

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
CIVIL SUIT NO. 40 OF 2021

KASENDWA BADRU.....PLAINTIFF

VERSUS

1. GABURA STEPHEN

2. MOHAMMEED MUGENYI

3. SSALI DEUS

4. MUGWANYA RONALD

5. KASUJJA SANDE

.....DEFENDANTS

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK

Judgment

Brief facts:

15 The plaintiff in 2017 acquired the suit land approximately 8 acres comprised in Block 269 Plot 118 land at Mawokota, Mpigi District from Kato Wilson at a consideration. At the time of purchase, the land comprised in Block 269 Plot 118 had bibanja occupants to wit; Gabula Stephen, Mamiya Aisha, Bata, Kyalyango, Karinda and Namazi. The plaintiff purchased the suit land after
20 conducting due diligence and satisfying himself that his purchase is subject to equitable interest of bibanja owners. After the purchase, the plaintiff subdivided Block 269 Plot 118 into several Plots to wit; Plots 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141 and 142.

25 That prior to the subdivision of Block 269 Plot 118 land at Mawokota, Mpigi District, the plaintiff entered into an arrangement with some of the Bibanja owners to forfeit their bibanja to the plaintiff in exchange for a certificate of title in strict compliance with the Land Act. That under the aforementioned arrangement, the bibanja owners retained portions of their bibanja and
30 acquired title for land comprised in Block 269 Plot 126 land at Mawokota and receipt was acknowledged by the 1st defendant on the 11/12/2017.

The plaintiff further handed over the certificate of title of land comprised in Block 269 Plot 130 to Nalongo Mamiya Aisha and Karinda on the same day. Thereafter, the plaintiff retained the other portion of the original Block 269
35 Plot 118 with certificates of titles acquired to wit; 123, 124, 125, 126, 127,

128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141 and 142 as Land Lord and the other three bibanja owners who did not enter into an arrangement kept their respective portions to date without any interference whatsoever.

- 5 That the 1st defendant resides in the neighbourhood and has at all material times been aware of all transactions affecting the plaintiff's interest in the suit land. On or around mid April 2020, the plaintiff received information that some people were erecting structures on the suit land and demarcating the same. The plaintiff made a visit but was shocked and surprised to find houses
10 erected on the suit land and other structures on wall plates. On further internalization, the plaintiff discovered that the defendants had demarcated the suit land into small pieces of land separated by boundary marks locally known as "Empanyi" and mark stones.

Representation:

- 15 M/s Atlas Advocates appeared for the plaintiff. The suit proceeded exparte against all the defendants. The plaintiff filed written submissions.

Issues:

1. Whether the defendants are trespassers on the suit property?
2. Whether the defendants acted fraudulently to acquire the suit property?
- 20 3. Whether the plaintiff is the lawful owner of the suit property?
4. What are the available remedies to the parties?

Resolution:

Section 101 (1) of the Evidence Act provides that;

- 25 *"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 v. Co-operative Bank Ltd [1982] HCB 129** considered the above sections where it was held that the burden of proof in civil proceedings lies upon the person who alleges.

- 30 Thus the burden of proof in civil suits lies on the party who alleges that is the plaintiff to prove their claim against the defendant. **(See: Sections 101 and 103 of the Evidence Act)**. In the case **Nsubuga v. Kavuma, (1978) H.C.B 307**, it was held that;

- 35 *"In civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities."*

I will resolve the issues adopting the order followed by the plaintiff.

I have carefully perused the court record, the evidence as adduced, exhibits tendered in court, the locus proceedings and submissions for the plaintiff with the law and authorities cited therein to resolve the issues raised above.

Issue 3: Whether the plaintiff is the lawful owner of the suit property?

5 Counsel for the plaintiff submitted that it was PW1's testimony that he bought the suit land in 2017 and at the time of purchase there were five bibanja owners. That three bibanja owners remained on the land and he gave the 1st defendant a certificate of title for plot 126 in accordance with the provisions of **Section 36(1)** of the Land Act and he acknowledged the arrangement as
10 evidenced by PEX4. That after giving titles to the bibanja owners who accepted the arrangement, the plaintiff retained proprietorship of plots 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141 and 142. That as such the plaintiff is the registered proprietor of the above plots according to the certificates of title that were tendered in court
15 and collectively marked PEX10.

Section 59 of the Registration of Titles Act provides that;

20 *"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 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
25 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".*

The plaintiff in the instant case in his testimony told court that he purchased the suit land in 2017 and his purchase is not being challenged by any third
30 parties. Not even the 1st defendant who subdivided and sold to other parties. The plaintiff also tendered in court the certificates of title of the suit land indicating that he is the registered proprietor of the same. As such possession of a certificate of title is conclusive proof in accordance to 59 Registration of Titles Act which clearly provides that possession of a certificate of title by a
35 registered person is conclusive evidence of ownership of the land described therein.

I hereby resolve this issue in the affirmative.

Issue 1: Whether the defendants are trespassers on the suit property?

Counsel for the plaintiff submitted that around April 2021, upon receiving information from Mamiya Aisha Nalongo that people were erecting structures on the land, the plaintiff found when the 1st defendant had subdivided and started selling the suit land without his consent. Counsel added that the plaintiff was able to prove to court that the defendants without his permission erected illegal structures, demarcated the suit land into small pieces, created roads through the suit land and poured building materials on the same and made them remain there without the consent of the plaintiff. Thus, the defendants disposed the plaintiff of the suit land through the above activities which amounts to trespass. Counsel relied on the case of **John W. Katende v. Te Uganda Commission, Civil Suit No. 573 of 2017** which cited the case of **Onega & Another v. Attorney General & Another, HC.C.S No. 006 of 2002** where the ingredients of trespass were said to be the following;

- a. entering upon the land in possession of another;
- b. remaining upon such land;
- c. placing any material object upon it.

In the instant case the plaintiff proved to this court that the defendants trespassed on the suit land and the same was confirmed during the locus in quo visit. The plaintiff also tendered in court sale agreements of the 1st and 3rd defendants and one between the 2nd and 3rd defendant.

In **Salmonds Law of Torts, 9th Edition at page 207**, trespass was defined as consisting the act of entering upon land in the possession of the plaintiff or remaining upon such land or placing any material object upon it in each case without lawful justification.

In the case of **Justine E. M. N Lutaaya v. Stirling, Civil Engineering Company, Civil Appeal No. 11 of 2002**, it was held that; trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes, with another person's lawful possession of that land.

In light of the above authorities and facts of this case I find that the acts of the defendants on the suit land to wit; entering on the suit land without the consent of the plaintiff; erecting illegal structures, demarcating the suit land into small pieces, creating roads and pouring building materials thereon all amount to trespass. These acts were all done unlawfully without the consent of the plaintiff. The defendants in this case are therefore found to be trespassers on the suit land.

This issue is hereby resolved in the affirmative.

Issue 2: Whether the defendants acted fraudulently to acquire the suit property?

Counsel for the plaintiff submitted that the plaintiff and the 1st defendant entered into an arrangement to forfeit part of his kibanja which was measuring approximately one acre in exchange for legal interest which the plaintiff delivered and the 1st defendant acknowledged receipt. That the plaintiff kept possession of his land without any complaint whatsoever until April 2021 when the defendant embarked on its subdivision and selling to the other defendants. That the transactions were entered into without the involvement of the plaintiff and this was done to defeat his interest in the suit land. That the 1st defendant was given a certificate of title on 11/12/2017 and was present when the land was subdivided which made him aware that the suit land was registered land and that prior to any dealing, the plaintiff had to be involved. Thus, the 1st defendant had no right whatsoever to sell bibanja to the rest of the defendants who never carried out due diligence. As such the acts of the 1st defendant were fraudulent and no consent was obtained for the plaintiff as the land lord before sale contrary to the provisions of **Section 34(3)** of the Land Act.

I agree with the submissions for the plaintiff. The 1st defendant was in the know that the plaintiff had interest in the suit land as the land lord and the same defendant had reached an arrangement with the plaintiff whereof he was given a certificate of title for his portion of land. The 1st defendant in this case therefore had no title to pass on as the same was already begin held the plaintiff. Thus, the acts of the defendants amount to fraud.

Fraud denotes actual fraud or some act of dishonesty as per the cases of **Kampala Bottlers Ltd v. Domanico (U) Ltd SCCA No.22 of 1992, Waimiha Saw Milling Co. Ltd v. Waione Timber Co. Ltd (1926) AC 101, Assets Co. v. Mere Roihi (1905) AC 176 and David Sejjaka v. Rebecca Musoke CA No. 12 of 1985.**

The acts of the defendants were therefore fraudulent with the intent to defeat the plaintiff's interest in the suit land.

This issue is hereby resolved in the affirmative.

Issue 4: What are the available remedies to the parties?

Counsel for the plaintiff submitted that the plaintiff has proved his case against the defendants as such the prayers sought in the plaint should be granted. Additionally counsel submitted that it is trite that damages are a direct and probable consequence of the act complained of as per the case of **Kampala District Land Board & George Mitala v. Venansio Bamweyana, Civil Suit No. 2 of 2007.** Counsel in the instant case prayed for UGX 60,000,000/= as general damages.

In the alternative counsel submitted that an order directing the defendants or any other person claiming under their authority to compensate the plaintiff at the market value on the basis of a willing seller and willing buyer be made.

5 It is true that when this court visited the suit land it was found in occupation by various individuals and the 1st defendant admitted to having sold to them the suit land. The plaintiff informed court that he had no intention of evicting any one on the suit land if they were willing to compensate him through purchasing the legal interest and he hands over the certificates of title to the people interested in taking the option of buyout. The plaintiff informed court
10 that he is willing to enter into this negotiation, upon delivery of judgment in his favour and once payment is made, he will effect transfer of the legal interest since he is in possession of the certificates of title to the suit land.

The plaintiff prayed for UGX 60,000,000/= in general damages, however, I find the same excessive in this case. I find an award of UGX 5,000,000/= as
15 general damages justifiable in this case. I accordingly award the same to the plaintiff.

Having found that the plaintiff is the lawful owner of the suit property and the defendants are trespassers, this court finds that the plaintiff has proved his case on a balance of probabilities against the defendants. Judgment is hereby
20 entered in favour of the plaintiff in the following terms;

1. A declaration that the plaintiff is the lawful and rightful owner of the suit land comprised in Block 269 plots 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141 and 142 all situate at Mawokota measuring approximately 8 acres.
- 25 2. A declaration that the defendants fraudulently claimed ownership of the suit land and interfered with the plaintiff's possessory rights.
3. A declaration that the defendants are trespassers on the suit land comprised in Block 269 Plots 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141 and 142.
- 30 4. A permanent injunction doth issue against the defendants, their servants, workmen, agents, representatives or any other person claiming under their authority from trespassing, dealing, alienating, interfering with the possession and occupation of the suit property.
- 35 5. An order for cancellation of all illegal agreements conferring ownership entered between the 1st, 2nd, 3rd, 4th and 5th defendants and any the person not known to the plaintiff at the time of instituting this suit is hereby issued.
- 40 6. An order for eviction and demolition of all illegal structures erected on the suit land by the defendants without the plaintiff's authority or consent is here issued.

7. An order for removal of all illegal demarcation boundaries planted by the defendants without any authority on the suit land is hereby issued.
8. An award of UGX 5,000,000/= in general damages.
9. Costs of the suit are awarded to the plaintiff.

5 In the alternative, since the plaintiff is willing to be compensated through purchasing his legal interest, if any of the parties is willing to enter this arrangement they may enter into negotiations with him and obtain title of their respective pieces upon completion of payment. I so order. Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

9/09/2024

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