

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

CIVIL SUIT NO. 260 OF 2006

KINYERA SIMON :::::::::::::::::::: PLAINTIFF

VERSUS

SBI INTERNATIONAL
HOLDINGS NV (U) LTD. :::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT:

December 6th 2016

This suit has a long history dating as far back as 14th September 2005 when the matter was first instituted as land claim No. 041 of 2005 before Masindi District Land Tribunal. It was transferred to this Court due to jurisdictional issues and it became the instant H.C.C.S 260 OF 2006.

The original plaint, under claim 041 of 2005 was maintained as the Plaintiff's pleadings. The Plaintiff sued for:-

- (a) Compensation for damages caused to the Plaintiff's customary holding piece of land.
- (b) Costs of the suit.
- (c) Any other remedies Court deems fit.

The Plaintiff averred that he inherited the suit land from his father in 1982. That his father had also inherited it from his fore fathers and that the Plaintiff was in the process of obtaining Registration of the land as a lease.

In 2004, the Defendant through it's Workers, Agents or Employees unlawfully without the Plaintiffs consent entered the land, excavated Murrum from the land (3.4 metres deep and 105.05 by 44.3 metres in area for which he seeks compensation.

In defence, the Defendant pleaded denying the Plaintiff's claim thus;-

"5. The Defendant denies the contents of paragraph 5 of the statement of claim and shall aver in response thereto that without prejudice to the above, if any murrum was excavated from the Claimant's land, this was done with the consent

of the Claimant".

In the scheduling memorandum filed by the Defendant further stated that it was engaged in upgrading Karuma-Olwiyo road and did not infringe on the Plaintiff's land.

The following are the agreed issues for determination;-

1. Whether the Plaintiff owns land at Diima 'B' village.
2. Whether the Defendant trespassed on the suit land by extracting murrum from the land without the Plaintiffs consent.
3. What was the quantity of marrum removed and what was it's value.
4. Remedies.

The Plaintiff testified that he is a customary owner of the suit land. The land was passed on to him through customary succession. PW1, the LC.I Chairman of Diima village confirmed that the Plaintiff/owns the land. PW2 also told Court that the Plaintiff owned the land and had a home near the land.

Exhibit DE.I at Page 4 - the Surveyor's Report states "-----
documents secured from Kiryandongo District Land Office (photocopies attached) confirmed that the land currently held on customary tenure and Simon Kinyera having lodged his application for lease of the same way back in February 2004 (application No. 8062) to date to lease has never been processed to conclusion but the Applicant remains a customary owner of the land"

This defence Exhibit corroborates the Plaintiffs claim of customary ownership of the suit land. Article 237 (3) of the Constitution of the Republic of Uganda 1995 declared and guaranteed customary tenure as one of the land ownerships in Uganda.

Section 1(1) of the Land Act., defines customary tenure;-

"(1) "Customary tenure" means a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons, the incidents of which are described in Section 3"

The Plaintiff has proved the customary succession of the land ownership. He has been in occupation since 1982 and has applied for a lease and the application is pending since 2004.

Therefore, the Plaintiff has been in occupation and possession as can be deduced from Exhibit DE.I. It is not only through possession of a customary Certificate that would prove ownership of a customary tenure once the party proves occupation and possession of the land under customary practices of the area, in absence of proof of any other claims by a third party, ownership is proved.

In view of the above, the Plaintiff has proved to the satisfaction of this Court that he is the customary owner of the suit land.

Section 4 of the Land Act., provides that any person, family or community holding land under customary tenure on former public land may acquire a Certificate of customary ownership in respect of that land in accordance with the Act.

In my view, it is not mandatory that every customary tenure be evidenced by presentation of a Certificate.

I will now consider the alleged trespass. The Plaintiffs evidence is that the Defendant excavated marrum on his land without his consent. PW3 testified that the Defendant company was constructing Karuma-Pakwach Road, took marrum from his land and that he did not agree to this excavation. PW1 corroborated this evidence. He as the LC.I Chairperson since 1996 had not been contacted by SBI (Defendant). That Defendant entered the Plaintiff's land and excavated marrum without his consent. It is settled that trespass is constituted where there is unauthorised entry on land.

See:- Addie Versus Dumkreck (1929) AC 358 Justine Lutaava Versus Stirling Civil Engineering Co. C.A 11 of 2005(SCV

In Sheikh Muhammad Lubowa Versus Kitara Enterprises Ltd. (1987) HCB 68;- It was held that trespass to land is constituted where there is any entry on the land without the consent of the owner. Every unlawful entry by one person on land in possession of another is a Trespasser for which action lies although no actual damage is made. See:- **H.L.E Volume 36, 3rd Edition Page 734.**

The Defendant's defence first reproduced above, stated that the Defendant had the Plaintiff's consent. The moment the Defendant alleged the existence of consent it had a burden to prove the consent.

The defence had a duty to lead evidence to show that the Plaintiff agreed to it's entry on the land and excavation of land. I have not found any such evidence to establish the Plaintiffs consent.

I find that the Defendant by entering the Plaintiff's customary land and excavating marrum on the land committed acts of trespass.

Damaged values:

PW4 - Arnold Sebugwawo, a Valuation Surveyor did valuation of land that was excavated and taken away, about 15,890.41 cubic metres (approximated 15,000 cubic metres at the Masindi District Local Government rates of Shs. 2,500/= . The volume value became Shs. 39.726,026/= plus 30% disturbance allowance which added up to Shs. 11,917,808/=.

4| P a g e

On the other hand defence evidence given by DW1 and DW2 presented another Survey Report admitted as DE.I. The quantity of taken away marrum was 4,868.40 cubic metres. That the compensation rate applicable is what Kiryandongo Land Board compiled for 2016/2017 Financial Year. While the Disturbance Allowance is in accordance with the Land Act, 1998.

I have considered the two positions advanced by the Plaintiff and the Defendant. It is clear that

when Court is awarding compensation, it will be according to the open market value at the time of making the award.

The Plaintiffs expert evidence was that there was 15,850.4 cubic metres of murrum, arising from an area of 105.5 metres by 44.30 metres. However, he did not explain whether this excavation included clay or loam soil that did not form part of the murrum taken away. This has been evaluated with the defence evidence (DW1) uncontested, that in excavation, unwanted soil like loam soil and clay were left and cannot be part of the murrum to be paid for in compensation.

DW1 testified that the pitcat was 23,249.6 cubic metres and the pitfall was 18,381.2 cubic metres which would leave the difference as the murrum taken.

My understanding of this evidence is that murrum was 4,868.40 cubic metres. That is 23,249.6 less 18,381.2 cubic metres. The compensation rates were set out in Exhibit PEX.1.

In view of the above evaluation the Plaintiff was entitled to compensation of 4,868.40 cubic metres of murrum at Shs. 5500/per cubic metre which is Shs. 26,776,200/=.

The disturbance allowance is allowed at 30% which is Shs. 8,032,860/=. Hence the total compensation is Shs. 34,809,060/= only.

The unchallenged evidence is that the Plaintiff used the suit land for cultivation of food and cash crops. The land was rendered un-useable for that purpose. This was supported by defence evidence in Exhibit DE.1. This justifies an award for general damages because this damage was directly due to the Defendants' acts complained of. I have no doubt

the Plaintiff has been subjected to inconveniences, mental stress. He could not cultivate his land for food and cash crops. This dispute dates as far back as 2004, over 10 years. I find general damages of Shs. 20,000,000/= (Twenty million shillings) a reasonable compensation.

The compensation for murram and general damages shall attract an interest at 10% per annum from the date of judgment until payment in full. The Plaintiff is granted costs of this suit.

To remove any doubt whatsoever, judgment is entered for the Plaintiff against the Defendant as follows;-

- (a) The Defendant shall pay the Plaintiff compensation for murram excavated and taken at Shs. 26, 776,200/=.
- (b) The Defendant shall pay the Plaintiff, disturbance allowance of Shs. 8,032,860/=.
- (c) The Defendant shall pay the Plaintiff general damages of Shs. 20,000,000/= only.
- (d) The above decretal sums in (a), (b) and (c) shall attract interests at 10% per annum from the date of judgment until payment in full.
- (e) Costs of the suit to the Plaintiff.

Dated at Kampala this 6th day of December 2016

J.W. Kwesiga
06/12/2016
Judge

In the presence of:-

- > Mr. Omony John Paul for Plaintiff
- > Mr. Walukaga Isaac for Defendant
- > The Plaintiff present
- > Ms. Irene Nalunkuma - Court Clerk

