IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 005 of 2018

In the matter between

ABODA FABIANO **APPELLANT**

And

1. TOM OLA LAKERE

2. AKENA PHILLIP **RESPONDENTS**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure *—Res judicata — section 7 of The Civil Procedure Act and section 210 of The Magistrates Courts Act — no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court. — The plea of "res judicata" is in its nature an "estoppel" against the losing party from again litigating matters involved in previous action but does not have that effect as to matters transpiring subsequently. The judgment in first action operates as an "estoppel" only as to those matters which were in issue and actually or substantially litigated. It is matter of public concern that solemn adjudications of the courts should not be disturbed. — The plea cannot be supported by a mere assertion that a previous judgment was rendered in which the question was in issue and determined. The burden of proving the existence and the character of the judgment and its legal effect will fall upon the party pleading the estoppel, unless his opponent introduces the record of the former trial as a part of his case.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondents jointly and severally seeking recovery of land measuring approximately 100 x 150 feet situated at Kalabong Trading Centre, Kalabong Parish, Namokora sub-county, in Kitgum District, a declaration that he is the rightful owner of the land in dispute, general damages for trespass to land, an order of vacant possession, a permanent injunction restraining the respondents from further acts of trespass onto the land, and the costs of the suit.

[2] The appellant's claim was that he purchased the plot in dispute from a one Kasimiro Okeny during the year 1958 at the price of shs. 10/= He began construction of a permanent commercial, building, currently at foundation level, and also established a kiosk on the land during the year 1962. On 25th September, 2014 without any claim of right, the 2nd respondent forcefully entered onto the land, destroyed the appellant's kiosk and began moulding blocks thereon. When challenged by the appellant, 2nd respondent claimed to have been authorised by the 1st respondent to undertake those activities on the land. Both respondents have since then not ceased their unlawful activities on the appellant's land despite his efforts to stop them, hence the suit.

[3] In his written statement of defence, the 1st respondent refuted the appellant's claim. He contended instead that he inherited the land in dispute as part of approximately 50 acres of land that belonged to his late father Caesar Acac who owned it under customary tenure. Upon his death, Caesar Acac was buried on that land together with multiple other deceased relatives. The 1st respondent was born and raised on that land and he too raised his family on it. It is him who authorised the 2nd respondent to make him bricks on that part of the land. On his part, the 2nd respondent too refuted the appellant's claim. He contended that he

was only hired by the 1st respondent to lay bricks for him on the land, which to his knowledge is owned by the 1st respondent.

[4] In reply to the written statement of defence, the respondents averred that the land inherited by the 1st respondent is separated by a road from the land in dispute. The 1st respondent has never been in possession of the land in dispute. The appellant has occupied the land from 1958 until 2006 when insurgency interrupted the his developments on the land.

The appellant's evidence in the court below:

[5] P.W.1 Aboda Fabiano, the appellant, testified that he bought the land in dispute from a one Kasimiro Okeny in 1958. The 1st respondent sent the 2nd respondent and his mother who destroyed his kiosk and foundation on the land in dispute. Following mediation by the elders, the respondents were ordered to restore the appellant's property but they refused to. P.W.2. Atim Rose testified that the land in dispute originally belonged to her late brother, a one Kasimiro Okeny. The appellant bought it from Kasimiro Okeny in 1958 and she was a witness to the transaction. There was a banana plantation on the land at the time the appellant bought it. The appellant had erected a kiosk on the land but the 2nd respondent destroyed it claiming that the land belonged to him and he began laying bricks on the land. The 1st respondent had previously sued her over the same piece of land and the decision was in favour of the 1st respondent.

The respondent's evidence in the court below:

[6] Testifying in his defence, D.W.1 Tom Olaa Lakere, the 1st respondent, stated that the land in dispute measures approximately a quarter of an acre. He inherited it from his late father Caesar Acac in 1990. The part in dispute forms part of the rest of the land he inherited. His late father was buried on a part adjacent to the one in dispute. He used to occupy and cultivate the land before the insurgency.

Kasimiro Okeny lived on the land for about 6 years and left some time before 1960. He had a small shop on a different piece of land given to him by the 1st appellant's father which he sold to the father of the 2nd respondent Remijo Nyeko who still occupies it.

[7] D.W.2 Akena Phillips, the 2nd respondent testified that he was hired by the 1st respondent to make bricks on the land. There was no kiosk on the land at the time he began the work but he found only a part of a wall approximately ten meters from where he was moulding the bricks. The work was interrupted by the appellant's claims of ownership. At mediation he was directed to compensate the appellant with bricks but the appellant declined to receive them. D.W.3 Akena Albert testified that in 2002 the land in dispute was decreed to the 1st respondent when he sued encroachers thereon who included P.W.2 Atim Rose. Remijo Nyeko too used to live on the land before the insurgency. Kasimiro Okeny too used to live on the land and when he left he sold his part to Remijo Nyeko and not to the appellant. D.W.4 Malandra Lamot testified that the appellant came to the land in the 1960s. Remijo Nyeko bought land from Kasimiro Okeny.

Proceedings at the *locus in quo*:

[8] The court visited the *locus in quo* on 5th September, 2017 where the 1st respondent showed it the his entire land which was traversed by two roads. He showed the court spots vacated by Okeny Faustino and Akaka Franco when they lost the suit on 2002. The appellant showed the court the location of his foundation and the spot where the kiosk used to stand. The Magistrate recorded evidence from; (i) Okidi Charles; (ii) Okeny Faustino both of whom claimed to have seen the 2nd respondent destroy the appellant's kiosk. The court prepared a sketch of the land in dispute illustrating the location of a pit latrine, bricks left by Akera Albriko on one side and the foundation. It further illustrates the location of the former kiosk and the spot left by Okeny Faustino on the other. The undisputed land belonging to the 1st respondent is across a road that branches

off the main road to Kaabong. On the other side of the road adjacent to the area in dispute is located the home of the 2nd respondent, the spot vacated by Franco Akaka, the homes of Okidi and Olaya Justine s/o Okeny Faustino, all of which lie outside the area in dispute.

Judgment of the court below:

[9] In his judgment delivered on 9th January, 2018 the trila Magistrate found that the appellant claimed to have lost the agreement of purchase during the insurgency. However, P.W.2 Rose Atim who claimed to have been a witness to the transaction, was only seven years old in 1958 when the appellant claims to have purchased the land. Evidence of ownership based on purchase was most unsatisfactory. The claim that the appellant had a kiosk on the land which the 1st respondent destroyed was not supported by credible evidence. In the year 2002, the 1st respondent successfully sued persons that had encroached on this part of the land who included P.W.2 Atim Rose and Okeny Faustino. There was evidence seen during the court's visit to the *locus in quo,* of the spots that the defendants in that suit used to occupy. Kasimiro Okeny from whom the appellant claimed to have purchased the land occupied the land for six years from where he operated a small shop and later returned to his home in Pugoda, Namukora after selling the small house to Nyeko Remijo, father of the 2nd respondent. The evidence showed that the appellant at one time had a kiosk on the land which was destroyed by other persons not party to the suit, from whom the appellant had received compensation.

[10] It was not clear to the court under what circumstances the appellant had established a kiosk on the land nor for how long it had existed there. The 1st respondent's claim was found to be more plausible considering the location and surroundings of the area in dispute. It forms part of the approximately 50 acres inherited by the 1st respondent. What the court found on the land was only the appellant's recently dug foundation. Since the land belongs to the 1st respondent,

the respondents are not trespassers on it. The 1st respondent was declared the rightful owner of the land in dispute. The respondents have suffered loss and inconvenience as a result of the appellant's unfounded claimed hence they are entitled to an award of general damages. The 1st respondent was awarded shs. 1,200,000/= while the 2nd respondent was awarded shs. 800,000/= as general damages. The respondents were awarded the costs of the suit.

The grounds of appeal:

[11] The appellant was dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and apply the law, thereby coming to wrong conclusions.
2. The learned trial Magistrate erred in law and fact when he held that the appellant's claim was *res judicata*, thereby occasioning a miscarriage of justice to the appellant.
3. The learned trial Magistrate erred in law and fact when he took into consideration extraneous maters not pleaded or supported by evidence in arriving at his decision, thereby occasioning a miscarriage of justice to the appellant.
4. The learned trial Magistrate erred in law and fact when he awarded general damages to the respondents which they never pleaded and proved hence causing a miscarriage of justice.

Arguments of Counsel for the appellant:

[12] In their submissions, counsel for the appellant, submitted that the trial Magistrate misdirected himself when he found that P.W.2 was too young to have witnessed the transaction of purchase between the appellant and Kasimiro Okeny. Having found that the evidence established that the appellant occupied the land at one

time, he erred when he failed to establish the circumstances of that occupancy. Had he properly directed himself he would have found that the land belonged to the appellant. It was wrong for the trial Magistrate to have relied on findings of fact made during proceedings by the elders' forum. The trial Magistrate further misdirected himself regarding the proceedings of 2002 as having resulted in a declaration that the land in dispute belonged to the 1st respondent. When the court visited the *locus in quo*, there were multiple features that belonged to the appellant on the land yet the respondents had none. There was no evidence to support the court's finding that the land East and West of the road to Namukora belongs to the 1st respondent. The respondents did not plead any damage or loss and therefore the award of general damages was erroneous. They prayed that the appeal be allowed with costs.

Arguments of Counsel for the respondents:

[13] Appearing *pro se*, the respondents argued that the first ground of appeal is too general. The 1st respondent had in the year 2002 successfully sued three persons for trespass on to the same land. When the trial court referred the dispute in the instant appeal to the Kalabong Elders' Forum, it too established that the land belongs to the 1st respondent. The trial court was right to have relied on facts established during the mediation proceedings. The order directing the 2nd appellant to return the appellant's bricks was not based on the appellant's ownership of the land. At the *locus in quo*, the 1st respondent showed court the spots vacated by the trespassers he had successfully sued in 2002. Apart from the foundation, the appellant had nothing on the land in dispute to show court. There are variations in the evidence regarding the dimensions of the land claimed by the appellant which indicate that he was telling the court lies. There was no evidence that the appellant had ever been in possession of the land in dispute. The trial court was justified in awarding the respondents general damages. The appellant's unlawful activities on the land had interfered with their rights. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[14] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[15] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Ground one struck out for being too general.

[16] I find the first ground of appeal to be too general that it offends the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically

point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The ground is accordingly struck out.

Ground two; courts' finding that the suit was *res judicata.*

[17] In ground two, it is argued that the trial court was wrong to have found the suit to be *res judicata.* According to section 7 of *The Civil Procedure Act* and section 210 of *The Magistrates Courts Act*, no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

[18] The basis of the rule of *res judicata* is that an individual should not be vexed twice for the same cause. A person should not be twice vexed in respect of the same contest as to his or her rights and on the other hand, the time of the Courts should not be wasted by trying the same matter several times. The plea of "*res judicata*" is in its nature an "*estoppel*" against the losing party from again litigating matters involved in previous action but does not have that effect as to matters transpiring subsequently. The judgment in first action operates as an "*estoppel*" only as to those matters which were in issue and actually or substantially litigated. It is matter of public concern that solemn adjudications of the courts should not be disturbed. Therefore, where a point, question or subject-matter

which was in controversy or dispute has been authoritatively and finally settled by the decision of a court, the decision is conclusive as between parties in same action or their privies in subsequent proceedings. A final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in the former suit. In short, once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in another suit afresh (see *In the Matter of Mwariki Farmers Company Limited v. Companies Act Section 339 and others [2007] 2 EA 185*). By *res judicata*, the subsequent court does not have jurisdiction.

[19] Four factors are considered in determining the validity of a plea of *res judicata*: (i) was the claim decided in the prior suit the same claim being presented in the current suit? (ii) Was there a final judgment on the merits by a court of competent jurisdiction? (iii) Was the party against whom the plea is asserted a party or in privity with a party to the prior suit? and (iv) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

[20] Being a question of mixed law and fact, the proper practice is for the trial Court to try that issue and receive some evidence to establish that the subject matter has been litigated upon between the same parties, or parties through whom they claim (see *Karia and another v. Attorney-General and others [2005] 1 EA 83*). *Res judicata* is an affirmative defence which must be raised by the pleadings by stating all facts sufficient to constitute the estoppel by judgment. Where *res judicata* has been properly pleaded, it should be supported by the introduction of the record of the former judgment, which must correspond in its essential particulars with the pleadings.

[21] The plea cannot be supported by a mere assertion that a previous judgment was rendered in which the question was in issue and determined. The burden of proving the existence and the character of the judgment and its legal effect will

fall upon the party pleading the estoppel, unless his opponent introduces the record of the former trial as a part of his case. The party pleading *res judicata* will be required to show that the particular point or question as to which he claims the estoppel was within the scope of the issues foreclosed by the prior litigation.

[22] When the parties to the two suits are not the same and the plaintiff denies any privity of parties between himself and any party to the former judgment, an issue fact is raised. The best evidence of the existence of the judgment relied upon as a bar is the judgment itself. Where the record in the former suit is in existence, it is the only evidence admissible to prove its contents. If it can be shown that there was a record which has been lost or destroyed, other competent evidence may be introduced to prove its con-tents. Parol proof can be admitted in aid of the record only when there is a record to be aided.

[23] In the instant case the previous judgment was neither pleaded to adduced in evidence. Parol evidence regarding what was decided was therefore inadmissible. It was not proved that the claim decided in the prior suit was the same claim being presented in the current proceedings. The conclusiveness of a judgment is normally upon the real party in interest, such as the relation existing between principal and agent, master and servant, or employer and employee or relations analogous to those, which was not proved in this case. The existence of a final judgment on the merits by a court of competent jurisdiction was never proved. It was not proved that the appellant was a party or in privity with a party to the prior suit and was given a fair opportunity to be heard on the issue, yet the trial Magistrate erroneously considered the doctrine of *res judicata* applicable to the facts before him. This ground therefore succeeds.

Grounds three and four; validity of award of general damages.

[24] In grounds three and four of appeal, it is contended that the trial court misdirected itself resulting in incorrect findings of fact and erroneous award of

general damages. The appellant's claim was based on disputed ownership of the land. Ownership connotes a complete and total right over a property, i.e. all rights, powers and privileges which an individual may have or exercise over a piece of land. To amount to ownership the right claimed must be infinite and absolute. Ownership is a creation of law. It is the law that determines what land may or may not be owned by an individual or groups in society.

[25] Ownership is acquired by; purchase, inheritance, gift, transmission by operation of law, prescription or adverse possession. According to section 110 of *The Evidence Act*, when the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner. The implication of this presumption is that in the event of two competing claims of title to land and in the absence of satisfactory proof of ownership by either party or claimant; title will be awarded to the party in possession.

[26] Possession is the actual physical control over a piece of land. It is constituted by the fact that somebody is in physical control of the land with intention to control it. Possession is a question of fact to be decided on the merits of each particular case. It may be established by evidence of physical residence on the land. It may also be established by a show of some visible or external sign which indicates control over the piece of land in question. For example, in *Wuta Ofei v. Danquah [1961] 3 All ER 596*, it was held that the demarcation of the land with pegs at its four corners by the claimant was sufficient act of possession even though it was an uncultivated land. Cultivation of a piece of land, erection of a building or fence thereon, demarcation of land with pegs or beacons are all evidence of possession. A person can also be in possession through a third party such as a servant, agent or tenant.

[27] It is trite that "possession is good against the entire world except the person who can show a good title" (see *Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn*

CJ at 5). Possession raises the presumption of ownership in favour of the person in possession. Possession may thus only be terminated by a person with better title to the land. To be entitled to evict the plaintiffs from the land, the defendants must prove a better title to the land**.** If someone is in possession and is sued for recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them (see *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*). Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. The plaintiff must succeed by the strength of his or her own title and not by the weakness of the defendant's. The respondents did not prove a better title.

[28] The appellant's version as presented by P.W.1 Aboda Fabiano was that he bought the land in dispute from a one Kasimiro Okeny in 1958. He has kiosk and foundation on the land in dispute. P.W.2. Atim Rose testified that the land in dispute originally belonged to her late brother, a one Kasimiro Okeny. The appellant bought it from Kasimiro Okeny in 1958. The appellant had erected a kiosk on the land.

[29] In contrast, the respondents' as presented by D.W.1 Tom Olaa Lakere was that he inherited it from his late father Caesar Acac in 1990. The part in dispute forms part of the rest of the land he inherited. He used to occupy and cultivate the land before the insurgency. Kasimiro Okeny lived on the land for about 6 years and left some time before 1960. He had a small shop on a different piece of land given to him by the 1st appellant's father which he sold to the father of the 2nd respondent Remijo Nyeko who still occupies it. D.W.2 Akena Phillips testified that there was no kiosk on the land at the time he began the work but he found only a part of a wall approximately ten meters from where he was moulding the bricks. D.W.3 Akena Albert testified that Remijo Nyeko too used to live on the land before the insurgency. Kasimiro Okeny too used to live on the land and when he

left he sold his part to Remijo Nyeko and not to the appellant. D.W.4 Malandra Lamot testified that the appellant came to the land in the 1960s. Remijo Nyeko bought land from Kasimiro Okeny.

[30] It is common ground that the land originally belonged to the 1st respondent's father Caesar Acac. It is him who sometime before 1960 gave part of it to Kasimiro Okeny who built a small shop on it. While the appellant contends he then bought it from Kasimiro Okeny and proceeded construct a kiosk, pit latrine and to lay the foundation of a commercial building thereon, the respondents contend Kasimiro Okeny sold it to a one Remijo Nyeko, the 2nd respondent's father. The implication is that for nearly 40 years, the land had ceased being the property of Caesar Acac when the 1st appellant purported to inherit it in the year 1990. Caesar Acac divested himself of that part of the land when he gave it to Kasimiro Okeny sometime before the year 1960.

[31] When a person in possession of land files a suit to recover land, or to obtain compensation for a tortious interference with his or her land, it generally suffices that the claimant has a good title as against the defendant(s), notwithstanding that there is some third party who has a better title than the claimant; the claimant is not required to establish that he or she has a good title as against the whole world (see *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*). If the person challenging the possession does not succeed in proving a better title, the one in possession gets to keep the land, even if a third party has a better claim than either of them. Therefore all the plaintiff has to prove is that he or she has a better title to possess than the defendant. Any possession is good against a trespasser. A suit for possession is intended to protect the right to physical occupation of the land against those who are wrongfully interfering with (see *Secretary of State for the Environment, Food and Rural Affairs v. Meier [2009] 1 WLR 2780* and *Mayor of London v. Hall [2011] 1 WLR 504*).

[32] In order to obtain or retain possession of land, a person must have an appropriate degree of exclusive physical control, and an intention to take possession, to the exclusion of all others. Thus, the question for the trial court was whether the appellant, at the relevant time, had that degree of control over the land that a typical owner would have had, i.e. whether he was able to determine, to the extent a typical owner could, whether and how the land was used or otherwise dealt with and who used or dealt with it. When seeking to answer that question the trial court had to consider; - (1) whether and how he has used and enjoyed the land; and (2) whether others have used and enjoyed it against his will or whether he has effectively excluded the world at large from it.

[33] What constitutes possession of any particular piece of land must depend upon the nature of the land and what it is capable of being used for. Observations made by the court during the visit to the *locus in quo* as illustrated by the sketch map show the location of the appellant's former kiosk and the foundation are located on the land in dispute. The undisputed land belonging to the 1st respondent is across a road that branches off the main road to Kaabong. The evidence showed that the appellant had been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so for that long. Those artefacts constitute a sufficient degree of exclusive physical control thereby characterising the appellant as the person having factual possession of the land until and at the time of intrusion by the respondents. The appellant was in possession of the land at the time he filed a suit to eject the respondents as intruders and to obtain compensation for their tortious interference with his occupancy. Notwithstanding that there could be some third party who has a better title than the appellant, he was not required to establish that he had a good title as against the whole world. The respondents, as persons challenging the appellant's possession did not succeed in proving a better title. Being the one in possession, the appellant should have got to keep the land. It generally sufficed that the appellant has a good title as against the respondents. Had the trial court properly directed itself, it would have found so.

[34] An appellate Court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. An appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made (see *Matiya Byabalema and others v. Uganda Transport company (1975) Ltd., S.C.C.A. No. 10 of 1993 (unreported)* and *Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises. S.C.C.A No. 16 of 2006*). Had the trial court properly directed itself, it would have come to a different conclusion and decided in favour of the appellant. There was therefore no basis for making that award and it is accordingly set aside.

[35] Trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be "at large", that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. ***Halsbury'sLaws of England***, 4th edition, vol. 45, at para 1403, explains five different levels of damages in an action of trespass to land, thus; (a) If the plaintiff proves the trespass he is entitled to recover *nominal damages*, even if he has not suffered any actual loss; (b) if the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss; (c) where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use; (d) where there is an oppressive,

arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded; and (e) if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

[36] In *Halsbury's Laws of England*, 4th Ed., Vol. 45 (2), (London: Butterworth's, 1999, at paragraph 526), the law on damages for trespass to land is addressed thus: "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."

[37] The defendant's conduct is thus key to the amount of damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was wilful, 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. In the instant case no evidence was led regarding the total acreage of the appellant's land wrongfully occupied by the respondents. Considering that this was wilful trespass, I will award substantial damages of shs. 3,000,000/= per annum which translates into shs. 18,000,000/= for the last nearly six years, to be paid jointly and severally by the respondents.

Order:

[38] In the final result, there is merit in the appeal. It is accordingly allowed. The judgment of the court below is set aside and in its place judgment is entered dismissing for the appellant against the respondents jointly and severally in the following terms;

a) A declaration that the appellant is the lawful customary owner of the land in dispute.
b) The respondents are declared trespassers on that land.
c) The appellant is granted vacant possession of the land.
d) A permanent injunction issues restraining the respondents, their agents and persons claiming under them from committing further acts of trespass onto that land.
e) General damages of shs. 18,000,000/=
f) Interest on the above sum at the rate of 8% per annum, from the date of this judgment until payment in full.
g) The costs of the suit and of the appeal are awarded to the appellant.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Abwang Otim, Opok and Co. Advocates.

For the respondents: ….