

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
HIGH COURT CIVIL SUIT NO. 118 OF 2012

1. TAYEBWA GEOFFREY
2. BESINGOMWE EDISON:.....:PLAINTIFFS

VERSUS

KAGIMU NGUDDE MUSTAFA:.....:DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGEMENT

The Plaintiffs sued the Defendant for trespass on their land comprised in Block 70 Plot 235 at Butambala (hereinafter the suit land), eviction from the suit land, malicious damage to property, special and general damages, a permanent injunction and costs of the suit.

The facts of the case are that the Plaintiffs are registered proprietors of the suit land measuring approximately 38.7 acres having been registered thereon in 2011 and; in physical possession of the same having acquired it from the Late Muhamudu Buwule (hereinafter the deceased). The suit land was subdivided from land in Block 70 Plot 226 Butambala from which the Defendant had bought several parcels from the deceased at which he developed with a dairy farm. The suit land neighbors the Defendant's farm land.

It is the case of the Plaintiffs that the Defendant trespassed on the suit land whereupon he destroyed its fences and other properties. In his defence, the Defendant denied trespassing and destroying the Plaintiffs' property on the suit land claiming that the same forms part of his farm land having acquired a Kibanja interest on it which he had partially paid for to the deceased with the intention of effecting transfer thereafter to him. It is also his claim that he has been in quiet

possession of the suit land which he had developed with a dairy farm since 1996 until the Plaintiffs interfered with the possession thereof on the 28th January, 2012.

To that end, the Defendant counterclaimed against the Plaintiffs, *interalia*; for trespass, malicious damage to property, special and general damages, mesne profits and permanent injunction. The Plaintiffs disputed all the assertions of the Defendant's counterclaim as mere falsehoods. They also asserted that the Defendant's WSD was invalid on ground that contained mere denials.

At trial, the Plaintiffs led evidence of four (4) witnesses that is; Tayebwa Geoffrey (PW1) Besingomwe Edison (PW2), Muwakanya Umar, the son to the late Buwule (PW3), and Sula Kabugo (PW4) and; the Defendant also led four (4) witnesses that is; Kagimu Ngudde Mustafa (DW1), Ssenyunja George (DW2), Mary Mulumba (DW3) and Farouk Ssetimba (DW4). Counsel for both parties made written submissions which I will consider resolving the controversy between the parties.

At scheduling, the following issues were agreed upon by the parties for determination by this court;

1. Whether the Plaintiffs have a cause of action against the Defendant
2. Whether the Defendant has a valid defence to the suit,
3. Whether the counter Plaintiff has a cause of action against the counter Defendant in the counterclaim,
4. Whether the parties are entitled to any remedies.

Upon perusal of the pleadings, the evidence and written submissions on record, it appeared that both parties claim trespass on the suit land against each other which is the crux of the first and third issue. According to the authority of *Justine E.M.N. Lutaaya vs Starling Civil Engineering Co. SCCA No.11 of 2002*, trespass to land is premised upon interference with the possession of land. I must to mention that one's physical presence on the land or use or de facto control of it does not amount to possession sufficient to bring an action of trespass as one is required to have had an interest in the subject land.

In the case of *John Katarikawe versus William Katwiremu [1977] HCB 210 at 214*, it was observed by **Byamugisha J.**, (as she then was) that interests in land, in particular, include registered and unregistered interests. In the instant case, whereas the Plaintiff's claim in the suit land is based on a registered interest, that of the Defendant is based on an unregistered interest. Byamugisha J., further observed in the case of *Ojwang versus Wilson Bagonza CACA No.25 of 2002*, further observed that for one to claim an interest in land, he or she must show that he or she acquired an interest or title from someone who previously had an interest or title thereon. Whereas the Defendant does not dispute that the Plaintiffs are the registered interest in the suit land, the Plaintiffs deny that the Defendants has a Kibanja interest thereon which is an unregistered interest. I am alive to the position of law in *Turinawe & 4 Ors versus Eng. Turinawe & Anor SCCA No. 10 of 2018* wherein the Supreme Court affirmed the proposition of law by the Court of Appeal that a certificate of title is not conclusive proof of ownership in land until the circumstances of acquisition have been investigated.

Counsel for the Defendants sought to defeat the Plaintiffs' title by raising an allegation of fraud against the Plaintiff when he argued that the Plaintiffs' interest was registered so as to defeat that of the Defendant whom they found already occupying the suit land. In doing so, Counsel relied on the cases of *Kampala District Land Board & Anor versus Venansio Babweyaka & Ors SCCA No.2 of 2007, Kampala District Land Board & Anor versus National Housing & Construction Corporation CA No.2 of 2004 and John Katarikawe versus William Katwiremu [1977] HCB 210 at 214*. While as I do agree with the propositions of law as regards fraudulent registration of title in the cases cited by Counsel for the Defendant, I reject Counsel's view as the Defendant's counterclaim was not premised on allegations of fraud. It also appeared that the Defendant by his pleadings does not seek to challenge or impeach the Plaintiff's title in the suit land save for claiming a Kibanja interest thereon which; in my view, can co- exist with the Plaintiffs' legal interest in view of Section 3(4)(b), 29(1)(b) Land Act, Cap 227 and Section 3(b) Land (Amendment) Act 2010. Given the above, it is now pertinent to investigate the Defendant's Kibanja interest in the suit land.

The Defendant, DW1, testified that it was the Plaintiffs who interfered with his possession of suit land. It was his testimony that he developed the suit land from being a forest and a swamp since 1996 upon the request of the deceased. He added that he bought several parcels of land from the

deceased and; that the suit land was the last parcel he had partially paid for but not given chance to complete payment as the deceased fell sick when negotiations were under way. According to his testimony, he had so far paid Ugshs.2,500,000/- (*two million, five hundred thousand shillings only*) by virtue of the agreement, DEX2, signed between him and late Buwule Muhamudu on the 31 March, 2007.

He further testified that the deceased sold the suit land to the Plaintiffs without refunding his partial payments. His testimony regarding the development and purchase of the suit land from deceased was supported by DW2, DW3 and DW4. In particular, DW2 testified that the Defendant purchased and started developing the suit land in 1996. DW3 added that she was a witness to all sales made between the Defendant and the late Buwule Muhamudu. DW4 further added that the Defendant was in occupation having purchased it from the deceased sometime in 1996 until 28th January, 2012 when he was dispossessed by the Plaintiffs. DW4 added that it was through him that the Defendant made the final payment of Ugshs.500,000/= only (*five hundred thousand shillings*) to the deceased for the suit land.

The Defendant's evidence of having a Kibanja interest in the suit land was vehemently disputed by the Plaintiffs. According to their evidence, the suit land neighbors that of the Defendant and; that at the time of acquisition, it had paddocks which belonged to the deceased. PW1 and PW2 testified that at the time of acquiring their interest from the deceased, the deceased never informed them that there was a Kibanja holder on the suit land. Further, that upon acquisition in 2011 they took possession of the suit land which they later fenced in 2012 in order to prevent the Defendant's animals from accessing it.

In support of this, PW3 testified that the suit land was initially a common grazing ground to which the Defendant had access and; that the Defendant wanted to exclude other people from accessing it. PW3 further added that the Defendant always wanted to buy the suit land from his father (the deceased) but upon failing, he kept on pressing the deceased to deny the Plaintiffs from accessing the suit land.

According to the original agreement and its addendum, DEX2, which is the root of the Defendant's claim, it is indicated that the Ugshs.2,500,000/- only (*two million, five hundred thousand shillings only*) was received by the deceased on the understanding that it was a loan as

the full consideration for the purchase of the suit land was yet to be agreed upon by the parties. Although DW1 testified that he had agreed with the deceased to pay Ugshs.300,000/- (*three hundred thousand shillings*) per acre of the suit land, this was not indicated anywhere in DEX2. Much as he insisted during cross examination that the payments to the deceased were for purchase of the suit land and not as loaned monies, a testimony which was supported by DW2, DW3 and DW4.

I was not convinced by his evidence that the partial payments were for the acquisition of a Kibanja interest in the suit land in view of the agreement. My view is further buttressed by the fact that the parties to the purported sale agreement were yet to agree on the total consideration as there was no evidence that Ugshs.300,000/- only (*three hundred thousand shillings*) was the agreed unit price per acre as claimed by the Defendant.

Turning to the testimony of DW2, DW3 and DW4, these all testified that the Defendant had acquired a Kibanja interest in the suit land. In my observation, however, the three witnesses appeared unreliable and shallow of the facts in dispute. In particular, the trio testified that the Defendant bought the suit land in 1996 contradicting the latter's testimony that he agreed with the late Buwule to purchase the same in 2007. Additionally, DW4, also testified that it was through him that the Defendant made the final payment of Ugshs.500,000 a testimony which was also contrary to the addendum which indicates that the last installment was Ugshs.400,000/= only (*four hundred thousand shillings only*)

Bearing in mind all these circumstances, I find the Defendant's evidence short of proof of his claim of holding an interest (Kibanja) in the suit land which also; is necessary to sustain his counterclaim against the Plaintiff. Ultimately, I find that Defendant's counterclaim is unsustainable regardless of the Defendant's claim of possession of the suit land.

Having resolved as above, I shall now determine the merits of the Plaintiff's claim. Because it is the law that court only looks at a party's pleadings in determining whether a cause of action is disclosed therein, it is my view that the issues above cannot not appropriately dispose of the

matter in controversy given that court now has to look at the evidence on record. Counsel for both parties were alive to this position in their respective submissions as they cited several relevant authorities that is; *Kapeka Coffee Works Ltd versus N Parts CACA No.3/2000; Uganda Aluminum Ltd versus Restetuta Twinomugisha CACA No.22/2000; Auto Garage versus Motokov (No.3) [1971] EA 514.*

Accordingly, I shall base on O.15 r5(1) Civil Procedure Rules Section I 71-1 to amend issue one and three for purposes of determining the real controversy between the parties. I therefore propose the following issues for determination;

1. Whether the Defendant trespassed on the suit land,
2. Whether the Defendant has a valid defence to the Plaintiff's suit,
3. Whether the Plaintiff is entitled to any remedies,

RESOLUTION

Issue No. 1:

Whether the Defendant trespassed on the suit land

According to Supreme Court case of *Justine E.M.N. Lutaaya vs Sterling Civil Engineering Co. SCCA No.11 of 2002* trespass to land occurs “*when a person makes an unauthorized entry upon land, and thereby interfering, or portends to interfere, with another person's lawful possession of that land*”. Court in that case added that the tort is committed not against the land, but against person who is in actual or constructive possession of the land. In order to succeed in this case, the Court of Appeal in *Sheikh Muhammed Lubowa versus Kitara Enterprises Ltd CA No. 4 of 1987* observed that one must prove;

- *That the disputed land belonged to the Plaintiff*
- *That the Defendant had entered upon it, and*

- *That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the disputed land.*

The evidence of the Plaintiff is that the Defendant together with his agents entered the suit land and destroyed the fence thereon. PW1, in particular, testified during cross examination that the Plaintiffs took possession of the suit land in 2011 and fenced it in 2012 in order to stop the Defendant's animals from crossing onto it. PW4 corroborated this evidence by testifying that the Defendant and some men came and uprooted the Plaintiff's poles on the suit land.

Most of this evidence was uncontroverted by the Defendant save for asserting that it is the Plaintiffs' that trespassed on the suit land thereby dispossessing him. I have already noted that the Defendant had no interest in the suit land in order to sustain his claim. It has been observed before in ***Ocean Estates Ltd versus Pinder [1969] 2 A.C 19*** that;

“Where the owner is suing a person allegedly in possession, even the slightest acts by the owner indicating his or her intention to take possession are enough to maintain the action. This is analogous to saying that the Defendant's cannot sustain his claim against the Plaintiffs regardless of whether or not he was in actual possession of the suit land”.

I must also note that there was in fact no evidence that the Defendant was in possession of the suit land on the 28th January, 2012 as his evidence was full of grave inconsistencies and contradictions and; as such, I am more inclined to believe the Plaintiffs' evidence that on the 28th January, 2012 they were in possession of, on top of having an interest in, the suit land.

For those and in the circumstances, I find that the Defendant interfered with the Plaintiffs' lawful possession of the suit land.

Issue No. 2:

Whether the Defendant has a valid defence to the Plaintiff's suit

In his submissions, Counsel for the Plaintiff contended that the Defendant's written statement of defence is invalid for the reasons that it contains denials yet at scheduling the Defendant admitted that the suit land belongs to the Plaintiffs who are in actual possession thereon. He accordingly submitted that the written statement of defence contravenes O.6 r10 of the Civil Procedure Rules.

In his submissions in reply, Counsel for the Defendant did not address the concern for the substance of the written statement of defence save for arguing that the Defendant has a good defence to the suit on ground that he owned a Kibanja on the suit land which he was in possession thereof. His omission was captured by the Plaintiff's Counsel in rejoinder who emphasised his earlier submissions and; also added that the written statement of defence contravenes O.6 r8 and O.8 r6 of the Civil Procedure Rules.

I have had a benefit of looking at the provisions referred to by Counsel for the Plaintiffs together with the written statement of defence. Whereas O.6 r8 of the Civil Procedure Rules requires that a party to specifically deny every allegation of fact which he or she does not admit the truth, O.6 r10 of the Civil Procedure Rules bars evasive denials of every allegation of fact in the previous pleading of the opposite party. Having looked at the written statement of defence, I observed that the Defendant dealt specifically with each allegation of fact raised in the plaint and; was not evasive in doing so as he specifically denied trespassing on the suit land but explained that he held a Kibanja interest thereon.

That said, what is most crucial in the Defendant's written statement of defence is paragraph 15 in light of the Defendant's admission during scheduling that the Plaintiffs are in actual possession of the suit land as registered proprietors. In this paragraph, the Defendant pleaded that he has in *"no way caused any suffering to the Plaintiffs, prevented the Plaintiffs from developing the suit land nor occasioned all the inconveniences claimed therein..."*

A critical look at paragraph 15 of the written statement of defence in light of the agreed facts creates only one inference that is; an acknowledgement by the Defendant of the Plaintiffs' exclusive rights and interest in the suit land. Counsel for the Plaintiff was alive to my observation as he referred to O.13 r6 of the Civil Procedure Rules and Section 16 Evidence Act Cap 6 which would entitle the Plaintiffs to a judgment on admission against the Defendant. That said however; having not taken steps to secure judgment on the admission, I am of the opinion that the Defendant's admission should only be considered in making the final judgment rather than making a finding that his of the written statement of defence as invalid.

Issue No. 3.

Whether the Plaintiff is entitled to any remedies

The Plaintiff sought for a declaration that they are the rightful owners of the suit; a permanent injunction against the Defendant and his agents from interfering on the suit land; special damages of Ugshs.9,000,000/- (*nine million shillings*) and general damages in addition to; interest and costs of the suit.

In view of the above findings, I grant the Plaintiffs a declaration that they are the rightful owners of the suit land. I also order a permanent injunction against the Defendant restraining him, his agents, relative, or any one claiming any interest through him from interfering with the Plaintiffs' possession of the suit land.

I was unable to award special damages for the reason that these were never strictly proved by the Plaintiffs as required by the law. See **Robert Cuossens versus Attorney General SCCA No.8 of 1999.**

Turning to the claim of general damages, I am aware that in assessment of general damages, Courts are mainly guided by the value of the subject matter, the economic inconvenience that the innocent party may have been put through and the nature and extent of the breach suffered. In **Charles Acire versus Myaana Engola HCCS No. 143 of 1993** it was also held that;

“A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong.”

It is also trite law that in exercising the discretion to grant general damages, Court should not punish the Defendant for the breach but, rather put the Plaintiff in the position he or she was prior the breach complained of. See **Boschcon Civil & Electrical Construction Co., (U) Ltd versus Salini Construttiri Spa HCCS No. 151 of 2008.** Taking account of the inconvenience suffered by the Plaintiff as a result of the Defendant's acts, I am inclined to award Ugshs.5,000,000/- only (*five million shillings*) as general damages to the Plaintiffs at Court rate from the date of judgment till full payment.

I am unable to award the Ugshs.20,000,000/- only (*twenty million shillings*) claimed as general damages, in addition to other claims, for the alleged destruction of the Plaintiffs' crops and properties for the reason that pecuniary losses ought to be strictly proved. See **Robert Cuossens versus Attorney General SCCA No.8 of 1999**. In other words, in case the Plaintiffs desired to secure this sum, they ought to have pleaded it as special damages and gone ahead to strictly prove it. Further, because the Plaintiffs averred that they took possession of the suit land 2011 upon acquisition from the deceased up to date, I was unable to take account of their claim of denial of the development of suit land in the quantification of general damages.

The Plaintiffs are also granted costs of the main suit/counter claim.

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Henry I. Kawesa

JUDGE

14/2/2019

14/2/2019:

Catherine Murangira for the Plaintiff.

Kyeyune for the Defendant.

Defendant present.

Plaintiffs present.

Court: Judgment delivered to parties above.

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Henry I. Kawesa

JUDGE

14/2/2019