

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 389 OF 2010

HAJI ZUBAIRI MUSOKE.....PLAINTIFF

VERSUS

BETTY NAGAYI.....DEFENDANT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This suit was brought by the Plaintiff seeking declarations that he is a bona fide purchaser for value of the property comprised in Mengo Kyadondo Block 113 Plot no. 39 (now Kyadondo Block 113 Plot nos. 340 - 373) at Bumbu Kiteezi; and that the Defendant does not have any caveatable interest in the property comprised in Kyadondo Block 113 Plot nos. 340 - 373; plus orders that the caveats lodged by the Defendant on Kyadondo Block 113 Plot nos. 340 - 373 vide instrument no. KLA 407675 on the 6th day of March 2009 be vacated/lifted; that the Defendant compensates the Plaintiff for both special and general damages sustained by him as a result of the lodging of the said caveats; costs of the suit; and any other relief deemed appropriate by court in the circumstances.

The Defendant was by order of this court served with summons to file a defence through substituted service by publication of the same in the New Vision newspaper, which was eventually done through the New Vision of Wednesday 20th April 2011, a copy of which is filed on the court record. This was after this court expressed dissatisfaction with the previous modes of service effected by the Plaintiff on the Defendant. The Defendant did not file a defence, consequent to which the Plaintiff successfully sought to have the matter fixed for hearing *ex parte* under Order 9 rule 11 of the Civil Procedure Rules (CPR).

During the *ex parte* hearing this court heard the the sworn evidence of **Hajji Zubairi Musoke**, the Plaintiff.

According to the pleadings and their annexures, together with the Plaintiff's oral sworn evidence, the Plaintiff's case is that the Plaintiff sued the Defendant sometime in 2010 when he learnt that his properties in Block 113 Plots 340 - 373 had been encumbered by the Defendant. He had bought two plots of land in 2004 one being Block 113 Plot 39 from Standard Schools Ltd, and an agreement to that effect was signed (annexture **A** to plaint, exhibit **P1**). Before that he had conducted a search in the Registry of Titles and established that the property existed free of incumberances registered in the names of Standard Schools Ltd. He got registered as proprietor of the property in September 2006. In 2009 he subdivided the property (plot 39) in two smaller plots which were numbered Plots 340 - 373 of Block 113. In the same year the LC Chairman of the area gave the Plaintiff a copy of a letter written by

the Defendant to the Registrar of Titles. It was alleging that the Plaintiff had had forged a title for Block 113 Plot 39 and registered it in his names, and that he had fraudulently claimed that the property belonged to Standard Schools Ltd which did not exist as a company in the Companies Registry. He asked his lawyer to respond to the letter, which he did (Annexure **B** to plaint, exhibit **P2**). Subsequently, at his request, his lawyers searched the Registry of Titles and found, through search letters issued by the Registrar of Titles (Annexure **C** to plaint, exhibit **P3**) that the properties in Block 113 Plot 340 – 373 had been encumbered by the Defendant by way of lodging a caveat on the same on 6th March 2009. The Plaintiff had not been notified. The Plaintiff had sub divided the property in order to sell the smaller plots at a profit as the bigger plot was not selling easily. He has failed to sell the land as prospective buyers have been saying that they can only buy when the caveat is removed. The average size of the plots is 12 decimals at a market price of about U. Shs. 15,000,000/=. He prayed court to lift the caveat, and for damages for the inconvenience and loss of profit as well as costs of the suit.

Learned Counsel for the Plaintiff, relying on the evidence adduced in court, submitted that since the evidence adduced by the Plaintiff had not been controverted by the Defendant, he had discharged the burden of proving his case and accordingly prayed that judgment be entered in his favour. He also submitted that the Plaintiff is entitled to costs of the suit by virtue of section 27(2) of the Civil Procedure Act, cap 71, which provides that the costs of any action, cause or matter or issue shall follow the event.

On the question of not filing a defence, Order 9 rule 12(2) of the CPR provides that:-

“ Where the time allowed for filing a defence...has expired and the Defendant...has...failed to file his or her defence(s), the Plaintiff may set down the suit for hearing ex parte.”

There are court decisions to the effect that in the circumstances, the Defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37**, court held that since the Appellant had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 171**. This was the reason the suit proceeded *ex parte*. However, whether a suit proceeds *ex parte* or not, the burden of the Plaintiff to prove his/her case on the balance of probabilities remain.

Order 9 rule 10 of the CPR is to the effect that where the Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence. Case decisions on this point are to the effect that a party who has not filed a defence is deemed to have admitted the allegations.

On the issue of damages the principles set out in **Kampala District Land Board & George Mitala V Venancio Babweyana, Civil Appeal No. 2 of 2007**, unreported, Odoki CJ; **Kyagulanyi Coffee Ltd V Steven Tomusange, Civil Appeal No. 9 of 2001**, unreported, Mukasa Kikonyogo DCJ, as she then was; and **Mbogo & Anor V Shali [1968] EA 93** are well settled law on award of damages by a trial court. It is trite law that general damages are the direct probable consequences of the act complained of. Such consequences may be loss of profit, physical inconvenience, mental distress, pain and suffering. See

Kiryabwire J in Assist (U) Ltd V Italian Asphalt & Haulage Ltd & Anor HCCS No. 1291 of 1999, unreported, at page 35.

Besides, section 142 of the Registration of Titles Act states as follows:-

“ Any person lodging any caveat with the Registrar...without reasonable cause, shall be liable to make to any person who may have sustained damage by lodging of the caveat such compensation as the High Court deems just and orders.”

The evidence adduced before court by the Plaintiff, which is unchallenged, is that he had sub divided the caveated property in order to sell the smaller plots at a profit as the bigger plot was not selling easily. He has failed to sell the land as prospective buyers have, since the caveat was lodged, been saying that they can only buy when the caveat is removed. The average size of the plots is 12 decimals at a market price of about U. Shs. 15,000,000/= . He prayed court to lift the caveat, and for damages for the inconvenience and loss of profit as well as costs of the suit.

I would, on the basis of the said authorities, and the given circumstances of the case, award the Plaintiff damages of U. Shs. 5,000,000/= against the Defendant.

In the premises, and on the foregoing authorities, I am satisfied that the Plaintiff has satisfied his claim against the Defendant for the following orders:-

- i) The Plaintiff is a bona fide purchaser for value of the property comprised in Mengo Kyadondo Block 113 Plot no. 39 (now Kyadondo Block 113 Plot nos. 340 – 373) at Bumbu Kiteezi.
- ii) The Defendant does not have any caveatable interest in the property comprised in Kyadondo Block 113 Plot nos. 340 – 373 at Bumbu Kiteezi.
- iii) The caveats lodged by the Defendant on Kyadondo Block 113 Plot nos. 340 – 373 vide Instrument No. KLA 407675 on 6th March 2009 be vacated/lifted.
- iv) The Defendant pays U. Shs 5,000,000/= as general damages to the Plaintiff for the inconvenience and loss of profit he has caused him.
- v) The costs of this suit are awarded to the Plaintiff.

Dated at Kampala this 8th day of December 2011.

Percy Night Tuhaise

JUDGE.