

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 843 OF 2021

5 1. SUZANNE MABEL GWENDOLINE KAINEMBABAZI KAZZORA MUSERURE
2. VANESSA MARION GRACE BAHIRANA KAZZORA
3. MARK ALEXANDER KAMPURA KAKONDO KAZZORA
4. MAX PETER KOMUHANGI STOLL KAZZORA
5. MATHEW RICHARD RUBAHAMA KAZZORA ::::::::::::::: PLAINTIFFS

10 VERSUS

1. SARAH NAMUSISI
2. JANE NANYONDO ::::::::::::::: DEFENDANTS

Before: Lady Justice Alexandra Nkonge Rugadya

15 JUDGMENT (EXPARTE)

Introduction:

20 The plaintiffs filed this case against the defendants seeking orders that the defendants were trespassers on property comprised in ***Kyaddondo Block 253, plot 82, land at Lukuli,*** measuring 2 acres; a declaration that the suit property belongs to the estate of the late John Wycliffe Rutagyemwa Kazzora; an order for vacant possession of the suit property against the defendants; a permanent injunction restraining the defendants and their agents from dealing with the suit property in any way; aggravated damages; mesne profits ; and costs of this suit.

Background to the case:

25 It is the plaintiffs' claim that the late John Wycliffe Rutagyemwa Kazzora purchased land comprised in ***Plot 82 Block 253 Lukuli Kyadondo*** measuring approximately two acres and became its registered owner on 21st May, 1963. The transfer instrument number was KLA37964.

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That upon purchase of the land, the land was free of any encumbrances and had no squatters. However that sometime during the 1971 war, the late John Wycliffe Rutagyemwa had to flee to exile. Upon his return from exile in 1986, he found the late Mr. Nyamumiza occupying his land as a squatter.

He approached him and he admitted that he was a squatter and requested for time to leave the land, but unfortunately passed on before he could shift his family, which included the defendants.

As he continued to pursue the process of removal of the defendants, the 1st plaintiff got married and the suit property was given to her as wedding gift by her father, the late John Wycliffe Rutagyemwa.

Through the late John Wycliffe Rutagyemwa Kazzora lawyers, notification to the defendants as illegal occupants of the land was made. He however passed on before the defendants vacated the suit land.

Kazzora was survived by the plaintiffs who obtained letters of administration and who continued to notify the defendants of their continued trespass on the land. The plaintiffs who contend that the late John Wycliffe Rutagyemwa Kazzora lawfully purchased the property and registered proprietor in his names filed this suit therefore to among other things, obtain vacant possession thereof.

Representation:

The plaintiffs were represented by the firm of ***M/s Kibuka Musoke & Tendo Advocates and Legal Consultants.***

As per order of this court granted on 1st December, 2021, ***vide: MA No. 1840 of 2021***, the plaintiffs served the defendants by way of substituted service. (Ref: The affidavit of service dated respectively 7th December, 2021 and 30th March 2022). The defendants however did not enter appearance.

Issues:

1. ***Whether the defendants are trespassers on the suit land; and***

2. ***What are the remedies available to the parties?***

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Resolution of issues:

1. Issue No. 1: Whether the defendants are trespassers on the suit land;

The law:

By virtue of **section 101 (1) of Evidence Act, Cap. 6**, whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist. **(George William Kakoma v Attorney General [2010] HCB 1 at page 78).**

The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. **(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.**

Trespass to land is defined in **Black's law dictionary 9th Edition**, as an unlawful act committed against the property of another. Furthermore as stated elaborately in **Justine E.M.N. Lutaaya Vs Sterling Civil Engineering Ltd Supreme Court Civil Suit No. 11 of 2002**, trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or pretends to interfere with another person's lawful possession of that land.

Needless to say, a tort of trespass to land is committed, not against the land, but against the person who is in actual possession of the land. Such possession may be physical or constructive. **(See EMN Lutaya Vrs Sterling Civil Engineering Company Ltd SCCA NO. 11/2002).**

Furthermore, in **Oala Lalobo versus Okema Jakeo Akech C.S No.20 of 2004** the court also ruled that trespass to land is a continuous tort which cannot be affected by the **Limitation Act** or the **Land Act**.

(See: **Justine E. M Lutaaya vs Stirling Civil Engineering Company Ltd. Civil Appeal No. 11 of 2002).**

Thus the operative word in the tort of trespass to land is "unlawful"; which simply denotes that which is contrary to the law and for which the trespasser is ultimately liable. **(See: Kailash Mine Limited versus B4S Highstone Ltd Civil Suit No.139 of 2012).**

In **George Kasedde Mukasa v. Emmanuel Wabende & Others, Civil Suit No. 459/1998** trespass to land was held to be committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another.

Needless to say, the tort of trespass to land committed not against the land, but against the person who is in actual or constructive possession of the land. **Hccs No. 22 of 2015 Ababiri Muhamood & Four Ors versus Mukomba Ananstansia & Taita Wilfred**

5 It is the plaintiffs' unchallenged evidence that the late John Wycliffe Rutagyemwa lawfully purchased land and was registered on the 21st day of May, 1963 upon which he took immediate possession of the suit land.

The 1st plaintiff Ms Suzanne Mabel Kainembabazi Kazzora Musherure testified as **Pw1**, and adduced evidence to prove that the plaintiffs' late father was currently the registered owner of the land comprised in **plot 82, Block No. 253 Mengo District**.

10 The land had been registered in his names on 21st May, 1963. The search certificate dated 14th April, 2022 was confirmation that the suit land was still under the names of the deceased. Three caveats had been lodged by the administrators on 12th August, 2005, under Instrument No. KLA 278504. A second caveat was lodged on 21st June, 2007 by the 3rd plaintiff and on 23rd July, 2012, and the third caveat was lodged by the 2nd plaintiff.

15 **PExh 5** was *Probate and Administration Cause No. 826 of 1999* by which the plaintiffs had obtained Probate to administer the estate. It was issued on 18th January, 2000. As per, **PExh 2(a)** the plaintiffs granted unrestricted powers of attorney to the 1st plaintiff. By the said instrument dated 3rd February, 2000 they had permitted her to deal with all aspects surrounding the estate of the late Kazzora.

20 It was the testimony of the 1st plaintiff that her father owned the land later given to her by her father as a wedding gift. That at the time of purchasing and registration of the land into his names there were no squatters or other encumbrances.

Resolution of the court:

25 I have taken careful note of the contents of the pleadings, the evidence and the arguments raised in submission by counsel for the plaintiffs. The points raised therein have not been challenged.

30 **Section 59 of the Registration of Titles Act, Cap 230**, states that a certificate of title is conclusive evidence of all particulars and endorsement appearing therein, and that the person named therein as the proprietor is possessed of the estate or interest described. It is conclusive proof of ownership. (**Kampala Bottlers Ltd Vs Dimanico (U) Ltd, SCCA No. 22 of 1992**).

Counsel for the plaintiffs referred to the authority in **Wuta – Ofei Vs Danquah (1961)3 ALLER 596**, that in the absence of any other person having lawful possession, a person holding a



certificate of title to land has sufficient legal possession of that land to support an action of trespass on land. The interest of a registered proprietor therefore prevails over any other unregistered interest or claim over the land, except where fraud is established.

On record are the several notices that had been issued by the plaintiffs and their father before his death, notifying the defendants regarding their unauthorized possession of that land. Such notification dated as far back as 6th December, 1993 for according to **Pw2** Kajwengye Nathan Musime, his personal Assistant at that time, Kazzora died in November, 1999.

In support of her witness statement **Pw1** adduced evidence of a title acquired by the late John Wycliffe Rutagyemwa for the land comprised in **Block 253, plot 82, Kyadondo** and registered under his name.

It is further stated that at the time of purchase there were no incumbrances and no squatters on the land. But that during the 1971 war the late Kazzora went in exile and on his return 1986 he found a trespasser called the late Mr. Nyamumiza whom he immediately approached and he agreed to leave the land.

Through his lawyers he notified the late and his family and he promised to vacate but he passed on before he could conclude removal of his family. The land was given by the deceased to the 1st plaintiff and this was confirmed by Kajwenge Nathan Musime who testified as **Pw2**.

Pw2 who worked closely with the late John Whycliffe Rutagyemwa informed court that before Kazzora's demise, the defendants were served with several notices to vacate the premises but they have continued to illegally occupy the premises.

The 1st plaintiff further confirmed in her testimony that she together with the city authority demolished illegal structure and sent more notices confirming the continued trespass on the land.

The law is that once a person is registered as proprietor of an estate or interest in land, his/her/its title cannot be impeached except as prescribed under this provision of the Act. *Trespass* to land will occur when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere with another person's lawful possession of that land.

Pw2 further told court that he himself had personally met the defendants but they were adamant and refused to leave the land. That in 2006 they were stopped by the KCC from constructing on the land but that in 2008 they resumed, and the structures were demolished.

It was also the plaintiffs' evidence that on 5th August, 1996 the deceased's lawyers **M/s Sam Kuteesa & Co. Advocates** had written to the 2nd defendant referring to an earlier letter dated

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6th December, 1996 under which they had been requested to vacate the suit land, which they had refused to do, prompting the plaintiff's father through his counsel, to report the matter to Police.

By their correspondence, **PExh 3** to the 2nd defendant dated 5th August, 1996 notice was given to her to vacate the land and demolish the illegal structures by 31st August, 1996, and a notice of intention to sue was also given to the defendants.

PExh 6 (b) is proof that the defendants had been summoned by Kampala City Council (KCC) on 15th August, 2006, about the illegal four roomed structure. **PExh 4**, is a letter dated 25th September, 2006 from KCC, to the area M.P entitled: *Nanyondo Jane and Sarah Namusisi*. It shows that unauthorized structures had been put up, in contravention of the building rules and regulations. (See also **PExh 6(a)**, letter dated 14th September, 2006 from KCC).

The 1st plaintiff filed a complaint on 12th September, 2006 to KCC and sought their help to remove an illegal structure. This was sufficient confirmation that the construction works commenced by the defendants and their agents lacked the approved plans and that no consent had been secured from the plaintiffs to put up any structure on the suit land. The order to demolish the structure was thereupon made by KCC on 18th September, 2006.

The defendants did not respond to any of the summons by court to counter the allegations against them. In effect there was admission on their part that they lacked interest in the suit land and in the final outcome of this case.

It was also constructive admission that there was unauthorized entry on the land, leading to interfering with the lawful possession of the suit land by the plaintiffs; and that no fraud had been committed by the deceased in acquiring this land or his successors in title.

What rights then did the defendants hold on the suit land?

Section 29(5) of the Land Act, Cap. 227 provides that any person who has acquired the interest of the person qualified to be a *bona fide* occupant under that section is taken to be a *bonafide* occupant. A tenant by occupancy on registered land enjoys security of occupancy by virtue of **section 31 of the Land Act**.

Section 29 (2) thereof defines a *bonafide* occupant as a person who before the coming into force of the Constitution had occupied and utilized or developed the land unchallenged by the registered owner or agent of the registered owner for twelve years or more.

From the plaintiffs' unchallenged evidence, the defendants who did not take any steps to challenge any of the above actions taken by the plaintiffs' to displace them, appeared to claim from one Nyamumiza, since deceased, who occupied the land as a squatter.

Pw1's testified that her father returned from exile in 1986 and found Nyamumiza on his land.

- 5 Nyamumiza admitted that he had no authority/consent to stay on that land; and that he was n a squatter at the time. He then requested Kazzora for some time to leave the land, but passed on before he could shift his family.

The element of consent is crucial in relation to land transactions. Thus without consent of the legal owner, the late Nyamumiza could not as a squatter acquire protectable interest under

- 10 **Section 29 (2) of the Land Act, Cap. 227.**

With all due respect therefore, the authority by the late Kazzora to the late Nyamumiza to remain on the late for more time, made Nyamumiza a mere licensee on that land. The issue of license was decided upon in **Civil Appeal No. 52 of 2010 Musisi Gabriel Vs Edeo Ltd & George Ragui Kamoi.**

- 15 Going by its definition, a licensee by invitation is a common law principle and defined by **Black Law Dictionary 9th Edition at page 1064 as:**

"One who is expressly or impliedly permitted to enter another's premise to transact business with the owner or occupant or to perform an act benefiting the owner or occupant".

- 20 The cardinal principles is that a licensee is simply authorized to do a particular act or series of acts upon the other's land without possessing any estate therein. It is a principle founded on personal confidence. It is generally not assignable or transferrable. No proprietary interest passes to the licensee. It is revocable at will by the property owner.

Likewise, Nyamumiza in this case as a licensee could not pass on any valid interest to his family.

- 25 The family in any case needed to first secure letters of administration for the estate of Nyamumiza before taking over what was perceived by them to be part of their father's estate.

Under those circumstances, neither Nyamumiza nor his family could claim this land as *bonafide* occupants so as to warrant any protection as the equitable owners thereof.

- 30 Accordingly, the defendants were mere trespassers on the suit land. The plaintiffs' case against the defendants therefore succeeds, to merit the prayers sought.

Issue No. 2: Remedies:

The plaintiffs prayed for damages, *mesne* profits and costs.

Its trite law that, that damages are direct and probable consequence of the act complained of. This was noted in the case of **Kampala District Land Board and George Mitala Vs Venansio Bamweyana CA No. 2 of 2007**. Such may be loss of profit, physical inconvenience, mental distress, pain and suffering, (*See also Assit (U) Vs Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999 at page 5*).

It is also a settled position of the law that the award of general damages is in the discretion of court and is always as the law will presume to be the natural consequence of the defendant's act or omission. The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. (*See: Fredrick Nsubuga Vs Attorney General S.C.C.A. No. 8 of 1999*).

Therefore, in the circumstances of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and event of the breach.

A party is eligible for damages where loss and inconvenience has been suffered due to the wrongful act of the defendant. He/she must be put in the position he or she would have been in had he or she not suffered the wrong; and must lead evidence or give an indication what damages should be awarded on inquiry as the quantum. (*Ongom Vs. AG (1979) HCB 267, cited by court in Kamugira Vs National Housing & Construction Co. CS.No. 127 of 2009*)

Thus where the defendant has obtained a benefit at the expense of the plaintiff, justice demands that this should be restored to the plaintiff. This is to secure corrective justice by rectifying an imbalance between the plaintiff and the defendant.

The plaintiffs in this case proved that they failed to enjoy the full benefits and exclusive use of the land on account of the defendants' unauthorized activities over the years; suffered inconvenience and spent time and financial resources trying to claim back the property which according to them is worth **Ugx 200,000,000/=**.

The pleadings however do not show whether or not the defendants were occupying the entire piece and how they were utilizing it, thus leaving much to the discretion of this court.

Costs.

The plaintiffs also prayed for an order for costs. **Section 27(2) of the Civil Procedure Act, Cap.71** is to the effect that costs are discretionary and normally follow the event. (**Roko**

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Construction Co. Ltd Vs. Uganda Co-operative Transport Union. Supreme Court Civil Application No. 32 of 1997).

Accordingly, the following prayers are granted:

5 a). *the defendants are trespassers on the suit land comprised in Plot 82 Block 253, Lukuli Kyadondo as it belongs to the estate of the late John Wycliffe Rutagyemwa Kazzora.*

b) *An order of vacant possession of the suit property issues against the defendants to vacate the land within 3 months from the date of notification of this judgment.*

10 c). *an order of permanent injunction issues restraining the defendants, their agents and any other person claiming under them from dealing with the suit property;*

d). *general damages of Ugx 60,000,000/= is awarded to the estate of the late John Wycliffe Kazzora;*

15 e) *interest of 20 % is payable per annum against the award of damages, from the date of delivery of this judgment till payment is effected in full.*

e) *costs of the suit.*



Alexandra Nkonge Rugadya

20 **Judge**

5th May, 2022.

Delivered by email
Ambony
J 5/5/2022