

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL SUIT NO.593 OF 2013**

GAB HOLDINGS LTD-----PLAINTIFF

VERSUS

- 1. GODFFERY NYAKANA**
- 2. COMMERCIAL PRINTING SERVICES LTD-----DEFENDANTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGEMENT

The Plaintiff according to the amended plaint is a Limited Liability Company which brought this suit against the Defendants jointly and severally for a declaration that the Defendants are trespassers, the Defendants cease all illegal activities on the Plaintiffs' land, the Defendants be evicted from the Plaintiffs' land, a permanent injunction be issued restraining the Defendants, their agents, servants, workmen from interfering and or alienating the Plaintiffs' land formerly comprised in LRV4201 Folio 18 now FRV1462 Folio 22 land at Industrial Area Kampala District, general damages for the inconvenience caused, punitive damages against the 1st Defendant and costs of the suit.

It was the Plaintiffs' claim that he was the registered proprietor of land formerly comprised in LRV 4201 Folio 18 now FRV Folio 22 land at Industrial Area Kampala District measuring 1.122 hectares which he acquired from the Uganda Land Commission in 2011 with which he is

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in possession up to the present date (the suit land). That in October 2013, the 1st Defendant in the Company of “*kanyamas*” without the Plaintiffs’ knowledge or consent encroached on the Plaintiffs’ land, started leveling it, fenced it off and started putting up illegal structures. That the Defendants have threatened to alienate the entire Plaintiffs’ land and render the Plaintiff landless due to the encroachment, the Plaintiff cannot use her land something that has caused her inconvenience.

Eventually, that the Plaintiff on various occasions contacted the 1st Defendant to vacate the suit property but the Defendants remained adamant. She contends that she cannot develop her property because of the Defendant’s illegal encroachment which has caused her financial loss.

The Plaintiff further claimed that the Defendants, in a bid to unlawfully deprive her of the ownership of the suit property fraudulently attempted to acquire a lease from Kampala District Land Board to no avail. She specified the particulars of fraud in paragraph 6 of the plaint.

The parties filed a joint scheduling memorandum with the following agreed facts and issues;

Agreed facts

1. The 1st Defendant is the majority shareholder in the 2nd Defendants Company with 80% shares (*eighty percent*).
2. The 1st Defendant is the Division Mayor of Kampala District Central Division, where the suit land is situate.

Agreed issues

1. Whether the Plaintiff is the lawful owner of the suit land.
2. Whether the Defendants are trespassers.
3. What remedies are available to the parties.

The Plaintiff called two witnesses to support its claim. These were; Byamuhangi Adrian; the Managing Director of the Plaintiff Company (PW1) and John Kaggwa an Advocate from M/s

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Kaggwa & Kaggwa Advocates (PW2). The Defendants also presented one witness called Geoffrey Nyakana the 1st Defendant (DW1).

Both parties were allowed to file written submissions in support of their respective cases.

Evidence Adduced.

(PW1); Byamuhangi Adrian is the Managing Director of the Plaintiffs' Company. He stated that in 2009, they wanted a place to build a paint factory, they got a place in Industrial Area and they established that it was under Uganda Land Commission. They then applied for the land in the names of the Plaintiff on the 18th February 2010, which application was replied on 25th February 2010. That after getting the land, the Defendant entered the land and started constructing structures thereon. He stated that before he applied for this land, it was free and it belonged to Uganda Land Commission and that the 1st Defendant has been in occupation of the land since 2013 while he is just renting for the operations of the Plaintiffs' Company.

In cross examination, he told Court that by the time he applied for the land, it had already been surveyed and the Uganda Land Commission had the title in its names. He however stated that he never carried out a search with the Kampala District Land Board yet the user was Uganda Railways. He stated further that he applied for freehold in 2013 and that by the time he applied, the Defendants were not in occupation as they came in occupation in August 2014. PW1 contradicted his earlier assertions when he stated that he visited the land before conversion and the Defendant was in occupation. In re-examination, he confirmed to this Court that he applied for the conversion to freehold tenure in 2012 which was signed by the Secretary of the Uganda Land Commission.

(PW2); John K. Kaggwa is the Advocate who assisted the Plaintiff to acquire the suit land. He testified to the effect that he visited the suit land before applying and that there were no developments on the suit land. That he carried out a search and wrote a letter to Commissioner of Surveys and Mapping of Entebbe, though he was not sure to whom the application was to be addressed to as the controlling authority (Uganda Land Commission or Kampala District Land Board).

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He collaborated with PW1 when he stated that he wrote a request letter dated 18th February 2010 which was replied on 25th February 2010 and a lease was offered and subsequently a land title was issued and that the current registered proprietor is the Plaintiffs' Company.

In cross examination, he stated that he does not remember whether he assisted the Plaintiff in the acquisition of the freehold as he saw it for the first time. He claims that he did not identify the land for the Plaintiff and that he did not inquire beyond the letter of the Commissioner as to who was the granting authority.

(DW1); Godfrey Nyakana is the Director of the 2nd Defendant Company as well as the 1st Defendant in the instant suit. He testified that the 2nd Defendant owns property on plot No.M875 Industrial Area and it is about 3 acers. That when he got information from his agents, he saw the land and did diligence to ascertain the availability of the land and he got information that the land was available, but un surveyed with squatters which he did and then surveyed the suit land. That he then went to the District Land Board which gave him provisional allocation with instructions to get a no Objection from Uganda Railways Corporation which he did and got the no objection (consent dated 25th November 2011).

He states that he later found out that the Plaintiff had gone to Uganda Land Commission and got a title, and that he also found out that Kaggwa Advocates had been involved in irregularity in seeking a title from the Uganda Land Commission. He stated further that he failed to sort it out with Mr. Kaggwa as he was evasive and he was later sued by the Plaintiff.

That the squatters he compensated vacated the land and he possessed the land with his Company, by establishing a small office and built a wall fence around the said land as advised by the Area Land Committee on 18th January 2010. Further that the District Land Board confirmed his application on 24th April 2011 and he was required to get a consent from Uganda Railways Corporation which he obtained on 25th April 2011.

He states that he obtained the input of physical Planning Department on 24th April 2010 and when he found out that the Plaintiff had a title from Uganda Land Commission, he wrote to the

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Uganda Land Administration who responded in writing that the controlling authority is the District Land Board on 11th November 2014.

In cross examination, he stated that the District Land Board has not leased the suit land and that he has not been given an offer of the land, and that he has never paid premium or stamp duty for the suit land. That even in the absence of a lease offer, he can say the board gave him land. He contends that Kampala District Land Board cannot give a land title over the land that has a certificate of title and that it is the same reason why he has no lease offer because they cannot accept him to pay premium over the land that has a title.

Resolution of the issues.

Issue one:

Whether the Plaintiff is the lawful owner of the suit land

It is a fact that the Plaintiff has both the lease hold title and the freehold title to the suit land. Section 57 of the Evidence Act Cap 6 stipulates that *no fact need to be proved in any proceeding which the parties to the proceedings are deemed to have admitted.*

The evidence of PW2 and which is supported by the evidence of PW1 indicates that the Plaintiff carried out due diligence through his Advocates; M/s. Kaggwa & Kaggwa Advocates. However what is in dispute is whether the Plaintiff is the lawful owner of the suit land.

To submit on this issue, Counsel for the Plaintiff contends that according to EX.3a letter dated 18th February 2010 and EX.4 a reply to the letter dated 25th February 2010. He further stated that the Commissioner Surveys and Mapping confirmed that plot M875 which gave birth to FRV 1462 Folio 22 falls under the jurisdiction of Uganda Land Commission and the user was Uganda Railways. He also said that the Plaintiff then proceeded to apply for the land and got a title. He referred this Court to section 59 of the Registration of Titles Act which provides for the indefeasibility of title and also cited the case of *John Katarikawe versus William Katwiremu & Anor (1977)* where Ssekandi J (as he then was) held that;

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“The provisions of Section 6 now (Section 59) of the Registration of Titles Act are clear that once a person is registered as a proprietor of land, his title is indefeasible except for fraud”.

He also cited the case of *Olinda De Souza versus Kasamali Manji (1962) E.A at 756* where it was held that *“in the absence of fraud, possession of a certificate of title is conclusive evidence of ownership of land and the registered proprietor has indefeasible title against the whole world”*, and that a registered proprietor is protected against ejection except for grounds of fraud. (See Section 176(c) of the Registration of Titles Act)

He submits that there is no evidence led by the defence to the fact that the land was acquired fraudulently by the Plaintiff, and that the Defendants on their part failed to lead evidence to the fact that they own the land and that there is no single evidence of the alleged compensation of the alleged former owners was brought to Court.

He told this Court that an application by the Defendants to the District Land Board for a property as evidenced in the annexure of the Defendants does not confer any interest known in law to the Defendants and that an equitable interest is created by operation of the law where parties enter into an enforceable contract to convey or create a legal interest in land. He further stated that Kampala District Land Board has never leased the land to the Defendants because there is no lease offer and no evidence of payment of premium or ground rent.

In defense, Counsel added two other issues which are;

- i) Who actually owns the land.
- ii) Who as between Uganda Land Commission and the Kampala District Land Board is the mandated controlling authority over the suit land.

I will have to note at this point that the above issues were not agreed upon by the parties during the scheduling conference therefore, adding new issues during submission is an ambush to the opposite party. This was held in *Tororo Cement Co. Ltd versus Frokin International Ltd SCCA*

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No.2/2001 and Stanbic Bank (U) Ltd versus Uganda Cross Ltd SCCA No.4/2004, which stated that the purpose of scheduling conference is inter alia to sort out issues over which parties are agreed so that there is no litigation over them thereafter. Similarly, Section 22 of the Evidence Act is to the effect that facts which are admitted need not to be proved. Therefore, Court will not dwell on issues which have been raised at the bar at the detriment of the other party. In order for Court to determine the previous ownership of this land as an issue, it would have been prudent to make the alleged owners parties to the claim.

While submitting on the first issue, Counsel for the Defendants contended that before acquiring such land, there are various approvals that have to be obtained from various authorities by a person intending to acquire a lease interest in public land and that the Plaintiff Company in its evidence did not show that it obtained all the necessary approvals from the authorities and that this points it to fraudulent dealings. He cited that case of *Makula International versus His Eminence Cardinal Emmanuel Nsubuga (1982) HCB11*, where it was held that a Court of law cannot sanction what is illegal and illegality once brought to the attention of Court, override all questions of pleadings. Counsel stated further that for the Defendants, they adduced evidence to show that they obtained all the necessary approvals from the authorities including the area land committee of Kampala Central, the city council of Kampala and Uganda Railways Corporation and that this all points to fraud committed by the Plaintiff. He averred that even the conversion of the lease was done fraudulently.

In the case of *Kampala Bottlers Ltd versus Damanico (U) Ltd SCCA No.2 of 2002*, it was held that;

“It is not a requirement that the word fraud be used, however facts must be stated to show that fraud need to be charged and fraud cannot be inferred from facts pleaded”.

It was further observed that for a party to plead fraud in the registration of land, a party must first prove fraud and it must be attributed to the transferee. This means that fraud must be specifically pleaded and proved because the degree to prove fraud is higher than that of balance of

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probabilities, (see *Patel versus Lalij Makani (1987) E.A 355*). The Defendants did not adduce any evidence to show the fraud committed by the Plaintiff neither did they counter-claim.

Section 2 of the Contract's Act 2010 provides that:

“A contract is an agreement made with a free consent of the parties with the capacity to contract for a lawful consideration and with a lawful object, with the intention to be legally bound”.

The Defendant's Counsel argued that the Defendants, by virtue of the acceptance letter by the Kampala District Land Board had been granted a lease and they took physical possession.

Section 59 of the *Registration of Titles Act*, provides that a certificate of title is conclusive evidence of ownership. The Section provides that;

“No certificate of title issued upon an application to bring land under this act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of the title issued under this act shall be received in all Courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power”

It is on record that the Plaintiff is in possession of a certificate of title to the suit land. It is also on record that the Defendants have no lease or title to the said land but are in physical possession. According to Section 176 of the *Registration of Titles Act*, a registered proprietor of land cannot be ejected except where fraud has been pleaded and proved. According to the testimony of DW1, he claims Kampala District Land Board never gave him title to the land because there was a subsisting title on the same, which subsisting title Court has been informed is the Plaintiffs' title. Therefore, in absence of fraud pleaded and proved by the Defendants, this Court cannot be inclined to conclude that the Plaintiff was fraudulent in acquiring the leasehold and freehold title to the suit land.

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The Defendants claim that there were squatters on the land whom they compensated, however I will have to agree with the Plaintiffs' Counsel that the Defendants have not produced evidence in Court of the alleged squatters and the compensation given to them, it is also evident that the Defendants have failed to prove ownership of the suit land either as licensees, lessees or otherwise apart from their application letters to Kampala District Land Board.

From the facts adduced, the Defendants claims to be lease holders by agreement between them and the District Land Board. It must be noted that a lease may be created by agreement or by operation of the law or the agreement may be inferred from the conduct of the parties.

The Evidence Act (Cap 6) of Laws of Uganda Section 101 and 102 are instructive as to the burden of proof required in evaluating such evidence. This Section provides that; *“Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts existed”*.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies in that person. Accordingly the burden was on the Defendants to prove to this honorable Court that indeed there was a lease created between them and the District Land Board. Mere assertions cannot suffice.

I also note from the evidence adduced that the Defendants failed to state some of the essential ingredients of their lease agreement with the District Land Board, e.g the duration. Under Section 3(5) (c) of the Land Act it is stated that:

“A leasehold tenure is a type of tenure under which one person, namely the landlord or lessor, grants or is deemed to have granted another person, namely the tenant or lessee, exclusive possession of land usually but not necessarily for a period defined, directly or indirectly, by reference to a specific date of commencement and a specific date of ending”.

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Therefore, the period of the lease must have been certain and further, there is no evidence of payment of the premium or the ground rent by the Defendants to the board, this means that there was no lease agreement as alleged.

I accordingly do find that the Plaintiff is entitled to the exclusive use of the suit property given the fact it is in possession of the certificates of title which has not been disputed.

Issue two

Whether the Defendants are trespassers

In the case of ***Justine E. M. Lutaaya versus Sterling Civil Engineering C.A No 11 of 2002***, the *Supreme Court* held that;

“Trespass to land occurs when a person makes unauthorized entry upon land and, thereby interferes with another person’s lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land, but against the person who is in actual or constructive possession of the land”.

Counsel for the Plaintiff submitted that the Defendants have no instrument granting them the said land. This is a fact admitted by the defence since DW1 stated that he has no lease agreement or title to the land. This means that the Defendant has no right to stay on the land and he is on the same illegally, therefore he is a trespasser.

Issue 3

What are the remedies available?

a) General damages

It is trite law that damages are the direct possible consequences of the act complained of as noted in the case of ***Storms Versus Hutchison (1905) AC515 and Kampala District Land Board & George Mitala versus Venansio Bamweyana Civil Appeal No.2 of 2007***. Such consequences may be due to loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering.

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The general rule regarding measure of damages applicable both to contract and tort has its origin in what **Lord Blackburn** said in *Livingstone versus Ronoyard's Coal Co. (1880) 5 APP. Case 259*. He therein defined the measure of damages as that sum of money which will put the party who has been injured, or who has suffered the wrong, 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 instant case the PW1 testified that the 1st Defendant is in occupation of the land since 2013 and that he is just renting for the operations of the Plaintiff Company. From the above, I do find that the Company has suffered financial loss, inconveniences and sufferings.

Considering all the above circumstances, it suffices that the Plaintiff is awarded general damages as follows;

- 1) Shs 5,000,000/- only (*five million*) per year for lost earnings; assuming that the land had been put to use by the Plaintiff for the stated purpose, which is 5 million x 6 years = 30 million (*thirty million*).
- 2) Pain and suffering at shs 2 million x 6 years of nonuse of the land = 12 million (*twelve million*).
- 3) Punitive damages of shs 8 million.

The Plaintiff is therefore given a total award of shs 50.000.000/= only (*fifty million*) as general damages.

b) Costs.

Section 27 of the Civil Procedure Act states that the costs are awarded to the discretion of the Court. It is trite law that costs follow the event where a party succeeds in the main suit. This is further highlighted in section 27 (2) of the Civil Procedure Act as follows:

"... but the costs of any action, cause or other matter shall follow the event unless the Court or judge shall for good reason otherwise order".

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Therefore since the Plaintiff is the successful party, he is entitled to costs of the suit and all the other remedies prayed for.

I so order.

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Henry I. Kawesa

JUDGE

07/06/2018

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07/06/2018:

Plaintiff absent.

Plaintiffs' lawyer absent.

Defendant present.

Lawyer absent.

Court:

Judgment delivered in the presence of the parties above.

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Henry I. Kawesa

JUDGE

07/06/2018

Right of Appeal explained.

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Henry I. Kawesa

JUDGE

07/06/2018