

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)  
CIVIL SUIT NO. 634 OF 2020**

5 **NELSON KAWALYA .....PLAINTIFF**

**VERSUS**

10 **SEBANAKITTA HAMIS.....DEFENDANT.**

**Before: Lady Justice Alexandra Nkonge Rugadya**

**JUDGMENT:**

**Introduction:**

15 The plaintiff Mr. Nelson Kawalya is the registered proprietor of the land comprised in ***Kyadondo block 263 plots 123 and 124*** measuring a total of 5 acres (suit land.).

In this suit he seeks against Mr. Sebanakitta Hamis, the defendant an eviction order; a demolition order; a permanent injunction against the defendant and his  
20 agents; general damages; punitive damages; interest and costs of this suit.

**Facts of the Case:**

In the facts as pleaded by the plaintiff, it is stated that sometime in 2017 the defendant illegally constructed a commercial storied building on a portion of the plaintiff's land measuring 0.03 acres.

25 In 2020, the plaintiff engaged a surveyor who opened boundaries and established that indeed the defendant had constructed a storied building on the plaintiff's land.

The plaintiff then engaged lawyers who facilitated a meeting with the defendant with a view of finding an amicable settlement to the dispute but the parties failed to agree which gave rise to this suit.

5 The defendant on his part however denied the allegations, claiming that he knew nothing about the judgment that was passed by this court in favour of the plaintiff since he had neither been party to the suit nor had he been served with the said judgment. He also denied claiming interest whatsoever in the plaintiff's land.

10 That his participation in the meetings which were held between him and the plaintiff was purely in the spirit of settlement, but not a gesture of admission of the alleged trespass.

15 That the money demanded by the plaintiff which was at a rate of **Ugx 25,000,000/=** per decimal was too high for him, considering the fact the assessment for each decimal did not exceed a value of **Ugx 6,500,000/=**. That the plaintiff undertook to get back to the defendant but on account of his greed and frustration instead filed this suit.

20 The defendant further claimed that he is a lawful occupant of the *kibanja* on which he constructed a building, having lawfully bought it from the former *kibanja* owners, who were at all material times recognized by Kisingiri and whose interest can be traced as far back as 1930s, 1940s, 1950s, and 1960s as evidenced by the *busuulu* payments.

The defendant prayed for the suit to be dismissed with costs.

25 **Agreed facts:**

It was an agreed fact that the plaintiff is the registered proprietor of the suit land comprised in **Kyadondo block 263, plots 123 and 124 land at Bunamwaya.**



It was also agreed that the defendant had constructed a commercial building on a portion of the suit land in 2017.

**Issues:**

1. ***Whether the defendant is liable for trespass***

2. ***Remedies.***

**Representation:**

The plaintiff was represented by ***M/s Kawalya & Co. Advocates.*** The defendant on the other hand was represented ***by M/s UNIQUUS Advocates.*** As directed by court, both sides filed written submissions.

**Consideration of the issues:**

**Analysis of the evidence:**

**Issue No. 1. Whether the defendant is liable for trespass:**

**The law:**

***Section 101 of the Evidence Act, Cap. 6*** provides that 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.

***Section 103*** further stipulates that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. (***Sebuliba versus Co-operative Bank Ltd [1982] HCB 129***).

***Section 110 of the Evidence Act,*** stipulates that when the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner. The plaintiff in this case had the duty to prove that trespass, among other acts alluded to, was committed by the defendant.

Trespass to land occurs when a person makes an authorized entry upon land, and thereby interferes or portends to interfere with another person's lawful

possession of that land. (*Justine E.M.N. Lutaaya Vs Stirling Civil Engineering Co. Civil Appeal No. 11 of 2002 (SC)*).

Thus in *Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4 of 1987, the East African Court of Appeal* court declared that in order to  
5 prove the alleged trespass, it was incumbent on the party to prove that the  
disputed land belonged to him; that the defendant had entered upon that land;  
and that the entry was unlawful in that it was made without his permission; or  
that the defendant had no claim or right or interest in the land. (*Ref also: H.C.C.S No. 118 of 2012, Tayebwa Geoffrey and Anor Vs Kagimu Ngudde*  
10 *Mustafa; Justine E.M.N. Lutaaya Vs Sterling Civil Engineering Co, SCCA No. 11 of 2002*).

**Analysis of the evidence:**

The plaintiff in this case relied on the evidence of two witnesses, himself as **Pw1**  
and his surveyor, Senteza Bob as **Pw2**. He also presented several documents.  
15 which I will refer to in the course of this judgment.

It was the plaintiff's claim that he had legal possession of the land comprised in  
**plots 123 and 124** and presented the certificates of titles as proof. He refuted  
the claim that the defendant had protectable interest on the land since he had  
not obtained consent from him in purchasing the area occupied by him. He  
20 therefore committed trespass to the land.

Secondly, that the defendant who bought the *kibanja* in 2017 several years after  
the plaintiff had acquired the land from a Stanley Kisingiri, had put up a storied  
structure on part of the plaintiff's land and together with one Lutakome blocked  
the access road to his land.

25 Thirdly, that the structure was erected by the defendant before securing the  
approved plans from the relevant authorities.

Finally (and without isolating this from the above), the matter of ownership had  
been resolved by this court in a case filed by the plaintiff concerning one **plot**



**124**, which was also subject to the dispute in this suit. Under the said judgment, the plaintiff was declared as the legitimate owner of the land; and the said judgment was never challenged.

5 In his defence, the defendant however denied having committed the alleged acts of trespass and blocking access of the plaintiff's land to the main road. He also argued that the plaintiff had failed to prove that he had not sought the requisite approval before putting up the structure

10 in *paragraph 8* of his WSD he further claimed to be the lawful occupant of the *kibanja* on which he had constructed the building, having lawfully bought the same from one David Muyanja who in turn had purchased from Kaddu Fahad Hamudan.

15 That Muyanja gave him a copy of that sale agreement as evidence of previous ownership by the former *kibanja* holders, who according to him were at all material times recognized by Kisingiri and whose interest can be traced as far back as the 1930s-1960s.

That having purchased the interest formerly enjoyed by his predecessors he was therefore a lawful occupant, deriving protection under **section 29(1)(a) of the Land Act.**

20 The defendant relied on his own evidence as **Dw1** and that of his surveyor Asiimwe Dennis, as **Dw2** and also presented a number of documents, which court intends to refer to in the course of this judgment.

**Consideration of the issue:**

25 **Sub-issue 1: Whether the defendant derived protection under section 29 of the Land Act:**



**Section 29(1)(a)(i)** under which the defendant claims to derive protection defines the term *lawful occupant* as a person occupying land by virtue of the repealed ***Busuulu and Envujjo Law of 1928***.

5 Counsel for the plaintiff citing various authorities and **sections 1(1), 29(1)(b) and (2)(a) all from the Land Act, Cap. 227** claimed that the defendant did not fall under any of the above categories of tenancies which derive protection under the said law, as he had acquired the land in 2017 without the knowledge and consent of the plaintiff as the registered owner.

10 Furthermore, that he failed to present any proof that he had since 1980 when the titles were issued in his names paid to him any *busuulu* as the owner. The mother title was **plot 17**, out of which both **plots 123 and plot 124** had been created.

15 The two titles were tendered in court as **PExh 1 and PExh 2**, respectively. It was clearly indicated in the title for **plot 124** that the original owner had been Stanley Kitaka Kisingiri before it was transferred to him. The defendant on his part tendered in two sale agreements to prove how he had acquired the *kibanja* on that land.

**a) Sale transaction dated 30<sup>th</sup> May, 2007 (DExh 2(a)):**

20 The principle as correctly submitted by counsel for the defence is that in order for a party to claim interest in the land, his title ought to be derived from someone who had a recognized right on the land. **Godfrey Ojwang vs Wilson Bagonza CA No. 25 of 2002.**

25 The defendant on his part therefore relied on the receipts for the *busuulu* payments and in addition presented two sale agreements as proof of how he had acquired the *kibanja*.

In the first transaction, a one Fahad Hamadan purportedly acquired the *kibanja* as an inheritance from his father, Yaasi Kabugu in 2003. He sold it to one David Muyanja who later sold to the defendant.



**DExh 2 (a)** was the hand written sale agreement between them dated 30<sup>th</sup> May, 2007. The *kibanja* had initially exchanged hands at **Ugx 2,300,000/=** as the total consideration, paid in full by David Muyanja.

5 The sketch attached to the agreement indicates that the *kibanja* had been divided into two. It is not clear which of these divisions had been acquired and sold to the defendant in 2017 by David Muyanja as a *kibanja*.

The defendant's claim was that all the predecessors of the defendant on the suit land had lived on it uninterrupted and without doubt therefore he had equitable interest on that land. Neither Kaddu the vendor nor Muyanja the purchaser  
10 attended court as witnesses.

The defendant presented to court a distribution deed, dated 19<sup>th</sup> October, 2003 (**DExh 3**). The said scheme was a photocopy, which showed how the land located in Nyanama, belonging to Yaasi Kabugu had been distributed between his beneficiaries, amongst whom was his son, Kaddu. The share apportioned to  
15 Kaddu was 23 ft x 50 ft.

According to the counsel for the defendant, all efforts made to trace the original deed of distribution had failed. Evidence of such efforts were however not presented to court, so as to enable this court to exercise its discretion to have **DExh 3** admitted as secondary evidence. That evidence was therefore discarded  
20 by court.

**Section 180 of the Succession Act** in any case provides that an administrator of the estate of a deceased person is his or her legal representative for all purposes, and as such all the property of the deceased person vests in him or her.

25 Thus also by virtue of **section 25**, all property in an intestate devolves upon the personal representative of the deceased, as trustee for all the persons entitled to the property.

*Amulya*

Based on the above provisions Lubowa appearing in the deed as the person who distributed the estate of Yaasi Kabugu did so as a clan leader. There is nothing to show that he had the authority of court to distribute the estate.

5 In that regard also therefore, David Muyanja who bought from Kaddu could not therefore validly acquire interest and sell the *kibanja* acquired from a person who had no letters of administration. The three key people whose evidence was believed to be crucial to the defendant's case were not produced in court as witnesses.

10 On the issue of the *busuulu* payments presented in a bunch tendered in as **DExh 4**, court noted that they were issued in various names, with differing signatories.

The defendant did not however offer to explain who the persons making the payments were or who the recipients of the *busuulu* payments were to Kisingiri as the land owner and whether they had authority to receive the payments on his behalf; and what relationship the paying tenants had with the successive  
15 *bibanja* claimants, including Kaasi, Kaddu and Muyanja. The defendant did not endeavor to explain under what circumstances Muyanja had acquired the receipts before handing them over to the defendant.

As correctly noted by the plaintiff's counsel, the defendant who was neither a witness nor the person named on any of the *busuulu* receipts was not competent  
20 to tender them in.

Not least was the fact that they were issued in the names of a person who did not sell to him the *kibanja*. But secondly as noted correctly, a number of the receipts were issued for Kisingiri's estate at Bombo.

25 The defendant in his attempt to explain the discrepancies did not rule out the possibility however remote, that there could have been other areas in Bunamwaya owned by Kisingiri and in respect of which the *busuulu* receipts could have been issued. This court also takes judicial notice of the fact that Kisingiri himself had since passed on.





Counsel cited the case of **Robert Shaka vs Nsubuga Disan & Anor HCCS No. 0146 of 2018** arguing that any attempt to rely on oral evidence to vary the written document/deed (in this case the *busuulu* receipts) would offend the parole evidence rule.

- 5 He also cited **section 90 of the Evidence Act**, that after a period of thirty years this court would presume that both the receipts and signature appearing thereon were authentic, arguments which the plaintiff counsel did not accept. Court did not find these two authorities/principles entirely relevant or applicable to the instant case.
- 10 It is for the reasons as highlighted that the *busuulu* receipts were disregarded by this court as they could not help court to trace the original ownership of the *kibanja*, if at all it existed.

The defendant could not therefore satisfy this court that he or others before him had enjoyed peaceful and uninterrupted occupation of the *kibanja* as would entitle him to protection under the law as an equitable owner.

15

**b) Sale transaction dated 13<sup>th</sup> September, 2017: (DExh 1(a)):**

Regarding the second transaction therefore which is dated 13<sup>th</sup> September, 2017, it was the defendant's claim that Kaddu had sold the *kibanja* he obtained as a share from his father to the LC chairman, Muyanja David which Muyanja later sold to the defendant. (**DExh 1 (a)**).

20

Going by the contents of that agreement, the defendant had purchased the *kibanja* together with a three roomed house from David Muyanja at a sum of **Ugx 18,000,000/=** which amount he had paid in two instalments. The first instalment was made on the same day the agreement was made.

- 25 The balance of **Ugx 3,000,000/=** was paid on 12<sup>th</sup> December, 2017. The agreement which was endorsed by both parties was witnessed by Nakabugo Nusulah; Siraje Mugejjera; Zalwango Sarah.



None of those who were present at the time was however brought in court as a witness. On the date of completion of the balance, Ms Victo Mukasa, LC/Secretary for Finance however signed the agreement, endorsing it with the LC stamp.

- 5 This court also noted that not only was the block and plot numbers on which the *kibanja* was located missing from the pleadings, those details were also not reflected in the agreements.

The measurements appearing in both agreements: ***DExh 1(a) and DExh 2 (a)*** did not quite tally. It was partly for that reason that some surveys had to be  
10 conducted as there was no indication that any measurements were taken to ascertain the boundaries of the *kibanja*.

During the *locus* visit when the surveyor for the defendant was requested to take some measurements it was discovered as duly pointed out by the plaintiff's counsel that the defendant's building was on more land than what he had  
15 actually purchased.

It was also noted by court that it was the same Ms Victo Mukasa, LC/Secretary for Finance who had witnessed the said transaction. Her presence in court was therefore crucial to the defence case, yet she was never called in to testify.

**Sub-issue 2: Whether the defendant secured the permission/consent of the registered owner Legal requirement for consent:**  
20

A party who intends to purchase any part of the *kibanja* by virtue of ***section 29 of the Land Act*** needs to prove that prior consent of the owner was secured.

It is the general principle that a certificate of title is conclusive evidence of ownership, save where it is proved that fraud was committed. (***Ref: sections 59 and 176 of the RTA***).  
25

The ownership of the legal interest by Kisingiri in this case was not disputed. His names were entered on the title on 26<sup>th</sup> January, 1967, *vide Inst. KLA 46744*.





The plaintiff became registered owner on 10<sup>th</sup> April, 1980 vide *inst. No 93898*. No encumbrance was registered on the title.

Counsel for the plaintiff in his submissions referred to various provisions of the **Land Act, Cap. 227** that is, **sections 34(3), 34(9) and 35**, the gist of which is  
5 that a tenant by occupancy is required to obtain prior consent of the owner of the land before undertaking any sale transaction relating to that land. **(Section 34(3))**.

Secondly, no transaction is to be taken as valid and effective to pass any interest in land if it is undertaken without consent of the owner of the land. **(Section 34**  
10 **(9))**.

The third aspect which is equally important is that a tenant by occupancy who purports to assign the tenancy must give the first option to the owner of the land. **(Section 35)**. His point was that even if therefore the defendant was a valid *kibanja* holder, his failure to give the first option to the plaintiff rendered the  
15 transaction invalid.

In *paragraphs 6, 7, 8, 9 and 11* of his witness statement the defendant's argument was that he was informed by David Muyanja the LC 1 Chairperson and other residents that the land lord was Kabandwa Augustine.

Kabandwa had introduced himself as the land lord at the time the defendant was  
20 constructing on that land but that after construction, the plaintiff also came and introduced himself as the lawful owner, showing him his certificate of title.

That in one of the meetings which were convened to have the dispute resolved another landlord Beatrice Mukarurungi also came in to claim another part of his building. **(DExh 5)**. There is no indication anywhere that consent was secured  
25 by the defendant from any of the three claimants.

Indeed if the defendant's point was to be taken seriously and valid, both the sale agreements that he relied on should have been endorsed by any one of the three whom he was assured of as the legal owner.

In absence of such consent, the two transactions could not be considered to have been valid.

**Sub-issue 3: Whether or not the defendant could claim adverse possession:**

The defendant's counsel maintained that the plaintiff as a matter of fact never objected to the first transaction between Kaddu and Muyanja and cited **Crabb vs Arun District Land Council [1976] 1 Ch. 183**, relied on by court in **River Oli Division Local Government vs Sakaram Abdalla Okoya HCCA No. 018 of 2013** on the application of the doctrine of equitable estoppel which would bar the plaintiff from insisting on his legal rights, having regard to the dealings which took place which he chose to ignore. Counsel however did not avail to court the two authorities.

The suggestion was that the defendant was in adverse possession of the disputed land, a claim which the plaintiff counsel however refused to accept.

In the Supreme court decision earlier cited ( **Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu: SCCA 15 of 2019)**), the concept of adverse possession, providing preconditions that must be satisfied before court can consider one to be an adverse possessor in Uganda.

These are:

1) **Factual possession of the land. There must be physical control of the land in issue. The person in occupation must be dealing with the land as owner might be expected to, and no one must be doing the same;**

2) **The possession must be a continuous period of at least 12 years uninterrupted.**

3) **Animus possidendi; an intention to possess the land to the exclusion of all others, including the legal owner.**



the trespassers the land which at the time was comprised in **MRV 464 Folio 21, plot 124 Bunamwaya.**

That at all material time he and not Kabandwa was the legitimate owner of the suit property which fact the defendant ought to have established if he been  
5 diligent enough in his inquiries prior to the sale.

Related to that, **Civil Suit No. HCCS No. 72 of 2010 Nelson Kawalya vs Augustine Kabandwa t/a Kabandwa Education & Development Institute** had been filed to challenge the occupation of Kabandwa. It was not made clear to this court by the plaintiff's side at the time of hearing why the second suit was  
10 filed if the issue of ownership had already been determined as implied in the context of **PExh 4.**

But be that as it may, in the later suit the plaintiff claimed vacant possession of the land measuring 5 acres comprised in **LRV 131 FOLIO 12, land at Bnamwaya and Mengo, Block 263 plot 124.** Judgment was passed in his  
15 favour. The judgment and decree were tendered as **PExh 8 and PExh 9.** It was executed against Kabandwa who was subsequently evicted.

As noted by plaintiff's counsel the said suit had been filed by the plaintiff seven years before the defendant bought the land. It was therefore pertinent for this court to address the question as to whether or not the defendant was under  
20 those circumstances a *bona fide* purchaser for value.

In dealing with this question, there is need for caution in the application of the provisions of **section 29 of the Land Act** which provide that an occupant of land seeking a benefit from the provision of *bona fide* occupant has to prove that he had been in such possession for a minimum of 12 years, without any  
25 challenge to such occupation before the coming into force of 1995 Constitution.

It is quite apparent that that the intention of the Constitution and the **Land Act** as cited is to protect occupancy of a *bona fide* occupant, upon their adverse possession, within the meaning of the Act. (**Civil Suit No. 857 of 2000:**

*Anthony*

**Jonathan Masembe and 3 others vs. Makerere University & 2 others. (Owiny Dollo).**

A *bona fide* purchaser is defined in **Black's Law Dictionary 8<sup>th</sup> Edition at page 1271** as:

5

**"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."**

10

**Halsbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977, at page 27** provides:

15

**"Prior equitable interest in land can only be defeated by a bonafide purchaser for value without prior notice. Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation."**

20 Thus a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser for value without notice of the fraud, if he/she fails to make inquiries before such purchase is made.

25 In the recently concluded suit the plaintiff had filed an action against Augustine Kabandwa claiming ownership of 5 acres of the said land. As held by court Kabandwa who was the defendant in that suit, had been declared a trespasser on that land and was evicted from the land. Neither the defendant nor Kabandwa challenged/ appealed against that decision.

*Anthony*



With an ongoing suit in court over the land, the defendant could not have acted prudently in acquiring land at a time when the ownership was being challenged. He went ahead to put up a storied structure before waiting for the outcome of the decision from court. Such ought to have been a red flag to him, before the  
5 purchase he made in 2017.

In all cases, a party who knows of an order whether null or valid, regular or irregular cannot be permitted to disobey it as long as it existed. (***Hadkinson vs Hadkinson [1952] all E. R.***). In short, a judgment of the court if undischarged must be obeyed. (***Hon. Sitenda Sebalu vs Secretary General of the East African Community Ref No. 8 / 2012.***)  
10

Based on that judgment counsel for the plaintiff rightly so, disputed the defence claim that he had secured consent of one Augustine Kabandwa at the time when the issue of ownership was still in court against him.

The defendant who having had constructive knowledge of the proceedings touching on the land part of which he occupied cannot be seen to argue (as his  
15 counsel did), that the dispute between the plaintiff and Kabandwa had made it difficult for the defendant to know that the land lord was the plaintiff.

Particularly so, when the plaintiff had presented to him the certificate of title (as admitted by him under *paragraph 8* of his statement), and had even evicted  
20 Kabandwa.

A key component of due diligence is prior consultation and any such failure to make reasonable inquiries, ignorance or negligence forms particulars of fraud. The arguments fronted by the defence were confirmation that Kabandwa and Muyanja had duped him into believing that Kabandwa was the registered owner  
25 which claims, rather unfortunately, the defendant did not attempt to verify.

Given the fact that the vendor was also the LC1 chairman, the duty to widely consult becomes even more critical.

In any case as declared in the recent case of **Yovani Katosa & 2 Others vs Fred Mbabazi Civil Appeal No. 125 of 2014** (drawn to the attention of this court by counsel for the plaintiff, which authority is binding to this court), the plea of *bonafide* purchaser would only be available to a party who holds a certificate of title.

Even where the plaintiff was not in physical possession as argued in the defence counsel's submissions, there would still have been no way court would have regarded Kabandwa's consent (if at all any) as valid since he never presented a certificate of title to him at the time of sale or for that matter, to court during his trial. Nor was he in any case ever been validly registered on the title as the owner.

Kabandwa's troubled stay on that land said it all. His eviction in execution of the judgment should have put the defendant on notice of the questions surrounding his ownership. He could not therefore have passed on better title than what he himself possessed.

Thus on account of the defendant's failure to conduct a prior search to establish who the registered owner was and secure his consent, the defendant was not a *bona fide* purchaser for value.

All in all, the case of **David Byatika Matovu vs Richard Kikonyogo, HCCA No. 3 of 2014** cited by counsel for the plaintiff duly summarizes the principle of law that in selling and purchasing of a *kibanja* on titled land the consent of the landlord is mandatory.

Even though in the present case it is clear to court that sale transactions were made over the land acquired by the defendant, the two transactions were illegal on account of the fact they both contravened vital provisions on consent as spelt out under **sections 34 and 35 of the Land Act, Cap. 227**.

Under those circumstances the defendant who was claiming to be an adverse possessor could not pursue that right having bought the *kibanja* in 2017,





decades after the plaintiff acquired ownership and duly confirmed as owner through the courts of law.

The defendant did not therefore satisfy the pre-conditions of an adverse possessor or rely on the plea of a *bona fide* purchaser for value to claim valid ownership.

He therefore had no valid interest protectable under **section 29 of the Land Act**.

**Sub-issue 4: Whether the defendant blocked the access road?**

Counsel for the plaintiff submitted that the evidence that the plaintiff's land had access to the main road remained uncontroverted.

A right of way is defined as *the right to pass over another's land. It may exist as a public right exercisable by anyone; as an easement for the benefit of a particular piece of land; or as a licence purely personal to the person to whom it is granted. (Oxford Dictionary of Law 5<sup>th</sup> Edition)*. Availing access to a public road is also a requirement under the **National Physical Planning Standards and Guidelines 2011**.

The plaintiff's counsel in his submissions claimed that the defendant's structure covered about 90% of the plaintiff's land; that the plaintiff had also been denied access to the main road; and that part of the defendant's house was constructed in a road reserve, claims which the defendant's counsel however disputed.

The record shows that a complaint to that effect had been lodged in the office of the Town Clerk, Bunamwaya by one Henry Kawalya holding powers of Attorney granted to him on 28<sup>th</sup> February, 2022 by the plaintiff, vide **CExh 2**. This evidence was tendered in court by **Cw1**.

From the contents of the letter exhibited as **CExh 1** dated 26<sup>th</sup> July, 2022, the defendant and one Richard Lutakome had blocked access to the plaintiff's property, purportedly with the knowledge of the LC1 Busingiri Nyanama.



The defendant in his submissions argued that two access roads existed to the main road: one at the lower part and the other at the upper part adjacent to the markstone. At the locus visit however, court noted that there is a direct access to the main road to **plot 124**, but there is no visible access from the main road to **plot 123**.

In *paragraph 13* of his statement, his point was that Dr. Ronald Sengendo who was assigned by the Wakiso District Staff Surveyor to carry out the boundary opening for the area found that the plaintiff's land (*former plot 17*) does not share a boundary with the existing Nyanama-Zana road.

He admitted that there were encroachments by the building on **plots 726 and 727** and plaintiff's land. According to his report, **DExh 8**, part of the access road connecting to Nyanama-Zana to former **plot 17** falls inside the boundaries of **plots 726 and 727**.

That the common boundary between the two former plots, **17 and 89** was on the upper side towards Zana and recommended that the issue of access to former **plot 17** be amicably resolved between the plaintiff and Mukarurungi.

The defendant further argued that the issue had been concluded at *locus* where the surveyors showed court the access road which was far from the defendant's building, located at the gate; and therefore denied the claim that it was blocked by the defendant.

The plaintiff's side however disputed those claims and some of the findings made by the defendant's surveyor and Dr. Ssengendo who during the visit at the *locus* endeavored to explain that for mailo titles, there can be no road reserve where a road falls on some other person's land.

The defendant also relied on the report by Asimwe Dennis a registered surveyor who discovered that the storeyed building occupies the land owned by the plaintiff by 1.316 decimals; and that the rest of the building exists on land owned by Mukarurungi, described as **Block 263, plot 727**.



Mr. Asimwe who carried out a survey the objective of which was to locate and establish the block and plots which the *kibanja* was situated' testified as **Dw2** and also attended the *locus* visit.

5 **DExh 9** was tendered in as his report and indeed from his sketches on pages 103 and 101, the building and its compound fall partly on **plot 123 and 124**, both owned by the plaintiff.

10 It then cuts across a long and narrow strip of land that constitutes a small portion of **plot 727**, just before it crosses over to **plot 726**. The front portion which is the parking area claimed and occupied by the defendant, stops just next to the existing road, which road according to him was created out of **plot 726**.

From his sketch, it appears that **plot 727** shares the same boundary with the plaintiff's two neighboring **plots 123 and 124**, blocking direct access of the plaintiff's front portion of land to the main road.

15 But also, as noted by **Dw2** in that report the building falls on several plots, two of which belong to the plaintiff. At locus, measurements taken by **Dw2**, the defendant's surveyor show clearly that the defendant built on an area bigger than what he actually purchased, in excess by an area of about 3 ft.

20 The plaintiff on his part relied on the evidence of **Pw2**, Senteza Bob who as his surveyor filed a survey report dated 15<sup>th</sup> July, 2020, tendered in court as **PEXH 7**.

25 On page 23 of the plaintiff's trial bundle his sketch indicates that the entire structure belonging to the defendant falls squarely on **plots 123 and 124**, covering an area of 0.03 acres, findings which did not tally with those of **Dw2** who stated that the encroachment reaches even beyond, to other neighboring plots.

For **plot 123** however, the deed print in the title, (**PEXH 1**) clearly shows that between **plot 123** and the narrow strip constituting **plot 727**, there was an area

which is not plotted. The assumption is that this was the location of the main road.

According to the print, the two **plots 726 and 727** as shown run parallel to each other and also parallel to the main road. The bigger **plot 726** is separated from the road by the narrower **plot 727** and accordingly derives its access to the main road from a separate road that branches off the Nyanama-Zana road.

On the other hand, a survey report by the Senior Staff Surveyor one Patrick Kasujja showed that the building partly occupied the plaintiff's land and part of the neighboring plot of land which observation tallies with **Dw2's** findings.

But what was majorly different here were the findings by Kasujja as contained in his report, (**Cw4**) which summarized the contention in the terms below:

- *former plot 17(current plots 123 and 124) existed on the ground in its expected location. Notably the computed and measured area of the plot on ground was 5 acres, which is consistent with the area registered on the cadastral map.*
- *The plots have a proper existing access road which feeds off Nyanama Zana road. (emphasis mine).*
- *Plot 17 was encroached on at the lower side by several structures and at its upper side by an incomplete structure. Also its boundary along the access road is encroached on by some temporary commercial structures ....*

This was not the view by Dr. Ssengendo Ronald. His findings in respect of **plots 123 and 124** showed that the measurements on the certificates of title differed from the area as computed on ground, making it appear that what was on the ground exceeded the 5 acres of the original **plot 17**, whereas not.

At locus, the Senior Staff Surveyor, Mr. Kasujja stated that the narrow strip of land claimed to be **plot 727** between the plaintiff's land and Nyanama- Zana is

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a road reserve, which to court would suggest that **plot 726** is the plot for the main road.

The above findings show several unresolved issues and divergences about this land, as portrayed through the various surveys. What is on the ground specifically for **plot 123** seems to indicate that there is no direct access route for a vehicle to pass to the main road.

Yet cadastral boundaries as shown on *page 101* of the defendant's trial bundle (**DExh 9**) contained in **Dw2's** report seem to show the access can be created through **plot 727** leading up to **plot 726** where the main road is located.

10 The sketch drawn by the plaintiff's surveyor on *page 23* of the plaintiff's trial bundle does not show where the main road was mapped out for **plots 123 and 124**. But from the old cadastral sheet on *page 25* **plot 89** and former **plot 17** used to share boundaries.

15 None of the surveys could rule out the possibility that the subdivision of former **plot 17** into **plots 123 and 124** had been made in the 1980s, even before the subdivisions of **plot 89** were made to create Mururunga's titles.

In short therefore the access was blocked by the creation of **plot 727**. That implies also that the access for **plots 123 and 124** as indicated in Kasujja's report could have been originally through **plot 89**.

20 It is also important to note at this stage as indicated in Kasujja's report that at the time the above report was made on 20<sup>th</sup> June, 2022, the defendant's structure was incomplete. By the time when the *locus* visit was conducted the defendant's building was already fully constructed and even occupied by tenants. (**Ref. PExh 5**).

25 This was so, despite the fact that there was a case of trespass against the defendant pending in this court, and an earlier one previously concluded between the plaintiff and Kabandwa; and the judgment executed over the same land.

22

In passing, this court also learnt through Kasujja's findings which were acknowledged as correct by the court witness, **Cw1**, Nsereko Alex Duncan that Mukarurunga got her title on 31<sup>st</sup> December, 2013 under *inst. No 571171*.

5 Court further noted as a by the way, from **Cw1's** report, that the registered ownership of **plots 724-727** created from **plot 89** seems to have been under the names *M/s Muluba Farm Ltd.*

10 So while it is not disputed that the original **plot 89** out of which **plots 724-727** were created were in the names of Mukarurungi as administrator of the estate of the late Victor Assuman, **Cw6**, a letter addressed to the chairman LC 1, Bunamwaya dated 18<sup>th</sup> April, 2023 by Kizito Bashir Juma from Wakiso District Local Government raises the question as to whether Beatrice Mukarurungi or her predecessors in title had duly acquired the registered interest in that land from *M/s Muluba Farm Ltd*; and if so how and when.

15 One common thing however runs through the various reports which court vital to this dispute. The surveyors left no doubt in court's mind that the defendant had encroached on the plaintiff's land.

20 The issue of access in court's view is a matter that could only be resolved through a boundary opening to be conducted by Wakiso District Survey department, in order to provide adequate access for the plaintiff to the main road. Since plot 727 blocks the plaintiff's direct access to the main road, the exercise ought to involve the owners of both **plots 726 and 727** who were not parties to this suit.

**Sub-issue 4: Whether the defendant acquired statutory approval of development plans before constructing a building on the suit land.**

25 The defence counsel wished court to disregard the claim that the defendant did not acquire statutory approval, claiming that the plaintiff had failed to lead evidence to prove the allegation.

Such request seems to suggest the plaintiff and not the defendant (to whom the burden shifted once the allegation was made), should have presented



documents as proof that such approvals were obtained before construction, which cannot be correct.

**Section 31 of the Physical Planning Act, 2010** as cited, requires every land owner to use the services of a qualified planner to prepare a local physical development plan for approval. That requirement with all due respect is not restricted to only registered land owners.

**Section 33 (2)** makes it an offence punishable by a fine or sentence for any person to carry out any such development without the permission; and by virtue of **section 33(3)** of that same Act any such dealings/developments in connection thereof would be considered null and void; and an offender may be required to restore the land to its original position. (**section 33(4)**).

Furthermore, **section 44 (3)** of the said **Building Control Act** requires the owner of the building to apply for an occupation permit upon completion of the building. Under **subsection 3(a)** thereof, it is an offence to occupy or use the building before the occupation permit has been issued.

These provisions are clear and unambiguous and require no further interpretation or explanation. Suffice then to state that the above were all illegalities which court could not sanction or ignore once brought to its attention, as they would override all manner of pleadings. (**Makula International Ltd vs H.E Cardinal Nsubuga & Anor (1982) HCB 11**).

Thus in that connection and in summary, three different aspects of the illegalities were brought out by the plaintiff's evidence as having committed by the defendant in this case.

He purchased the land without the consent of the plaintiff who was the registered owner, thus contravening the provisions of **sections 34(9) (as amended) and 35 both of the Land Act**.



Secondly, the defendant embarked on the development of the disputed land, without securing the necessary planning/development approvals, contrary to the requirements of the **Physical Planning Act, 2010**.

5 The defendant put up a structure and completed the construction of the structure in total disregard of the undischarged orders of court on the ownership of the land.

All in all, in response to **issue No. 1**, given the findings of this court in the issues as highlighted above, the defendant was not only a trespasser but also committed illegalities, which court cannot ignore.

10 **Issue No. 2: Remedies:**

The plaintiff accordingly sought for an eviction order; a demolition order for the storied building constructed on his land in violation of violating **section 33 of the Physical Planning Act** and prayed to have the suit land restored to its original position.

15 He also prayed for a permanent injunction to restrain the defendant from trespassing on the land. In the submissions by counsel he sought for general damages of **Ugx 300,000,000/=**; and punitive damages of **Ugx 80,000,000/=** for flouting the laws; interest and costs.

20 Damages are the direct and probable consequence of the act complained of, also noted in the case of **Kampala District Land Board and George Mitala Vs Venansio Bamweyana CA No. 2 of 2007**.

Such may be loss of profit, physical inconvenience, mental distress, pain and suffering, (**See also Assit (U) Vs Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999 at page 5**).

25 It is also a settled position of the law that the award of general damages is in the discretion of court and is always as the law will presume to be the natural consequence of the defendant's act or omission.

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The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. (**See: Fredrick Nsubuga Vs Attorney General S.C.C.A. No. 8 of 1999**).

5 General damages are awarded at the discretion of court. Therefore, in the circumstances of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and event of the breach.

10 An award of damages lies within the discretion of court. Based on the circumstances of this case, court would take into account the time this matter has taken in court; construction by the defendant on the land while the case against him was still in court and the inconvenience occasioned to the plaintiff and costs incurred by him in trying to recover the land.

In the premises, the following declarations/orders are made:

- 15 **1. The defendant is a trespasser on the land comprised in plots 123 and 124.**
- 20 **2. The access of the plaintiff's land to the main road to Nyanama- Zana was a matter to be resolved through the opening of boundaries by the Wakiso District Staff Survey department and is to be conducted in the presence of the rightful owners of plots 123, 124, 726 and 727.**
- 25 **3. The defendant flouted the law when he put up a structure without prior approval, as required under the law.**
- 4. The defendant shall accordingly pay to the plaintiff as compensatory damages of Ugx 25,000,000/= (shillings seventy- five) per decimal for trespass in respect of the area illegally acquired and**

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occupied by the defendant, and shall do so within a period of one hundred and twenty days, from the date of delivery of this judgment.

5 5. In case of failure to pay the said amount within the period as stated, the structure on the land shall be demolished without giving any further notice or orders.

10 6. General damages of Ugx 30,000,000/= (shillings thirty million) are awarded to the plaintiff;

15 7. Punitive damages are awarded against the defendant at Ugx 30,000,000/, (shillings thirty million) for putting up a building contrary to the law; and for entering into an invalid agreement detrimental to the plaintiff's interest;

20 8. Interest of 15% is payable per annum in respect of orders 4,6, and 7 above, payable from date of delivery of this judgment till payment is made in full.

25 9. A permanent injunction issues, to restrain the defendant and agents and those claiming under him from trespassing on the land;

Costs to the plaintiff.

25   
Alexandra Nkonge Rugadya

Judge

30 3<sup>rd</sup> November, 2023.

Delivered by mail  
Alexandra  
3/11/2023