

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
LAND DIVISION  
CIVIL SUIT N0. 24 of 2013**

**MUYINGO**

**JOHN**

**PAUL.....PLAINTIFF**

**VERSUS**

**1. ABASI LUGEMWA**

**2. ASADU**

**LUGEMWA.....DEFENDANT**

**S**

**3. NAKUYA HADIJA**

**JUDGMENT**

**BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

The plaintiff brought this suit against the defendants jointly and severally for declaratory orders that he is the rightful owner of a kibanja situate at Kazinga Bweyogerere, Kira Town Council in the Wakiso District measuring 64ft by 24ft (hereinafter referred to as the suit land), a declaration that the 1<sup>st</sup> defendant by his attempts to reposes the suit land, was in breach of contract, a permanent injunction to guarantee the plaintiff's peaceful occupation and quiet enjoyment of the suit land, special damages for loss of land and bodily harm, exemplary damages for high handiness, general damages and costs of the suit.

The brief facts of the case are that on the 7/8/08, the 1<sup>st</sup> defendant and the plaintiff executed an unequivocal agreement in which the 1<sup>st</sup> defendant gave the plaintiff the suit land in consideration of constructing for him a three bed roomed house on a plot adjacent to the suit land. The agreement took effect on execution, whereupon the plaintiff at his expense, started constructing two houses, one for the 1<sup>st</sup> defendant, and another on the suit land for himself. The plaintiff

completed construction of both houses and both parties took effective occupation of their respective houses, at the end of 2008. The plaintiff furnished his house and connected the necessary utilities of piped water and electricity. The two parties continued in their cordial relationship until 2010 when the 1<sup>st</sup> defendant claimed ownership of both houses. The 1<sup>st</sup> defendant then incited the other two defendants who together with him, interfered with the plaintiff's occupation, destroyed his property, and caused him and his family grievous harm and eventually forced him out of the suit land and destroyed the house on it completely.

None of the three defendants filed written statements of defence despite having been served with summons, and an interlocutory judgment was entered in favour of the plaintiff on 14/10/13. The matter then proceeded *ex parte* for formal proof on 10/3/15

The plaintiff proceeded by way of witness statements sworn by the plaintiff, (PW1), Mariam Namugwanya (PWII) and Nantongo Zaitun (PWIII) and plaintiff's counsel presented written submissions which will be considered when making this judgment.

By inadvertent omission, plaintiff's counsel did not file any scheduling notes. However, he proposed three issues which court using its powers under Order 15 r. 3 reframed to read as follows:-

**Issues:-**

1. Whether there is a valid contract between the plaintiff and 1<sup>st</sup> defendant in respect of the suit land, and if so, whether the 1<sup>st</sup> defendant is in breach of that contract.
2. Whether the plaintiff is the rightful owner of the suit land?
3. Whether the plaintiff is entitled to the remedies sought.

Because of their similarity, I will resolve issues, one and two concurrently.

However, before I can resolve the issues I need to point out that all three defendants chose not to file written statements of defence and thereby left the plaintiff's case unrebutted. In such circumstances, the provisions of Order 8 r. 3 CPR would apply and for clarity, I will reproduce that provision;

***“Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against a person under disability; but the court may in***

***its discretion require any facts so admitted to be proved otherwise than by that admission.”***

However, this case is on formal proof and I choose to have the plaintiff prove his claim on the facts and evidence, as relayed.

It was the evidence of PW1 that on 7/8/14, the plaintiff and 1<sup>st</sup> defendant executed an equivocal agreement by which the 1<sup>st</sup> defendant agreed to give the plaintiff the suit land in consideration of the latter constructing for him a three bed roomed house on an adjacent plot. The parties executed a sale agreement that was admitted into evidence as Exhibit P1. Both PWII and PWIII were witnesses to that agreement. In exhibit P.1, the 1<sup>st</sup> defendant clearly stated that he was giving part of his plot at Kazinga measuring 64ft by 24ft to the plaintiff and his wife Mariam Namugwanya. He gave them the suit land while in good health and without force.

The agreement in issue was made in August 2008, and therefore came into force before the Contracts Act, 2010. Thus although the definition of a contract given in Section 10 of that Act is instructive, it would not apply to the present circumstances. In my view, the contractual relationship between the parties, if any, would be governed by the now defunct Contract Act Cap 73 which provided for the application of English contract Law in Uganda.

**Traitel** in his book – **The Law of contract**, 8<sup>th</sup> edition quoted in page 1 of **Chitty on Contracts – General Principles** (Sweet and Maxwell) at page 263, described a contract to be an agreement giving rise to obligations which are recognized by law. On the other hand, **Pollock – Principles of Contract**, 13<sup>th</sup> Edition at page 1 defines a contract as “*a promise or a set off promises which the law will enforce.*” What is important is that there must be evidence of two (or more parties) with capacity to contract entering into a binding agreement. It is also a cardinal principle, that in order to form a legally binding contract, both parties must have agreed to offer something of value, or more specifically, consideration is a cardinal necessity of the formation of a contract. See for example, **Tweddle Vs Atkinson (1861) 121 ER 762** and **Combe Vs Combe (1951) 2KB 215.**

The subject of the agreement was the suit land which was well defined by size, location and boundaries. In spite of the elaborate evidence by the plaintiff that the consideration from the

plaintiff was for him to build a house for the 1<sup>st</sup> defendant on an adjacent plot, this was not reflected in the agreement. What is apparent is that the 1<sup>st</sup> defendant donated the land to the plaintiff and PWII in return for the good relationship they enjoyed between them. There may have been unrebutted evidence that the plaintiff built a house for the 1<sup>st</sup> defendant on an adjacent plot to the suit land, but that could have been an oral agreement between them, the specifics of which cannot be known and which could be quite parrel to the contents of Exhibit P.1. In any case, the parole evidence rule demands that this court should concentrate on the terms of the agreement that was executed between the parties and presented in evidence.

My understanding of the contract is that natural love and affection is presented as the mode of consideration flowing between the parties. According to English contract law, love and affection does not amount to valuable consideration in order to form a legally binding contract because, common law only considered valuable consideration. See for example **Bret Vs JS & Wife (1600) Cro Eliz 756**. Going by that authority therefore, the agreement would be void and unenforceable.

The above notwithstanding, the plaintiff would still have remedy under equity in that there was a definite intention of the 1<sup>st</sup> defendant to make a gift of the suit land to the plaintiff by way of deed of gift.

Indeed the heading on the agreement is translated as follows:- “An agreement to give away part of my Plot at Kazinga.”

**Words and Phrases Legally Defined (2<sup>nd</sup> edition) at page 317** defines a deed of gift as follows:-

*“a gift at law or equity supposes some act to pass the property: In donations inter vivos if the subject is capable of delivery, delivery of; if a chose in action, a release or equivalent instrument; in either case, a transfer of the property is required”.*

The court in **Nolan Vs Nolan & Anor (2003) Vsc 121** held that a gift inter vivos is a gift between two living people, meant to take effect during the life of the people who are party to the transaction. Here consideration is not necessary. It was held further that delivery is the legal act essential to complete the gift.

The above court further advised that the equitable doctrine of undue influence is always relevant and a gift will be impeached for undue influence if in the eyes of equity, it is not an independent expression of the donor's free will. The same court also cautioned that the relationship between the parties is also important. If the relationship is personal, then it is more likely to be a gift. Closer to home, my brother Justice Wangutsi K.D. in **Joy Mukobe Vs Willy Wambuwu (HCT 04 CV CA 0055/2005)** gave essential conditions of a valid gift to include, (i) the absence of consideration; (ii) the donor and the donee; (iii) the subject matter; (iv) transfer and acceptance. In summary, the facts as presented show that there was no consideration at all. However, the gift of the suit land was made with free will by the 1<sup>st</sup> defendant as the donor and accepted on the same terms by the plaintiff. According to the agreement, their relationship was one of close friends, which makes the intention of a gift more likely. There was transfer and acceptance of the gift because the plaintiff agreed to take the land, took possession and developed it. The 1<sup>st</sup> defendant had the capacity to make the gift for it was stated by PWII, that she and the plaintiff first made diligent inquiries including approaching the 2<sup>nd</sup> defendant, the owner of the *mailo* interest, who confirmed owning that interest and having given away the suit land to the 1<sup>st</sup> defendant. I would thus hold that the transaction between the plaintiff and 1<sup>st</sup> defendant was one where the latter gave the former the suit land as a gift.

Having found that there subsisted between the parties a transaction of equated to a gift in law, the plaintiff testified and provided evidence that he took possession of the suit land and developed it with a house that he furnished and connected to utility grids of water and electricity. Group Exhibit P.3 are photographs that include the plaintiff's house (i.e. on the extreme left) before it was demolished. Exhibit P. 2 is utility bills and receipts in the names of the plaintiff and PWII in respect of services at Kazinga, which was in the facts stated to be the location of the suit land. This un rebutted evidence points to the fact that the plaintiff is the owner of the suit land and at one time occupied it. In my view, his ownership began the day he executed Exhibit P.1 and continues to date. His ownership did not cease but was unlawfully interrupted by the 1<sup>st</sup> defendant as this judgment will hereafter show.

It was the testimony of PW1 and PWII that the 1<sup>st</sup> defendant interfered with their ownership and quiet occupation of the suit land. He began by claiming that the suit land did not belong to them and followed this up by an eviction letter. He then incited the other two defendants to indulge into criminal acts that violated the plaintiff's occupation. This included physical attacks upon

the plaintiff, PWII and their family and vandalizing their property. Eventually, they destroyed the plaintiff's house on the suit land completely. Photographs of the plaintiff's house before and after it was demolished as well as destroyed households that appeared to be strewn outside were admitted in evidence as P.Exhibit 3 and P.Exhibit 5 respectively. Apart from the oral testimony, the photographs depicted a picture of an eviction which was supported by PWIII who as a neighbour took photographs of the destroyed property. Also photographs of the destroyed house lent credibility to the fact that the plaintiff and his family were evicted. The photographs were invariably taken by the plaintiff and his witnesses and were not contested.

Also admitted as part of Exhibit P.3 are photographs stated to be taken by the plaintiff and PWII depicting the plaintiff and PWII in different postures of agony with numerous injuries on their upper bodies. Both claimed to have been injured by the defendants, which evidence was not rebutted. In **United Building Services Ltd Vs. Yates Muskrat T/A Quickset Builders & Co. HCCS No. 154 of 2005** Justice Lameck Mukasa held that, *a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract.* I also find the definition given in Black's Law Dictionary 8<sup>th</sup> Edition Page 200 as instructive.

***“Violation of a contractual obligation by failing to perform one's promise, by repudiating it, or by interfering with another party's performance.”***

The evidence presented shows that the plaintiff took possession and him and his family was housed on the suit land for some time. These were facts in full knowledge of the 1<sup>st</sup> defendant who was stated to be a close friend of both the plaintiff and PII. Without a doubt, the acts of the defendants amounted to interfering with the plaintiff's performance of the contract by peaceful enjoyment. Under such circumstances, I would have no other conclusion than to hold that the 1<sup>st</sup> defendant was in breach of the contract between him and the plaintiff in respect of the suit land.

I thereby find issues one and two in favour of the plaintiff.

In his plaint the plaintiff sought different categories of damages, declaratory orders and costs against all three defendants. I believe the declarations have been addressed and will now consider the damages.

Counsel for the plaintiff submitted that since the plaintiff sought for alternative accommodation at a monthly rate of 650,000/= from July 2012 to date (650,000 X 28 months = 18,200,000/=) the plaintiff is entitled to this amount as well as the medical bills.

The law on special damages is that they must be strictly pleaded and proved. See for example, **Eladam Enterprises Ltd Vs. S.G.S (U) Ltd & Ors Civil Appeal No. 20 of 2002**. I am already satisfied that the plaintiff and his family were unceremoniously evicted from the suit land. This evidence came in the form of the testimony of all three plaintiff's witnesses. Reasonably, he had to find alternative accommodation. In my view, he not only pleaded but proved special damages by adducing evidence of a tenancy agreement with one Namataka Justice which was admitted in evidence as Exhibit P.4(a). The rent receipts which were jointly admitted as Exhibit P.4(b) showed that he paid a monthly rent of Shs. 650,000/= for the period 23/2/12 to 13/3/14. He claims in his statement that the tenancy continues to date which is credible testimony since his house has never been rebuilt.

However, it is not clear when the plaintiff fled from his house but what is clear is that the defendants broke into the plaintiff's house and destroyed his property in June 2012 and then broke down the house on 6/11/12. I would deduce therefore that the plaintiff fled his house and had to find alternative accommodation sometime in June 2012. There is sufficient evidence that he paid rent at alternative premises at a rate of Shs.650,000/= per month and thus a sum representing 37 months is granted. However the plaintiff did not provide or even prove the medical bills he incurred as a result of his injuries, and these cannot be granted.

### **Exemplary damages**

Counsel submitted that the plaintiff and his wife suffered severe injuries and loss of property as a result of the violence meted out by the defendants and their agents who acted in a high handed manner.

Lord Delvin in **Rookes Vs Barnard [1964]1 ALL ER 367** gave an insight of instances when exemplary damages can be awarded as follows:-

- (i) *Where there has been oppressive, arbitrary or unconstitutional action by servants of the government.*

- (ii) *Where the defendants conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff.*
- (iii) *Where some law for the time being in force authorizes the award of exemplary damages*

The second instance could apply to the present circumstances. However, in my view, exemplary damages if granted would be payable by the 1<sup>st</sup> defendant who probably stood to benefit financially if he regained the suit property arbitrarily. According to the above authority, it must be shown that the defendant calculated that the money to be made out of his wrong doing will probably exceed the damage at risk. That category is not confined to only money in the strict sense, but could extend to cases where a defendant seeks to gain at the plaintiff's expense some object e.g. property which he covets and cannot obtain or obtain at a high price. Such damages are not compensatory as such, but are meant to punish a wrong doer and deter him from repeating such wrong doing.

The acts of the 1<sup>st</sup> defendant were indeed deplorable and arbitrary. However, the land in issue was originally his property and when he sought to re-gain it, he destroyed all the developments on it. Since no evidence of the value of the land or developments on it were put before me, I am unable to confirm to a reasonable degree what exactly the 1<sup>st</sup> defendant stood to gain by his actions. Also by destroying the plaintiff's house, his calculated gains were thereby substantially reduced. Under such circumstances, I would be reluctant to grant the prayer for exemplary damages, and that claim fails.

### **General damages**

The plaintiff also prayed for general damages for trespass, inconvenience and damage to property.

It is trite law that damages are the direct and probable consequence of the act complained of as noted in the case of **Kampala District Land Board & George Mitala Vs Venansio Bamweyana Civil Appeal No. 2 of 2007**. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Also see; **Assist (U) Ltd Vs. Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999 at Pg 5**.



In the instant case, a valid agreement subsisted between the two parties. The 1<sup>st</sup> defendant wantonly breached that contract in a manner so aggressive and so inhumanly deplorable. He then incited and also joined the other defendants into injuring the plaintiff and destroying his house, causing him and his family to flee like outcasts. Although the police examination reports availed in evidence, were only admitted to the level of identification, the photographs and witness statements depicted that the plaintiff and PWII suffered serious injuries and must have feared for their dear lives. PW1 claimed to have lost an ear and even been smeared with feces by the 1<sup>st</sup> defendant. All this harm and misery was meted upon them by a friend the plaintiff previously loved and trusted and none of the defendants ever bothered to put before this court evidence countering their participation in that violence which led the plaintiff and his family to loose and flee from his home.

According to the court in **Livingstone Vs. Ronoyard's Coal Co. (1880) 5 APP. Case 259** the measure of damages was defined as, *“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”* In the present circumstances, I find difficulty in finding a sum that can atone for the plaintiff's loss and restore his original position as a family man of dignity and pride. However, taking a leaf from **Haji Asuman Mutekanga Vs. Equator Growers (U) Ltd SCCA No. 7 of 1995**, I will employ the opinion and judgment of a reasonable man, to make an award of 30,000,000/= as adequate compensation in general damages of the 1<sup>st</sup> defendant's breach and all antecedent actions by the three defendants flowing from that breach. The acts of the defendants were inhuman and endangered the life of the plaintiff and his family. Their intention was to deprive the plaintiff of his property, livelihood, land and a healthy family life which are all his constitutional rights. They must be prevented from any acts that amount to interference with the plaintiff's quiet enjoyment of the suit land, and for that, a permanent injunction is issued against the 1<sup>st</sup> defendant.

Before I take leave of this case, I need to point out the suit was filed against three defendants. However, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants could not be said to have been in breach of the contract because they were in fact not privy to it. Therefore, because they were not in breach, an order directing them to pay damages flowing from that breach would be an order premised on a wrong

principal of law. I thereby order that the special and general damages shall be met by the 1<sup>st</sup> defendant as an individual.

I hasten to add that, the violent acts of those defendants cannot be separated from the breach and indeed, the evidence that they did not rebut, placed them at the centre of the plaintiff's misery and loss. At the very least, counsel for the plaintiff should have raised against them a tortious claim in assault and battery and even trespass, which he did not do. Under those circumstances, I would regretfully have to dismiss the claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. However, since both did not file defenses to the claim, such dismissal shall be without costs.

That notwithstanding, since the plaintiff has substantially succeeded on all three issues raised for determination, he shall be entitled to costs as against the 1<sup>st</sup> defendant.

In summary, the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is dismissed with no order as to costs. On the other hand, judgment is entered in favour of the plaintiff against the 1st defendant only in the following terms:-

- (a) A declaration that a valid contract subsisted between the plaintiff and 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant breached that contract.
- (b) A declaration that the unregistered land situate at Kazinga Bweyogerere Kira Town Council Wakiso District measuring 64ft by 24ft (suit land) is the property of the plaintiff.
- (c) A permanent injunction is issued to restrain the 1<sup>st</sup> defendant his agents, assignees or whosoever derives title from the 1<sup>st</sup> defendant from interfering with the plaintiff's peaceful occupation and quiet enjoyment of the suit land.
- (d) Special damages in the sum of Shs.24,050,000/=
- (e) General damages of Shs. 30,000,000/=.
- (f) Costs of the suit.

(g) Interest at the rate of 8% on both categories of damages and the costs from the date of judgment until payment in full.

I so order.

**EVA K. LUSWATA**

**JUDGE**

**18/6/2015**