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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO. 101 OF 2014**

**1. DAMARA AGRO PROCESSING CO.LIMITED**

**2. SPELIUS KIZITO:.....APPELLANTS**

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**VERSUS**

**NATHAN TABAHIKIZA:..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Uganda at Kampala (Land Division) Civil Appeal No.53 of 2011 delivered on 8<sup>th</sup> July, 2013 by Hon. Mr. Justice Murangira Joseph)*

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**CORAM: HON. MR. JUSTICE EGONDA - NTENDE, JA**

**HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

**HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA**

**JUDGMENT OF CHEBORION BARISHAKI, JA**

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The respondent together with one Grace Kasheingejja sued the appellants in the Chief Magistrates Court for Trespass to land located at Kibaambire Village Luwero District. Mrs Grace Kasheingejja abandoned the suit which was dismissed.

The respondent appealed the Chief Magistrates decision and the High Court upheld the appeal. The 1<sup>st</sup> appellate court found that the appellant then

5 together with Kasheingejja were lawful and bonafide occupants of the suit land and awarded them general damages.

The Judge awarded Nathan Tabahikiza and Grace Kasheingejja a total of 80,000,000/= in general damages and 20,000,000/= as exemplary damages.

The appellants were dissatisfied hence this appeal.

10 Grounds of Appeal;

1. *The learned judge on appeal erred in law and in fact when he entered judgment for and awarded general damages in the sum of UGX 30,000,000/=(Thirty million shillings) to a party who was not a party to the appeal who neither testified nor led any evidence in the lower court.*

15 2. *The learned judge on appeal erred in law and in fact when he awarded the sum of UGX 20,000,000(Twenty million shillings as exemlary damages in the absence of any pleading or prayer for them by the appellant (now respondent)in the lower court.*

20 3. *The learned judge on appeal erred in fact and in law when he held that the respondent was abonafide occupant or customary tenant on the suit land.*

4. *The learned judge on appeal erred infact and in law when he awarded general compensatory damages of UGX 50,000,000(Fifty million Shillings ) to the rêspondent OR in the alternative the learned judge on appeal arred in law and in fact in arriving at the amount awarded as general compensatory damages.*

5 At the hearing of the appeal, Mr. Dennis Owol appeared for the appellant while the respondent was represented by Mr. Lwanga Hassan.

Both parties filed written submissions.

On ground one counsel for the appellant submitted that throughout the 1st appellate court's re-evaluation of the evidence no mention was made of the 2nd  
10 plaintiff since she was not a party to the appeal. The 2nd plaintiff did not sign the plaint. He contended that the 1st appellate judge erroneously entered judgment and awarded general damages of UGX 30,000,000/= to a person who was not a party to the appeal, never signed the plaint and did not appear to prosecute her claim. She never testified and did not lead evidence in the lower  
15 court. That this was a grave error both in law and in fact. He faulted the 1st appellate judge for granting relief to a person who was a stranger to the appeal.

On ground 2 counsel submitted that the principles governing the award of exemplary damages were well settled and cited **Rookes vs Barnard (1964) A.C.1129 and Obong vs Kisumu Town Council (1971) E.A.91 and followed**  
20 **with approval in Esso Standard (U) Ltd vs Semu Amanu Opio- SCCA No.3 of 1993** for the proposition that the award of exemplary damages is limited to three instances; First where there is oppressive, arbitrary or unconstitutional action by the servants of the government which does not however extend to oppressive action by private corporations or individuals. Secondly, where the  
25 motive of making a profit is a factor and thirdly when prescribed by statute.

5 He contended that the respondent neither pleaded facts to justify an award of exemplary damages, led evidence nor prayed for them in his plaint. According to him the issue was never canvassed in the course of the trial in the lower court. It only came up in the judgment of the 1st appellate Court which meant that the appellants were never given an opportunity to be heard.

10 He submitted that a decision arrived at in breach of the non-derogable right to be heard, such as was done by the judge was void and of no consequence.

On ground 3 counsel submitted that the appellant's evidence (now respondent) that he was born and raised on the suit land and his family had been growing food crops and herding animals on the same land for more than 30 years was controverted successfully by the respondent (now appellant) who led evidence of DW1 and DW3 to the effect that the respondent was merely hiring the land to graze his cows. The appellant used to reside at Kalera village until 1991 when the land he was occupying was sold and it was then that he settled on the suitland. The respondent came in 1999.

20 He contended that the evidence of pictures adduced by the appellant in the lower court to prove the period of stay on the suit land was not sufficient. The judge should not have disregarded the finding of the trial magistrate who had visited the locus in quo.

Counsel contended that there was no evidence led by the respondent or any of his witnesses or any other person as to the actual size of land purportedly

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5 occupied by him as a kibanja and yet the burden rested on the respondent to do so.

That the 1st appellate judge based the award of UGX 50,000,000/=as damages to the plaintiff on mere speculation because there was no valuation done.He contended that this was erroneous and the appellate judge ought to have  
10 remitted the matter back to the trial court for assessment of damages.

In reply to ground one, counsel for the respondent submitted that he had no instructions to represent the none party, so he could not argue this ground. He added that if this court was inclined to determine this issue in favour of the appellants, the respondent should not be condemned to pay costs.

15 On ground 2 counsel for the respondent submitted that the the 1st appellate judge had discretion under S.33 of the Judicature Act to grant the respondent exemplary damages having taken into account the conduct of the appellant.

In his view failure to plead exemplary damages was a technical matter which could be cured by the application of Article 126(2) (e) of the constitution.

20 He submitted that the respondent/plaintiff sued the appellant for trespass and evidence of the respondent`s occupation of the land which included crops destroyed, water dams and burial grounds was not challenged on cross examination.

5 That the appellants had acted in a high handed manner by grading the land which conduct required restraining through award of punitive/exemplary damages.

He further submitted that the respondent was a bonafide occupant on the land since he settled on it before the coming into force of the 1995 constitution of  
10 the republic of Uganda and that no evidence was adduced to the contrary.

On the issue of damages, Counsel submitted that general damages are awarded at large and after due assessment by Court. They are compensatory in nature in the sense that they should offer some satisfaction to the injured plaintiff which the appellate judge had done when he held that since the  
15 plaintiffs were evicted from the suit land and the 1<sup>st</sup> defendant/respondent was carrying on developments, the eviction order could not be the best option, that rather a compensation order would suffice hence the award of UGX 50,000,000/= That Court had estimated the value of an acre at that time to be UGX 1,000,000/= which would offer some satisfaction to the injured  
20 respondent. In his view the appellate judge had judiciously exercised his discretion.

### **Determination of issues**

This being a second appeal from the decision of the High Court, this Court is enjoined pursuant to Section 72 of the Civil Procedure Act Cap 71, in relation  
25 to second appeals, to entertain only, grounds raising points of law, and not points of fact.

- 5 On ground 1 of the appeal, the learned first appellate judge is faulted for awarding general damages to a none party to the appeal. It was the appellant's case that the appellate judge awarded UGX 30,000,000/= as general damages to a none party who did not sign the plaint, didnot prosecute her claim, didnot testify and never led evedence in the lower court.
- 10 Counsel for the respondent declined to respond to this ground on account of having no instructions.

While dealing with this issue, the learned first appellate judge noted at page 83-84 of the record that;

15 "This is an appeal from the judgment and orders of the Magistrates court in Luweero which dismissed the appellants claim against the respondents.The appellant was the 1st plaintiff in Civil suit No.16 of 2011.

The 2nd plaintiff Grace Kashenge never appealed against the decision of the trial court."

- 20 Despite of being alive to the above position,the 1st appelalte judge went on to hold that;

*"Judgment is entered in favour of the appellant (plaintiffs) in the following orders that;*

*The plaintiffs are the lawful or bonafide occupants of the suit land/bibanja estimated to be measuring 50 acres and 30 acres,respectively.*

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5    *Consequent to order (iii) above, the plaintiffs are granted general damages which  
are compensatory in nature. I would estimate that an acre in Luwero (that very  
area where the suit land is located) costs at or around shillings 1,000,000/=*  
*(One million shillings). Thus, the 50 acres and the 30 acres of the plaintiffs*  
*respectively as pleaded in the plaint would cost Shs 80,000,000/= general*  
10 *damages .....*“

The record shows clearly that the 2nd plaintiff was never a party to the suit.  
she never signed the plaint, appeared or prosecuted the matter in any way.

A party to a suit is a person who on the record of the court has commenced a  
proceeding or has been served with summons or has been added by order of  
15 court. It connotes a person directly interested in the subject-matter of the suit  
and also enjoys the right to appeal from the judgment. Other rights of a party  
include; the right to adduce testimony, to cross-examine witnesses and do any  
other thing pertinent to the prosecution of one`s case. In the instant case the  
2<sup>nd</sup> plaintiff neither prosecuted the suit, nor appealed.

20 The 2nd plaintiff was never a party to the Appeal and it is trite law that she as  
an individual can not directly benefit from it. The first appellate judge erred in  
awarding general damages to the said 2nd plaintiff.

On ground 2 of the Appeal the 1st appellate judge is faulted for awarding UGX  
20,000,000/= as exemplary damages which was not pleaded for. The  
25 respondent replied that the 1st appellate judge had discretion to grant the



5 respondent exemplary damages having taken into account the conduct of the appellant.

While dealing with this issue, the 1st appellate judge stated;

10 *“...Thus the 50 acres and 30 acres of the plaintiffs respectively as pleaded in the plaint would cost Shs 80,000,000/= general damages and Shs 20,000,000/= as exemplary damages. I accordingly award the plaintiffs shillings 100,000,000/= as both general and exemplary damages.”*

15 General damages are to compensate the injured person while punitive or exemplary damages are awarded to punish, deter, express outrage of Court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct.

20 Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are awarded where the conduct of the defendant was high handed, insolent, vindictive or malicious, and abuse of the plaintiff's rights or disregarding every principle which actuates the conduct of a gentleman.

The record of Appeal in the lower court shows that the respondent made the following prayers;

25 a) *A declaration that the defendants trespassed on the plaintiff's bibanjas located at Kibambire/Katabengwa village.*

- 5           b) *A declaration that the plaintiffs are the undisputed lawful owners and a bonafide occupants of the said bibanjas.*
- c) *A permanet injunction order restraining the defendants,their agents or any persons claiming through them from further interfering with the plaitiff's possession and occupation of the suit kibanja.*
- 10          d) *A eviction Order*
- e) *General damages for tresspass.*
- f) *Interest on the above at 20% from date of trespass until payment in full.*
- g) *Costs of the suit.*

It is clear that there was no prayer for exemplary or punitive damages.

- 15          The general position of the law is that a party should clearly state the reliefs he/she is claiming. Order 7 Rule 1 (g) of the Civil Procedure Rules provides that;

*Every plaint shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for*

20          *general or other relief which may always be given as the court may think just to the same extent as if it had been asked for; and the same rule shall*

*apply to any relief claimed by the defendant in his or her written statement.*

The Supreme Court in ***Ms Fang min V Belex Tours and Travel Limited***

25          ***SCCA No.6 of 2013 consolidated with Civil Appeal No.1 of 2014, Crane Bank Limited V Belex Tours and Travel Limited*** stated as follows;

5            *"In the present case, it is clear that the Court of Appeal erred in basing its judgment on a cause of action which was neither pleaded nor argued before the Court or the High Court. The Court of Appeal also granted reliefs which were not prayed for in the plaint without any amendment of the plaint... It is now well established that a party cannot be granted relief*  
10            *which it has not claimed in the plaint or claim.*

The 1st appellate judge should have restricted his decision to matters which were pleaded.

I agree with counsel for the appellant that exemplary damages were never pleaded. I therefore find that the 1st appellate judge erred in awarding the  
15            respondent exemplary damages.

The 1<sup>st</sup> appellate judge is faulted in ground 3 for having found that the respondent was a bonafide occupant or customary tenant on the suit land.

The respondent`s counsel submitted that the respondent adduced evidence which clearly proved that he was born on the land bequeathed to the family by  
20            his late father who he said was buried on the same land. According to Counsel this evidence was unchallenged and should stand.

Counsel argued that customary tenancy can be established by using the land for cultivation of seasonal crops or grazing.

In deciding this issue, the 1<sup>st</sup> appellate judge held that; *"Having considered the*  
25            *evidence on record it clearly illustrates that the appellant was a bonafide*

5 occupant on the suit land having occupied it more than 12 years before the  
coming into force of the Constitution as per Article 237(8) and (9) of the  
constitution and section 29 of the Land Act cap 227. This can be evidenced by the  
existence of a well, banana plantation, burial grounds, fence and dam that were  
destroyed by the respondents which is reflected in the pictures submitted in the  
10 trial court which proves that the appellant had utilised the suit land....

It is my finding and holding that the trial Chief Magistrate erred in law and fact  
by failing to properly evaluate the evidence on record to ascertain that the  
appellant and the 2nd plaintiff were bonafide occupants which was evidenced  
by the photographs(exhibits) adduced at the hearing and the testimonies of the  
15 appellant and his witnesses that were not challenged by the respondents.”

**Article 237 (8) and (9) of the Constitution provides that;**

(8) Upon the coming into force of this Constitution and until Parliament enacts an  
appropriate law under clause (9) of this article, the lawful or bonafide occupants  
of mailo land, freehold or leasehold land shall enjoy security of occupancy on the  
20 land.

(9) Within two years after the first sitting of Parliament elected under this  
Constitution, Parliament shall enact a law—

(a) regulating the relationship between the lawful or bonafide occupants of land  
referred to in clause (8) of this article and the registered owners of that land;

5 (b) providing for the acquisition of registrable interest in the land by the occupant.

**Section 29 (2) of the Land Act cap 227** defines a “Bona fide occupant” to mean a person who before the coming into force of the Constitution—

(a) had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more;

10 (b) or had been settled on land by the Government or an agent of the Government, which may include a local authority.

**Subsection 29 (3)(c) of the Land Act** further provides that a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant.

15 In **Kampala District Land Board and Anor vs National Housing and Construction Corporation Civil Appeal No.2 of 2004**, Court stated that; for one to qualify to be a bonafide occupant, he must have spent a period of twelve years on the land before the coming into force of the 1995 constitution unchallenged by the registered owner.

20 DWI testified that she witnessed the agreements where the respondents hired the suit land for cattle grazing. The agreement was admitted in evidence as Exh.D1. The LC1 chairman of the area where the disputed land is located

5 testified as DW3 and stated that the appellant now respondent used to reside in a village called Kalera up to 1999 when he came to the disputed land.

I find that the respondent was a licensee in the disputed land having settled on it in 1999 to graze his cows.

In ground four of the appeal, the 1<sup>st</sup> appellate judge is faulted for awarding  
10 general compensatory damages of UGX 50,000,000/= to the respondent for a kibanja allegedly measuring 50 acres at UGX 1,000,000/= per acre. Counsel contended that there was no evidence led by the respondent or any of his witnesses or any other person as to the actual size and value of the land purportedly occupied by him as Kibanja. That the 1<sup>st</sup> appellate judge based his  
15 finding as to the acreage in plaint and the value by speculation because there was no valuation done.

The 1<sup>st</sup> appellate judge held that; *“Consequent to order (iii) above, the plaintiffs are granted general damages which are compensatory in nature. I would estimate that an acre in Luweero (that very area where the suit land is located  
20 costs at or around shs.1,000,000/=(one million shillings) thus the 50 acres and 30 acres of the plaintiffs respectively as pleaded in the plaint would cost shs. 80,000,000/= general damages...”*

In my view, the damages awarded were without basis as there was no evidence what's so ever showing that the suit lands measured 50 acres and 30 acres.  
25 The averments made in the plaint where never proved because the respondent never adduced evidence to prove the acreage and the value of an acre. The

5 figure of UGX 1,000,000/= per acre used by the 1<sup>st</sup> appellate judge was with  
due respect baseless.

Had it been necessary to award damages, the 1<sup>st</sup> appellate judge ought to have  
assessed them guided by a proper report provided by Land surveyors and  
valuers which could have enabled court to arrive at a proper decision in terms  
10 of the size of the land and its value.

In the result and for the reasons given herein, the appeal succeeds. The  
judgment and orders in the lower court are hereby set aside and the appellant  
is awarded costs in this court and in the court below.

15 Dated at Kampala this.....<sup>17<sup>th</sup></sup>.....day of.....<sup>March</sup>.....2020.



**HON.MR.JUSTICE CHEBORION BARISHAKI**

**JUSTICE OF APPEAL**

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**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

[Coram: Egonda-Ntende, Barishaki Cheborion & Tuhaise, JJA)

**CIVIL APPEAL NO. 101 OF 2014**

(Arising from High Court (Land Division) Civil Appeal No. 53 of 2011 at  
Kampala)

**BETWEEN**

Damara Agro Processing Co Ltd=====Appellant No.1

Spelius Kizito=====Appellant No.2

AND

Nathan Tabahikiza=====Respondent

*(On appeal from the Judgment of the High Court of Uganda, (Murangira, J.,)  
delivered on the 8<sup>th</sup> July 2013 at Kampala)*

**Judgment of Fredrick Egonda-Ntende, JA**

[1] I have had the opportunity to read in draft the Judgment of my brother, Barishaki Cheborion, JA. I agree with it and have nothing useful to add.

[2] As Tuhaise, JA, also agrees this appeal is allowed with costs here and below. The Judgment of the High Court is set aside and the judgment of the trial court is restored.

Dated, signed and delivered at Kampala this 17<sup>th</sup> day of March 2020

  
Fredrick Egonda-Ntende,  
**Justice of Appeal**



**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*Coram: Egonda-Ntende, Barishaki Cheborion & Tuhaise, JJA.*

**CIVIL APPEAL NO. 101 OF 2014**

**Damara Agro-Processing Co. Ltd**

**Spelius Kizito**

.....

**Appellants**

**versus**

**Nathan Tabahikiza**

.....

**Respondent**

*(Appeal from the judgment and orders of the High Court of Uganda at Kampala before Murangira J, dated 8<sup>th</sup> July 2013 in Civil Appeal No. 53 of 2011)*

**Judgment of Percy Night Tuhaise, JA**

I have had the benefit of reading in draft the judgment of my brother Barishaki Cheborion, JA. I agree with his analysis of evidence, decisions and conclusion that this appeal be allowed with costs here and below.

Dated at Kampala this 17<sup>th</sup> day of March 2020.



**Percy Night Tuhaise  
Justice of Appeal**