

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL SUIT NO. 939 OF 1996**

**PLACID WELI** ..... **PLAINTIFF**

**VERSUS**

- 1. HIPPO TOURS & TRAVEL LTD;**
- 2. ERIZAFANI GITTA;**
- 3. FREDERICK SEMAYOBE .....DEFENDANTS**

**BEFORE: Hon. Lady Justice Monica K. Mugenyi**

**JUDGMENT**

On 6<sup>th</sup> December 1989 the plaintiff executed an agreement with the first defendant for the sale of half of the land described as Kyadondo Block 236 plot 328. The 1<sup>st</sup> defendant is alleged to have fraudulently sub-divided the land described above into 3 plots instead of two as had been agreed thus trespassing onto the plaintiff's land and blocking access thereto. The plot allocated to the 1<sup>st</sup> defendant was subsequently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, a Managing Director and Director in the 1<sup>st</sup> defendant company. In a bid to rectify this, the plaintiff successfully applied to the Commissioner, Surveys and Mapping to amalgamate the three plots and re-demarcate them into 2 plots. The defendants, however, ignored the Registrar of Title's advice to them to re-submit the 3 plots' titles to enable the said re-demarcation take place. They contended that the Registrar of Titles rightly issued the 3 titles after satisfying himself that the plaintiff's consent had been duly obtained. The plaintiff has since died and was substituted as a party in the present proceedings with his son, Simon Iga Weli.

At a scheduling conference held on 1<sup>st</sup> June 2009 the following issues were framed:

- 1. Whether the demarcation and mutation of Kyadondo Block 236 plot 328 into plots 924, 925 and 926 was in breach of a sale agreement between the parties dated 6<sup>th</sup> December 1989.**
- 2. Whether the defendants trespassed onto the plaintiff's land and, if so, to what extent.**
- 3. Remedies available to the parties.**

This court shall proceed to determine this suit on that basis.

The issue of breach of contract was attested to by the plaintiff. It was his evidence that he was the registered proprietor of a 1 acre piece of land comprised in Block 236 plot 328 that he had

mortgaged with the then Uganda Commercial Bank (UCB). The title in respect of that land was admitted on the court record as Exh. P1. An agreement dated 6<sup>th</sup> December 1989 for the sale of half of the plaintiff's land to the 1<sup>st</sup> defendant was also admitted on the court record as Exh. P2. It was the plaintiff's evidence that he did give the defendants authority to redeem the land title from the bank in order to enable them survey, demarcate and mutate the land in question to reflect their 50% acquisition thereof. The land was supposed to be divided into 2 equal portions and separate titles in respect of each portion duly issued, but the defendants fraudulently had it divided into 3 portions. Further, although his total allocation (plots 925 and 926) measured half an acre, plot 925 was part of the land that had been sold to the defendants and should have been demarcated as such as spelt out in clause 7 of the sale agreement. The plaintiff testified that though now a public road, at the time plot 925 was not designated as such.

The pertinent clauses of the sale agreement in reference above are as follows.

Clause 1(b):

**“Whereas the seller at the first instance and request of the purchaser has agreed to sell and the purchaser has agreed to purchase half (1/2) an acre of land comprised in the above registered land free from all incumbrances.”**

Clause 3:

**“The purchaser shall be free any time to survey and demarcate off the piece hereby purchased.”**

Clause 7:

**“The land hereby sold shall be surveyed off from the vacant area closer to the gate leading to the seller's other properties.”**

Clause 1(b) of the agreement clearly spelt out the piece of land that was up for sale. It was intended to be half an acre of land comprised in Kyadondo Block 236 plot 328. Clause 3 of the same agreement authorised the purchaser to survey and demarcate the piece of land he had purchased. This would be the half acre of land spelt out in clause 1(b). Clause 7, then, explicitly stated the specific area of Block 236 plot 328 from which the purchaser was to demarcate the half acre of land sold to him. The purchaser was to survey and demarcate it from the ‘vacant area closer to the gate leading to the seller's other properties.’ It was the plaintiff's evidence that the defendants did not survey and demarcate unto themselves 0.50 acres of land from the western part of his land as had been agreed. It was also submitted on his behalf that the defendants were in breach of contract in so far as they did not survey off 0.50 acres of vacant land from the western side of the plot as had been agreed. Conversely, it was argued for the defence that no further description was made of the land that was due for demarcation to the purchaser beyond

the provisions of clause 7 of the agreement. This argument would appear to suggest that the 1<sup>st</sup> defendant was entitled to demarcate his piece of land from any part of Block 236 plot 328.

With respect, I find the defence argument flawed. To my mind, that clause of the agreement sought to clearly spell out the land that was available to the purchaser for demarcation. In my view, the key terms in the description of land provided by clause 7 of the agreement were the words 'vacant' and 'closer to the gate.' The purchaser/ 1<sup>st</sup> defendant contracted to demarcate its half acre of land from the vacant land close to the gate by which the plot was accessed. The evidence on record quite clearly suggests that the eastern part of Block 236 plot 328 was, at the time, occupied by the plaintiff and therefore was not vacant. The plaintiff's evidence indicated that there was a uniport and latrine at the eastern end of the land that were used by members of his homestead. A report from the visit to the locus in quo revealed that the uniport in question was situated almost mid-way the plot – between the eastern and western extreme ends. This evidence would support the position that the western end of the plot was vacant while the eastern part was occupied by the plaintiff and was bordered by the uniport. Further, clause 7 clearly provided for demarcation of the land 'closer to the gate'. The plaintiff testified that he was in occupation of the eastern end of the said land while the gate was at the western end thereof. Therefore, the only land that was available to the purchaser for survey and demarcation was the vacant land closer to the gate and at the western end of Block 236 plot 328.

On the contrary, the 1<sup>st</sup> defendant sub-divided the plot into 3 plots as follows:

- Plot 925 measuring 0.10 acres; bordering the gate at the extreme western part of the land was allocated to the plaintiff.
- Plot 924 measuring 0.50 acres and between plots 925 and 926 was allocated to the 1<sup>st</sup> defendant.
- Plot 926 measuring 0.40 acres and at the extreme eastern part of the land was allocated to the plaintiff.

There was no evidence on record to suggest that the plaintiff was consulted on this course of action. The defence case on this issue was that the plaintiff was present when the defendants surveyed the land referred to in clause 7 and he (plaintiff) witnessed the placing of mark stones in that regard but raised no complaint at the time. However, the 2 persons that allegedly witnessed the survey were not produced. DW1 testified that they were now deceased. Therefore, save for DW1's testimony, this evidence remained unsubstantiated. Further, it was averred in paragraph 4 of the written statement of defence that the plaintiff approved the survey of the 0.50 acres sold to the 1<sup>st</sup> defendant by signing a mutation form in the presence of the surveyor. This averment was squarely denied by the plaintiff, who attested to signing transfer forms not mutation forms and alluded to fraud on the part of the defence in their sub-division of the land in question without signed mutation forms. It was later submitted for the defence that the alleged omission to sign a mutation form should have been proved by the plaintiff as the burden of proof thereof lay with him and not the defence.

Sections 101, 102 and 103 of the Evidence Act state the law on burden of proof. In a nutshell, section 101(1) provides for a party who asserts a fact to prove the existence of that fact. In the present case the plaintiff alluded to fraud in the sub-division of Block 236 plot 328. However, beyond his singular averments no other evidence was adduced in proof of this allegation. Nonetheless, the defendants did also aver that the survey that preceded the said sub-division was done in the presence of the plaintiff and that he had given his approval of the said sub-division by signing a mutation form in the presence of a surveyor. The defence evidence furnished in support of this averment was not substantiated by separate evidence from either the witnesses that were present during the alleged survey, or the surveyor that was present when the plaintiff allegedly signed the mutation form approving the sub-division. No explanation was advanced for the failure to call the said surveyor as a defence witness. Further, no effort was made to substantiate DW1's evidence that the 2 alleged witnesses to the survey had existed at all, let alone having since died. While section 102 of the Evidence Act places the burden of proof in any suit or proceeding on the party that would fail if no evidence were provided by either party; section 103 of the same Act places the burden of proof of any particular fact on such party as wishes a court to believe in its existence. Therefore, although the general burden of proof in the present suit lies with the plaintiff, the burden of proving the existence of a mutation form duly signed by the plaintiff would lie with the defendant whose defence to the allegation of breach of contract is hinged on such form's existence. No such evidence was adduced. Therefore, on a balance of probabilities I would find that the defence has failed to prove that the sub-division of Block 236 plot 328 was done with the plaintiff's knowledge and consent.

It was also the defence case that there was a road on Block 236 plot 328 that was meant to be surveyed onto the plaintiff's land not that of the 2<sup>nd</sup> defendant (DW1). Interestingly, it was submitted for the defence that if there was any road on the portion of land described in clause 7 of the agreement the parties would have stated so in the agreement. Learned defence counsel invited this court to find that the road was not part of the portion of land specified in clause 7 of the agreement. This court finds no mention of such a term or intention in the sale agreement; neither does it find any mention in the same agreement that the said road was meant to be surveyed onto the plaintiff's land not that of the 2<sup>nd</sup> defendant or the 1<sup>st</sup> defendant, the purchaser. The road in question was demarcated into the present plot 925. No evidence was adduced by the defence to indicate the issue of the road was ever brought to the plaintiff's attention. This might have been the subject of re-negotiation of the agreement had it been disclosed. This court observes that the party responsible for the survey of the land was the purchaser. See clause 3 of the agreement. DW1 did concede as much in his evidence that the land comprised in Block 236 plot 328 had been surveyed but the purpose of their (defendants') survey was to curve out half of the said land for themselves. Therefore, the onus lay with the purchaser who discovered the existence of the road in the course of the survey to disclose the same to the plaintiff. This would have been done with a view to a renegotiation of the agreement. In the absence of a contract renegotiation or addendum, any demarcation contrary to the terms of the sale agreement would constitute a breach of contract.

This court was referred to sections 91 and 92 of the Evidence Act, as well as the case of **Muwonge vs. Musa (2004) 2 EA 187** (Court of Appeal, Uganda) in support of the position that where the terms of a contract have been reduced into writing no evidence may be adduced in respect thereof as would be deemed to vary or otherwise alter the terms of such agreement. I do agree with the position advanced. The evidence on record herein does not indicate that the parties contracted for the demarcation of 0.50 acres to the 1<sup>st</sup> defendant anywhere within the land described in Kyadondo Block 236 plot 328 save as provided under clause 7 of the sale agreement. The sale agreement did not provide for the purchaser to exclude the alleged road in its survey and demarcation exercise, as it apparently did; neither did it apportion the road to the plaintiff as was done by the 1<sup>st</sup> defendant. Finally, rather than survey vacant land on Block 236 plot 328 the 1<sup>st</sup> defendant included land already occupied by the plaintiff in the land it surveyed and had demarcated to itself.

I therefore, find that the 1<sup>st</sup> defendant did breach the sale agreement dated 6<sup>th</sup> December 1989. I so hold.

With regard to the second issue, the plaintiff averred that the defendants' recourse to the land demarcation they undertook denied him access to his houses, which were situated at the eastern side of the plot. The plaintiff complained that the defendants fraudulently demarcated plot 924 between his 50% portion of land instead of demarcating their 50% portion from the western part of the land as had been agreed. He contended that by so doing they encroached onto his land and subsequently built a wall through his door, thus denying him access to a pit latrine on that side of the land. The certificate of title in respect of plots 925 and 926 was admitted on the court record as Exh. D2, while that in respect of plot 924 was admitted on the record as Exh. D3. Finally, the plaintiff testified that the defendants have since sold the disputed land to Orange telecom company, which had in turn constructed a mast thereon. As highlighted earlier herein, it was countered for the defence that the demarcation effected by the defendants was done with the plaintiff's knowledge and approval. Learned defence counsel argued that it was inconceivable that the plaintiff did not complain about the alleged encroachment of his land for 7 years. He invited this court to treat the alleged complaint of trespass as an afterthought.

Learned counsel for the plaintiff referred this court to the following definitions of trespass to land. First, in **Halsbury's Laws of England 3<sup>rd</sup> Edition Vol. 38** it was stated:

**“Trespass to land is unauthorised entry upon land. A trespasser gives the aggrieved party the right to bring a civil law suit and collect damages as compensation for the interference and for any harm suffered.”**

Secondly, in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002** (SC) trespass to land was defined as follows:

**“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land.” (emphasis mine)**

Therefore the present plaintiff’s alleged knowledge and approval of the land sub-divisions that led to the defendants’ occupation of his land would constitute authorised entry upon the land and thus negate an action by him in trespass to land. However, as this court did find earlier, the plaintiff’s alleged knowledge and approval were not sufficiently proved by the defence. Conversely, clause 7 of the sale agreement clearly described the land that was available for occupation by the defendants. As this court has found, that clause was breached by the defendants. I, therefore, find that the defendants did trespass on the plaintiff’s land.

Before I take leave of this issue I wish to comment briefly on the submission by learned defence counsel that the plaintiff had in 1996 been convicted for malicious damage to the defendant’s property presumably in respect of the same land. While learned counsel did not clarify which court convicted the plaintiff, the plaintiff did attest to having been convicted in the Chief Magistrates Court of Nakawa. I am constrained to observe that this court is in no way bound by the decision of a Magistrates Court.

I now revert to the issue of remedies available. The remedies sought by the plaintiff were set out in paragraph 13 (a) to (g) of the amended plaint, namely;

- general damages for breach of contract and trespass to land;
- vacant possession of the suit land;
- order restoring access from the main road to the plaintiff’s land;
- orders directing the registrar of titles to cause the re-survey and sub-division of Block 236 plot 328 into 2 equal plots of half an acre each, and re-issue titles to the parties accordingly;
- costs of the suit;
- any further relief this court may deem fit.

The question would be whether specific performance or the grant of damages is adequate remedy for a breach of contract for the sale of land.

In **Manzoor vs Baram (2003) 2 EA 580 at 592** this question was aptly addressed as follows:

**“Specific performance is an equitable remedy grounded in the equitable maxim that ‘equity regards as done that which ought to be done’. As an equitable remedy it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy, such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard the courts have long considered damages an inadequate remedy for breach of contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course.” (emphasis mine)**

This court would have ordered specific performance in the present case but the genesis of this case indicates that the defendants have been unwilling to cause a proper demarcation of the suit land. However, in my view the orders sought in respect of the then registrar of titles (now referred to as Commissioner Land Registration) adequately cater for the performance of the present sale agreement in so far as they seek a re-demarcation of Block 236 plot 328 as provided in clause 7 thereof.

Be that as it may, the plaintiff does also seek general damages for breach of contract. Learned counsel for the plaintiff addressed this court quite extensively on justification for the grant of damages for trespass to land, but did not address the issue of damages for breach of contract. Therefore, this court does grant the orders sought of the Commissioner Land Registration but declines to award damages for breach of contract.

With regard to damages for trespass to land, this court was aptly referred to the following passage in Halsbury's Laws of England 3<sup>rd</sup> Edition Vol.38 para.1222:

**“In an action of trespass the plaintiff, if he proves the trespass, is entitled to recover damages even though he has not suffered actual loss. If the trespass is accompanied by aggravating circumstances, the plaintiff may be awarded exemplary damages. If the trespass has caused the plaintiff actual damage, the plaintiff is entitled to receive such an amount as will compensate him for his 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). (emphasis mine)**

In the present case, having found that the plaintiff has proved the action in trespass to land, this court does allow the award of damages therefor. Further, a sketch drawing in the report on the visit to the *locus in quo* did reveal that the mast set up by Orange Telecom company on lease from the defendants was situated between a uniport that was originally on the plaintiff's land and plot 926, currently occupied by him. On a balance of probabilities, it is reasonable to conclude that had Block 236 plot 328 been divided as provided in the sale agreement this area occupied by the mast would have fallen in the plaintiff's land together with the uniport. I do therefore find that the defendants have made use of the plaintiff's land thus entitling him to mesne profits therefor.

Finally, this court was not sufficiently addressed as to how the plaintiff has been accessing his plot to date. Therefore, no order is made as to access through the defendants' land. This could be a matter of negotiation between the parties.

In the result, judgment is entered for the plaintiff with the following orders:

1. I award general damages for trespass to land in the sum of Ushs. 100,000,000/= payable with interest at 8% per annum from the date hereof until payment in full.
2. I award mesne profits in the sum of Ushs. 50,000,000/=.

3. It is hereby ordered that the Commissioner Land Registration amalgamate plots 924, 925 and 926; cause the re-survey and sub-division of the original Block 236 plot 328 into 2 equal plots of half an acre each, the defendants to own the eastern half and the plaintiffs to own the western half, and issue each respective party with a title in respect of their land holding.
4. Costs of this suit are awarded to the plaintiff.

I so order.

**Monica K. Mugenyi**  
**JUDGE**

**18<sup>th</sup> October, 2013**