

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA; AT KAMPALA**  
**(LAND DIVISION)**  
**CIVIL SUIT No. 318 OF 2012**

**NAMAGEMBE MARGARET:..... PLAINTIFF**

*VERSUS*

**SERENE HOTEL LIMITED:..... DEFENDANT**  
**(SERENE SUITES LIMITED)**

**BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO**

**JUDGMENT**

The Plaintiff is the registered proprietor of land comprised in Kibuga Block 32 Plot 39, located in Mutundwe II Zone LC1, Rubaga Division, (hereinafter the suit lands); while the Defendant is the registered proprietor of the adjacent Plot 37. She has brought this suit against the Defendant for allegedly trespassing onto the suit land by building on it, part of its suite and apartments and a perimeter wall; and so, she seeks the following reliefs from Court; namely: –

- (a) A declaration that the suit land belongs to her.
- (b) A declaration that the Defendant has trespassed onto 0.02 of the suit land
- (c) An award of special damages in the sum of U. shs. 2,800,000/=.
- (d) An award of general damages.
- (e) An award of mesne profits and exemplary damages.
- (f) An order of permanent injunction against the Defendant, its agents, and employees.
- (g) An order for costs of the suit.
- (g) Any other alternative relief as this Court may deem fit and proper in the circumstances.

The Defendant has denied the alleged trespass. It concedes that it has built a perimeter wall touching part of the suit land; but that it has done this with the acquiescence of Marion Kabaale

Munyangwa and Fred Munyangwa who are the bona fide occupant of the suit land. The Counsels for the parties filed a joint scheduling memorandum in the case, and respective witness statements, as Court had directed them to do. The issues agreed upon for Court's determination, which I have recast and framed as is my duty to do, are as follows: –

1. Whether the plaint discloses a cause of action.
2. Whether in building the perimeter wall fence, it was lawful for the Defendant to deal with Marion Kabaale Munyangwa and Fred Munyangwa.
3. Whether the Defendant has committed any acts of trespass onto the suit land.
4. Whether the Plaintiff is entitled to the reliefs claimed in the plaint.

When the case came up for hearing, neither the Defendant nor its Counsel turned up in Court. Counsel for the Plaintiff however chose to forfeit his right to insist on the attendance of witnesses for the Defendant, for cross-examination; and so the hearing of the suit, constituted solely by the respective witness statements on record, was closed. Counsels then filed written submissions as was directed by Court. I consider it proper that I first resolve issue No. 3, which is on whether there is a cause of action disclosed in the plaint. This decision is informed by the fact that in the event that the issue of cause of action is resolved in the negative, the suit would have collapsed on a technical ground; and there would then be no need to go into the other issues in such a situation.

**Issue No. 1. Whether the plaint discloses a cause of action.**

The Defendant contends that the Plaintiff has no cause of action, and so cannot maintain an action in trespass, since she is neither in possession, nor entitled to immediate possession of the suit land because another person is in possession. The Defendant relies on the authority in *Khatibu bin Mamadi vs Issaji Nurbhai*, 4 ZLR 55, and *Justine EMN Lutaaya vs Stirling Civil Engineering Co. Ltd.*, SCCA No. 11 of 2002, for this proposition of law. It is the duty of this Court to determine whether the plaint herein does not disclose a reasonable cause of action against the Defendant. In *General David Tinyefuza vs Attorney General of Uganda – S. C. Constitutional Appeal No.1 of 1997* – the Supreme Court approved of the definition of 'cause of action' in *Mulla on Indian Code of Civil Procedure*, (Vol. 1, 14<sup>th</sup> Edn., at p. 206); which is as follows: –

*"A cause of action means every fact, which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the Plaintiff a right to relief against the Defendant. ... It is, in other words, a bundle of facts ... necessary for the Plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It is a media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."*

In ***Drummond–Jackson vs British Medical Association & Ors.***, [1970] 1 All E. R. 1094, at page 1101, Lord Pearson clarified on what a reasonable cause of action; is as follows: –

*"... 'reasonable cause of action' means a cause of action with some chance of success. When only the allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out."*

In the case of ***Ismail Serugo vs Kampala City Council & Anor.***, – ***Supreme Court Constitutional Appeal No. 2 of 1998*** – MULENGA J.S.C., took cognizance of the three ingredients that constitute a cause of action; and reiterated as follows: –

*"A cause of action in a plaint is said to be disclosed if three essential elements are pleaded; namely, pleadings (i) of existence of the Plaintiff's right, (ii) of violation of that right, and (iii) of the Defendant's liability for that violation. In ***Auto Garage vs Motokov (No. 3) [1971] E. A. 514***, at 519 D, after reviewing a line of precedents, *SPRY V. P.* put it thus: –*

*'I would summarise the position as I see (it) by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated, and that the Defendant is liable, then in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.'*

*A reasonable cause of action on the other hand, has been described as a cause of action which, in light of the pleadings, has some chances of success; see ***Drummond – Jackson vs British Medical Association (1970) W.L.R. 668.***"*

In the case of *Tororo Cement Co. Ltd. vs Frokina International Ltd.*, (supra), the Defendant/Applicant contended that the Plaintiff had not particularized the negligence it had alleged, the Court cited the case of *Auto Garage vs Motokov (No. 3)* (supra) with approval; and at page 240, Oder JSC stated, that: –

*"A cause of action means every fact which is material to be proved to enable the Plaintiff to succeed, or every fact which, if denied, the Plaintiff must prove in order to obtain judgment see Cooke vs Gull LR 8 E.P. at page 116 and Read vs Brown 22 QBD at p.31. It is now well established in our jurisdiction that a plaint has disclosed a cause of action even though it omits some fact which the rules require it to contain, and which must be pleaded before the Plaintiff can succeed in the suit. What is important in considering whether a cause of action is revealed by the pleadings are the questions whether a right exists and whether it has been violated, (Cotter vs Attorney General [1936] 5 EACA 18)."*

In the case of *Mulindwa Birimumaso vs Government Central Purchasing Corporation C.A.C.A. No. 3 of 2002*, TWINOMUJUNI J.A. followed the decision of the Supreme Court in the *Ismail Serugo vs Kampala City Council* case (supra); and added that: –

*"It is now settled law that when a Court is considering whether a plaint raises a cause of action or not, under order 7 rule 11, it must only look at the plaint and its annexures. See N.A.S. Airport Servises Ltd vs Attorney General of Kenya [1959] E. A. 53.*

In the instant case, the Plaintiff is the registered proprietor of the suit land. She therefore has legal possession of the suit land even though she does not have physical possession. The tort of trespass is a wrong, which may be committed against a person or on land, in respect of which the person complaining of the trespass is in possession, and the one accused of trespass has no right to have access. Thus, an action in trespass may be brought by anyone who is either in physical or legal possession of the land in issue. In the instant suit, the Plaintiff has adduced legal possession of the suit land, by the production of a certificate of title to the land.

Mere occupancy of the suit land by another person, however lawful that occupancy is, does not quash this legal possession as such occupancy is subject to the title of the Plaintiff. In *Justine EMN Lutaaya vs Stirling Civil Engineering Co. Ltd.*, (supra), Mulenga JSC clarified on the issue possession. He cited the Kenyan case of *Moya Drift Farm Ltd vs Theuri [1973] E.A.114*, and quoted from a passage on at page 115, where Spry V.P., in agreeing with the argument that a

registered proprietor of land has legal possession, and has a right to bring an action in trespass, said: –

*"I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as 'the absolute and indefeasible owner' of land if he could not cause a trespasser on it to be evicted."*

Mulenga JSC noted that section 23 of the Kenya Statute applied in the *Moya's* case, was similar to section 56 of the Registration of Titles Act of Uganda, and stated as follows: –

*"I think the decision in Moya's case represents what the law should be in Uganda. It is an authority. I therefore hold that a person holding a certificate of title has, by virtue of that title, legal possession, and can sue in trespass. ... The import of the decision in that case is that in the absence of any other person having lawful possession, the legal possession is vested in the holder of a certificate of title to the land."*

Mulenga JSC pointed out, that where a lessee of the land in issue is in possession, it is such lessee who has a right to institute a suit in respect of trespass to that land. He however qualified this proposition of law, restricting the cause of action in trespass to a lessee in possession, as follows: –

*"An exception is that where the trespass results in damage to the reversionary interest, the landowner would have the capacity to sue in respect of that damage."*

From this decision, two issues arise with regard to the matter before me. First is whether Marion Kabaale Munyangwa and Fred Munyangwa, whom the Defendant claims to have obtained permission from as bona fide occupants of the suit land, are lawful occupants, in the light of the denial by the Plaintiff that they are. Second is whether, even if Marion Kabaale Munyangwa and Fred Munyangwa are lawful occupants of then suit land as contended by the Defendant, their occupancy would preclude the Plaintiff from bringing an action in trespass with regard to the suit land. I am of the view that owing to the contention by the Plaintiff to the contrary, Marion Kabaale Munyangwa and Fred Munyangwa needed to adduce convincing evidence that they are truly bona fide occupants of the suit land. This on the evidence is not so.

Even if Marion Kabaale Munyangwa and Fred Munyangwa are bona fide occupants of the suit land, this would not negate the Plaintiff's right to sue for trespass. This is because the Defendant's construction of its hotel, as well as the perimeter wall, on part of the suit land, have

clearly caused damage to the suit land since they affect the Plaintiff's reversionary interest in the suit land. On the authority of *Justine EMN Lutaaya vs Stirling Civil Engineering Co. Ltd.*, (supra), per Mulenga JSC, the Plaintiff has a cause of action against the Defendant for these acts of trespass. In the plaint, the Plaintiff has shown she has proprietary right over the suit land, averred the violation of that right, and named the Defendant as the perpetrator of that violation. These three ingredients, in law, constitute a cause of action.

**Issue No. 2.                    Whether in building the perimeter wall fence, it was lawful for the Defendant to deal with Marion Kabaale Munyangwa and Fred Munyangwa.**

**&**

**Issue No. 3.                    Whether the Defendant has committed any acts of trespass onto the suit land.**

I agree with Counsel for the Defendant that these two issues are in fact largely one; hence, it is appropriate to dispose of them together. The Defendant does not dispute the Plaintiff's title to the suit land; and concedes that it has entered the suit land, but that it did so with the permission of the person in physical possession of the land. The evidence by the surveyor commissioned by the Plaintiff shows that the Defendant did not only build a wall on the suit land; but has also constructed part of its hotel on the suit land. The Defendant has not disputed or challenged this finding. The construction of the hotel on to the suit land, and building the wall in such a manner that it includes part of the suit land in the Defendant's compound, but without the consent of the Plaintiff, constitute trespass.

Further act of trespass is in the Defendant's construction of the access road on the suit land without the consent of the Plaintiff. There is no evidence adduced by Marion Kabaale Munyangwa and Fred Munyangwa that the nature of their interest in the suit land, vis-a-vis that of the Plaintiff, entitled them to deal with anyone regarding the suit land in the exclusion of the Plaintiff. Accordingly, the Defendant's intrusion onto the suit land – the construction of part of its hotel premises, the perimeter wall, and the access road – merely with the permission of Marion Kabaale Munyangwa and Fred Munyangwa, but without the consent of the Plaintiff, are continuous acts of trespass. This amounts to deprivation of the suit land from the Plaintiff; and thereby affecting her reversionary right thereto.

**Issue No. 4. Whether the Plaintiff is entitled to the reliefs claimed in the  
plaint.**

The three acts of intrusion have resulted in the Defendant's continuous trespass onto the suit land; and this has entitled the Plaintiff to bring this action for the reliefs specified in the plaint and the scheduling conference memorandum, which the Counsels to the respective parties hereto jointly arrived at. The Plaintiff is entitled to the reliefs she has pleaded for owing to the trespass onto the suit land. In determining the quantum of damages to award, the trial Court must be guided by the party seeking such an award. In *Fulungenso Sernako vs Edirisa Ssebugwawo [1979] H.C.B. 15*, Butagira J. advised as follows: –

*"In an action for damages, one of the duties of Counsel should be to put before Court material which would enable it to arrive at a reasonable figure by way of damages. In this respect, Counsel owes duty to their client as well as to Court to help in arriving at a reasonable award."*

George Wana, PW2, who opened the boundary to the suit land, testified to having been paid U. shs. 2,800,000/= (Two million, eight hundred thousand only) as his professional fee. Counsel for the Defendant has attacked this, as not sufficient proof of the special damages pleaded. I do not agree. The Plaintiff specifically pleaded the special damages and proved it by causing the very person who received the money to give evidence to that effect. There is nothing sacrosanct in a receipt. In any case, a receipt is not issued on oath as the statement by PW2 was. On the award of general damages, the Plaintiff's uncontroverted evidence is that the Defendant has constructed part of its hotel on the suit land. Naturally, it has reaped and continues to reap benefits from the use of the suit land.

Furthermore, the construction of part the hotel, the perimeter wall, and the access road onto the suit land are injurious of the Plaintiff's reversionary interests in the suit land. This entitles the Plaintiff to award of general damages. However, because the Plaintiff was not using the suit land, the intrusion did not disrupt any activity by the Plaintiff thereon. Nonetheless, she has certainly been dispossessed of the part of the suit land by the Defendant's trespass. I consider an award of U. shs. 20,000,000/= (Twenty million only) as general damages for the trespass to be reasonable. As for mesne profits, it should be a measure of loss of rentals or awarded in lieu of ascertained profitable use of the land by the owner, who is denied such benefits by the wrongful occupation. This is not the case here.

There is no evidence that the Plaintiff was using the suit lands before the Defendant's trespass on it. I therefore find the claim for mesne profits as far-fetched, and unjustified; and so, I decline to award it. Similarly, I find this case to be one where an award of punitive damages is not justified. The Defendant has pleaded that its entry onto, and use of, the suit land was with the permission of the two people in occupation, whom it believed had the powers to entitle it to carry out the activities the Plaintiff now holds them liable for. There is nothing outrageous in what it has done, or that it has acted with impunity; albeit its occupation and use of the suit land being wrong in law. I therefore decline to award the exemplary damages claimed by the Plaintiff for being unjustified in the circumstances of this case.

In the premises then, I allow this suit; and make the following declarations and orders: –

- (i) The Defendant has committed trespass onto the suit land.
- (ii) The Defendant shall forthwith vacate the suit land.
- (iii) The Plaintiff is awarded special damages, in the sum of U. shs. 2,800,000/= (Two million, eight hundred thousand only).
- (iv) The Plaintiff is awarded general damages, in the sum of U. shs. 20,000,000/= (Twenty million only), for the Defendant's trespass onto the suit land.
- (v) The Defendant shall pay the Plaintiff's full costs of the suit.
- (vi) The monetary award in (iii) shall attract interest at the rate of 10% per annum from the date of the suit until payment in full.
- (vii) The monetary award in (iv) and (v) shall attract interest at the rate of 6% per annum from the date of this judgment until payment in full.



Alfonse Chigamoy Owiny – Dollo  
**JUDGE**

**08 – 11 – 2014**