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

CIVIL APPEAL NO. 119 OF 2019

10 **(ARISING FROM THE JUDGMENT AND DECREE OF HER WORSHIP
AWIDI SUSAN, MAGISTRATE GRADE ONE IN CIVIL SUIT NO. 26 OF
2014)**

1. ROSETTE KATENDE

2. LUTALO AISHA

3. LUWERO TOWN COUNCIL ::::::::::::::::::::::::::::::::::: APPELLANTS

15

VERSUS

MAYENGO NSAMBA DAN ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE IMMACULATE BUSINGYE

BYARUHANGA

JUDGMENT

20 This appeal was by Rosette Katende, Lutalo Aisha and Luwero Town Council
(hereinafter referred to as “the 1st, 2nd and 3rd appellants” respectively) challenging
the judgments and orders of Her Worship Awidi Susan, Magistrate grade one of
Luwero Chief Magistrate’s Court *(hereinafter referred to as the “trial court”)* which
was delivered on 26th September 2018. The trial court decided in favour of the
25 Mayengo Nsamba Dan (hereinafter referred to as “the respondent”) and declared
him as the as the owner of the suit land, and declared the appellants as trespassers
and issued an eviction order against the 1st and 2nd appellant, a permanent injunction
was issued against the 1st, 2nd and 3rd appellants, general damages to the tune of
Uganda shillings 10,000,000, punitive damages of Uganda shillings 2,000,000,

5 interest at a rate of 8% at court rate from judgment till full pay and costs of the suit to be borne by the appellants.

Background

The respondent filed a suit in the trial court against the 1st and 2nd appellants on 26th February, 2014 seeking ownership of the disputed land, an eviction order, special
10 damages, a permanent injunction, mesne profits, interest on special damages and mesne profits and costs of the suit. The respondent in plaint averred that he was the owner of diplomatic lodge situate at Luweero Town Council, Luweero District which he alleged to have constructed between 1982-84 after his father distributed land to his children when he was still alive. The respondent further averred that he
15 constructed a lodge and left space for parking of vehicles and cycles. The respondent further pleaded that the 1st and 2nd appellants without any colour of right entered the respondent's parking yard of the diplomatic lodge and put there an illegal structure up to dump course. The respondent pleaded that he reported the action of criminal trespass to Luweero police but the 1st and 2nd appellants continued their action of
20 trespass and on 5th and 13th January 2014 they brought three containers and put them in the parking yard reserved by the management of diplomatic lodge without the permission of the respondent thereby committing acts of trespass.

On their part, the 1st and 2nd appellants contended in their written statement of defence that the respondent was he owner of Diplomatic lodge but the disputed piece
25 was a road reserve which was being controlled and managed by Luweero Town Council which compensated the former owner a one Kijjambu Godfrey through his wives Dorothy Nakafeero and Safiina Nazziwa and Sendi Fred on 15th April, 1997 upon their request. A copy of the Town Council minutes, valuation list and compensation documents were annexed as "P," "Q", "R", "S" and "T" respectively.
30 That ever since the compensation to the former owners, the Town Council

5 constructed a road and had been utilizing the place as a refuse bank for long without any complaint from the respondent. The 1st and 2nd appellants averred that they came to the suit land with the approval and consent of the Town Council as a temporary measure before they were allocated a permanent place to do business. The 1st and 2nd appellants indicated that the respondent had no claim over the disputed place
10 since he did not share it from his late father and even his purported lodge was non existing as the house was being occupied as a residence with various ways of access to it.

A third party notice was issued to Luwero Town Council on 6th August, 2015 indicating that the 1st and 2nd appellants had claimed that the land in dispute was a
15 road reserve under the Town Council's control and that the former owners had been compensated.

The parties agreed on the following issues for determination at the trial;

1. *Whether the suit is bad in law?*
2. *Whether the plaint discloses a cause of action?*
- 20 3. *Whether the suit land lawfully belongs to the late Erunasane Batulabidewa Nsamaba's family?*
4. *Whether the beneficiaries of the late Erunasane Batulabidewa Nsamba were duly compensated?*
5. *Whether the defendants trespassed on the suit land?*
- 25 6. *Whether the plaintiff is entitled to the remedies sought?*

The trial court decided the case in favour of the respondent. The appellants were dissatisfied with the judgment and orders of the trial court and filed this appeal and advanced the following grounds of Appeal;

- 5 *1. That the Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and held that the suit land was not duly compensated for by the third defendant now the third appellant.*
- 2. That the Learned Trial Magistrate erred in law and fact when she held that the appellants are trespassers on the suit land.*
- 10 *3. That the Learned Trial Magistrate erred in law and fact when she ordered the first and second appellants to pay costs of the suit, general damages and punitive damages yet they had issued third party notices to the 3rd appellant.*
- 4. That the Learned Trial Magistrate wrongfully exercised her discretion when*
15 *she awarded excessive general damages with interest and costs.*

Mr. Katamaba Sowali of **Sowali Katamba & Co. Advocates** appeared for the appellants while Wetaka Andrew and Kabwama Derick of **Wetaka, Kibirango & Co. Advocates** represented the respondent. Both Counsel filed written submissions to argue the appeal. The submissions are on record and I will occasionally refer to
20 them while resolving the grounds of appeal.

Role of the 1st Appellate Court

The duty of this court as a first Appellate Court was stated in the case of **Kifamunte Henry V Uganda, S.C Criminal Appeal No. 10 of 1997** where court held that;

25 *“The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”*

5 This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion.

I will therefore bear these principles in mind as I resolve the grounds of appeal in this case.

In reevaluating the evidence and subjecting it to the fresh scrutiny, I will keep in
10 mind the issues raised at trial and the evidence adduced by both parties in order to resolve the grounds presented in the memorandum of the appeal.

Ground One

The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and held that the suit land was not duly
15 **compensated for by the third defendant now the third appellant.**

According to the record of proceedings, PW1(the respondent in this appeal) testified that the suit land measures 100ft x 100ft and the same belonged to his late father Erinasani Batwaladdewa Nsamba, who bequeathed the same to his seven children who were born by Fais Nalubega and these children include Mubiru Sam, Namutebi
20 Betty, Nalwoga Justine, Mayengo Nsamba Dan, Betty Namukasa, Nambi Christine and Joyce Namalugga.

PW1 also testified that his late father had more land on which he had built a house that he bequeathed to his other children Sendi and Kijambu. PW1 also testified that this particular house and the land it was built on was never included in the estate of
25 his late father, because the family knew that the Late Erinasani had given that house to Sendi Fred and Kijambu Godfrey during his lifetime.

In corroboration, during cross examination, PW3 (Ssendiwala Fredrick) testified that his Late Father Erinasani Batulabidewa left them some land which neighbours the

5 diplomatic lodge. He further testified that the 3rd appellant compensated him and the Late Kijjambu's widows for their portion which had a house, trees and a toilet only. PW3 also testified that their portion for which the 3rd appellant (Luweero Town Council) compensated was turned into a road.

I have started exhibits DE1 and DE2 and the following are my findings. According
10 to DE2 which is a valuation for compensation of land dated 17th February 1992, Kijambu Godfrey and Sendi Fred were the only claimants from the family of the Late Erinasani Batulabidewa who were considered for compensation to a tune of Uganda shillings 1,128,736 (one million two hundred twenty-eight thousand, seven hundred thirty-six shillings). DE1 is an acknowledgment of the above sum received
15 as compensation and the same was paid to PW3 and Kijjambu plus the widows i.e. Nakafero Dorothy and Naziwa Safina.

DW3 (Betty Kyeyune) who testified that she was the town clerk of Luwero Town Council from 1988 to 1996, testified that she could not remember how much was paid in compensation. She also confirmed in court that Kijjambu's family is the one
20 that was compensated. DW3 also testified that she was told that Kijjambu was his late father's heir hence the compensation. On the other hand, DW5 who was the Assistant Engineering Officer for Luwero Town Council testified that valuations and compensations were made to all the parties from the town council take over.

In light of the above evidence, it is clear that exhibits DE1 and DE2 are silent as to
25 the measurements of the land for which they were compensating Kijjambu and Ssendi for. Furthermore, what is clear is that only Ssendi and Kijjambu were compensated for their portion and the respondent was not included in the valuation for compensation. In addition, it was not contested that the respondent is owner of the premises that house the diplomatic lodge.

5 Furthermore, PW2 testified that only the people whose land was to be used for the road area were compensated and that is why only Kijambu and Ssendi were selected for compensation. This evidence was corroborated by exhibit DE5.

Therefore, I find that the evidence on record only proves that the 3rd appellant compensated the Kijambu and Ssendi Fred (PW3) for their portion and the
10 respondent's suit land was not included in the said valuation. This ground fails.

Ground two

The Learned Trial Magistrate erred in law and fact when she held that the appellants are trespassers on the suit land.

According to the authority of *Justine E.M.N. Lutaaya vs Sterling Civil*
15 *Engineering Co. SCCA No.11 of 2002*, trespass to land is premised upon interference with the possession of land. I must 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.

20 DW1 (Rosette Katende Nakigudde) and DW2 (Lutalo Aisha) testified that they were directed by the 3rd respondent to put containers and not permanent structures on the suit land for which they paid the 3rd appellant a sum of Uganda shillings 800,000 (eight hundred thousand shillings). The trial Magistrate saw the said containers on the suit land as the same can be identified from the locus in quo sketch map.

25 It is a known principle of law that in issues relating to the tort of trespass, possession is paramount. It is the law that possession can either be actual or constructive. **Justice Mubiru** elaborated the same in **Omito Luka & Others versus Attorney General HCCS 073 of 2004**, where he stated *that possession signifies an appropriate degree of exclusive possession, and it is proved by showing that the alleged possessor has*

5 *been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.*

PW1 testified that suit land was used as a parking yard for motor cyclists and motor vehicles that visited the diplomatic lodge. On the other hand, PW2 testified that the 3rd appellant used to use the land that is occupied by the containers as a refuse or a waste bank. Having found in ground that the 3rd appellant did not duly compensate the respondent for the suit land, I find that by allowing the 1st and 2nd appellants to put up containers on the suit land without first compensating the respondent, the 1st and 2nd appellants trespassed on the respondent's land.

This ground equally fails.

15 **Ground three**

The Learned Trial Magistrate erred in law and fact when she ordered the first and second appellants to pay costs of the suit, general damages and punitive damages yet they had issued third party notices to the 3rd appellant.

Order 1 rule 14 (1) of the Civil Procedure Rules states as follows;

20 *“Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the suit, he or she may, by leave of the court, issue a notice (hereafter called a “third party notice”) to that effect.”*

25 The trial Magistrate issued a third party notice on the 3rd appellant on the 6th day of August 2015 wherein the claims to be indemnified included ownership of the disputed land, eviction on the land, special and general damages and what the plaintiff may be ordered to recover against the defendants in the suit land.

30 According to the record of proceedings, the Trial court amended pleadings and the appellate pleadings identify the 3rd appellant as the 3rd defendant and the 3rd appellant

5 respectively. Counsel for the respondent submitted that the 1st and 2nd appellants did not adduce any evidence in the trial court to prove the degree to which the 3rd appellant was to contribute to indemnify the 1st and 2nd appellants.

The 1st and 2nd appellants testified in the trial Court that they were directed by the 3rd appellant to put operate their businesses on the suit land basing on the knowledge
10 that the suit land was public land and the same was not contested as was corroborated by the evidence of DW3.

During their testimonies in the trial Court, DW1 and DW2 (the 1st and the 2nd appellants respectively) never raised the issue of indemnity against the 3rd appellant. I agree with counsel for the respondent that the issue of indemnity was only an
15 afterthought at the appellate stage.

During the trial, the 3rd appellant ought to have filed their defence as a third party, however, the 1st and 2nd appellants chose to add the 3rd appellant as the 3rd defendant and they went through the proceedings till this point, treating the 3rd appellant as one of defendants and appellants as opposed to a third party.

20 Therefore, I find that 1st and 2nd appellants actions rendered the third party proceedings redundant and as such they are estopped from resurrecting the issue of indemnity against the 3rd appellant at the appellate stage yet the same was ignored in the trial court.

Hence, the 1st and 2nd appellants are equally liable for trespassing on the respondent's
25 land and as such the trial Magistrate acted judiciously when she ordered all the defendants (appellants) to pay general and punitive damages.

This ground equally fails.

Ground four

5 **The Learned Trial Magistrate wrongfully exercised her discretion when she awarded excessive general damages with interest and costs.**

As properly stated by both counsel, damages are granted at the discretion of the court. I am alive to the authorities cited by Counsel for the respondent, however, I fail to understand which wrong principle of law was applied by the trial Magistrate
10 when she was awarded general damages to a tune of Uganda shillings 10,000,000 (ten million shillings).

PW1 testified that 1st and 2nd appellant put containers on the suit land on which they were conducting their businesses. This testimony was confirmed by the appellants in the trial Court.

15 PW1 testified that the suit land had always acted as parking yard for the diplomatic lodge and the same could no longer serve that purpose because the 1st and 2nd appellants on authorization by the 3rd appellant started using the suit land for their own personal business from 2013 to the detriment of the respondent.

Therefore, I find that the trial Magistrate acted judiciously when she awarded the
20 respondent general damages to a tune of Uganda shillings 10,000,000 for the emotional stress suffered by the respondent as a result of the appellants' actions. A sum of Uganda shillings 10,000,000 (Ten million shillings) is not excessive and I find it reasonable.

Interest

25 In **Uganda Revenue Authority vs Stephen Mabosi SCCA No.1 of 1996**, It was held that; *an award of interest is discretionary; the basis of such an award is that the defendant has kept the plaintiff out of his money and the defendant has had use of it so the Plaintiff ought to be compensated accordingly.*

5 In the instant case, the trial Magistrate granted an interest rate on 8% on the general damages from the date of Judgment until payment in full. Such interest is provided for under section 26 (2) of the Civil Procedure Act. The said section provides as follows;

10 *“Where and insofar as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further*
15 *interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier dates as the court thinks fit”.*

20 In this appeal, the respondent proved to court that the 1st and 2nd appellants had denied him his right to use the suit lodge as a parking yard for his lodge. The trial magistrate awarded a sum of Uganda shillings 10,000,000 (Ten million shillings) as general damages. Since she awarded the said sum as a principal sum, she was right to subject interest on the said principal sum adjudged under section 26 (2) of the Civil Procedure Act.

25 As earlier stated the trial Magistrate had the discretion to award the general damages as well as the interest because there was proof of loss and inconvenience suffered by the respondent.

Costs

30 It is trite law under section 27 (2) of the Civil Procedure Act that costs follow the event. As the successful party, the respondent was entitled to costs. Therefore, I find that the Trial Magistrate acted judiciously when she awarded the respondent with general damages, interest and costs. This ground also fails.

- 5 Given the above re-evaluation of the evidence above, I order as follows;
- a. This appeal is dismissed.
 - b. The Judgment and orders of the Trial Magistrate Her Worship Awidi Susan Magistrate Grade One in Civil Suit 026 of 2014 are upheld.
 - c. The appellants shall pay the costs of this appeal jointly.

10 I so order.

Judgment delivered at High Court, land Division on the 12th day of April, 2023.

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IMMACULATE BUSINGYE BYARUHANGA

15 **JUDGE**

12-05-2023