The Hon. Justice Tsekooko

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUIT NO.896 OF 1993

DAVID BBUYE.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA

JUDGMENT:

In this suit, the Attorney General has been sued in his representative capacity. That is, in accordance with the provisions of section 11 of the Government Proceedings Act, Cap.69.

The plaintiff, Mr. David Bbuye, sought, in the plaint, an order of this court directing the defendant to hand over, to the plaintiff, the land comprising leasehold Register Volume 2089 Folio 11, plot No. 39, Commercial Street Port Bell, in the city of Kampala. The plaintiff also seeks orders for special and general damages. He also prayed for the costs of this suit.

Briefly, the background to the institution of this suit is as set out below:

Plot No.39, Commercial Street, Port Bell, measures just a mere 0.046 of an hectare. It is a commercial plot. The plot appears to have been leased to the plaintiff, by Kampala City Council, the Controlling Authority, in 1986, for an initial period of 6 years. The 6 years' extension, in its turn also expired in 1994. The plaintiff then obtained a further extension of the lease for a period of 4 years commencing on 1st March, 1994. The certificate of title No.41149, in respect of the last extension was issued to the plaintiff on 12th February, 1996. That certificate of title was exhibited in this court and marked as exhibit P.16.

On 22nd May, 1989, without any prior indication to the plaintiff, the Minister of Lands And Surveys, as the Ministry was then called, issued a Statutory Instrument acquiring, among others, plot 39, Commercial Street, Port Bell. It was Statutory Instrument No.19 of 1989. It was titled "The Land Acquisition (plots 23-53, Port

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Bell Road, Commercial Street, Luzira) order, 1989". Through that statutory Order, the Minister invoked the powers vested in him under subsection (1) of section 2 of the Land Acquisition Act (Act 14 of 1965). The Minister declared all the land comprising plots 23 - 53, Commercial Street, Luzira, to be land required by the Government for a public purpose.

Following the publication of Statutory Instrument No.19 of 1989, on 18th March, 1991, one Muhumuza Joseph, an assessment officer issued a Notice, published in the New Vision of that day, calling upon all persons affected to appear before him at the Ministry of Lands and Surveys not later than two weeks from the date of the publication of the notice.

Strangely, and quite dramatically. On 9th April, 1992, the Minister, through S.1 No. 6 of 1992, revoked statutory instrument No. 19 of 1989. The Statutory Instrument was titled 'the Land Acquisition (plots 23 to 53, Port Bell Road Commercial Street, Luzira Revocation Order, 1992". This, of course, meant that the acquisition of the suit land by the government was effectively revoked on 30th June, 1992, when that Statutory Instrument was published in the Uganda Gazette. When the plaintiff obtained the initial lease of plot 39 Commercial Street, Port Bell, in 1986, he appears to have been quite anxious to develop the suit land. He caused a building plan to be drawn up. The plan exhibited in evidence as exhibit P4, was for a commercial building comprising shops on the ground floor and residential apartment upstairs. The building plan was approved by Kampala City Council on 4th December, 1986.

As soon as the statutory order which had effected the acquisition of the suit land by the Government, in 1989, was revoked the plaintiff vigorously embarked upon effecting his building plans. He fenced the plot, built a temporary structure intended to operate as office and store.

However, on 13th July, 1993, while the plaintiff was on the suit land with some of his employees, he was forcefully evicted from it by officers of the Directorate of Water Development. Those officers, apparently acting on the basis of statutory Instrument No.19 of 1989,

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which had already been revoked, told the plaintiff to leave the suit land and never to step on it as it had been acquired by Government for the benefit of the Directorate of Water Development. To punctuate its hold of the suit land, the Directorate of Water Development, through its officers, destroyed the temporary store cum office which the plaintiff had built on the suit land. They also took away the timber and iron sheets of which the structure was made. They eventually graded the entire plot thus removing or destroying the heaps of sand, aggregated and hard core and chipping stones which the plaintiff had placed on the suit land. At the time of the hearing of this case, the suit land was being used partly as an open air store for the Directorate's material and partly as a car washing bay.

The plaintiff filed this suit in 1993 to recover the suit land and to seek damages for the loss and onconveniences caused to him by the defendant. Three issues for determination were agreed upon by both counsel at the commencement of the hearing of this case. The three issues are:-

a) whether the plaintiff is the proprietor of the suit land;
b) whether the plaintiff is entitled to possession of the suit land as against the defendant; and
c) whether the plaintiff is entitled to the other remedies which he is seeking in the plaint.

Each party called evidence from three witnesses in support of each part's case. Perhaps before I examine each of the three issues in light of the evidence on record, it might be quite appropriate for me to record this court's serious displeasure with the Directorate for Water Development.

Counsel for the defendant, at first Mr. Michael Kibita, and later, M/S Kiryabwire, informed this court that the Director for Water Development was to be a key witness for the defence case. On 6th February, 1996, upon the closure of the plaintiff's case, Mr. Kibiita sought an adjournment to enable him assemble the evidence for the defence. This was followed by a series of other adjournments generally on the basis that Mr. Kibiita, and later M/S Kiryabwire, could not get the key witness, whom I understand to be the Commissioner or Director for

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Water Development, as is now called, to come to court. The Director was too busy, on several occasions, either in Kampala or up-country attending to other urgent departmental responsibilities including, at one occasion, attending a seminar at Jinja.

I believe it should be a matter of general knowledge especially to senior public officers that matters before courts of law take precedence over all other matters, which those officers have to attend to as part of their normal official duties unless either the constitution or the law otherwise provide. Public officers ought, and indeed are expected, in my view, to respond to matters before courts of law, in relation to their respective departments, on a priority basis. Quite unfortunately, that was not the case with the Directorate of Water Development in relation to this case. Although several adjournments had been secured by the defence in order to enable the key witness to come to court, he ended up not appearing to testify. Instead, three junior officers gave evidence. Such negative attitude to public affairs and especially where a case before a court is involved, is highly regrettable.

I will now turn to the three issues for determination in this suit. I will start with the first issue. That is whether the plaintiff is the proprietor of the suit land.

The plaintiff in his testimony produced Exhibit P.16 a certificate of title in his own names. It is also not in dispute that he obtained certificate of the title in respect of the 2 year lease with effect from 1st March, 1986 and the 6 years lease from 1st March, 1988. The plaintiff's earlier certificates were surrendered to the land registry before each successive certificate of title was issued to the plaintiff. All this evidence was not disputed by the defendant.

The only matters raised by Ms Kiryabwire were to the effect that when S.1 No. 19 of 1989 was issued the plaintiff was not the proprietor of the suit land. She wondered why the certificate of title for the 6 years extension was issued as late as 29th October, 1992, for a term commencing on 18th March, 1988. She also wondered why the controlling Authority could have renewed the lease in 1988

in favour of the plaintiff when the plaintiff had not fulfilled the conditions of the earlier grant. She also complained that the plaintiff had applied for the renewal of the lease of the suit land knowing very well that it had been acquired by Government.

Now, I find all these submissions to be either misconceived or totally irrelevant. In Livingstone Ssewanyana vs Martin Aliker. SCC. Appeal No. 4 of 1990, it was was held by the Supreme Court of Uganda, that interest in land vests in the proprietor from the time the grant is made. In respect to the 6 years' lease extension, the controlling Authority specified that the grant was with effect from 1st March, 1988. It can not, therefore, be argued that the plaintiff was not the leasee of the suit land in 1989. Besides, how could the plaintiff have known that the suit land had been acquired when, as I will show later, he was never served with the declaration Instrument and when there was no Notice in the Gazette as required by law? Section 57 of the Registration of Titles Act, Cap. 205, is quite clear in its provisions. A certificate of title constitutes conclusive evidence of entitlement or proprietorship of the land in question to the person named in the title. That entitlement can only be questioned where fraud is alleged. In this case no fraud is alleged. The plaintiff is named in the certificate of title as the leasee of plot 39 Commercial Street, Luzira, volume 2450 Folio 3. This court has no reason whatever to doubt the plaintiff's title. The defence has, indeed provided none either. The acquisition of the suit land having been effectively eventually revoked.

I, therefore, find that the plaintiff is the undisputed leasehold properietor of plot 39, Commercial Street, Luzira. I, accordingly, answer the first issue in the affirmative.

The second issue is whether the plaintiff is entitled to possession of the suit land as against the defendant.

The defendant's case is that he took possession of the suit land on the basis of the authority of Statutory Instrument No. 19 of 1989. It is also in dispute as to what point in time, the directorate of Water Development took possession of plot 39, Commercial Street, Luzira.

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According to the evidence of PW1, John Kaboggoza Senkungu, and DW2, Kabanda.. the directorate moved from Entebbe to Luzira suring the month of April, 1992. The Directorate transferred its materials to Plot 39, Commercial Street, during the same month and year. The defence also produced exhibits D2 and D3 which tend to show that the Directorate had possession of the suit land at least by May, 1992, and that by the end on the year 1992, the Directorate had demolished the plaintiff's temporary structure. However, the plaintiff and PW2, Kakeeto Jackson Musajjaguma, testified that the official of Water Development evicted the plaintiff on 13th July, 1993, and that all the plaintiff's properties were on the suit land by then. PW2 claims to have been physically present together with the plaintiff on the suit land on that day. I find no reasons to disbelieve them. I think that exhbitis D2 and D3 might have been actually written at later dates but given earlier dates in order to justify their authenticity. If it is true that the Directorate took possession of the suit land on 13th July, 1993, then it can not claim to have done so on the basis of the authority of Statutory Instrument No.19 of 1989, which had been effectively revoked by 30th June, 1992, the day of the publication in the Gazette of S.1 No.6 of 1992.

But be that as it may, there are numerous other reasons which show that Statutory Instrument No.19 of 1989 was not legally effected so as to give rise to any effective possession of the suit land by the defendant.

In the first place, it is curiously observable that S.1 No.19 of 1989 was most likely drafted by a lay person or by a legal officer without any legislative drafting training or experience. While sub-section (1) of section 2 of the land Acquisition Act, 1965, gives the Minister power to make a declaration by Statutory Instrument, what was made in the case of S.1 No.19 of 1989 was a Statutory Order instead of a declaration Instrument.

While that deviation might have been curable by section 43 of the interpretation Act, 1976, other more serious omissions were made. Those omissions, in my view, rendered any claim, by the Directorate of Water Development, to have taken possession of the suit land on the basis of S.1 No.19 of 1989, to be obsolutely void and

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completely untenable. Subsection (3) of section 2 of the Land Acquisition Act requires the Minister to cause a copy of the declaration to be served on the registered proprietor or the controlling authority or the occupier of the land. In my view, this provision is mandatory. In the instant case, there is no evidence that this mandatory provision was ever followed. Indeed, the plaintiff was quite set aback when he got to know of the purported acquisition from a newspaper notice.

Under section 4(1), of the Land Acquisition Act, an assessment officer is required to publish a notice in the Gazette and exhibit it on or near the suit land indicating Government's intention to take possession of the land and calling for claims in respect of any interest in the land. In the instant case, there is no evidence that such notice was ever published in the Gazette. What was exhibited, as Exhibit D1, was a copy of a purported Notice signed by one Muhumuza Joseph and published in the New Vision issue of 18th March, 1991. Certainly, that was not the notice envisaged in section 4(1) of the Land Acquisition Act.

Under section 4(4) of the Land Acquisition Act, the notice required to be issued under section 4(1) has to specify a day which is not earlier than 15 days or 30 days, if the Minister so directs, from the date of the notice, on which the assessment officer would hear the presentation of claims by those holding interest in the land. In the instant case, the purported Notice was not only illegal for lack of publication in the Gazette, but it did not specify any date. When it vaguely attempted to do so, it set a period of "two weeks" which was apparently short of the minimum of 15 days required by the Land Acquisition Act itself. The notice was to that extent inconsistent with/Act and accordingly void.

Still worse, section 6(1) of the Land Acquisition Act requires the assessment officer to be the one to take possession of any land acquired under the Act. However, an assessment officer can only do so as soon as he has made an award under section 5 of the Act. In the instant case, the evidence shows that the officers of the Directorate of Water Development simply arbitrarily took possession of the suit land and subsequently physically and violently evicted the registered proprietor of the suit land. None of them was the assessment officer

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and no award had been given to the plaintiff in respect of his leasehold interest in the land. There was, therefore, no taking of possession in law.

With all those illegalities and arbitrariness, I have no option but to fully agree with Mr. Nangwala's submission that the taking of possession by the Directorate of Water Development of the suit land, was a nullity abinitio. The Directorate trespassed on the suit land as it took the suit land illegally and has since so remained in possession to date. It was held in Bishop-gate Motor Finance Corporation vs Transport Brakes Ltd. (1949) 1 All E.R. 37, that a court has to presume that a person in possession of property is in lawful possession until the contrary is proved. The plaintiff in my view, has proved his case on the balance of probabilities.

Accordingly, my finding on issue number two is also in the affirmative. The plaintiff is entitled to possession of suit land as against the dfendant.

Issue number three is whether the plaintiff is entitled to the remedies which he is seeking.

The first prayer of the plaintiff is for directing the defendant to hand over vacant possession of the suit land to the plaintiff. In view of my finding in relation to issues number one and number two, I find no reason to hastate to grant that prayer. It is accordingly granted. The defendant is hereby ordered to hand over, to the plaintiff, vacant possession of the land contained in Leasehold register, volume 2080, Folio 11, plot 39, Commercial Street, Luzira. This order has to be effected not later than 30 days from the date of the delivery of this judgment.

In prayer number three, the plaintiff is praying for special damages. As, a general rule, special damages have got to be specifically pleaded and proved at the hearing of the case. (see Kwarakunde vs Attorney General (1984) HCB 60. In the instant case, special damages were pleaded in subparagraph (ii) of paragraph 10 of the plaint.

The first claim under paragraph 10(ii) is a sum of Shs. 3,000,000/= alleged paid to Messrs TESAGA THOM CONSTRUCTOR on 6th

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July, 1993, as advance payement against construction charges for the planned building. While the plaintiff produced Exhibit P.6, a memorandum against which the money was paid, he never produced any evidence beyond that to show that he actually lost the sum of Shs.3,000,000/= or that Messrs Tesaga Thom Construction can not now honour that advance payment any more and that the plaintiff will now need to engage another constructor or pay that sum of money all over again or that he can not recover that sum from the constructor in the event that the contract can now not be effected. In the circumstances, I am unable to grant the sum of Shs.3,000,000/= as special damages.

The second claim relates to Shs.2,000,000/= arising out of the loss of the temporary store. Both parties agree that the temporary store existed on the site and that it was made of timber and iron sheets. The plaintiff addcued evidence in the form of cash receipts totalling to approximately Shs.2,000,000/= in respect of purchases of materials and labour towards the construction of the store/office on the suit land. I, therefore award the 2,000,000/= to the plaintiff as special damages.

The third claim is Shs.500,000/= in respect of the loss of the pit latrine. The existence of the pit latrine on the suit land was established by the evidence of both sides. It is, therefore, not in dispute. The plaintiff produced cash receipts in relation to labour and materials for the pit latrine. This was Exhibit P-8. The total sum is Shs.500,000/=. I, therefore, accept this claim and award Shs.500,000/= as special damages against this item.

The plaintiff claims Shs.1,325,000/= for loss of timber and poles The evidence adduced, however, does not establish that there were timber and poles on the site when the Directorate of Water Development took it over. The only timber borne out in evidence is the one used in the construction of the temporary store/office and the pit latrine. I, therefore, reject the plaintiff's claim of Shs. 1,325,000/= in that regard. I award nothing against that item.

The next three claims relates to losses of hard core stones, sand and chipping stones. The evidence of both sides establish that there were heaps of stones and sand on the site before the Directorate took possession of the suit land. The amounts, however, are not

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established. There is no doubt that those materials were in existance on the suit land and were lost as a result of the defendant's trespas on the land. The plaintiff has provided Exhibits, P12, P11 and P10 to prove his expenditure on those items. I accordingly award him special damages in the sums of Shs.3,000,000/= for loss of hard core stones, Shs.2,000,000/= for loss of sand and Shs.1,000,000/= for loss of chipping stones.

The last two claims under this item relate to loss of barbed wire and aggregate stones. I am prepared to award Shs.800,000/= in respect of the loss of barbed wire. The evidence and Exhibit P.13 duly establish that claim. Shs.800,000/= is accordingly awarded. In respect of loss of aggregate, a sum of Shs. 3500,000/= is claimed. Exhibit P 14 indicates that a total of 30 tons of aggregate stones were purchased and delivered on site. This appears to be an awful lot of stones. However, considering the size and elevation of the planned building, it is probable that that amount of stones might have been necessary in order to effect the building plan. Accordingly, I accept the claim and award Shs.3,500,000/= million as special damages against the item.

In all, I award Shs.12,800,000/= in special damages to the plaintiff.

In prayer No.2, the plaintiff prays for general damages. General damages are compensatory and aim at placing the plaintiff in the position he would have been in had the defendant's illegal act not intervened. (see J. A. Arad Osiyingo vs Attorney General HCCS No. 991 of 1988 and Katatumba vs Attorney General, (1991)HCB,99.

The plaintiff's claim for general damages include (a) general damages for trespass, (b) general damages for conversion and (c) general damages for inconveniences of failing to comply with the development covenants in the leasehold.

The evidence as laid out above indicate that the servants of the defendant committed trespass to the plaintiff's land. They took possession illegally when possession would have been taken by an assessment officer. They remained in possession of the property

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even when they knew or ought to have known that the Statutory Instrument under which they purported to take possession of the land had long been revoked. In fact the officers of the Directorate of Water Development acted in a rather very high handed manner quite unbecoming of officers of their calibre. They physically evicted the plaintiff while they were in the company of an armed police woman. They destroyed or carried away all the valuable building material on the site. Should the plaintiff have pleaded it, I think it would have been appropriate in this case to award punitive or exemplary damages against the defendant in this case. But without express pleading that cannot be done.

There is no dispute that the unlawful acts were committed by officers of the Ministry of Natural Resources, specifically, the Directorate of Water Development while in the course of their employment and that the defendant is, therefore, vicariously liable for those officers' actions.

The plaintiff claimed Shs.20 million in general damages for the overstretched trespass since 1993, for conversion of the suit land and for the inconvenience caused to him in failing to fulfil the development covenants. The consequences of the defendant's actions were, in my view, quite reasonably foreseable.

However, while I agree with the plaintiff's counsel that the plaintiff deserves the award of general damages in this case, I think that 20 million is rather a very high sum. I think a sum of Shs. 10 million shillings would be appropriate in the circumstances of this case. I therefore award 10 million shillings to the plaintiff as general damages.

I similarly award interest, at court rate, on special damages from the date of the filing of this suit until full payment. I also award the costs of the suit to the plaintiff.

In the final result Judgment is entered for the plaintiff and I issue the following orders:

a) an order requiring the defendant to give vacant possession of the land contained in Leasehold register, volume 2080, Folio 11, plot 39, Commercial Street Luzira to the

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plaintiff within 30 days from the date of this judgment;

b) an order awarding Shs.12,800,000/= to the plaintiff as special damages;

c) an order awarding Shs.10,000,000/= to the plaintiff as general damages;

d) interest on (b) and (c) above at court rate, from date of the filing of this suit until full payment; and

e) an order awarding the costs of this suit to the plaintiff.

V. F. Musoke-Kibuuka

J u d g e

10/2/98

Read out in Chambers

in the presence of: