

UGANDA / JUDGMENT

Musoke v Wasswa & 2 Others (Civil Suit 439 of 2015) [2024] UGHCLD 173 (28 June 2024)

[2024] UGHCLD 173

COURT

HC: Land Division (Uganda)

BEFORE

Naluzze Aisha Batala, J

CASE / FILE NUMBER

Civil Suit 439 of 2015

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND DIVISION)

CIVIL SUIT NO. 439 OF 2015

MUSOKE MOSES ::::::::::::::::::::::::::::::::::: PLAINTIFF VERSUS

1. WASSWA ABDALAH 2. BABIGUMIRA ANDREW 3. BABIGUMIRA
AGABA ::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE; HON. LADY JUSTICE NALUZZE AISHA BATALA JUDGEMENT

Introduction;

- 1. The Plaintiff brought this suit against the defendants jointly and severally seeking the following remedies;
- i) A declaration that the defendants trespassed upon the suit Kibanja and caused the plaintiff loss upon the suit Kibanja
- ii) A declaration of the plaintiff's interest in the suit Kibanja
- iii) A permanent injunction to prevent the defendants from further trespassing on the suit Kibanja.
- iv) General damages of Ugs. 81,200,000 (Eighty-one million two hundred thousand shillings) with interest at a court rate from the date of judgement to full payment.

- v) Costs of the suit.
- vi) And any other remedy the court shall deem fit.

Background;

- 2. On the 31st day of July, 1995, the Plaintiff bought the suit Kibanja measuring approximately 4 acres at Janda village, Kabulanaka Ziobwe in Luwero District from Yusuf Kaggwa the previous Kibanja holder who had inherited the same from his late grandmother who also lived on the same Kibanja.
- 3. A sale agreement was executed to that effect and witnessed by the 1st Defendant as the Landlord after the Plaintiff had made to him the first payment of Busulu known as "Kanzu". The Plaintiff then took peaceful and quiet possession of the suit Kibanja and started cultivating various crops thereon.
- 4. The Plaintiff made efforts to pay Busuulu but discovered that there were disputes over who the rightful owner of the land/ Landlord

was and the people claiming an interest on the land told the Plaintiff not to Pay until the disputes were resolved.

- 5. In 2013, the 1st Defendant asked the Plaintiff to buy the interest in the land he was occupying (suit kibanja) to which negotiations were held at the local council offices wherein the Plaintiff asked for the certificate of title from the 1st Defendant in vain. Since there were various people including the 2nd & 3rd Defendants herein claiming to be landlords and the 1st Defendant failed to avail a Certificate of Title, the negotiations were futile
- 6. In September, 2014, the Defendants and/or their agents entered onto the Plaintiff's Kibanja and destroyed his crops thereon including cassava, coffee trees, banana plantations, maize, beans, among others to which the Plaintiff instituted both civil and criminal cases for trespass, malicious damage to property and also seeking compensation.
- 7. The criminal case vide LUW00/CR/CO 13891201'5 was heard and the 1st and 2nd Defendants herein and another were found guilty of Criminal Trespass and Malicious damage to property by the learned Magistrate at the Chief Magistrates Court of Luweero.
- 8. The Plaintiff sought a civil remedy against the 1st Defendant herein before the LC3 Court of Ziobwe vide Civil Case No. 8 of 2014 where it was found that the 1st Defendant had sold his interest in the land to the 2nd & 3rd Defendants herein. The LC3 Court Ruling given on the 3rd day of September, 2014 was not in the Plaintiff's favor to which he instituted an appeal to the Chief Magistrates Court of Luweero.
- 9. The learned Chief Magistrate set aside the said Ruling of LC III Court but went ahead to dismiss the Appeal for lack of jurisdiction.

- 10. The Learned Chief Magistrate further held that any interested party could file a fresh suit before a court with competent jurisdiction hence the instant suit.

Locus visit;

- 11. Court conducted a locus visit of the suit land on the 18th of march 2023 and the following observations made;
- i) That the suit land is unregistered land measuring 4 acres with cassava plantation thereon that belonged to the plaintiff.
- ii) That the plaintiff is in possession of the suit land free from any disturbances
- iii) That the land lord stays adjacent to the suit Kibanja.

Representation;

- 12. The plaintiff was represented by Mr. Muhangi George of MBS Advocates whereas there was no representation from the defendants.
- 13. The Court gave Pre-Trial directions to all parties and the Plaintiffs acted. Plaintiffs filed witness statements and trial bundles. Even though the defendants were served, they never acted and never appeared despite being effectively served with hearing notices and summons thus, plaintiffs prayed for Exparte Proceedings under 0.9 rule 20(1) a, which prayer was granted by court.

Issues for determination;

- i) Whether the Plaintiff is the rightful owner of the suit Kibanja?
- ii) Whether the Defendants are trespassers on the suit Kibanja?
- iii) What remedies are available to the parties?

Resolution and determination of the issues?

- i) Whether the plaintiff is the rightful owner of the suit Kibanja? *14.* It is the submission of counsel for the plaintiff that In the case of **Owembabazi Enid vs Guarantee Trust Bank Limited & 2 others Civil Suit No.0063 of 2019**, a Kibanja was defined as*; "a form of land holding or tenancy that is subject to the customs and traditions of Baganda, characterized by user rights and ownership of developments on land in perpetuity, subject to payment of annual rent (busuulu) and correct social behavior, distinct and separate from ownership of the land on which the developments are made in respect of which the user and occupier rights exist. Kibanja refers not only to the piece of land, but also to the tenant's rights. Consequently, a Kibanja holder has conditional perpetual occupancy and user rights in the land.*

- *15.* The land Act cap 227 under **Section 29(1)** defines a lawful occupant to mean a person occupying land by virtue of, inter alia, the repealed Busuulu and Envujjo law of 1928 or one who entered upon the land with the consent of the registered owner.
- *16.* **Section 29 (2)(a)** of the land Act cap 227 defines a Bonafide occupant to mean a person who before the coming into force of the

constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more.

17. Counsel for the plaintiff further submitted that A Kibanja is a form of customary land tenure mainly in Buganda region and held according to long established rules developed along Kiganda customs. Thus, a Kibanja holder is a customary tenant within the meaning of section 3 of the Land Act Cap 227 as Hon. Lady Justice Alexandria Nkonge Rugadya held in the case of **Robert Shaka**

Versus Nsubuga Didas & Anor. HCCS No. 146 of 2018

- *18.* Further counsel for the Plaintiff submits that the plaintiff is the Kibanja Holder/ rightful owner of the suit Kibanja located at Janda village Kabulanaka Ziobwe Luwero District measuring approximately 4 acres having bought the same from Yusuf Kaggwa the previous Kibanja owner on the 31st day of July 1995 as stated under Paragraphs 1 & 2 of PW 1's witness statement.
- *19.* The said Yusuf Kaggwa had inherited the suit Kibanja from his grandmother, the late Salaama, who owned and stayed on the suit land. In fact, Yusuf Kaggwa sold the suit Kibanja including the

house of his late grandmother Salama as evidenced by the sale agreement and its translation marked Pex 1.

- *20.* Further it is the submission of counsel for the plaintiff that the Plaintiff took possession and began his occupation of the suit kibanja with the consent of the 1st Defendant as the Landlord. In 1995, the sale agreement between the Yusuf Kaggwa and the Plaintiff (previous and current kibanja holders of the suit land respectively) as evidenced by the sale agreement and its translation marked PEX1.
- *21.* Plaintiff has also always been in actual physical possession of the suit kibanja measuring approximately 4 acres since 1995 to date and he utilizes the same by growing various crops thereon such as cassava, coffee, bananas, maize, among others. His occupation of the suit land has always been in the knowledge of the Defendants and many other witnesses that are from the same village of Janda.
- *22.* It is our submission that as per the Parameters set in the above case, the Plaintiff herein is a kibanja holder for the suit land measuring approximately 4 acres and has been in actual possession and occupation of the same.

\$\$\overline{\mathbf{Bamagap}}\$\$

Analysis of court.

- 23. I take note of the submissions and authorities relied upon by counsel for the plaintiff, it's not a disputed fact that the plaintiff has been in possession of the suit kibanja as per the evidence adduced in court and the findings of court during the locus visit where court made an observation that it was the plaintiff in possession of the suit kibanja and he had seasonal crops there on.
- 24. It is also the testimony of the plaintiff that he has been in possession of the suit kibanja as evidenced in PW2 witness statement and the sales agreement marked annexure PEX1
- 25. This plaintiff's evidence stands uncontroverted, therefore I find that the plaintiff is the holder of the same kibanja as per the evidence adduced in court, hence issue 1 is answered in the affirmative

Issue 2; whether the defendants trespassed on the suit land?

26. It is the submission of counsel for the plaintiff that Trespass to land has been clearly discussed and explained in the decided case of **Justine E. M. N Lutaaya vs. stirring Civil Engineering Co. Ltd**

SCCA No. 1.1. of 2002, where Mulenga Jsc. held that: **"Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a landowner who grants A lease of his land does not have the capacity to sue, because he parts with possession of the land... a person who acquires a cause of action in respect of trespass to land may prosecute that cause of action after parting with possession of the suit land"**

27. In the decision of sheik **Muhammed Lubowa vs Kitara Enterprises Ltd C. A No.4 of 7987**, as cited with approval in the case of **Dennis Desire Mitti vs. Patrick sewagude Musoke & Ors. HCCS 449 of 2016**. the East African Court of Appeal noted that; **"in order to prove the alleged trespass, it was incumbent on"**

"the appellant to prove that the disputed land belonged to him, that the respondent had entered upon that land and that the entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the suit land."

- 28. In a claim for trespass the following elements ought to be considered; ownership or possession of the suit land at the time of the alleged trespass and the unlawful entry upon the land by the defendant.
- 29. As to possession or ownership of the suit Kibanja; Counsel for the plaintiff reiterated the submissions in Issue 1 (i) above and also adds that the Plaintiff herein as a kibanja holder was in possession of the suit land at the time the alleged trespass happened as per paragraph 7 of the witness statement of PW1 and confirmed by PW2 at the hearing of this matter.
- 30. Further still, it is the submission of counsel for the plaintiff that the person in occupation and actual possession of land such as the Plaintiff herein reserves the right to sue for Trespass to land.
- 31. In regards to the ground of unlawful entry onto the land by the defendants; it is our submission that the defendants and or their

agents without any colour of right illegally, forcefully and unlawfully entered onto the plaintiff's

suit kibanja and destroyed all the crops on the suit kibanja evidenced by the photographs marked PEX2 and stated in paragraphs 3.1 and 3.2 of the witness statement of PW1.

- 32. The unlawful acts complained of took place around September and November 2014 to which the Plaintiff instituted criminal proceedings against the 1st & 2nd Defendants and Another a result of which the accused persons were found guilty of Criminal Trespass and Malicious damage to property as evidenced by PEX4

Analysis of court;

- 33. In the Supreme Court case of **Justine E. M. N Lutaaya v Stirling Civil Engineering(supra)** trespass to land occurs "when a person makes an unauthorized entry upon land, and thereby interfering, or portends to interfere with another person's possession of that land.
- 34. In order to succeed in an action of trespass, the Court of Appeal in **Sheikh Muhammad Lubowa v Kitara Enterprises Ltd CA No 4 of 1987** observed that one must prove:
 - *a) That the disputed land belonged to the plaintiff.*
 - *b) That the defendant had entered upon it, and*
 - *c) 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.*

- 35. In the instant case, it is the submission of the plaintiff and findings in issue 1 that the suit kibanja belonged to the plaintiff, which fact is not disputed by the parties to the suit. It is the submission of counsel for the plaintiff that the defendants without any color of right, illegally and unlawfully entered the suit kibanja and destroyed the crops of the plaintiff.
- 36. It is a fact that the said unlawful acts occurred in September and November of 2014 where the plaintiff instituted criminal proceedings against the 1st, 2nd defendants and another where the said persons were found guilty of criminal trespass and malicious damage as per PEX 4.
- 37. During the locus visit proceedings at the suit kibanja conducted by court on the 18th of March of 2024, it was the testimony of the plaintiff that he has been in quiet possession of the suit kibanja ever since 2017 till date. The plaintiff brought a criminal case vide Criminal Case No. 389 of 2015 for criminal trespass and malicious

damage to property against the 1st and 2nd defendants and Anor. Further it was the testimony of the 2nd defendant in the criminal case that his brother (3rd defendant) called him and told him to protect his interest in the suit kibanja hence destroyed the plaintiff's crops and property on the suit land.

- 38. The magistrate court found the defendants guilty of criminal trespass and malicious damage to property but failed to award any compensation for reasons that the complainant who is the plaintiff herein may use the conviction to recover the damages in the high court as per exhibit PEX4 which is the record of proceedings.
- 39. The facts above take to the finding that the unlawful acts of the defendants occurred in 2014 where the plaintiff reported the said acts via a criminal case and the 1st and 2nd defendants were found guilty of criminal trespass and malicious damage to property.
- 40. In the result, I am of the view that the defendants made unlawful entry onto the suit kibanja in 2014, hence they trespassed on the plaintiff's kibanja during that time and destroyed his property. Therefore issue 2 is answered in the affirmative.

What remedies are available to the parties?

General damages;

- 41. 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".**
- 42. In **Halsbury's Laws of England 4th Ed, Vol 45 (2) (London: Butterworth's 199 at paragraph 526** the law on damages for trespass is stated as follows: *"In a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has*

made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use... ..Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain*

by his unlawful conduct, exemplary damages may be awarded If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

- 43. In the instant suit, the plaintiff alleges that the unlawful acts of the defendants of destroying his crops occasioned to him loss which can be compensated through an award of general damages of UGX 81,200,000.
- 44. 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)*)
- 45. I take note of the acts of the defendants and the loss inflicted upon the plaintiff due to the same acts, the plaintiff prayed for general damages of UGx 81,200,000. I consider the property that were destroyed by the defendants and due to that fact, this

honorable court awards general damages of Ugshs. 5,000,000 (Five million Uganda shillings only) at an interest rate of 10% per annum from the date of this judgement until payment in full.

Exemplary/punitive damages

- 46. The law on punitive damages or exemplary damages is an exception to the rule that damages generally are to compensate the injured person. These are awarded to punish, deter, express outrage of Court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct.

(Ahmed El Termewy v Hassan Awdi & other HCCS No. 95 of 2012)

- 47. The plaintiff submits that this honorable court be pleased to award exemplary or punitive damages as a dorm of cautionary measure and or a lesson to not only the defendants but to the entire world in regards to respect of kibanja owners and as a reminder to the public to respect court process and proceedings and pray that this court awards exemplary and punitive damages of ug.shs 30,000,000(thirty million Ugandan shillings against the defendants.

48. The defendants and their agents unlawfully without any interest or color of right entered onto the plaintiff's kibanja and destroyed his property which included seasonal crops as per the evidence adduced in court. That particular conduct justifies the award of punitive or exemplary damages, this honorable court therefore awards Ugshs. 3,000,000 (Three million Ugandan shillings) to the plaintiff.

Costs

- 49. Under Section 27 of the Civil Procedure Act, costs follow the event. The plaintiff being the successful party in this case are entitled to costs of the suit.
- 50. For the foregoing reasons, I proceed to pronounce judgement and decree for the plaintiff against the defendants' jointly and severally upon the terms that;
 - i) A declaration that the plaintiff is the lawful holder of the Kibanja interest on the suit land measuring approximately 4 acres.
 - ii) A declaration that the defendants together with their agents trespassed on the plaintiff's suit Kibanja.
 - iii) General damages of Ug shs 5,000,000 awarded to the plaintiff at an interest rate of 10% from the date of this judgement until full payment to be paid by the defendants jointly and severally.
 - iv) Punitive damages of Ug.shs 3,000,000 awarded to the plaintiff to be paid by the defendants jointly and severally.
 - v) Costs of the suit are awarded to the plaintiff to be paid by the defendants.

I SO ORDER.

NALUZZE AISHA BATALA

JUDGE

28th/06/2024

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