

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO.449 OF 2016

DENNIS DESIRE MITTI:..... PLAINTIFF

VERSUS

- 1. PATRICK SSEWAGUDE MUSOKE**
- 2. BOARD OF GOVERNORS/DIRECTORS**
- 3. YOUNAN BULAMU SECONDARY SCHOOL**
- 4. YOUNAN INVESTMENTS (U) LTD:.....DEFENDANTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff brings this suit against the Defendants jointly and severally seeking declarations that;-

- a. The Plaintiff is the rightful owner of land at Bulamu Deputy in Gayaza Wakiso district measuring approximately 24 Decimals.
- b. An order of permanent injunction to restrain the Defendants, servants, their agents or any one acting on their behalf or purporting to derive interest from them from trespassing on the Plaintiff's said land and from interfering with the Plaintiff's possession and use of the suit land.
- c. An order for general damages, interest and costs of the suit.

Background of the case

The Plaintiff claims to be the rightful equitable owner of the land measuring approximately 24 decimals situated at Bulamu Deputy in Gayaza (*suit land*) having purchased the same from the 2nd and 3rd Defendants. That he took possession by utilizing the suit land until the 1st Defendant entered on the same and destroyed the Plaintiff's fence around his land which act, the Plaintiff reported to Kasangati Police Station Vide SD Ref; 24/14/07/2016. That later, the Plaintiff received communication from the 1st Defendant's lawyers claiming that the 2nd and 3rd Defendants had returned the suit land to the 1st Defendant because they had failed to pay for the land.

The Plaintiff alleges that at the time he purchased the suit land from the 2nd and 3rd Defendants, it was done with the knowledge and consent of the 1st Defendant and the suit land was represented to be free from any third party claims. That despite several protests from the Plaintiff, the Defendants have refused to stop their threats of entering the suit land and that they have interfered with the Plaintiff's possession and use of the land despite complaints to police and other authorities.

Finally, that the acts of the Defendants are unlawful and amount to trespass as the Defendants know that the Plaintiff acquired the suit land for value and with the knowledge of the Defendants. That there was nothing the vendors could return to the 1st Defendant whose only claim was to demand for his balance from the vendors.

The Plaintiff attached a copy of a sale agreement dated 2nd April 2015 as **Annexure 'A'**, an un translated copy of another sale agreement (*Luganda version*) dated 20th January 2016 as **Annexure 'B'** a copy of a report to police for criminal trespass as **Annexure 'C'**, copy of a letter from 1st Defendant's lawyers to the Plaintiff to stop the trespass as **Annexure 'D'**.

The 1st Defendant on his part denied all the allegations against him and in his defence he contends that upon the death of his father, the heir (Nelson Lutalo Ssewagude) gave him the land housed by Youn Bulamu Secondary School inclusive of the disputed land measuring 24 decimals

which forms part of the land belonging to him and that there has always been conflicts on the suit land.

Further, that the 2nd and 3rd Defendants sold the land which belongs to him, which sale he says was fraudulent in nature since it was done without his consent and that the Plaintiff has been approaching him to settle the claim. That the Plaintiff's alleged consent of the 1st Plaintiff was procured under mistaken belief upon not producing the whole document and only giving him the signature blanks for signing. It was his case that he was the first person to report the Plaintiff to Kasangati Police on issues of trespass vide Ref: 31/03/07/2016.

The 1st Defendant referred to a number of documents as his annexures but he did not attach the same to his pleadings.

The 2nd and 3rd Defendants filed a joint defence wherein they denied the trespass. They alleged and aver that they never failed to pay the 1st Defendant and that the said memorandum was a misrepresentation and a *nullity*. Further, that they have never interfered with the possession of the Plaintiff's land having sold to him and that the 1st Defendant was a witness to the sale agreement. That the 2nd and 3rd Defendant have never had any transaction with the 1st Defendant in regard to the Plaintiff's suit Kibanja and that the 2nd and 3rd Defendants are not responsible for the unlawful acts of the 1st Defendants.

It was their case that they distance themselves from any damage caused to the Plaintiff by any such acts of the 1st Defendant. On the 12th October 2018, it was proved to Court that the parties had failed at reaching a consent which was moved by the Defendants.

Court ordered the parties to file a joint scheduling memorandum, the Plaintiff's/Defendants' trial bundles and witness statements. When the suit came-up for hearing on the 8th February 2019, all the Defendants did not appear and upon proof of service upon them, Court allowed the Plaintiff to proceed *ex parte* under Order 9 Rule 20 of the Civil Procedure Rules.

In the Plaintiff's memorandum of scheduling, these were the issues for resolution by this Court;-

- i. Who is the rightful owner of the suit land?

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- ii. Whether the Defendants trespassed on the suit land?
- iii. What remedies are available?

When the suit came up for formal proof, the following pieces of evidence were admitted; -

- i) The sale agreement admitted as *PEX₁*, land sale agreement (*Luganda version*) marked as *PEX₂*,
- ii) Set of photographs indicating the destroyed place as *PEX₃*,
- iii) Letter to the Plaintiff written by the 1st Defendant's lawyers marked *PEX₄*,
- iv) A copies of letters to the Deputy Resident District Commissioner and the replies *PEX₅*.

Resolution of the issues;-

Issues 1 and 2 will be combined because resolution of one makes the other accordingly resolved.

Issues;

Who is the rightful owner of the suit land and whether the Defendants are trespassers

Section 101 of the Evidence Act 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 exist and the burden of proof lies on that person.

To prove his assertions, the Plaintiff introduced 2 witnesses to wit; - Dennis Desire Mitti as PW1 and Dr. Frank Nduga as PW2 who both proceeded by witness statements

Section 101 (1) of the Evidence Act (*supra*);

“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 exist.”

The case of *Sebuliba versus Co-operative Bank Ltd [1982] HCB 129*, considered the above sections and it held that the burden of proof in civil proceedings lies upon the person who alleges, therefore, to prove the alleged trespass, the burden of proof was squarely on the Plaintiff.

The Supreme Court while defining trespass as per the case of *Justine E. M. N Lutaaya versus Stirling Civil Eng. Civ. Appeal No. 11 of 2002*, held that ‘trespass to land occurs when a person makes an unauthorized entry upon another’s land and thereby interfering with another person’s lawful possession of the land’.

In *Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4 of 1987*, the East African Court of Appeal noted that;

‘in order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land belonged to him, that the respondent had entered upon that land and that the entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land’.

To prove ownership, Counsel submits that the Plaintiff purchased the suit land from the 2nd and 3rd Defendants with the consent of the 1st Defendant. This was corroborated by the evidence of PW2 a neighbor to the suit land who also purchased his interest from the 2nd and 3rd Defendants. He testified that PW1 acquired land from the 2nd and 3rd Defendants out of the land that they had acquired from the 1st Defendant and that after their purchase, the 1st Defendant began interfering with their possession of their respective portions of land that they had acquired from the 2nd and 3rd Defendants.

PW1 tendered in to Court a copy of a sale agreement which was admitted as *Annexure PEX₁* and having a close perusal of the same, it can be discovered that the Plaintiff paid all the purchase amount to a tune of shs.105,000,000/= only (*one hundred five million shillings*) to the 2nd and 3rd Defendants. On page 6 of the sale agreement, the 1st Defendant was a witness thereof.

It is trite that in equity, interests in land passes upon payment of the purchase price. See Semakula & Anor versus Sentiba, CA No. 5 of 2013, and Ismael Jaffer Allibhai & Ors versus Nandalr Harvijan Karia & Anor SCCA No. 53 of 1995, where it was held that;

‘In sale of immovable property, upon payment of deposit, property passes to the purchaser who acquires equitable interest and that the purchaser becomes the lawful purchaser when he has paid the deposit’.

Like in this case, the equitable interest in the suit land passed to the Plaintiff upon completion of payment of the purchase price as exhibited by PEX₁. It was PW1’s case that after acquiring such interest, he took possession and that he has been utilizing the same.

In my view, the Plaintiff acquired his equitable interest in the suit land through purchase from the 2nd and 3rd Defendants which sale was not disputed by the 1st Defendant when he witnessed on the same. The Plaintiff took possession of the suit land which was acquiesced to by the 3rd and 2nd Defendants who are the vendors in this case.

I therefore find that ownership of the suit land has been proved by the Plaintiff on the balance of probabilities since there is evidence of property passing to the purchaser/Plaintiff.

Secondly, to prove the unlawful entry, it was the Plaintiff’s testimony that around July 2016, the 1st Defendant entered on the suit land and destroyed the fence which he had erected around the land and he reported the matter to Kasangati Police Station Vide SD Ref: 24/14/07/2016 and on 20th July 2016, that he received communication from the 1st Defendant’s lawyers claiming that the 2nd and 3rd Defendant had returned the land to the 1st Defendant because they had failed to pay for the land.

PW2 testified in corroboration with PW1 that when the 1st Defendant started interfering with their possession, he, together with PW1 lodged a complaint with the office of the Resident District Commissioner Wakiso district, seeking an intervention in the issue. The said complaints were admitted and marked Exhibit P5 PEX₃ are photographs showing destruction of the Plaintiff’s property/fence which act was reported by police as theft and criminal trespass.

This is evident that the 1st Defendant forcefully entered the suit land which act the Plaintiff tried to resist by reporting the same to the relevant authorities hence this suit. The evidence available on record proves on the balance of probabilities that the Defendant trespassed on the Plaintiff's land. I accordingly answer the two issues in the affirmative.

Issue 2

What remedies are available in the circumstance

Having found that the Defendant trespassed on the Plaintiff's land, judgment is found in favor of the Plaintiff with the following orders which the Plaintiff prayed for;-

- A declaration that he is the rightful owner of the suit-land at Bulamu Deputy Gayaza, Wakiso district measuring approximately 24 decimals which is accordingly granted.
- General damages for trespass.

In the case of **Takya Kushwahiri & Another versus Kajonyu Denis CACA 85** of 2011 it was 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. In **Uganda Commercial Bank versus Kigozi [2002]1 EA 35**, Court gave guidance on how to assess the quantum of damages that;

“the consideration should mainly be the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered”.

In the result, the Plaintiff is entitled to damages of Ushs. 75,000,000/- only (*seventy five million shillings*) given the current value of the land with interest at Court rate.

A permanent injunction restraining the Defendants from dealing with the suit property.

I so order.

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Henry I. Kawesa

JUDGE

12/07/2019