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THE REPUBLIC OF UGANDA

IN TEHN HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL SUIT NO. 28 OF 2019

PETER OWINY MWA:: COUNTER CLAIMANT

VERSUS

10 **OKELLO GEORGE ODIPE:::::::::::::::::DEFENDANT TO THE COUNTERCLAIM**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

15 **Background facts**

The Counterclaimant commenced this litigation against the Defendant to the Counterclaim (hereafter, for brevity, the "Defendant") following a suit filed by the Defendant (the Plaintiff at the time). That suit was dismissed on 26 May, 2022 with costs, by Ajiji, J., for non-appearance of the Plaintiff (now Defendant to the Counterclaim). The dismissal was pursuant to the provision of Order 9 rule 22 of the Civil Procedure Rules (CPR). The Defendant (Plaintiff then) did not take advantage of the provision of Order 9 rule 23 of the CPR to apply for setting aside of the order of dismissal, and for reinstatement of the suit. The Defendant did not also think it necessary to defend the cross action. This court proceeded to fix the Counterclaim for hearing under the provisions of Order 8 Rule 13, and
25 Order 9 Rule 10 of the CPR, thereby proceeding as if the Defendant had filed a

5 Defence to the Counterclaim. It should be noted that, in the terminated suit, the present Defendant had Mr. Crispus Ayena Odongo as counsel. It is not known why learned counsel did not lodge a Defence for his client. Be that as it may, in his cross action, the Counterclaimant, relying on a certificate of title to the suit land measuring approximately 742.1 hectares, and comprised in LRV 1339, Folio 10 3, Block 3, Plot 18, Gulu (now Nwoya), contends that, the Defendant trespassed on the suit land in the year 2018 by entering onto, occupying, building thereon, and cultivating about 300 hectares thereof. The Defendant is said to have also hired part of the suit land to other persons for cultivation and charcoal burning. The Counterclaimant further avers that the Defendant was on 10 March, 2014, 15 convicted of criminal trespass by Magistrate Grade One of Gulu Magistrates Court sitting in Amuru, His Worship Odwori Ponsiano Romans who sentenced him to one year's imprisonment. The Counterclaimant thus prays for damages for trespass, mesne profits, punitive and exemplary damages, costs of the suit, and *"any other relief court deems fit to grant"*.

20 In the dismissed suit, the Defendant had claimed to be customary owner of approximately 500 hectares of the Counterclaimant's land. The Defendant however, recognize the Counterclaimant's registered interest but refrained from impeaching the certificate of title on ground of fraud or illegality or both. 25 Furthermore, the Defendant did not purport to claim to be a bonafide or lawful occupant of the suit land, interests which are protected by the Constitution of the Republic of Uganda, 1995, and the Land Act Cap 227. In his dismissed suit,

5 the Defendant had annexed the Counterclaimant's copy of leasehold certificate
of title. The certificate of title shows that the Counterclaimant enjoys a running
lease of 49 years from 1 August, 1983. The certificate of title was processed on
10 August, 1984. Although the certificate indicates that the suit land is located
within Gulu District, the parties agreed soon after the commencement of
10 litigation that the suit land is geographically located in the present-day Nwoya
District and straddles Padunyu, Cel-Peke, both situate in Lii Sub-County within
Nwoya (I think as of 1983, Nwoya District was not yet in place). The leasehold
grant was given by the Uganda Land Commission.

15 **Representation**

At the hearing, the Counterclaimant was represented by learned Counsel Ms.
Roselyne Kunihira. Learned Counsel proposed two issues for determination,
which court adopted, namely;

20 **1. Whether the Defendant to the Counterclaim trespassed on the suit
land comprised in LRV 1339, Folio 3, Plot 18, at Nwoya?**

2. Whether the Counterclaimant is entitled to the remedies sought?

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5 **The proceedings**

The Counterclaimant testified as CW1 and called one additional witness, Zeru Abukha who was stated to be the Chairman Nwoya District Land Board. Mr. Abukha testified as CW2. Their evidence was in the form of witness statements, lodged in accordance with the provision of Order 18 rule 5A (2) of the CPR (as
10 Amended in 2019). This Court thereafter visited the locus in quo on 23 October, 2023. The Defendant was in attendance notwithstanding his status in this suit. The court could not stop him from being present. At the close of the Counterclaimant's case, Learned Counsel lodged written submission on 08 November, 2023. I have taken the submission into account in this Judgment.

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Resolution of the issues

Whether the Defendant to the Counterclaim trespassed on the suit land?

In his testimony, the Counterclaimant (CW1) who was 77 years old (as at 05 April, 2023) testified that, he is the registered proprietor of the suit land. He
20 relied on the Certificate of title (CEX1). He stated that the Defendant's father a one Erinayo Moro (since deceased) has land across Puduny stream. The stream separates the land of the Defendant's family from the suit land. The Defendant who is related to CW1 (his father and the mother of the Counterclaimant are cousins), was at one time allowed by CW1 to live on the suit land as a helper to
25 tilt it. He also looked after cattle and tended to goats (of the Counterclaimant).

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5 According to CW1, during the Lord's Resistance Army rebels insurgency in the area which caused displacement of persons, CW1 hosted the Defendant at CW1's home in Gulu town. In the year 2006, as displaced persons started resetting home, instead of the Defendant going back to his parent's land near-by (across Puduny stream), the Defendant decided to go back to the suit land and built two
10 grass-thatched houses thereon. He started living on the suit land. These were done without the consent and authorization of the Counterclaimant. When the Counterclaimant asked the Defendant to vacate the suit land, he refused. This prompted the Counterclaimant to complain to Police, which resulted in the successful prosecution of the Defendant in the Chief Magistrates Court of Gulu
15 held at Amuru, for criminal trespass. CW1 relied on a copy of the Judgment dated 10 March, 2014, to buttress his point. According to CW1, the Defendant was sentenced to one year's imprisonment. This Court noted that, the sentencing proceedings was not adduced in evidence. Be that as it may, the fact that the learned Magistrate Grade 1 passed a Judgment against the Defendant as an
20 accused person implies he was convicted and ultimately sentenced. I therefore, believe the Counterclaimant that the Defendant was sentenced to the prison term of one year. CW1 also testified that, after serving his jail term, the Defendant continued trespassing on the suit land. He kept cultivating it, to-date, and as well as hiring part thereof to other persons. CW1 claims the Defendant
25 sold portions of the suit land, although no sale agreements were adduced in evidence.

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5 According to CW1, the parties agreed to and had a boundary opening and survey
of the suit land done. They agreed in the presence of their respective lawyers on
12 June, 2020. Thus vide CEX3, the parties had an understanding to the effect
that whoever would be found to have trespassed on the land of the other, would
vacate. According to CW1, after the survey and boundary opening exercise, a
10 report was prepared by Nwoya District Staff Surveyor vide CEX 5. The report
shows that the suit land belongs to the Counterclaimant. It also shows that the
Defendant occupies about 251.5 acres of the suit land in the southern part.
CEX5 also indicates that there were farming activities by squatters on the suit
land. Winding up his evidence in chief, the Counterclaimant asserted that the
15 Defendant is a trespasser and ought to be declared as such.

CW2 Zehu Abukha testified that originally, the suit land was part of the buffer
zone between human settlement and Murchison Falls National Park. He stated
that the suit land which measures 742.1 hectares, is registered in the name of
20 the Counterclaimant. The Counterclaimant has a lease of 49 years on the suit
land, effective 1983. The lease was granted by the Uganda Land Commission,
the Counterclaimant having applied for it in the year 1972. CW2 referred to the
Certificate of Title (CEX 1). CW2 added that the Counterclaimant has been paying
ground rent to Nwoya District Local Government to-date. CW2 relied on CEX 12
25 which is a collection of ground-rent payment documents. CW2 continued that
the Counterclaimant followed due process in the title acquisition and has a
genuine title. CW2 referred to a search he says he did on the directive of the

5 Resident District Commissioner of Nwoya in 2016, thus confirming the genuineness of the certificate of title. He concluded that he shared his findings with the community of the area of situation of the land in a meeting held in 2017. That meeting was attended by officials of Nwoya District Land Board, Senior Lands Management Officer, and Staff Surveyor (Nwoya).

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During the locus visit, the Counterclaimant was able to point out four huts that were constructed by the Defendant on the southern part of the suit land. He also showed court the fruit trees he claims were planted by the Defendant, such as jackfruit, pawpaw, and banana stems in 8 locations, plus maize and millet
15 gardens.

In her submission, Ms. Kunihira urged court to hold that the Defendant is a trespasser on the suit land. She prayed for other reliefs. Learned Counsel cited provisions of the Registration of Titles Act, among other statutes, and case law,
20 to buttress her arguments.

In my Judgment, I found it unnecessary to reproduce the submissions, for brevity. In any case, there are no contrary arguments with which to juxtapose the Counterclaimant's. That said, I will, however, consider whether the
25 Counterclaimant has been able to prove his claims on the balance of probability in spite of the fact that the Counterclaim is not opposed. It should be noted that, where a matter proceeds for hearing as if the Defendant had filed a Defence, the

5 person suing (be it the Plaintiff or Counterclaimant) still bears the burden of proving his case. The case being a land matter and court having proceeded pursuant to the provisions of Order 8 Rule 13, and Order 9 Rule 10 of the CPR, the Counterclaimant still ought to prove his claims on the balance of probability even where there is no Defence to the claim.

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Turning to the law regulating the subject-matter, the law of trespass to land is now well settled. Trespass to land is an unlawful entry on the land of another. The tort of trespass to land consists of entering on the land in possession of another; remaining on the land; or placing any material object on the land
15 without lawful justification. The principles were stated in the case of **Onegi Obel & another Vs. AG & another, HCCS No. 066 of 2002** (per Augustus Kania, J).

It is also trite law that a person holding a certificate of title to land can sue in
20 trespass to land. See: **Justine E.M.N Lutaya Vs. Stirling Civil Engineering Co. Ltd, Civil Appeal No. 11 of 2002 (SCU) (per Mulenga, JSC) (RIP)**. In the precedent-setting case, the Supreme Court of Uganda went on to explain that the tort of trespass to land is committed when a person makes unauthorized entry upon land and thereby interferes or portends to interfere with another person's lawful possession of the land. Therefore,
25 simply stated, trespass is entry on land without the consent of the owner. **See also: Sheikh Muhammed Lubowa Vs. Kitara Enterprises Ltd [1992] KALR 127**; and **Salmond & Heuston, the Law of Torts, 19th Ed. (London: Sweet and Maxwell, (1847) page 46.**

5 In ***Halsburys Laws of England, para 1205, Vol. 38, 3rd Ed***, it is opined that, trespass to land is committed where a person wrongfully or unlawfully sets foot upon, or takes possession of or takes materials from land belonging to another person.

In the instant case, the evidence adduced is clear. The Counterclaimant has shown that
10 whereas he initially accommodated and allowed the Defendant to stay on the suit land as a worker and a relative at that, the temporary authorization extinguished when the Defendant left the suit land due to the LRA insurgency and relocated to Gulu town where the Counterclaimant housed him. Thus at the cessation of the LRA insurgency and on return of relative peace from about the year 2006, the Defendant needed express
15 permission of the Counterclaimant before he could resettle on the suit land. It is apparent that his then services were no longer needed on the land. He accordingly needed consent of the Counterclaimant before he could construct his grass-thatched houses on the suit land. Having not sought one and yet he went ahead to do what he did and refused to vacate the suit land, the Counterclaimant was forced to report a case
20 of criminal trespass at Police. He had the Defendant successfully prosecuted. Although it is not clear whether the fruit trees were planted on the suit land post the 2006 period, and thus unauthorized, what is clear is that the grass-thatched houses, from court observation, appear to be structures that were erected after the year 2006 and not before. Regarding the fruit trees, I would not hold that planting them constitutes
25 criminal trespass as the precise years when they were planted, remains unclear. Court is aware that prior to 2006, any trees planted by the Defendant were with implied consent and authorization of the Counterclaimant who had welcomed the Defendant as a helper. However, this finding does not apply to the houses constructed on the suit

5 land all of which, I find, were built after 2006 as they appear more recent. The Defendant
did not stop there. He rented out the suit land to other people without the authorization
of the Counterclaimant. He allowed persons to cut down trees for charcoal burning,
without the consent of the land owner. Thus given that the suit land is undoubtedly
10 registered in the name of the Counterclaimant, and cognizant of the fact that his title
thereto has not been impeached on account of fraud, within the provision of section 64
of the Registration of Titles Act (RTA), or illegality or at all, and therefore, by virtue of
section 59 of the RTA, and by the force of the authority of **Kampala Bottlers Ltd Vs.**
Damanico (U) Ltd, SCCA No. 22 of 1992, I hold that the Counterclaimant is the owner
of the suit land measuring 742.1 hectares and the Defendant has no right thereto. I
15 further hold that the Defendant is a trespasser on the suit land.

The first issue is thus resolved in the affirmative.

Whether the Counterclaimant is entitled to the remedies sought?

Although not explicitly sought in the Counterclaim, given my affirmative
20 resolution of issue one, a declaration is hereby made that the Defendant has no
right to the suit land and is a trespasser thereon. The order of declaration
regarding the Counterclaimant's right to the suit land is appropriate, within the
purview of Order 2 rule 9 of the CPR, being consequential relief flowing from my
affirmative findings on issue one, although not expressly prayed for. To decline
25 the relief would tantamount to rendering this court's decision on trespass
ineffectual. I do not therefore think by making the said declarations, this court
would be committing errors of law in the circumstances. It is of course common

- 5 knowledge that founding a relief on unpleaded matter constitutes an error of law.
See: **AG Vs. Paul K. Ssemogerere & Z. Olum, Const. Appeal No. 3 of 2004 (Mulenga, JSC); National Social Security Fund & Another Vs. Alcon International Ltd, Civil Appeal No. 15 of 2009 (SCU) (per Katureebe, JSC, pp.15-16).**
- 10 That said, learned Counsel ought to do better when seeking specific reliefs in an action. This is because reliefs should not be hidden or implied under the sweeping prayers “*any other relief court deems fit*” as such prayers have no magical qualities. I am of course aware that, in some cases, courts have granted reliefs under such broad prayers.
- 15 The Counterclaimant also prayed for mesne profits. Mesne profits is defined in relation to property. Thus under section 2 of the CPA it means those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits. Mesne profits, however, shall not include profits due to
- 20 improvements made by the person in wrongful possession. The law requires that the particulars of mesne profits be pleaded. This position was reached by the Court of Appeal of Kenya in **Ngethe Vs. Gitau & Another [1999] 1 E. A 225**, which I think represents the position that has been applied in Uganda. Thus in the case of **Sandy Ndiwibo Vs. John Mbabali Makang & another, Civil**
- 25 **Appeal No. 71 of 2012, Eva K. Luswata, J.,** (as she then was) held that the

5 claim for mesne profits is in the nature of special damages and ought to be specifically pleaded and strictly proved.

In the instant case, no particulars of mesne profits was pleaded in the Counterclaim. No evidence was adduced to prove it. The Counterclaimant
10 adduced no evidence to show the profits which the Defendant as a person in wrongful possession of the suit land was able to receive or might have received if he exercised ordinary diligence. Whereas the Counterclaimant was able to show that the Defendant rented out a portion of the suit land to persons, he was unable to prove how much the hirers paid. Moreover, the value of the part
15 trespassed on its unknown, so there is nothing to guide this court as a starting point for assessing any would-be mesne profits. See: **Vivo Energy (U) Ltd Vs. Shire Petroleum Co. Ltd & 2 Others, HCCS No. 08 of 2016, Mubiru, J.** In any case, learned counsel did not submit on the prayer thus it is deemed to have been abandoned. The foregoing being the case, the claim for mesne profits ought
20 to fail.

The Counterclaimant also sought for general damages. In her submission, learned counsel proposed shs. 50,000,000 as an appropriate award. General damages is compensatory in nature and are intended to make good to the
25 aggrieved party as far as money can do for the losses he has suffered as a natural result of the wrong done to him. See: **Robert Coussens vs Attorney General, Civil Appeal No. 8 of 1999 (SCU); Bank of Uganda Vs. Masaba & Others**

5 **SCCA No. 3 of 1998.** General damages are the direct probable consequences of the act complained of. Such consequences may be the loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. General damages must be prayed for and proved. See: **Kampala District Land Board & George Mitala Vs. Venasio Babweyaka, SCCA No. 2/ 2007.**

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The object of damages is to compensate a party for the damage, loss or injury suffered. They can be pecuniary or non-pecuniary, the former comprising of all financial and material loss of business profit and income, and the latter representing inroad upon a person's financial or material assets such as physical
15 pain or injury to feelings. See: **Robert Coussens vs Attorney General, Civil Appeal No. 8 of 1999 (supra).**

The quantum of general damages is in the discretion of the court based on the circumstances of each case. See: **Crown Beverages Ltd Versus Sendu Edward,**
20 **SCCA No.1 of 2005.** It has, however, been held that, a person injured (by the conduct of the Defendant) must receive a sum of money that would put him in as good but neither better nor worse position than before the wrong was committed. This was the view expressed in the case of **Associated Architects Vs. Christine Nazziwa, Civil Appeal No. 05 of 1981.** That decision was
25 followed in **Sandy Ndiwibo Vs. John Mbabali Makang & another, Civil Appeal No. 71 of 2012 (supra).**

5 I should add that counsel owes a duty to their client and court to put before
court material which would enable court to arrive at a reasonable figure by way
of general damages.

In the instant case, I find that the Counterclaimant has been able to adduce
10 credible evidence that the Defendant is a trespasser on the suit land. The
Defendant interfered with the Counterclaimant's use of the whole 251.5 acres
trespassed on. The Defendant constructed grass-thatched huts on the suit land
and has settled there since about the year 2006, to-date. This court saw the huts
during the locus visit. They were four in number and dotted in the southern part
15 of the suit land. There is evidence that he has been cultivating the suit land since
2006. Court observed millet and maize gardens cultivated by the Defendant.
There is also uncontroverted evidence that the Defendant hired part of the suit
land to strangers for charcoal burning. In spite of his conviction and sentence
by the Magistrates Court for criminal trespass, the Defendant was not deterred
20 from continuing acts of trespass and remain recalcitrant. He has refused to
vacate the suit land, to-date. I find the Defendant's act to be arrogance of the
highest order. By allowing persons to cut down trees and burn charcoal on the
suit land, the Defendant degraded the Counterclaimant's land. These kind of
conduct should attract reasonable award of general damages, of course not of
25 the magnitude proposed by Ms. Kunihiro. However, I note that the trespass has
been continuous for almost 18 years, since 2006. In the circumstances, I would
find the sum of shs. 18,000,000 appropriate which I hereby award as general

5 damages. The general damages shall attract interest of 8% per annum from the date of this Judgment till full payment.

The Counterclaimant further prayed for punitive/ exemplary damages. Punitive or exemplary damages are exception to the rule that damages generally are
10 awarded to compensate the injured person. Punitive/ exemplary damages are awardable to punish, deter, express outrage of court at the Defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct. They may also be awarded for improper interference by public officials with the rights of ordinary subjects. They focus on the Defendant's misconduct
15 and not the injury or loss suffered by the Plaintiff/ Counterclaimant. Punitive/exemplary damages are in the nature of a fine to appease the victim and discourage revenge and warn society that similar conduct will always be an affront to society's, and also to court's sense of decency. These head of damages are awardable with restraint and in exceptional cases, because, punishment
20 ought, as much as possible, to be confined to criminal law, and not to civil law of tort and contract. See: ***Uganda Revenue Authority Vs. Wanume David Kitamirike, Court of Appeal Civ. Appeal No.43 of 2010 (per R. Kasule, JA)*** In ***Rookes Vs. Bernard (1964) AC 1129***, which has been followed in East Africa in the case of ***Obongo & Another Vs. Municipal Council of Kisumu [1971]***
25 ***E.A 91***, it was classically stated that, award of exemplary or punitive damages are limited to three category of cases, first, where there is oppressive, arbitrary or unconstitutional action by public servants; second, where the motive of

5 making a profit is a factor such as where the Defendant in disregard of the Plaintiff's rights, calculates that the money to be got out of the wrong to be inflicted on the Plaintiff will exceed the damages at risk; and third, where a statute imposes punitive/exemplary damages to be paid.

10 In the instant case, the acts of the Defendant being that of a private individual and not governmental acts or that of its officials, and given that no statute allows for award of punitive/ exemplary damages at all and more so in the circumstances obtaining, and there being no basis for considering profit motive given the nature of the Defendant, I have come to the conclusion that the claim
15 for award of punitive or exemplary damages is misconceived and is accordingly rejected.

I have noted that the counter-claimant also prayed for eviction order in the written submissions yet it was not pleaded. I find this practice rather problematic
20 yet having been declared a trespasser, if court refused an eviction order, it would render the decision of this court ineffectual and create a sort of pyrrhic victory. Declining the order of eviction because it is not pleaded would be to punish the Counterclaimant for default of his counsel yet he cannot re-litigate the matter again. Whereas this court is aware that granting a relief not pleaded constitutes
25 an error of law (**AG Vs. Paul K. Ssemogerere and Z. Olum, Const. Appeal No. 3 of 2004**), court finds the circumstances in the precedents distinguishable in that, in the instant case, an order of eviction is consequential on making a

5 declaration of trespass. Thus to do substantive justice, I am of the humble view
that the prayer for eviction ought to be granted as it flows from the affirmative
finding on issue 1. Accordingly, I order for the eviction of the Defendant and his
agents from the suit land, under the wide prayer of "*any other relief the*
honourable court deems fit to grant" notwithstanding my reservations on such
10 broad prayers. The Defendant shall be evicted upon being given Ninety (90) days'
notice.

Regarding costs, I note that the same was pleaded but not canvassed in the final
written submissions. Therefore, although costs usually follow the event unless
15 court orders otherwise for reasons to be given (See s.27 CPA and **Francis
Butagira Vs. Deborah Namukasa, Civil Appeal No. 6 of 1989 (SCU); Sheikh
Jama Vs. Dubat Farah (1959) E.A 789**), in this case, since the parties are
related and ought to reconcile (see: **Okwonga George & another Vs. Okello
James Harrison, Misc. Cause No 132/ 2021**), and further for the reason that
20 the case also proceeded ex parte against the Defendant, and given the manner
in which the prayers in the counterclaim were inadequate, I would order that the
Counterclaimant meets its own costs of the Counterclaim. However, considering
that the suit lodged by the Defendant (Plaintiff then) was dismissed with costs
pursuant to Order 9 rule 22 of the CPR by my brother Judge, and noting that
25 the said Order has never been set aside, I order that the Defendant who was the
Plaintiff in the dismissed suit, shall pay costs of the dismissed suit. For the
avoidance of doubt, the present Counterclaimant shall lodge the Bills of costs to

5 recover only costs of the suit dismissed vide the Orders of Ajiji, J., dated 26 May, 2022, and shall not recover costs of the Counter-claim which is not given.

It is so ordered.

10 Delivered, dated and signed in court this 19th February, 2024.

Handwritten: 19/2/2024
George Okello
JUDGE



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Judgment read in open Court.

Attendance

20 Counter-claimant in Court.

Ms. Isabella Aloyo, holding brief for Mr. Roselyne Kunihiro, for the Counter-claimant.

Mr. Ochan Stephen, Court Clerk.

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Handwritten: 19/2/2024
George Okello
JUDGE

