

UGANDA / JUDGMENT

Misaki and Another v Muwonge and Another (Civil Suit No. 236 of 2014) [2022] UGHCLD 89 (13 March 2022)

[2022] UGHCLD 89

COURT

HC: Land Division (Uganda)

BEFORE

Kawesa, J

CASE / FILE NUMBER

Civil Suit No. 236 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA [LAND DIVISION]

CIVIL SUIT NO.236 OF 2014

1. MISAKI BAKINTUMA

2. KOMUKAMA ANNABELLE..... PLAINTIFFS

VERSUS

1. JOHN BOSCO MUWONGE

2. UMOJA VETERANS & VENDORS MARKET LTD..... DEFENDANTS

JUDGMENT

BEFORE: HON. MR. JUSTICE HENRY KAWESA

The Plaintiffs herein claim for, against the Defendants;

- 1. A declaration that there were lawful owners of respective stalls on the suit land comprised in Lease Hold Register Volume 4477 Folio II Plot M889, Kafumbe Mukasa Road in Kisenyi—Kampala.
- 2. A declaration that the land exchange agreement between the 1st and 2 nd Defendants was subject to the Plaintiffs' interests.

- 3. A declaration that the 1st Defendant's action of demolishing the Plaintiffs' lockups and destruction of stock and other property was unlawful.
- 4. General damages.
- 5. Interest.
- 6. Costs of the suit.

The suit was initially brought against the Defendants by 22 Plaintiffs. However, the 20 of those Plaintiffs reached a consent agreement with the 1st Defendant and their claims were altogether withdrawn. This left the suit standing as regards the 2 Plaintiffs herein.

Only the 1st Defendant filed a written statement of Defendant, and as such, the suit proceeded **ex-parte** against the 2nd Defendant.

Facts of the Case.

Land comprised in Lease Hold Register Volume 4477 Folio 1 1 Plot M889, Kafumbe Mukasa Road in Kisenyi—Kampala (hereinafter the suit land) is currently registered in the name of the 1st Defendant. The predecessor of the suit land is the 2nd Defendant. Sometime in 2013, the 2nd Defendant sold the suit land to the 1st Defendant.

Plaintiffs' Claim

According to the plaint, the Plaintiffs allege that they were lawful owners of stalls in Umoja Veterans and Vendors Market situate on the suit land. That they occupied and carried out business on the said stalls as sitting tenants while observing their market and KCCA obligations without interference from third parties.

That they were surprised on the 3rd day of April 2014, when they were served with a notice to hand over management and vacate the suit land by the 1st Defendant's Advocates. That upon receipt of the notice, they realised that the 2nd Defendant had dealt with the suit land which was subject to their interests without their consent and giving them a first option to purchase the suit land as sitting and/or lawful owners of the lock-ups thereon. It is also their claim that the alleged transaction between the Defendants is unlawful for failure to uphold their first option right as equitable owners.

Further, that they were granted an interim order restraining the 1st Defendant and his agents from interfering with their equitable interest until the disposal of the main suit. That without any lawful authority and in disregard of the Court order, the 1st Defendant did demolish all their lock ups and destroyed property therein.

1 st Defendant's Defence

It is the court Defendant's defence that he lawfully acquired the suit land from the 2 nd Defendant at a valuable consideration. That the 2nd Defendant resolved to sell the suit property and passed the necessary resolutions. That upon that, the 2nd Defendant undertook to give him vacant possession of the suit land.

That he never had any notice of any interim order as it was never served upon him. Further, that all activities that affected the *status quo* of the suit land were done pursuant to the decree and warrant of execution issued by the High Court in Civil Suit No.273 of 2014. That the alleged destruction of the Plaintiff's properties is false as the Police supervised the peaceful removal of the goods by the Plaintiffs themselves; and that the Plaintiffs are seekers of wealth and unjust enrichment rather than justice.

He also asserted that the Plaintiffs have no proof that they dealt with the 2nd Defendant, but individuals whom the 2nd Defendant shall pray that they be brought on board through a third party notice.

A scheduling conference was conducted and the parties agreed on three issues for determination. These are:

1. Whether or not the Plaintiffs had any interest in the suit land

2. Whether the 1st Defendant carried out proper due diligence before entering into the agreement of sale of the suit property land

3. What remedies are available to the parties

The Plaintiffs adduced evidence as PW2 and PW5 in support of the issues raised. There is also evidence on record adduced by other witnesses in support of the Plaintiffs' case which I shall consider.

Whereas the 1st Defendant entered appearance and cross-examined the Plaintiffs' witnesses, he never turned up for his case. As such, Court closed the defence case under 0.17 r.4 of the Civil Procedure Rules SI 71-1, and I shall proceed to determine the issues accordingly.

The Plaintiffs' Counsel seemed to have abandoned the 2nd issue above, and instead submitted on another issue which he raised in his submissions. This is to the effect that:

Whether the 1st Defendant's demolition of the Plaintiffs' lock-ups was lawful for want of exhausting the controversy between the parties, I shall determine all issues as reproduced above.

Burden and Standard of Proof

In the case of Uganda *Petroleum Co. Ltd versus Kampala City Council Civil Suit No.250 of 2005*, it was held that;

***In civil cases the burden lies on the party who alleges to prove his or her case on the balance of probabilities. Additionally, it is also provided*

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*by Section 101 (1) of the Evidence Act cap 6 provides that whoever desires 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. In this case, the Plaintiffs bear the burden of proving the above issues on the balance of probabilities**.

Issue No. 1:

Whether or not the Plaintiffs had any interest in the suit land

PW2 testified that he had a lock-up in 1996 behind Owino market which was demolished. That she bought the space and built the lockup herself, roofed it and put in electricity and shatters. She adduced a copy of two agreements of purchase of said lock-ups which were admitted as PIDI. That since 1996, she had been trading in the lockups.

During cross-examination, she testified that she is not suing the 2nd Defendant, but the 1st Defendant who demolished her property. That the 2nd Defendant was like a manager of the suit land when she bought her lock-ups. That the 2nd Defendant was the sole owner who sold to her the space, and so it could not sale to the 1st Defendant what it had already sold to her. That she bought the part of land where her lockups were located.

She stated also that she never had a title for the suit land, and that she thought that the 2nd Defendant owned it. That the land she bought was not transferred to her, but that she only got possession and that she is not aware that the suit land had a title.

PW 5 also testified that he went to Umoja Market in 1999 and bought 4 lock-ups from Victoria Namuhenge at Ugshs. 3,200,000/- *(three million, two hundred thousand only)*. That they made an agreement

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transferring the lock-ups in his name. The said agreement was admitted as PEXH7.

That he was also given a transfer of the lock-ups by the Umoja Veteran's Office. Proof of transfer was admitted as PEXH8. This evidence was corroborated by PW6, Tumukunde Gard, who testified that the 1st Plaintiff had lock-ups on the suit land.

During cross examination, he testified that the 2nd Defendant was in charge of the market area. That he does not know the names of the leaders of the 2nd Defendant.

That he only owned lock-ups on the suit land and not the land itself. Further, that he has no claim against the 2nd Defendant, but the 1 st Defendant who broke his lockups.

Counsel's Submissions

Counsel submitted that the Plaintiffs' evidence of having an interest in the suit land was uncontroverted. That if the 1 st Defendant bought a reversionary interest in the suit land, then the same was subject to the Plaintiffs' equities. In support of this, he cited the case *Lt (Rtd) George Kiggundu versus The Attorney General I-ICCS No. 386 of 2014* where *Hon. Justice Musa Sekaana* quoted the *Supreme Court*'s observations in *Uganda versus Dusman Sabuuni* to the effect that:

"An omission or neglect to challenge the evidence in chief of a material or essential point of cross examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue".

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Basing on the above, Counsel argued that the Plaintiffs discharged their evidential burden, and proved that they owned property as equitable owners of the suit land.

Resolution

I noted that the predecessor of the suit land the 2nd Defendant, and is now registered in the name of the 1 st Defendant.

None of the Plaintiffs claim any registered interest in the suit land, but an unregistered interest. It is trite that unregistered/equitable interest in immovable property passes from the vendor to the buyer upon payment of the purchase price. *See Semakula & Anor versus Sentiba, CA No. 5 of 2013 and Ismael Jaffer Allibhai & Ors versus Nandalr Harviian Karia Anor SCCA No. 53 of 1995*, where it was held that;

"In sale of immovable property, upon payment of deposit, property passes to the purchaser who acquires equitable interest and that the purchaser becomes the lawful purchaser when he has paid the deposit".

In proof of the sale, PW2 adduced PIDI; and PW 5 adduced PEXH7. None of these documents shows that the Plaintiff's bought interests in the suit land but lock-ups located thereon.

Further, the documents do not show that they dealt with the 2nd Defendant in doing so as PW2 asserted in her evidence. For instance, P IDI show that PW2 bought from a one Bashir Kamanzi who signed "*on behalf of the office*" and Mr. Sendawula; and PEXH7 show that PW

5 bought from Victoria Namuhenge. Additionally, there is no proof that any of the said persons, from whom the Plaintiffs acquired the alleged equitable interests, ever dealt with the 2nd Defendant.

PEXH8 also shows that the lock-ups PW5 bought from Victoria Namuhenge were allegedly transferred to him by the 2nd Defendant. But this is not sufficient proof of acquisition of an equitable interest in the suit land, especially since the transfer was for lock-ups only. Further, the evidence does not also demonstrate that the persons who held out as officers of the 2nd Defendant in executing PEXH7 and PEXH8 did so with authority of the 2nd Defendant before their actions can be attributed to it.

All the above indicates that the Plaintiffs acquired only lock-ups on the suit land and carried out business thereon with the permission of the 2nd Defendant without having any interest in it. The logical inference is that they had a bare license from the 2nd Defendant (*a license is 'a permission given by the occupier of land which without creating any interest in land, allows the licensee to do some act which would otherwise be a trespass*'. *See Thomas versus Sorrell (1673) Vaugh. 330 at pg. 351 quoted in Megarry's Manual of the Law of Real Property 6th Edition by David J. Hayton at pg. 370*).

In the circumstances therefore, I disagree with the Plaintiff's Counsel that the Plaintiffs discharged their evidential burden and demonstrated that they owned property as equitable owners of the suit land. For those reasons, this issue is found in the negative.

Issue No.2:

Whether the 1st Defendant carried out proper due diligence before entering into the agreement of sale of the suit property land

According to the **Black's Law Dictionary (1968), 4th Edn., at page 544**, due diligence is "a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case*.

The evidence on record shows that the 1st Defendant purchased the suit land from the 2nd Defendant when the Plaintiffs were in occupation of it. The complaint of the latter against the 1st Defendant is that he failed to exercise prudence when he purchased the suit land without their knowledge and without ascertaining their interests. The impression of this is that had he done so, he would have ascertained the suit land was encumbered by their equitable interests.

I have however already found that the Plaintiffs had no interest in the suit land, but were mere licensees. It was therefore, not necessary for the 1st Defendant to consult them when buying the suit land, especially since the failure to do so was not fatal to his title.

In the circumstances of the case therefore, I find this issue in the affirmative.

Issue No.3:

Whether the 1st Defendant's demolition of the Plaintiffs' lock-ups was lawful

Evidence

Both PW2 and PW 5 testified that they had lock-ups on the suit land. That the lockups were demolished by the 1 st Defendant; and that this was done despite the existence of an interim order maintaining the *status quo* issued vide Misc. Appln. No.508 of 2014.

Counsel's Submission

It was Counsel's submission that at the time of demolition of the lockups, the 1st Defendant's advocates of M/s Ajungule Suleiman had consented to an interim order stopping any action that would remove the Plaintiffs from the suit land. He quoted Counsel Ajungule's statement on the record of 15th of October 2014 to the effect that:

The last time we appeared before this Court, an interim order was extended maintaining the status quo but to my surprise, I have learnt that the status quo has been interfered with by demolishing structures on the suit land without my knowledge and/or consultation by my client. In the circumstances, my conscience does not permit me to continue representing the first Defendant in clear contempt of Court orders issued by the same Court.

Basing on the quoted statement, Counsel argued that that was an Officer of Court admitting that the 1st Defendant indeed demolished the Plaintiff's lock-ups. That considering that there was an order of Court to protect the status quo proves that the demolition was unlawful. Ultimately, Counsel for the Plaintiff urged me to find this issue in the negative.

Resolution

The fact that lock-ups on the suit land were demolished was not contested by the 1st Defendant. He however asserted in his written

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statement of defence that it was done pursuant to the decree and warrant of execution issued by the High Court in Civil Suit No.273 of 2014, and that the Police supervised the peaceful removal property on the suit land by the Plaintiffs themselves. Further, that he was not aware of the interim order.

In my considered view, basing on the above, it is the lawfulness of the demolition that is contested, and not the fact that there was a demolition of the Plaintiffs' lockups. Considering the Plaintiffs' case and evidence, the lawfulness is contested on ground that there existed an interim order preserving the *status quo*. In other words, their claim is that the demolition was done in contempt of a Court order.

In the case of *Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd versus Uganda Revenue Authority H. C. M. A. No. 42 of 2010*, the elements which one must satisfy to prove contempt of a Court order are: -

- *Existence of a lawful order.*
- *The potential contemnor's knowledge of the order.*
- *The potential contemnor's failure to comply i.e. disobedience of the order*.

It is the position of the law that the standard of proof in contempt proceedings must be higher than proof of probabilities and almost but not exactly beyond reasonable doubt (*Hon. Sitenda Sebalu versus Secretary General of The East African Community No.8 Of 2012; Andrew Kilama Lajul versus Uganda Coffee Development authority HCMA No.324 of 2020*).

Court takes judicial notice of its record and confirms the existence of a Court order.

As such, the first element of content of Court is proved.

As regards the second element, the only thing I find is a statement by the former Counsel for the 1 st Defendant that there was a clear contempt of a Court order. It suffices to say that this lacks evidential value considering that it was not on oath. Secondly, the statement does not suggest that the 1st Defendant had knowledge of the interim order.

I need to state that the Plaintiffs' themselves led no evidence that the 1 st Defendant had knowledge of the interim order in question. As such, I find that the 2nd element of contempt of Court has not been proved to the required standard.

On the last element; it is impossible to determine the failure to comply/disobedience of the order without establishing its knowledge. This is because a person cannot be in disobedience of what he or she knows not. As such, I find proof of the 3rd element lacking.

In the circumstances, I find that the Plaintiffs have not proved contempt of Court to the required standard. As such, and in view of the finding on issue one, I find this issue in the negative.

Issue No.4:

What remedies are available to the parties

Since remedies are consequential to findings of violation of substantive rights, and having found no violations as such, I find that the Plaintiffs are not entitled to the remedies sought. This issue is thus found in the negative.

In the result, this suit fails and is hereby dismissed.

No costs are awarded to the Defendants, having not defended the suit.

I so order.

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Henry I. Kawesa **JUDGE** 13/3/2022

13/3/2022: Plaintiff present. John Mary Mugisha absent. Defendant absent.

Court:

Judgment read in the presence of Tebandeke Pius for the Plaintiff and in the absence of the Defendant.

.....

Ayo Miriam Okello

DEPUTY REGISTRAR

13/3/2022

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