Kasirye, the suit land was not listed and the place of abode was consistently mentioned as Mukono.

In my view the late Kasirye and his family stayed in Mukono. The evidence adduced by the defendants was insufficient to prove a gift *intervivos*.

In addition, the claim of the defendants still remains a kibanja interest whose principles of proof have been widely defined.

A Kibanja owner must know the landlord and pay the relevant dues.

In this case, DW3 stated in cross examination that she has never paid Busulu and has no proof that her husband paid Busulu. That the reason is because she did not know who the right land lord was. To me this alone qualifies them trespassers in the Suitland.

Ultimately, I find the Defendant's counterclaim unsustainable regardless of the claim of possession of the suit land.

The defendant is indeed a trespasser in the suit property.

WHETHER THE PLAINTIFF IS ENTITLED TO ANY REMEDIES

The Plaintiff sought for the following remedies.

A declaration that he is the rightful owners of the suit land.



I have already found that the plaintiff is the rightful owner of the suit land and I so declare.

A declaration that the defendant is a trespasser

I have already found that the defendant is a trespasser on the suit land, i so declare.

General damages

In assessment of general damages, Courts are mainly guided by the value of the subject matter, the economic inconvenience that the innocent party may have been put through and the nature and extent of the breach suffered. In **Charles Acire versus Myaana Engola HCCS No. 143 of 1993** it was also held that;

“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.”

Damages for trespass are per se;- once trespass is proved, there is no need for further explanation.

It is also trite law that in exercising the discretion to grant general damages, Court should not punish the Defendant for the breach but, rather put the Plaintiff in the position he or she was prior the breach complained of. See **Boschcon Civil & Electrical Construction Co., (U) Ltd versus Salini Construttiri Spa HCCS No. 151 of 2008.**

Taking in to account of the inconvenience suffered by the Plaintiff as a result of the Defendant's acts, I would have awarded UGX 5,000,000/= (five million only) as general damages to the Plaintiffs. However, the defendant is a retired officer who was brought to the Suitland by her late husband. She is a widow with children to look after with no known means. For those reasons I will not ward any damages.

Punitive and exemplary damages

“It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and although the benefit goes to the person who was wronged, their object is entirely punitive”. As per **Obongo Vs Municipal council of Kisumu [1971] EA 91,**

Punitive or exemplary damages are an exception to the rule that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct.

They are also awardable for the improper interference by public officials with the rights of ordinary subjects.

In this case I don't find any basis to award punitive damages and i shall not award the same.

PERMANENT INJUNCTION

Having earlier found that the plaintiff is the rightful owner of the suit land and that the 2nd defendant is not a bonafide purchaser for value, a permanent injunction restraining the defendants, their agents, assignees, legal representatives or transferees from any further trespass and/or claim on the suit land is hereby issued.

COSTS

Costs follow the event unless Court finds justification to decide otherwise. The Plaintiff is successful in this case. also granted costs of the main suit and the counter claim.

In conclusion, the counter claim fails and the plaintiff's case succeeds with the following orders;

1. A declaration that the plaintiff is the rightful owner of the suit land.
2. A declaration that the defendant is a trespasser.
3. A permanent injunction issues restraining the defendants, their agents, assignees, legal representatives or transferees from any further trespass and/or claim on the suit land.

4. No Punitive damages.

5. No order as General damages.

6. No order as to Costs.

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JUDGE

20/09/2023