

UGANDA / JUDGMENT

Kisuule & Another v Kyeyune & Another (Civil Suit 962 of 2021) [2024]

UGHCLD 247 (30 October 2024)

[2024] UGHCLD 247

COURT

HC: Land Division (Uganda)

BEFORE

Naluzze Aisha Batala, J

CASE / FILE NUMBER

Civil Suit 962 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 962 OF 2021

1. MIRIAM SARAH KISUULE

2. CHRISTINE NANZIRI :::::::::::::::::::::::::::::: (Suing as Administrators of The estate of the late Kisuule Zerubaberi)

VERSUS

1. JAMES KYEYUNE 2. KASSIM MUKIIBI

BEFORE; HON. LADY JUSTICE NALUZZE AISHA BATALA JUDGEMENT

Introduction:

- 1. The Plaintiffs brought this suit against the defendants jointly and severally seeking the following remedies;
- A declaration that the defendants have no interest legal, $\mathbf{i}$ equitable and or kibanja in or over land comprised in Busiro Block 333 Plot 45 at Nabbingo.

- A declaration that the defendants are fraudulently claiming the suit land.
- A declaration that the defendant's act of hiring iii) assailants armed with machetes and pangas and deploying them on the subject land on the 12th day of

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August 2021 infringed on the plaintiffs' rights to life and to own property under articles 22 and 26 of the 1995 Constitution of Uganda as amended.

- iv) Compensation order for infringement of the plaintiffs' human rights; an order for eviction and or removal of the first defendant's building materials from the suit land.
- v) A permanent injunction restraining and or prohibiting the defendants from laying claim over or trespassing on the suit land.
- vi) Special damages, General damages for trespass, aggravated damages and costs of the suit.

Background

Plaintiff's case;

2. The plaintiffs together with their brother Samuel Patrick Semwogerere are Administrators of the estate of the late Kisuule Zerubaberi. The suit land is part of the estate of the late Kisuule Zerubaberi having acquired the same in 1963, constructed his matrimonial home thereon, consists of burial grounds and has been occupied by the plaintiffs' family for over fifty years.
- 3. That unfortunately, the late Kisuule Zerubaberi died without completing the transfer of the suit land into his names and in order to preserve the interest of the estate, the 1st plaintiff lodged a caveat vide instrument No. WAK- 00241397.
- 4. The suit land has also in the past been a subject of litigation vide Civil Suit No. 189 of 1963 in the Magistrates Court of Nsangi where Court made a ruling declaring the late Kisuule Zerubaberi as the owner of the suit land and further made a finding that the suit land was acquired intact and free from any incumbrances or Kibanja interest.
- 5. The 1st defendant's father, a one James Lubanga had a plot adjoining the suit land which bordered a section of the suit land and upon the demise of the 1st Defendant's father, the 1st defendant began laying claims to a portion of the suit land alleging that he had inherited a Kibanja from his father, none of which is true and has on several occasions attempted to sell the suit land to third parties without the consent of the plaintiffs.
- 6. In spite the demands from the plaintiffs to date, the 1st Defendant has refused to vacate the suit land, he is claiming ownership and actively trying to construct a house on a portion of the suit land, estimated to be 50 by 70 without the consent of the plaintiffs.

- 7. On or about 12th August 2021, the 1st Defendant in connivance with the 2nd defendant hired assailants estimated to be more than forty who were armed with sticks, pangas and machetes and with the aid of a grader, they unlawfully cut down the plaintiff's plantation, felled down trees and levelled the ground. The plaintiffs called the local police for assistance, but to their surprise there was no intervention thus the local villagers took it upon themselves to defend life and property which resulted into several people being injured and demolition of the 1st Defendant's illegal structure on the property.
- 8. The Plaintiffs listed the following particulars of trespass;
 - i. Unlawful restriction on the access to and use of the portion of the suit land.
 - ii. Unlawful restriction to full development and enjoyment of the suit land.
 - iii. Unlawful cutting down of plantation, grading gardens of sweet potatoes, banana clumps, cassava plants and uprooting jack fruit trees.
 - iv. Apprehension of physical harm to the plaintiffs or their agents who try to access the suit land
 - v. Construction of a house on a portion of the suit land.
- 9. The plaintiffs further prayed for special damages incurred due to the Defendants' activities of wrongful entry into their land, illegally and without their authorization thus incurring enormous losses including the costs of constructing a wall fence to protect the suit land and the same are particularized as below;
 - i. Ug shs 2,800,000 for purchase of cement
 - ii. Ug shs 2,158,000 as compensation for destroyed crops
 - iii. Ug shs 800,000 as professional fees spent on M/s Peak Partners to value and quantify the damage caused by the defendants on the suit land.
 - iv. Ug shs 388,000 as expenses for the purchase of hoes and wheel barrows
 - v. Ug shs 4,800,000 as expenses incurred by the plaintiffs to buy building bricks for construction of a wall fence.
 - vi. Ug shs 600,000 as professional fees paid to M/s Keplerian Surveyors and property consultants for opening boundaries of the suit land
 - vii. Ug shs 10,000 as expenses incurred by the plaintiffs to purchase a cover for building materials
 - viii. Ug shs 1,200,000 as money spent on the purchase of five hundred pieces of 6th hollow blocks

- ix. Ug shs 1,200,000 as money spent on the purchase of an additional five hundred pieces of 6th hollow blocks.
- x. Ug shs 30,000 as expenses spent on the purchase of building foot wear.
- xi. Ug shs 85,000 as money spent on the purchase of one piece of a drum 240L
- xii. Ug shs 20,000 as expenses for building material
- xiii. Ug shs 63,000 as expenses for purchase of nails and steel bars.
- xiv. Ug shs 106,000 as expenses for the purchase of iron bars
- xv. Ug shs 7,600,000 as expenses for 4 trucks of hard core non porous stones
- xvi. Ug shs 1,900, 000 as expenses for one additional truck of hard core non porous stones.
- 10. The plaintiffs further pointed out the following particulars of fraud;
 - i. Claiming to own land and or Kibanja while knowing they have no interest in the suit land.
 - ii. Allegedly purchasing land well knowing that land belonged to the estate of the late Kisuule Zerubaberi.
 - iii. The 2nd defendant purportedly buying the suit land which is subject to a subsisting caveat lodged by the 1st plaintiff.
 - *iv.* The 2nd defendant's purported purchase of the suit land without conducting due diligence or inquiring for fear of finding out that it belonged to the estate of the late Kisuule Zerubaberi.

defendants' case

- 11. That the suit should be struck out for being malafide, frivolous and vexatious and does not disclose a cause of action against the 2nd defendant.
- 12. That the 1st defendant is the rightful owner of the Kibanja situate on land comprised in Busiro Block 333 Plot 2589 at Nabbingo and the same is totally different from the suit land comprised in Busiro Block 333 Plot 45 at Nabbingo. The defendants have never laid any claims or interfered with the alleged use and occupation of the suit land as alleged.
- 13. That all the activities of the 1st Defendant are limited to the Kibanja situate on Plot 2589 which the 1st defendant inherited from his father James Lubanga and since acquisition, he has ably paid busuulu to the current landlord Josephine Nantaaya Kabuusu just like his father before him.

- 14. That the 1st defendant has since time immemorial enjoyed quiet use and occupation of the suit Kibanja just like his father before him, without any interference by any one not even the plaintiffs. That out of the blue and without any justification or warning whatsoever, the plaintiffs pounced onto the 1st defendant's Kibanja with hired armed goons and forcibly demolished his house.
- 15. The plaintiffs and their armed goons violently threatened the 1st defendant with violence so he took off for his dear life only for his newly constructed residential home to be destroyed to

the ground, the building materials and equipment were either torched, stolen or destroyed in the process by the plaintiffs and their hired goons.

- 16. The plaintiffs then alienated the entire suit Kibanaj and fenced it off completely locking out the 1st defendant from accessing his home to date. The plaintiffs do not have any claim over the suit Kibanja and their alleged ownership is a concoction to illegally grab the suit land.

Counterclaim

- 17. The 1st defendant brought a claim against both plaintiffs for the following orders;
- i. A declaration that the counterclaimant is the rightful owner of a Kibanja situate on Busiro Block 333 Plot 2589 at Nabbingo.
- ii. A declaration that all dealings and actions on the Kibanja situate on land comprised in Busiro Block 333 Plot 2589 at Nabbingo by the counter defendants were wrongful and or illegal.
- iii. An order of compensation of the counterclaimant against the counter defendants for the demolition of his house and for the destruction of his building materials and equipment on the land comprised in Busiro Block 333 Plot 2589 at Nabbingo.
- iv. An order of eviction of the counter defendants from the suit land/ Kibanja and restoration of the counterclaimant's house and materials on land comprised in Busiro Block 333 Plot 2589 at Nabbingo.
- v. A permanent injunction against the counter defendants, their agents, servants and successors in title, restraining them from dealing, disposing off or selling land comprised in Busiro Block 333 Plot 2589 at Nabbingo.
- vi. General damages, interest at Court rate and costs of the suit.
- 18. That the Counter claimant is the rightful owner of a Kibanja situate on land comprised in Busiro Block 333 Plot 2589 at Nabbingo hereinafter referred to as the suit Kibanja. That the counter claimant avers that a survey shall be done to prove that his Kibanja is on a totally different land that is Plot 2589 not 45 as claimed by the counter defendants.

- 19. That out of the blue and without any justification or warning whatsoever, the counter defendants pounced onto the suit Kibanja with many armed goons and forcibly demolished the 1st defendant's newly constructed house, violently threatened the counterclaimant and his newly constructed residential home was destroyed to the ground.
- 20. That all the counter claimant's building materials and equipment were then either torched, stolen or destroyed in the

process by the counter defendants and their hired goons. The counter defendants then alienated the entire suit Kibanja and fenced it off completely locking out the counterclaimant from accessing his home to date.

- 21. That the house and properties of the counterclaimant that were demolished and destroyed by the counter defendants were estimated at about Ug shs 150,000,000 and now claims against the counter defendants jointly and severally in special damages;
 - i. Ug shs 70,000,000 being the value of the house
 - ii. Ug shs 40,000,000 for building equipment including a concrete mixer, wheel barrows, spades, hoes, handsaws, masonry trowels among other
 - iii. Ug shs 30,000,000 for building materials including bricks, stones, sand, cement, iron sheets, iron bars, timber, nails, doors and windows among others.
 - iv. Ug shs 10,000,000 spent on rent for alternative accommodation.
- 22. That after destroying the counterclaimant's land and running him off, the counter defendants alienated the suit land and erected a parameter wall to forcefully evict and keep the former out.
- 23. The counterclaimant shall aver that since the counter defendants destroyed his home, he does not have any other

place to stay so he resorted to renting alternative places to stay so he shall pray for lost earnings, exemplary and general damages. The counter claimant avers that's he no longer has peace as the counter defendants threatened his life thus, he shall pray for punitive damages.

Locus visit;

- 24. Court conducted a locus visit on the suit land at Nabbingo on 19th September 2024. While at Locus, Court observed that the plaintiffs are in possession of the suit land, carrying on farming (planting seasonal crops) and part of the land is graded. The LC1 Area Council informed Court that the 1st defendant does not own the land. He connived with some brokers and built the small house which was demolished.
- 25. The boundaries of the suit land are from the wall fence till the lower road. The 1st defendant is not on the land and is not in possession of the same.

Representation;

26. At the hearing, the plaintiff was represented Ritah Nakalema of Engoru, Mutebi Advocates whereas there was no representation from the defendants.

27. The Court gave Pre-Trial directions to all parties and the Plaintiffs acted. Plaintiffs filed witness statements and trial bundles. The defendants were served through their lawyers of M/s Lukwago Matovu & Co. Advocates who withdrew from the conduct of the defendant's case. Court ordered for substituted service which was done on 26th March 2024 in New vision newspaper on page 30 but still the defendants entered no appearance. Thus, plaintiffs prayed to proceed exparte under 0.9 rule 20(1)(a) of the Civil Procedure Rules which prayer was granted by court.

Issues for determination;

- 28. The plaintiffs raised the following issues for determination before this Honorable Court
- i) Whether the Plaintiff are the rightful owners of the suit land?
- ii) What remedies are available to the parties?

Resolution and determination of the issues?**i) Whether the plaintiffs are the rightful owner of the suit land?**

- *29.* Counsel for the plaintiff in his submissions relied on the provisions of Section 101 of the Evidence Act which provides that whoever desires any Court to give judgement 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.
- *30.* He stated that to prove ownership PW3 testified that she, the 1st plaintiff and Samuel Patrick Semwogerere are administrators to the estate of the late Kisuule Zerubaberi. Further PW2 states under paragraphs 4 and 5 of his witness statement that the suit land was in the past subject of litigation vide Civil Case No. 189 of 1963 in the Magistrates Court of Nsangi where Court made a ruling declaring the late Kisuule Zerubaberi as the owner of the suit land affirmed the same during examination in chief.
- *31.* Counsel further relied on exhibit PEX3 which were the receipts of payment of relevant consents and transfer fees issued under receipt No. 375824 & 378203 dated 3rd June 1978 and 6th July 1978 which were issued to the late Kisuule in an attempt to transfer the suit land into his names.
- *32.* That notwithstanding, while at locus Court confirmed that the plaintiffs are in actual possession of the suit land with the

1st plaintiff's matrimonial home thereon, burial grounds, crops and a perimeter wall that was constructed by the plaintiffs.

Analysis of court.

- 33. It is the plaintiffs' uncontroverted evidence that the late Kisuule Zerubaberi purchased the suit land from the late Yowana Mulo Mugwanya in 1963 and he passed on before he could transfer the same into his names but was in the process according to exhibit PEX3 which were the receipts of payment of relevant consents and transfer fees issued under receipt No. 375824 & 378203 dated 3rd June 1978 and 6th July 1978 which were issued to the late Kisuule in an attempt to transfer the suit land into his names.
- *34.* 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. *(See; Ojwang versus*

Wilson Bagonza CACA No. 25 of 2002)

- 35. Further the supreme Court in **Turinawe & 4 others versus Eng. Turinawe & Anor SCCA No. 10 of 2018**, 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.
- 36. Whereas, the plaintiffs have ably illustrated to Court their interest in the suit land and how the same comes about, the defendants didn't adduce any evidence to prove that they own the suit land but rather made mere allegations. The defendants further stated that their Kibanja is totally different from the suit land as theirs is situate on land comprised in Busiro Block 333 Plot 2589 at Nabbingo. However, while at Locus Court established that the land subject of the dispute is one in which the plaintiffs are in possession and the defendants have nothing thereon neither are they in occupation of the same.
- 37. Based on the foregoing, this Court is inclined to find the plaintiffs as the owners of the suit land, hence issue 1 is answered in the affirmative

Whether the defendants trespassed on the suit land?

38. It's the submission of counsel for the plaintiff that Trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land. Counsel relied on the authorities of **Dima Dominic Poro v Inyani & Anor HCCA No. 0017 of 2016** [2017] UGHCCD 154 (30 November 2017) at page 15 to further define trespass as an unlawful interference

with possession of property and an invasion affecting an interest in the exclusive possession of his property.

- *39.* Counsel further cited the authority of **Adrabo Stanely v Madira Jimmy HCCS No. 0024 of 2013** where Court emphasized that the core of a trespass is the violation of possession, not a challenge to title. As such, the plaintiff must prove that (1) they were in possession at the time of the defendant's entry, (2) that the entry was unlawful or unauthorized, and (3) that it caused damage to the plaintiff.
- *40.* In order to succeed in a claim for trespass, the Court of appeal in **Sheik Muhammed Lubowa vs Kitara Enterprises Ltd C. A No.4 of 1987**, observed that one must prove the following;
 - *i. That the disputed land belonged to the plaintiff*
 - *ii. That the defendant had entered upon it, and*
 - *iii. That entry was unlawful in that it was made without permission or that the defendant had no claim or right or interest in the suit land.*"
- 41. As already found the suit land belongs to the plaintiffs as the same forms part of the estate of the late Kisuule Zarubaberi,

they are in possession with a matrimonial home and burial grounds thereon.

- 42. PW1 in his evidence stated that on the 12th day of August 2021, the suit land was wrongfully and illegally graded by land grabbers including the 2nd defendant who he learnt about on Bukedde TV segment – Fayiro ku meza where he claimed to be the lawful owner of the suit land.
- 43. The plaintiffs' further adduced video footages of the events that occurred on the 12th day of August 2021 showing the unlawful entry onto the suit land, grading the suit land at the behest of the defendants and destroying crops thereon and this evidence was collaborated by PW3 who shot the said footage, PW4, a registered valuation surveyor working with Peak Partners who assessed and valued the damage caused by the defendant's action and made a report to that effect which was exhibited as PEX 4 dated 13/9/2021.
- 44. While at Locus on 19/9/2024, Court established that the suit land was indeed graded, crops were destroyed and the 1st defendant's illegal structure was also demolished.
- 45. All this evidence was uncontroverted by the defendants save for asserting that the 1st defendant is the rightful owner of the

suit land and that the plaintiffs hired armed goons and forcibly demolished his house thereby dispossessing him. As earlier noted, the defendants clearly have no interest in the suit land.

- 46. All the said acts combined, including the 1st defendant setting out to construct a house on land in which he clearly has no interest amount to an unlawful entry onto the land interfering with the plaintiffs' lawful possession of the suit land thereby trespassing onto the same.

What remedies are available to the parties?

47. The plaintiffs sought for a declaration that the defendants have no interest in the suit land, a declaration that the defendants are fraudulently claiming the suit land, a declaration that the defendant's acts of hiring assailants armed with machetes and pangas infringed on the plaintiffs' rights to life and to own property under Articles 22 and 26 of the 1995 Constitution, compensation for infringement of the plaintiff's human rights, an order for eviction and or removal of the 1st defendant's building materials from the suit land, a permanent injunction restraining and/or prohibiting the defendants from laying claim over or trespassing on the suit land, special

damages, general damages for trespass, aggravated damages and costs of the suit.

48. In view of the above findings, I declare the plaintiffs as the lawful owners of the suit land with the defendants having no interest in the same. I also order a permanent injunction against the defendants, their agents or anyone claiming after/through them from laying claim over or trespassing on the suit land.

General Damages;

- 49. In assessment of general damages, Courts are 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.
- 50. In **Charles Acire vs Myaana Engola HCCS No 143 of 1993** it was 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 he or she had not suffered the wrong"*
- 51. It is also trite law that general damages are granted at the discretion of Court and the aim is to put the plaintiff in the position he/she was prior to the breach.
- 52. The defendant's conduct is thus key to the amount of the general damages awarded. If the trespass was accidental or inadvertent, damages lower. If the trespass was willful, damages are greater. And if the trespass was in between i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well. **(See; Adrabo vs Madira (Civil Suit No. 0024 of 2013)**
- 53. Taking into account the inconvenience suffered by the plaintiffs as a result of the defendant's acts, I am inclined to award **Ug shs 15,000,000 (Uganda shillings Fifteen Million)** as general damages to the plaintiffs at Court rate from the date of judgement till payment in full.

Aggravated Damages;

- 54. The plaintiff also prayed for aggravated damage. Aggravated damages are awarded by Court in form of an extra compensation to the plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted.
- 55. In *Obongo V Kisumu Council* (1971) EA 91, at page 96, *SPRY, V. P* made the following statement regarding aggravated damages;

"..... It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature."

- 56. In respect to the case before me, the plaintiffs' led evidence of the acts that occurred on the 12th day of August 2021, a group of guys attacked the plaintiffs on the suit land with machetes and with the aid of a grader, they unlawfully cut down a plantation, ferried down trees and levelled the ground without any justification and all this was witnessed from the video footage recorded on that day and all this evidence was uncontroverted.
- 57. Therefore, this court shall consider an award of Ug shs 10,000,000 as aggravated damages for the distress occasioned onto the plaintiffs by the defendants.

Special Damages

58. It is trite law that in all cases where special damages are claimed, they must be proved strictly. They are exceptional in their character, therefore, they must be claimed specially and

proved strictly. In *Jivanji v Sanyo Co. Ltd* EA 84, Court held that;

"It is trite law that special damages must be pleaded and then strictly proved in order for a plaintiff to succeed on a claim for special damages."

- 59. The defendants and their agents unlawfully without any interest or color of right entered onto the plaintiffs' Kibanja and destroyed his property which included seasonal crops as per the evidence adduced in court which prompted the plaintiffs to construct a perimeter wall on the suit land thus prayed for special damages of Ug shs 23,760,000/=.
- 60. It is trite law that damages are compensatory and their main function is to place the plaintiff in as good a position, as to the extent that money could do if the breach complained of had not occurred. These can where possible be measured by the material loss suffered by the plaintiff. Court should of course avoid unnecessary enriching the plaintiff. In the same vein it should not deny him appropriate compensation. (See *Kakumba*

Francis v Kobil (U) Ltd HCT-00-CC-CS-0098-2010.

61. The plaintiff under paragraph 6 (a, d, e, g, h, I, j, k, l, m, n, o & p) are expenses incurred by the plaintiffs during the construction of the wall fence. The lost income for construction of the wall fence cannot be faulted on the defendants, it was the plaintiffs' choice to construct the fence on the suit land at their own volition and the same remains for their own benefit. Using that as a basis for awarding special damages would be extending the arm of special damages too far beyond limitless points.
62. This Court shall thus consider compensation for the damaged crops as per the valuation report which is Ug shs 2,158,000/=, Ug shs 800,000 as professional fees paid to M/s Peak Partners to value and quantify the damage caused by the defendants on the suit land and Ug shs 600,000 as professional fees paid to M/s Keplerian Surveyors and property consultants for opening boundaries of the suit land which totals up to Ug shs 3,558,000/=.

Costs

- 63. Under Section 27 of the Civil Procedure Act, costs follow the event. The plaintiffs being the successful party in this case are entitled to costs of the suit.
- 64. For the foregoing reasons, I proceed to pronounce judgement and decree for the plaintiffs against the defendants' jointly and severally upon the terms that;
 - i) A declaration that the plaintiffs are the lawful owners of the suit land with the defendants having no interest whatsoever in the same.
 - ii) A declaration that the defendants are trespassers on the suit land.
 - iii) A permanent injunction doth issue restraining the defendants and their agents from trespassing onto the suit land.
 - iv) General damages of Ug shs 15,000,000 at Court rate of 10% from the date of delivering this judgement until payment in full.
 - v) Aggravated damages of Ug shs 10,000,000/=
 - vi) Special damages of Ug shs 3,558,000
 - vii) Costs of the suit are awarded to the plaintiffs

I SO ORDER.

NALUZZE AISHA BATALA

Ag. JUDGE

30th/10/2024

Delivered Electronically via ECCMIS on the 30th of October, 2024.

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Prepared on 13 October 2026 · Esheria