

THE REPUBLIC OF UGANDA
LAND DIVISION
CIVIL SUIT NO.0244 OF 2015

RUTH SIMWOGERERE:.....PLAINTIFF

VERSUS

6 GEORGE WILLIAM CHARLES SERWADDA:.....DEFENDANT

BEFORE HON LADY JUSTICE ELIZABETH JANE ALIVIDZA

JUDGMENT

REPRESENTATION

The Plaintiff was represented by Counsel Sam Ssekyewa.

The Defendant was represented by Counsel Yiga Roscoe.

12 INTRODUCTION

The Plaintiff filed this suit against the Defendant seeking declaration that the Defendant is a trespasser on land comprised in Kibuga Block No.27 Plot No.398 at Makerere Estate (herein referred to as the suit land), declaration that the Defendant is in unlawful occupation of the suit land, declaration that the Plaintiff is the lawful/rightful owner of the suit land, a permanent injunction
18 restraining the Defendant, his agents or his servants from trespassing on the suit land, general damages, punitive damages, order for vacant possession and costs of the suit.

BACKGROUND

The Plaintiff's facts

The Plaintiff is the administratrix of the estate of the late Yekosofati Mukibi
24 Simwogerere and the registered proprietor of land comprised in Kibuga Block 27 Plot 398, land at Makerere measuring approximately 0.020 Hectares. The Defendant is the owner of land comprised in Kibuga Block 27 Plot 56 at Makerere and the Plaintiff's immediate neighbor.

30 In 2008, the Defendant trespassed on the suit land and forcefully occupied a portion of the same by illegally constructing a perimeter wall which encompasses part of his compound and an access road that stops right at his gate thus alienating a portion of Block 27 Plot 398 to the Plaintiff's detriment and other beneficiaries to the estate of the late Yekosofati Mukiibi.

36 Following the illegal encroachment on the suit land by the Defendant, the Plaintiff's land remained isolated and prone to both petty and hardcore criminals in the area and in a bid to protect her tenants and herself, she erected a perimeter wall for the purpose of protection and not to show any perceived demarcations of her land.

42 Then the Plaintiff contracted three qualified surveyors to ascertain the extent of trespass by the Defendant. The survey done on the 7th February 2020 in the presence of all parties to the suit, their advocates, the area police and the area Local Council authorities. The survey report show that there is an encroachment and trespass on Plot 398 Block 27 by 0.20 acres by the owner of Plot 56 Block 27.

48 The Plaintiff avers that she endeavored to engage the district leaders to resolve the matter amicably and upon hearing both recommended eviction, compensation and demolition of the illegal wall and closing up of the illegal access road on the basis of the survey reports. However this was never done hence compelling the Plaintiff to file this suit.

Defendant's facts

54 The Defendant is the registered proprietor of land comprised in Block 27 Plot 56 Makerere Estate having purchased it from Stanley Kizito in 1968 who had mortgaged it. Barclays bank took the land from him when he had failed to clear a loan. Upon purchase of the land, the Defendant was registered under instrument No.KLA.509-612 on the 30th of July 1968 free of any encumbrance or claims.

That the said Stanley Kizito had been proprietor since 1938 when the same included the access road now in dispute and the Defendant has never mutated or subdivided the purchased land into any other plots.

60 In 1969, the Defendant improved the structure of the building on the suit land under a building plan approved by the then City Council Authority which building was included in the access road which the Defendant tarmacked in 1970.

The Defendant contends that he has never encroached on the Plaintiff's land or built any access road. That the access road has been in use since 1983 and it used to run from Nanfubambi to Kawala. That however with the passage of time,
66 the remainder of the road from Kawala back up to the Defendant's land has been blocked with developments.

That the road is an easement protected by law and therefore it cannot be impeached. That the Plaintiff has built a wall leaving the access road in between the two lands.

AGREED FACTS

- 72 1. The Plaintiff is the administratrix of the estate of the late Yekosofati Mukiibi Simwogerere and the registered proprietor of land comprised in Kibuga Block 27 Plot 398, land at Makerere
2. The Defendant is an immediate neighbor to the portion constituting the suit land and the registered proprietor of land comprised in Kibuga Block 27 Plot 56 also next to Block 27, Plot 398 from which the suit land
78 emanates.

DISAGREED FACTS

The parties disagreed on the following facts.

1. The Defendant as neighbor of the suit land, sometime in 2008 trespassed and forcefully without right occupied a portion of the same by illegally

84 constructing a perimeter wall which encompasses part of his compound
and an access road that stops right at his gate thus alienating a portion of
the suit land to the detriment of the beneficiaries of the estate of the late
Yekosofati Mukiibi.

90 2. In 1969, the Defendant improved the structure of the building on the suit
land under a building plan approved by the then City Council Authority
which building was included in the access road which the defendant
tarmacked in 1970.

3. The access road has been in use since 1983 and it used to run from
Nanfubambi to Kawala however with the passage of time the remainder of
the road from Kawala back up to the Defendant's land has been blocked
with developments.

AGREED ISSUES

96 The following issues were agreed for the determination of the Court.

1. Whether the Defendant encroached and trespassed on the Plaintiff's land
comprised in Kibuga Block 27 Plot 398 land at Makerere?
2. Whether in the alternative, the suit land is part of the access road to which
the Defendant is entitled to use to access his property?

102 It should be noted that in a Court order dated 1st March 2022, it was also agreed
that the District staff surveyor (senior staff surveyor) Kampala conducts a
boundary opening exercise of land comprised in Kibuga Block 27 plot 398 at
Makerere Kikoni and land comprised in Kibuga Block 27 plot 56. Court
instructed the surveyor to establish whether the perimeter wall of access road
encroached on Plot 398 and any other issues relevant to the determination of
the dispute, parties agreed to be bound by the outcome of the survey.

108 In the course of the trial, the Defendant died and the matter was taken over by
his legal representative.

Court visited locus on the 11 day of April 2023. The Plaintiff, Defendant, Local Chairman of the area and Counsel for both parties were present. During locus, PW1, DW1 and CW1 Mukasa Derrick testified.

114 **BURDEN OF PROOF**

The Plaintiff has a burden of proof to adduce evidence on the balance of probabilities that the defendant trespassed on the suit land. *Section 101 of the Evidence Act* 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 and the burden of proof lies on that person

120 Under *Section 102 of the Evidence Act*, 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.

Also under *Section 103 of the Evidence Act*, 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 that the proof of that fact shall lie on any particular person, who asserts must prove

126 I also guided by the case of *Senkungu and 4 others vs. Mukasa (Civil Appeal No. 17 of 2014) [2017] UGSC 14* where the Supreme Court 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.

RESOLUTION

132 Timelines for filing written submissions were issued by this court, both parties filed written submissions that this court has taken into consideration.

Preliminary objection

The Defendant in his written submissions raised a preliminary objection to the effect that whether in the absence of a valid valuation report, a clear established value for the land, this court had pecuniary jurisdiction to hear and determine this matter? I shall start with that;

138 Counsel for the Defendant submitted that under paragraph 11 of the plaint, the value of the suit land is estimated to be UGX 280,000,000 and in paragraph 4(d) it is alleged that the Defendant trespassed by 5.3 meters and further set an access road of 6.0 metres into the suit land making the total of encroachment approximately 11.3meters or 0.07 acres.

144 Based on assumptions, Counsel for the Defendant further submitted that in case all the seven meters of land were encroached upon (including the road) which the Defendant disputes, the value of the suit property would be about UGX 23,000,000 which would put the suit property out of the jurisdiction of this Court. However, Counsel also acknowledged that the High Court has unlimited jurisdiction in all matters.

150 Counsel for the Defendant argued that the pecuniary jurisdiction of the High Court is UGX 50,000,000 and above. The Plaintiff conceded that she is not aware of the value of her claim and it would be null and void for this Court to award any judgment based on UGX 280,000,000 that are merely speculative.

156 I note that jurisdiction is a creature of statute. Under *Section 14 (1) of the Judicature Act*, this court has the have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.

Regardless of the value of the suit property this Court has the jurisdiction to hear and determine this matter. I accordingly dismiss the preliminary objection.

Issue 1 Whether the Defendant encroached and trespassed on the plaintiff's land comprised in Kibuga Block 27 plot 398 land at Makerere?

162 Counsel for the Plaintiff submitted that the Plaintiff conducted a survey of the suit land through Survey Tech Solutions who issued a report dated 19th May 2016. I note that there was also a joint survey conducted, which was tendered in evidence CEX1 through CW1 Mr. Derrick Mukasa. This report confirms that the Defendant encroached onto the Plaintiff's land by constructing a perimeter

wall. This above evidence corroborated the testimony of PW1 and PW2 that the Defendant had constructed a perimeter wall in the Plaintiff's land.

168 To prove ownership of the suit land, it is uncontested that the Plaintiff is the registered proprietor of land comprised in Kibuga Block No.27, Plot No.398 being administrator of the estate of the late Yekosofati Mukiibi Simwogere. PEX1 a copy of letters of administration dated 27th August 2007 was adduced in evidence. The plaintiff also adduced PEX2 a copy of a certificate of title for the suit land being described as Block 27 Plot 398 Kibuga Makerere.

174 During cross examination, DW1 testified that he is aware that the perimeter wall is on the Plaintiff's land. During locus he conceded that there is trespass on the Plaintiff's land. Furthermore, DW2 testified that the road of Serwadda passed through the Plaintiff's land, and stops at Mr. Serwadda's. That the road called Serwadda down up to Kawala. That there is no gate leading to Serwadda's

It is my finding that the Plaintiff has proved that the Defendant encroached on
180 the Plaintiff's plot as indicated by CW1 at the locus in quo and as per the survey report.

I answer the first issue in the affirmative.

Whether the suit land is part of the access road to be accessed between the Plaintiff and the Defendant?

The Plaintiff submitted that the access road named Gladys Nansamba road was
186 illegally constructed on the Plaintiff's land by the Defendant and is not the access road to the Defendant's plot but rather an act of encroachment and illegal occupation by the Defendant.

However the Defendant insisted that the access road was not created by the Defendant. That the late Sserwadda emphatically denied ever constructing this road. That the road has always been in existence from 1937 and only begun to
192 narrow and thin out on the lower side when the population from as far as Kasubi begun to increase.

I noted that according to the boundary opening survey report CWDEXH1, under the findings 3.0 (vi) and (viii) it was found that both plots are bound by the existing Nanfumbambi Road on the eastern end and Gladys Nansamba road between them and that the existing Gladys Nansamba road encroaches onto plot 398 by 0.015 hectares (0.04 acres).

PW1 stated that she did not remember the Christmas tree or using the Gladys Nansamba road. That part of the land goes to the Defendant's compound. That they got to know when they brought surveyor.

DW1 testified that the road was in existence since 1965. That he had used it many times, and that the tarmac was put there by his father in 1975. That initially there was a Christmas tree fence. That the signpost Gladys Nansamba was established in 2022 when this case was in Court. He also stated that he had no minutes from KCCA meetings.

CW1 testified that Gladys Nansamba road encroaches 4 decimals which is equal to 0.04 acres. That the report has both ground data and records. That both roads are not named. That Nanfumbambi road is not in the system but it's marked as existing road however he did not see the Gladys Nansamba close.

During locus, PW1 stated that she came in 1993. That before they stayed up there, the Defendant stayed there before them. That the Ambassador of hope close is on the old plans of city council when she managed to see the plans. That the Gladys Nansamba road was not on any plan. That the Defendant constructed the road before they settled there.

The evidence of the cadastral field print, the ortho-photo and the topographic map all showing the spatial position of Plot 398 and Plot 56 Kibuga Block 27 all show that there is an existing access road that encroaches into plot 398. According to CW1 testified that the Nanfumbambi road is not in cart system but it's marked as an existing road however he did not see Gladys Nansamba road.

DW1 testified that he had no minutes from KCCA designating Gladys Nansamba road as an access road and that the road ends at the entrance of his father's house but this was not the case previously. He also testified that there is no other route to access his place.

When the Court visited the locus, it was clear that the encroachment of the Plaintiff's plot to create a compound and access road for the Defendant is illegal. One does not create an access road out of land belonging to another especially under private Mailo land tenure.

Counsel for the Defendant submitted that this is a KCCA road and the construction and naming of roads in Kampala City is by KCCA. That this road was named Gladys Nansamba road in 2020 by KCCA a signage to that effect is there to prove.

I note on record a letter by City Council Kampala 16th August 2010 (PEh6) where the illegal construction of the wall and access was noted. Infact the letter noted that *"the area planned for the access road is used by Mr Serwadda as his compound"*. There is no evidence adduced that the access road declared illegal in 2016 had become a KCCA legally accepted road in 2020 especially since it encroached on the Plaintiff's Plot.

During locus, this Court was shown two different access roads used by the Plaintiff and the Defendant. It was the plaintiff's testimony that the access road is only used by the Defendant and none of the neighbours uses it. Court observed that indeed the access road leads directly to the Defendant's gate as stated by the Defendant and seen from the sketch map.

It is my finding that the Defendant in alleging that this road was designated by Kampala City Authority, he ought to have adduced evidence to prove the same. He or she who alleged a fact must prove it.

It is my conclusion that the access road is part of the suit land and it is not an access road between the Plaintiff and Defendant.

Issue 3 whether the suit is time barred and affected by Limitation?

Counsel for the Plaintiff submitted that the Defendant trespassed and unlawfully occupied the suit land by illegally and unlawfully constructing a perimeter wall, an access road and alienating part of the suit land to serve as his compound and to date is still in unlawful occupation. That the Plaintiff's suit is not time barred as alleged by the Defendant. That trespass to land is a continuing tort, when an unlawful entry on the land.

Counsel for the Defendant on the other hand submitted that this is a claim for recovery not trespass on the land. That the Plaintiff did not dispute the wall fence that was only put in or about 2008. That the Plaintiff admitted that there was a fence prior to 2008.

Section 5 of the Limitation Act provides for limitation of actions to recover land, it provides;

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.

This limitation is applicable to all suits in which the claim is for possession of land, based on title or ownership i.e., proprietary title, as distinct from possessory rights.

Section 11 (1) of the same Act provides that;

No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession"), and where under sections 6 to 10, any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue until adverse possession is taken of the land.

276 In the case of Madvani International S.A Vs. Attorney General CACA No. 48 of 2004 that was cited by Counsel for the 1st Defendant, it was held that in considering whether a suit is barred by any law court looks at the pleadings only, and no evidence is required.

282 Under paragraph 3 of the Plaint, the Plaintiff's claim against the Defendant is for declaration that the Defendant is a trespasser on land comprised in Kibuga Block No.27, Plot 398 at Makerere, Declaration that the Defendant is in unlawful occupation of the suit land among others and under paragraph 5 of the Plaint the Plaintiff contended that the Defendant's entry on the suit land without her permission and or consent constitutes trespass to land. The Plaintiff prayed for the following against the Defendant;

- a) Declaration that the Defendant is a trespasser on the suit land
- b) Declaration that the Defendant is in unlawful occupation of the suit land
- 288 c) A declaration that the plaintiff is a the lawful/ rightful owner of the suit land
- d)
- e)
- f)

294 In my finding that the Plaint on the face of it indicates that this action is for trespass and not recovery of land as Counsel for the Defendant has submitted. It is trite law that an action for the tort of trespass to land is for enforcement of possessory rights rather than proprietary rights.

The Plaintiff in her evidence stated that she went to Kampala City Council when the Defendant was constructing the perimeter wall, and that she went to the LC towards 2007. DW1 testified that he constructed the perimeter wall in 2008 and that before there was a Christmas tree that acted as a fence.

300 In the case of Aroga v Haji Muhammad Anule (Civil Appeal 10 of 2016) [2018] UGHCLD 24 (22 March 2018) Justice Stephen Mubiru in referring to Konskier v. Goodman Ltd [1928] 1 KB 421 stated that with the tort of trespass to land, the Courts treat the unlawful possession as a continuing trespass for which an

306 action lays for each day that passes, subject only to recovery of damages for the period falling within the upper limit of six years, provided for by section 3 (1) (a) of The Limitation Act, reckoning backwards from the time action is initiated, if the unlawful possession has continued for more than six years.

Thus, on the face of the Plaintiff, as indicated in the quoted paragraphs, the facts pleaded give raise to a reasonable inference that the suit is not time barred.

I answer this issue in the negative.

Issue 4: What remedies are available to the parties?

312 The Plaintiff sought the following remedies;

1. Order for vacant possession,
2. General damages
3. Punitive damages,
4. Interest
5. Costs of the suit.

318 I shall consider each remedy separately.

Vacant possession

324 Having found that the Defendant encroached on the Plaintiff's land, the Plaintiff is hereby granted vacant possession. The Defendant should vacate the suit land or in the alternative compensate the Plaintiff for the suit land in accordance with the prevailing land market price in the area. Failure to compensate the Plaintiff within six months from the date of delivery of this judgment, the order for vacant possession to issue.

General damages

330 General damages are compensatory in nature, they are non-financial losses; and compensation cannot be specifically calculated but only evaluated on some basis. General damages directly arise from the natural or probable consequence of the act complained of (as per Stroms v. Hutchinson (1905) AC 515).

In the case of Draza v Aderubo (Civil Suit No. 3 of 2016) [2017] UGHCLD 86 (22 June 2017) court noted that;

336 *"In an action of trespass if proved by the plaintiff, he or she is entitled to recover damages even though he or she has not suffered actual loss. If the trespass has caused the plaintiff actual damage, the plaintiff is entitled to receive such an amount as will compensate him or her for his or her loss. Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as should reasonably be paid for that use (mesne profits) (see Halsbury's Laws of England 3rd Edition, Vol.38 para.1222).*

342 *The defendant's conduct is thus key to the amount of the damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was wilful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well (see Halsbury's Laws of England, 4th edition, vol. 45, at para 1403)."*

348 In this case, from the findings of the survey, the Defendant's perimeter wall extends to encroach 4.9m into plot 398 on the upper end adjacent to Nanfumbambi road and 1.7m on the lower end measuring up to 0.011 hectares (0.03 acres).

It was evident from the evidence that the Plaintiff suffered inconvenience as a result of the Defendant's encroachment of the suit land. Therefore, I award, the Plaintiff general damages of UGX 27,000,000 for the inconvenience she has faced as a result of the Defendant's trespass.

354 *Punitive damages.*

Punitive damages, also referred to as exemplary damages represent a sum of money of a penal nature in addition to the compensatory damages given for the pecuniary and mental suffering. They are deterrent in nature and aimed at

curbing the repeat of the offending act. (See Butterworth v. Butterworth (1920) P.126).

360 From the evidence, the Plaintiff testified that she labored to engage the local authorities in order to settle this matter amicably however the Defendant was adamant. Even after the survey was done which confirmed that there was encroachment, the Defendant remained adamant.

366 This dispute would have been settled outside Court. Encroachment into another person's property without regard of the other person's fundamental right to property is becoming rampant. Therefore I award the Plaintiff UGX 3,000,000 as punitive damages.

Interest

372 Under *Section 26 of the Civil Procedure Act*, this Court has the discretion to ward interest, in my opinion the Plaintiff should be awarded interest 18% per annum on the general and punitive damages from date of delivery of judgment until payment in full.

Costs of the suit

It is settled law under *Section 27(2) of the Civil Procedure Act* that costs shall follow the event unless Court shall for good reason otherwise order. I see no reason not to award costs to the Plaintiff.

The Plaintiff also awarded costs of the suit.

378 **FINAL ORDERS AND CONCLUSION**

1. Court finds in favor of the Plaintiff.
2. The Defendant ordered to vacant the suit property within six months from date of delivery of judgment or in the alternative pay an amount equivalent to the current market price of the suit land.
3. The Plaintiff is awarded general damages of UGX 27,000,000

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4. The Plaintiff is also awarded punitive damages of UGX 3,000,000.

5. General and punitive damages shall carry an interest of 18% per annum
from date of delivery of judgment until payment in full.

6. The Plaintiff is awarded costs of the suit.

So ordered

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Elizabeth Jane Alividza

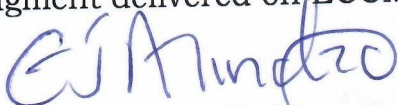
Judge

29th September 2023

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17th October 2023

Judgment delivered on ECCMIS



Elizabeth Jane Alividza

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Judge