

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

HCT-12-CV-LD-0079 OF 2014

ATUGONZA FRANCISPLAINTIFF

VERSUS

ATTORNEY GENERAL DEFENDANT

JUDGMENT

The plaintiff herein sued the defendant for recovery of special and general damages, an order of eviction and delivery of vacant possession in respect of 5 square miles of land located at Kavule village, Bukinda parish, Kyangwali sub county in Hoima district. He also asked for compensation in terms of mesne profits and exemplary damages plus costs of the suit.

The defendant was served but did not file a written statement of defence. Under rule 6 of the Government Proceedings (Civil Procedure) Rules S.I. 77-1 interlocutory judgment was entered against the Government. The matter came before me for proof of damages.

Three issues were set down for determination by court.

1. Whether the plaintiff is the owner of the suitland under customary tenure.
2. Whether the defendants agents committed acts of trespass on the suit land.
3. What are the remedies available to the plaintiff.

The sole witness was the plaintiff. He told court that he was the owner of land measuring 5 square miles under customary tenure situated at Kavule Village, Bukinda Parish, Kyangwali Sub-county, Buhaguzi County, Hoima District which given to him as gift intervivos by his late grandfather Erinesti Bitamazire of the Babyansi clan. He has always used the land for decades together with his family members for grazing and growing food crops uninterrupted.

He told court that in 2013 the RDC of Hoima one Martha Asimwe in company of police men led by one Kaganzi and UPDF men together with the Camp Commandant of Kyangwali refugees Settlement invaded his land, slashed his crops, demolished his structures and evicted him from

the land. All this was done without a court order. Also present was his relative who used to reside in the place one Mustafa Kasaija. The said Kasaija was the first one to report to him the invasion, and he also moved to the scene and witnessed the same.

He told court that the group caused mayhem. They demolished the house which he was constructing. It had reached window seal level. They also demolished the old house which used to house his grandfather Erinesti Bitamazire. The chicken house structure was also destroyed. The invading group further slashed down his crops, including his coffee plantation, cassava, maize, potatoes and others crops for home consumption. They took the food which they cut down and gave it to the refugees. His goats and 40 cows from the farm were also carried away.

The structure which his late grandfather built was of mud and wattle but later it was plastered with cement. It was roofed with iron sheets. The structure was demolished and they removed the iron sheets, door frames and windows frames.

The witness testified that he was constructing a permanent house on the land. The demolition squad removed and ferried away the iron sheets, the roof structure, the windows, and the rest of the materials. Everything was taken. The chicken house also doubled as the goats shed. This was a permanent structure and it was also demolished and everything removed and ferried away.

The demolition was done by army and police. They were under the supervision of the camp commandant and the RDC. When he arrived at the scene, he asked the RDC why they were destroying his property. She responded that that they had received orders that she should remove the plaintiff from suit land and hand over the same to the Camp Commandant for refugees settlement camp administration to use. She did not explain the origin of those orders.

The witness testified that the suit land was not part of the refugee camp. This was land where his grandfather Erinesti Bitamazire lived together with his father Aloziyo Munaku and two daughters.

He grew up with his grandfather on the suit land. He would stay here during holiday time when he started going to school. He used to assist his grandfather who was getting on in age, in

harvesting coffee and other food stuffs. It was during one of such interactions in 1994 that he told the plaintiff how suit land was for him as the grandson. This was in the hearing of plaintiff's father. The witness immediately accepted the offer from his grandfather. The land was under customary tenure as it had no title. Plaintiff was to take possession immediately and he did so.

From that time onwards, he took possession and started using the land. He grew crops and was staying on the land. He later transferred to Parajwoki Village, Kiragura Parish Kitoba Sub-county where he built another home. He took his grandfather to his son Aloziyo Munaku to be looked after.

When he took his grandfather to the son who was plaintiff's father, he plaintiff continued utilizing the suit land peacefully. He even planted bananas both for food and juice. He had different types of bananas commonly known as nyamunyo, Kitika, serere and barwokole. He mainly grew kitika type because it was the best for commercial purposes. He was also utilizing suit land for growing perennial crops and also for grazing. The land was big in size and so, he started renting out parts of it to pastoralists who paid him some money to earn a living. He rented part of the land to Bosco Hijire and Nyamugabo. He also had goats, cows and chicken on the land since it was a homestead.

The plaintiff told court that he was aware of the boundaries of the land very well. He lived in suit land with his grandfather, his two Aunts, and later he lived here with his wife and children. This was their ancestral land.

He described the boundaries. In the north there is Bugoma Central Forest Reserve and they share the boundary. They are separated by Mabolya river. In the south there is a camp with which they share boundaries. This is Kyangwali Refugees Settlement Camp. The camp is occupied by refugees from Rwanda. The suit land is separated from the camp land by acacia trees which were planted by his grandfather. On the east there is Mukora Hill which is owned by NFA. The suit land is separated from NFA land by Dyarowa swamp. On the west the land borders that of Eryeza Bagamba. The land of Eryeza bagamba Has in the boundary with suit land matooke.

There are eucalyptus trees which these two neighbours planted together to mark out the boundary between them.

After the destruction of the houses and crops, he went back to try and pick up some of the remnants of the food, but each time he found army men guarding the place. On the 3rd attempt, they threatened to shoot him if he dared step on suit land again.

He exhibited photographs of the structures soon after the destruction.

When court visited the locus on 3rd April 2017, there was no sign of the structures the witness talked about. Court was shown the places where they used to be, and some few remaining burnt bricks could be seen. Court also was shown the rugged line of acacia trees which the plaintiff said were planted by his grandfather as the boundary demarcation between his land and the camp land. The matooke and eucalyptus trees were seen.

The plaintiff told court that the bricks from the destroyed houses were taken by the refugees, who had to build for themselves structures. Court saw many shanty like structures of various shapes and sizes and of course could not tell if any of them was constructed using the bricks and window and door frames from the destroyed structures of the plaintiff.

The plaintiff exhibited copies of the Declaration of Assets forms which are filed bi annually by leaders under the Leadership Code Act. He submitted these as a leader, when he was the Mayor of Hoima Municipality, and they were for the years 2006, 2008, and 2015. These were copies which the witness told court he made and retained for future reference. Each of them made reference to the suit land as one of his properties. The one for 2015 even mentioned this high court case concerning the suit land. He clarified that he continued making the declarations to the IGG even when he was no longer the Mayor, like in 2015 exhibit 4C, because he remained a leader, being the National Secretary for Trade & Industry in the FDC party.

Repeated demands for settlement to the Prime Minister's office yielded no fruit, hence this suit.

He prayed for an order directing the settlement camp to stop extending their boundaries to his suit land, an order stopping the trespass by the refugee camp to his land. When court visited the

locus, the camp commandant was invited to attend but he never showed up, neither did he send a representative.

The burden of proof in civil matters is on the plaintiff. The standard is proof on a balance of probability. See *Dr. Vincent Karuhanga T/A Friends Polyclinic v. National Insurance Corporation & UR*. [2008] ULR 660 at 665, cited with approval in *Takia Kaswahili & Another v. Kajungu Denis*. CA No. 85/2011. The Court held that the general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise the presumption that what he asserts is true he is said to shift the burden of proof that is his allegation is presumed to be true unless his opponent adduces evidence to rebut that presumption.

The 1st issue was whether the plaintiff is the owner of the suit land under customary tenure. The plaintiff testified that his grandfather Erinesti Bitamazire lived on the suit land together with the his father Aloziyo Munaku and two of his aunts who were daughters of the late Erinesti Bitamazire. His father later bought land and established his home in Parajwoki. The plaintiff further testified that used to stay with his grandfather on the suit land especially during school holiday time. On one such occasion his grandfather gave him the suit land and he inspected the entire suit land with his grandfather. He was given the go head to own and grow whatever crops he wished. This was at the time when Erinesti Bitamazire was still alive.

It was further his evidence that when his grandfather fell sick he was taken to Parajwoki and the land remained under the sole ownership and control of the plaintiff. The plaintiff used the land to grow various crops; coffee, cassava maize, potatoes. He rented out part of it to herdsmen such as Bosco Higiyo, Nyangabo for grazing. During locus visit the plaintiff showed court the boundary marks and explained the distinct features of the boundaries which separate the suit land from Kyangwali Refugee Settlement Camp. There was a line of acacia trees said to have been planted by the plaintiff's grandfather. There was Nkora Hill that is owned by NFA and the Dairwo Swamp.

The plaintiff having been a political leader both as a Mayor of Hoima Municipality and the Secretary of a political party, he was required to submit assets and liabilities declaration forms to

the IGG. The forms for the period 2006, 2008 included suit land among his assets. This was before this suit was contemplated, as this was before the alleged trespass. The plaintiff exhibited photographs that he took himself of the various properties that were destroyed on suit land.

S.3 (1) of the Land Act, does not define customary tenure. But it gives incidences of what amounts to customary tenure. The ownership must be in accordance with the customs and norms of a particular class of persons or community for that matter and subject to S.27 of the Land Act it is governed by rules accepted as binding by the class of persons to which it applies.

From the evidence on record, the plaintiff acquired suit land by way of a gift *intervivos* from his grandfather Erinesti Bitamazire. I was satisfied that the plaintiff was the owner of suit land under customary tenure.

The 2nd issue was whether the defendant's agents trespassed on suit land. Trespass is committed when a person unlawfully enters on land in possession of another. It is an injury to a possessory right and therefore the proper plaintiff in the suit for trespass on land is the person in possession of the land.

The plaintiff testified that he was in possession of suit land up to 2013 when one Martha Asimwe the RDC Hoima then came with armed forces, accompanied by Kaganzi the Camp Commandant of Kyangwali Refugee Camp and demolished his structures, crops and evicted the plaintiff's family and workers and tenants.

Under Article 26 of the Constitution, when Government seeks to acquire land in the public interest, there ought to be prior adequate compensation. The plaintiff testified that he was not consulted nor compensated prior to the coming onto his land by the people who did. In *George Kasede Mukasa v. Emmanuel Wabende & Others*, Civil Suit No. 459/1998 trespass to land was held to be committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another. In *Justin Lutaya Versus Sterling Civil Engineering Co. Ltd.* SC CA No. 11/2002, Justice Mulenga held that trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes or portends

to interfere with another person's lawful possession of that land. Needless to say the total trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land and that common law cardinal rule is that, "*Only a person in possession of the land has capacity to sue in trespass. Where trespass is continuous the person with the right to sue may subject to the law of limitation of actions exercise the right immediately after the trespass commences or any time during its continuation or after it has ended. Similarly subject to the law of limitation of actions a person who acquires a cause of action in respect of trespass to land may prosecute the cause of action after parting with the possession of the land*".

When the plaintiff was forcefully thrown out of suit land, he retained the right to sue in trespass being the person who was in possession at the time of trespass. The RDC and the Camp Commandant of the refugees camp entered onto suit land without any arrangement or prior payment of compensation to the plaintiff. That was an act of trespass. It needs no gainsaying that these are agents or workers of the Government of the Republic of Uganda. The Attorney General, the defendant is therefore vicariously liable for their acts.

The 3rd issue was on the remedies. First I noted upon the locus visit that the land under dispute was un inhabited. There were scattered and sparse gardens of maize. It was land which was neglected, hardly in use.

The plaintiff prayed for compensation for the houses and crops which were destroyed. He told court that he used to earn sh 50, million from the grazing animals, the food crops he used to grow and sell. That would therefore amount to sh. 200 million for the 4 years he was deprived of the same. He also prayed for general damages of sh. 500 million. He asked for sh. 200 million as mesne profits for non use of his farmland for 4 years. Lastly he asked for sh. 200 million as exemplary damages.

Regarding compensation for lost or destroyed items, the plaintiff told court that he spent sh. 6 million on the construction of his permanent house. He did not put any figure or value to the destroyed grand fathers house, nor the chicken house. He told court that he was earning sh. 12 million per year from each of the two herdsman. He was earning sh. 10 million from the banana juice per year and sh. 6 million per year from the matooke. O the whole working from the above

figures, the loss for the 4 years would amount to sh. 154 million. When I add the grand fathers house and chicken house at sh. 2 million each this comes to sh. 158 million. That is the figure I will award as compensation for what was destroyed.

I was asked to make an award for mesne profits. The plaintiff had planted coffee seedlings. The value of what he would have earned on maturity and the period of maturity were not stated. There were other crops destroyed which were for home consumption. Again the value was not given. I would only give an award of sh. 15 million for mesne profits.

Regarding general damages, the position of the law is that the award of general damages is at the discretion of court and this discretion is always exercised judiciously. General damages are awarded for purposes of putting back the litigant to the position he would have been had the tort not been committed. These are what law will presume to be the natural and probable consequence of the defendant's acts or omission. See Annet Zimbiha v. Attorney General, High Court Civil Suit No. 109/2011, James Fredrick Nsubuga v. Attorney General High Court Civil Suit No. 13/1993. In the exercise of its discretion court takes into account factors such as the suffering of plaintiff has gone through on account of the acts or omissions of the defendant, the malice, arrogance of the defendant. Rookes v. Bernard & others. [1964] A.C 1129.

The Court of Appeal in Takia Kaswahila & another v. Kajungu Denis. CA No. 85/2011 held that general damages should be compensatory in nature in that they should restore some satisfaction as far as money can do it to the injured plaintiff. The Court of Appeal went on to hold that where evidence has not be furnished to justify the damage or injury the party has suffered there would be no basis for awarding the same.

The plaintiff explained to court the suffering he has gone through, the manner in which the trespass was committed and the level of violation that was used and exhibited by the defendant's agents. I will award general damages of sh. 100 million under this head.

Lastly court was asked to award exemplary damages. Exemplary damages are not compensatory. They are punitive in nature meant to punish the high handedness, the arrogance, the unconstitutionality of the acts committed by the defendant.

The violent eviction of the plaintiff from suit land without regard to where his tenants and family would go, wanton destruction of his crops, and generally denial of his livelihood were brazen and high handed. The entire exercise was done in an oppressive manner and arbitral manner. This was not necessary. Even if the plaintiff was considered a trespasser, and I have found that he was not, the eviction could have been handled in a more humane manner. See Obong v. Kisumu Council, [1971] E.A 91 at page 94 where the purpose of exemplary damages was emphasized that it not meant to compensate the victim but rather to punish the offender. I will award a sum of sh. 50 million for that reason.

In the end, judgment is entered for the plaintiff in the following terms;

1. A declaration hereby issues that the actions of the defendant amounted to trespass.
2. An order of vacant possession is hereby issued in favour of the plaintiff.
3. A permanent injunction hereby issues restraining the defendant, his agents or anybody deriving any right under the defendant from further acts of trespass.
4. Compensation for loss and destruction of property and crops of sh. 158 million.
5. Mesne profits of sh. 15 million.
6. General damages of sh. 100 million.
7. Exemplary damages of sh. 50 million
8. Costs of the suit.

The sums awarded in compensation shall attract interest at 16 % pa from time of filing the suit till payment in full. The other awards shall attract interest at court rate from time of judgment till payment in full.

RUGADYA ATWOKI

JUDGE

08/11/2017.