

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CIVIL SUIT NO. 229 OF 2011**

DOROTHY

TUMA :::PLAINTIFF

VERSUS

1. ELIZABETH MULLER

2. TIBASHOBOKA

WYCLIFF:::DEFENDANTS

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGMENT

The Plaintiff brought this claim against the Defendant for: A declaration that the Defendant’s actions on the suit land are illegal and in violation of the Plaintiff’s Constitutional and legal right to peaceful enjoyment of her property (kibanja) comprised in Mengo Block 444 Plot 1496 situate at Nkumba continuously being antagonized by the Defendants; An order for a Permanent Injunction restraining the Defendants and/or their agents/ servants/employees from entering the suit land any manner whatsoever; A declaration that the Plaintiff is entitled to general and Exemplary damages as a result of the Defendant actions;A declaration that the Plaintiff is entitled to interest above 27% from date of cause of action until payment in full and a declaration that the Plaintiff is entitled to Costs of the suit.

Brief Facts

The facts of this case are that Plaintiff is a registered proprietor of the land comprised in Busiro Block 444 Plot 1496 land at Nkumba formerly part of Busiro Block 444-445 Plot 359. The Plaintiff alleges that she purchased the suit land from one Alexandra Kanyonyozi in 2003 who was the registered proprietor of the land and upon execution of the purchase agreement between the Plaintiff and

former owner, the Plaintiff immediately took possession of the Suit land by fencing it off. The Plaintiff states that she has been enjoying quiet possession of the suit land from 2003 until sometime in 2011 when the Defendants entered the land, fenced it off and ferried construction materials threatening to commence construction on the Plaintiff's land claiming that it was part of their Kibanja. This necessitated the Plaintiff to sue them.

According to the Defendants, they contend that the 1st Defendant has a Kibanja over the suit land having purchased the same from one Kawuma Hakim on the 14th day of October 1998 and the 20th of November 1998. The 1st Defendant claims that she carried out some Agriculture on the suit land until 2000 when she left the Country for the United Kingdom. Therefore, the Defendants contend that the Plaintiff's interest in the suit property is subject to the Defendant's Kibanja interest.

In this suit, the Plaintiff is seeking for orders against the Defendants for;

- a) A declaration that the Defendant's actions on the suit land are illegal and are in violation of the Plaintiff's constitutional and legal right to peaceful enjoyment of her property.
- b) A permanent injunction stopping the Defendants or their agents/servants/employees from trespassing on the suit land any manner whatsoever.
- c) General and exemplary damages.
- d) Costs of the suit.
- e) Interest on (c) and (d) above at 27% from date of cause of action until payment in full.

At the preliminary hearing of this suit, I requested the parties to schedule the matter and the parties agreed on the issues for determination before this Honourable Court as;

1. Whether the 1st Defendant holds any Kibanja interest in the Suit Land.
2. Whether the Defendants trespassed on the Suit Land.
3. Remedies available to the parties.

The Plaintiff was represented by Learned Counsel Mr. Kankaka Ali of Kyazze, Kankaka and Co. Advocates whilst the Defendant was represented by Counsel. Wabwire Anthony of Kashillingi, Rugaba and Associates.

Before I proceed to consider the Issues raised by the parties, I have a few observations to make.

The Defendants had filed a Written Statement of Defence in response to the Plaintiff's Plaint. The 1st Defendant alleged in Paragraph 4(a) of the Written Statement of Defence in 1998, she bought the Kibanja of approximately 16.5 acres from one Mr. Kawuma Hakim at a consideration of **UGX 6,000,000 (Six Million Uganda Shillings)** and signed the sales agreement. The Sale Agreement was marked as **Annexure "A"**. (the Defendants list of documents). In addition, the 1st Defendant stated that in 1998, she further bought 14.5 acres of kibanja from Mr. Kawuma Hakim at a consideration of **UGX 4,500,000 (Four Million, Five Hundred thousand Uganda Shillings Only)** and a sales agreement was executed as between them. The Sale Agreement was marked as **Annexure "B"**. (the Defendants list of documents).

The 1st Defendant alleged that since she bought the suit land in 1998, she has been carrying on Agricultural activities. The Defendants contended that they have for the past 13 years been enjoying undisturbed possession and utilization of the suit land until April 2011 when the 1st Defendant noticed that one Alfred Ibingira (the Plaintiff's worker) through his agents was encroaching on the 1st Defendant's kibanja.

The Defendants averred that the Plaintiff's registered interest is subject to the Kibanja interest of the 1st Defendant and sought a Declaration that the 1st Defendant is not a trespasser but a bonafide Kibanja holder.

Counter- Claim

The 1st Defendant brought a Counter-Claim to the effect that she has an interest on the suit land as a kibanja holder. The 1st Defendant also averred that the Plaintiff purchased the suit land to the Kibanja interest of the 1st Defendant. It was the Defendants claim that they are entitled to

general damages arising from the great inconvenience and disturbance arising from the abuse by the Plaintiff to the 1st Defendant's right to quiet enjoyment of her Kibanja. The Defendants contended that the Plaintiff is not entitled to any prayers in the Plaint.

Prayers in the Counter- Claim

1. A Declaration that the 1st Defendant is a bonafide owner of a Kibanja on the suit land and that the Defendants are not trespassers.
2. A Declaration that the Plaintiff acquired her interest subject to the Kibanja interest of the 1st Defendant.
3. A Permanent Injunction restraining the Plaintiff from continuous harassment to the Defendants.
4. General damages for inconveniences and disturbances arising from the abuse of the 1st Defendant's right to quiet enjoyment of her Kibanja.
5. Costs of the suit.

Submissions by Counsel Kankaka on the Counter-Claim.

Counsel Kankaka submitted that on 8/7/013 when the matter was fixed for scheduling, the Court directed parties to file Written Statements. The Plaintiff did file the same and served the Defendants but the Defendants never filed their Written Statements. Moreover, the Defendants were to serve the Plaintiff with some documents including; the letter of 2/11/11 and the translated copies of the Sale Agreement which they never did.

Counsel for the Plaintiff, Mr. Kankaka, asked this Honourable Court to dismiss the Defendants Counter- Claim with costs Pursuant to O.9 Rule 20 (1), O.17 Rules 3 & 4 of the Civil Procedure Rules S.I.71-1. It was also Counsel Kankaka's prayer that the Plaintiff is allowed to proceed *Exparte*.

The gist of this prayer was that this matter was adjourned in the presence of Counsel Wabwire, for the Defendants, with specific Orders of Court to be complied with. However, the Defendants never adhered to the Orders of Court and have never appeared in Court to explain why they did not

comply with the said Court Orders. Counsel Kankaka noted that Court Orders have to be obeyed as judicial Orders are central in the administration of justice. In addition, Counsel Kankaka submitted to Court that this matter has been pending since 2011 and that the Plaintiff and her Counsel have been diligent in attending Court.

Ruling on the dismissal of the Counter-Claim and the prayer on proceeding *Exparte*

Upon careful perusal of the cited Orders for dismissal of the Counter-claim and prayers for proceeding *Exparte*, I found them to be relevant and considering the fact the Defendant's Counsel has never been prudent to comply with Court Orders as Counsel for the Plaintiff has already cited. I also noted that this matter has been pending since 2011. For the foregoing reasons, I allowed the Plaintiff to proceed *Exparte* and dismissed the Defendants Counter- Claim Pursuant to Section 98 of the Civil Procedure Act Cap 71, O.9 Rule 20 (1), O.17 Rules 3 & 4 of the Civil Procedure Rules S.I 71-1. (See the detailed Ruling on the file).

Although this suit was for formal proof and it proceeded *ex parte* the law is that whether a suit proceeds *ex parte* or not, the burden of the Plaintiff to prove his/her case on the balance of probabilities remains. **(See *Yoswa Kityo V Eriya Kaddu [1982] HCB 58*).**

The testimonies of the Plaintiff's witnesses.

Dorothy Tuma (PW1) (Plaintiff), the Director DMT Consultants Uganda Limited testified that on 17th April 2003, she entered into a purchase Agreement with Alexandra Kenyonyozi Ibingira who was a registered owner of a large piece of land comprised in Block 444-445 Plot 359 at Nkumba. Under the said agreement the Plaintiff purchased 3(three Acres) at a total cost of **UGX 18,000,000 (Eighteen Million Uganda Shillings Only)**. A copy of the Purchase Agreement was tendered in Court and marked as P.Exh.1. According to PW1, at the time of execution of the purchase Agreement and taking possession of the suit land in 2003, the vendor handed over to her vacant possession of the 3 acres which was indeed vacant without any development whether agricultural or otherwise. The survey was done and mark stones were fixed to delineate the

suit land from the rest of the vendor's land without any resistance or complaint from any party on the ground. Upon taking possession, she fenced off the suit land and appointed Paddy Kitaka as the caretaker since the Plaintiff was not a resident of Nkumba. This still was done with no objection from any person whatsoever.

PW1 testified that in 2006, the process of subdividing the land was completed and a Certificate of Title for the suit land comprised in Busiro Block 444 Plot 1496 was issued on or about the 20th of July 2006. PW1 further testified that upon successful subdivision of the land and issuance of the Certificate of Title, Transfer forms for the suit land were executed in her favour in accordance with the terms of the purchase agreement. According to PW1, in February 2008, the transfer of the suit land into her names was completed. A copy of the Certificate of Title for the suit land was tendered in Court as evidence and marked as P.Exh.2.

It was PW2's testimony that sometime in August 2011 she was informed by Mr. Paddy Kitaka that unknown persons were fencing off a big chunk of land including the suit land and that the unknown people had blocked any further access to the land as well as the neighboring plots. PW1 testified that she reported the matter to Entebbe Police and a file for Criminal Trespass by unknown persons was opened. PW1 testified that later on, Mr. Odong, the CID Officer attached to Entebbe Police Station informed her that it was the Defendants who were fencing off the land purporting to be the Kibanja holders. It was PW1's testimony that while waiting for the police to carry out investigations, the Defendants sometime in September 2011 came to the suit land the 2nd Defendant wielding a pistol in the presence of the caretaker and police together with his agents started clearing the suit land alleging to commence construction. PW1 testified that when the police informed the Defendants of the Plaintiff's proprietary rights, they were not bothered as they alleged that their issues had been resolved by the Entebbe Resident Commissioner's office (RDC).

PW1 further testified that all attempts by Police to have the Defendants cease their operations until the matter is investigated were futile. Instead, the Defendants began ferrying construction materials to the suit land and even removed the Plaintiff's barbed wire. It was PW1's testimony that the obstinate, illegal and disregard of the law by the Defendants has caused her mental anguish, annoyance, great losses and inconvenience.

Alfred Ibingira (PW2), Consultancy worker and a Resident of Bugolobi, Nakawa Division Kampala testified that he got to know Tuma Dorothy (PW1) in 2003. PW2 testified that he knew the Defendants only by name since they had never met physically. PW2 testified that it was on 17th March 2003, when the Plaintiff purchased a plot of land measuring approximately 3 acres from his sister, Alexandra Kenyonyozi Ibingira through a purchase agreement. It was PW2's testimony that Ms. Alexandra Kenyonyozi Ibingira was represented by Mr. Mathias Sekatawa under the authority of Power of Attorney and the Plaintiff was represented by her brother Mr. Ezekiel Tuma also under the authority of the Power of Attorney because both Parties were not present at the time of signing the agreement. PW2 testified that his sister, Alexandra Kenyonyozi was the registered owner of the large piece of land comprised in Block 444-445 Plot 359 land at Nkumba out of which she sold the suit land to the Plaintiff in accordance with the terms of the agreement where PW2 on behalf of the vendor received the purchase price from the Plaintiff. PW2 further testified that at the material time when the Plaintiff took possession of the suit land in 2003, the entire piece of land was not occupied by any Kibanja holder, Squatters or any third party's interest whatsoever. In fact it was vacant without any development whether agricultural or otherwise.

PW2 further told this Honorable Court that subsequently, a Certificate of Title for the suit land was issued and transferred from, Ms. Alexandra Kenyonyozi to the Plaintiff. According to PW2, there was no issue on the Suit land until 2011 when the Defendants appeared suddenly unknown to him, his sister or any other person authorized to deal with the said land and begun fencing off a large piece of land belonging to several persons who had also purchased the same from his sister claiming that they had a Kibanja interest measuring approximately 27 acres on the land Block 444-445 Plot 359 at Nkumba. It was PW2's testimony that in 2012, the 1st Defendant purported to sell her alleged Kibanja interest by forging her signature claiming that she had agreed to sell to her the interest since she was a bonafide occupant. PW2 testified that on learning about the said forgery, he reported and filed a case of Forgery and Uttering False Documents at Entebbe Police station upon which the 1st Defendant was arrested and charged.

PW2 testified that despite all the attempts by Police to have the Defendants cease their operations until the matter is investigated were futile because the

Defendants have continued to fraudulently deal in the alleged Kibanja in total defiance of Court Orders and Police caution. PW2 further testified that the progress of the case had been hampered with because the 1st Defendant jumped bail and was not appearing in Court.

Odongo James (PW3), a Police Officer at rank of D/CPL and a resident of Entebbe Municipality, Wakiso District testified that he got to know the Plaintiff in 2011 while in the course of his duties at Entebbe Police Station. PW3 testified that the Plaintiff reported to him a Criminal Trespass case on her land comprised in Busiro Block 444 Plot 1496 at Nkumba by unknown persons. PW3 stated that he began investigations and found that a large chunk of land had been fenced off the Plaintiff's plot inclusive as identified to him by Kitaka Paddy (the Plaintiff's caretaker). PW3 testified that when he inquired from the employees who were fencing off the land, he was informed that their bosses (the Defendants) were within Entebbe and that they were to join them later.

It was PW3's testimony that on his next surveillance, he met the Plaintiff's care taker (Mr. Kitaka Paddy) along with the Plaintiff's Lawyer, Mr. Ali Kankaka inspecting the Land as well. PW3 testified that shortly after his arrival, the Defendants arrived in a car together with other three people and the 2nd Defendant threatened to use violence at the scene until PW3 identified himself as a Police Officer and thereafter, two Defendants introduced themselves as the rightful Kibanja owners measuring approximately 27 acres. According to PW3, the Defendants also had in their possession documents indicating that they were coming from a meeting with the RDC's Office and stated that the matter was being handled by the RDC in conjunction with the Ibingira's family who had sold the suit land to the Plaintiff and all the other owners of the entire disputed land. PW3 further testified that he informed the Defendant's that they had to go to the Police Station to make statements but all fell on deaf ears. PW3 testified that upon calling the Defendants, they informed him that the matter was being handled by the RDC's Office and asked him not to bother himself with the matter.

Kitaka Paddy (PW4) farmer and member of the security committee of Nkumba Bendegere LC I since 1993 testified that he got to know the Plaintiff in 2003 after she purchased the suit land. PW4 testified that himself alongside other people

helped the Plaintiff to erect a barbed wire fencing off her land. According to PW4, the Plaintiff appointed him as a care taker of her land. PW4 stated that at the time when the Plaintiff bought the Suit land, it was vacant and without and development whether agricultural or otherwise. According to PW4, the suit land was part of the big chunk of land belonging to the Ibingira family.

PW4 testified that in August 2011, the Defendants along with their workers began fencing off a big chunk of land the suit land inclusive which prompted him to call the Plaintiff who then reported the matter to the Police Station and filed a case against the Defendants. Pw4 further testified that the first day when he took the investigating Officer for inspection, they found only the employees of the Defendants on the suit land but on the next day on arrival, the 2nd Defendant who was carrying a pistol threatened to shoot them for trespassing on their Kibanja until Mr. Odongo James introduced himself as a Police Officer and informed them that they were required to report to the Police Station for a Criminal Trespass Charge which had been filed against them by the Plaintiff. It was PW4's testimony that upon hearing of the Criminal Trespass preferred against them, the Defendants took out some documents explaining that the matter was being handled in the Entebbe RDC's office along with the Ibingira's family.

It was PW4's testimony that since then, the Defendants have continued with their illegal activities of trespassing on the Plaintiff's land in that some time on 8th March 2012, the Defendants removed the barbed wire. PW4 further testified that on 25th May 2013, the Defendants attempted to clear the suit land but he successfully stopped them since there was a Court order halting commencement of any activity on the suit land.

Amvuku Richard (PW5), Police Officer with the Uganda Police Force at the rank of D/Sgt and a resident of Entebbe Police Barracks, Entebbe Municipality testified that he only knew the Plaintiff by name and got to know the Defendant in the course of his duties as a police officer at the Entebbe Police Post sometime in July 2012. PW5 testified that the case before this Honourable Court was in relation to a case of Forgery and Uttering False documents reported by Mr. Alfred Ibingira (PW2) through his agent Mr. Kananura Ronnie upon which the 1st Defendant was arrested to assist with the investigations.

PW5 further testified that the exhibits were sent to a handwriting expert at the Forensic Headquarters for examination by D/AIP Mwesigye and it was established that the sample of questionable documents was forged by Elizabeth Muller (the 1st Defendant). A Copy of the forensic report was tendered in as evidence and Marked **Annexure “A”**. According to PW5, he prepared the details of the findings contained in the Police report and the same was signed off by his boss Mr. Sentamu Joseph, the Entebbe Divisional CIID Officer on the request of Mr. Ibingira Alfred. A copy of the said report was also tendered in as evidence marked **Annexure “B”**.

PW5 testified that the 1st Defendant was charged with Forgery and Uttering of False documents in the Entebbe Chief Magistrate however, the progress of the case had been hampered by the fact that the 1st Defendant had been granted bail but was not appearing in Court.

I now turn to the submissions of Counsel Kankaka on the Issues raised.

Counsel for the Plaintiff, Mr. Kankaka Ali of Kyazze, Kankaka and Co. Advocates argued each of the issues separately, that is;

- 1) *Whether the 1st Defendant holds any kibanja interest in the suit land.*
- 2) *Whether the Defendants trespassed on the suit land.*
- 3) *Remedies to the Plaintiff.*

Issue 1

Whether the 1st Defendant holds any kibanja interest in the Suit Land

The Plaintiff's main argument was that the 1st Defendant's Counter-Claim allegation as a Kibanja holder was wild and unfounded. It was Counsel Kankaka's submissions that the 1st Defendant claimed under paragraph 4 (b) of her Written Statement of Defence to have acquired a Kibanja interested over the disputed suit land by purchase of the same as evidenced by annextures "A" and "B" to the Written Statement of Defence. The said annextures were photocopies of the alleged sale agreements in Luganda and there was no translation attached thereto. Neither did the Defendants tender in Court the original copy despite the sufficient time given to him to do so. Counsel for the Plaintiff cited Section **88 of**

the Civil Procedure Act Cap 71 which states that the language of all Courts shall be English and that all evidence in all Courts shall be recorded in English. Counsel for the Plaintiff also relied on the case of **Godfrey Katunda vs. Betty Atuhaire Bwesharire HCMA No. 185 of 2004 (Unreported)** where Justice P.K Mugamba held that,

“That English is the language of Court needs no emphasis. So clearly the attachments are of relevance to Court as long as they are in a different lingo. There is no way this Court can discern them to arrive at the relief sought after in the absence of any translation.”

It was Counsel Kankaka’s submissions that in the absence of any proof of owning/purchasing the alleged Kibanja, it is clear that neither of the 1st Defendant nor the 2nd Defendant can legally claim to have a Kibanja interest over the suit land. Counsel Kankaka noted that the Defendants’ claim that the 1st Defendant purchased the Kibanja interest measuring approximately 27 acres over the suit land in October 1998 meant that she could only have acquired the alleged Kibanja under the provisions of the 1998 Land Act Cap 227 as Amended under **Section 29(1) (b)** of which defines a Lawful Occupant to mean a person who entered the land with the consent of the registered owner, and includes a purchaser. Therefore, to determine whether the 1st Defendant had a kibanja or was Lawful Occupant, he or she must prove that he entered the land with the consent of the registered owner. Counsel Kankaka relied on the case of **Mugerwa & Anor vs. Kiganda HCCA No.9 of 2012 (unreported)** while addressing the import of Section 29 (1) (b), Justice Monica K. **Mugenyi** stated that,

“ the provisions of section 29 (1) (b) are such that a claimant there under should have entered on to the land in question with the consent of the registered owner. Occupation of the land with the alleged knowledge but not consent of the registered owner would not prescribe a claimant as a Lawful Owner within the meaning of that legal position.”

The position above was also emphasized by the Supreme Court in the case of **Muluta Joseph vs. Katama Sylvano SCCA No. 11 of 1999** cited with approval in **Mugerwa & Anor vs. Kiganda (Supra)**, where it was held that,

“An agreement purporting to sell and transfer a Kibanja holding was not sufficient proof of acquisition of a lawful Kibanja holding in the absence of proof

of the essential fact that would have constituted creation of the Kibanja holding namely consent of the mailo owner. ”

It was Counsel Kankaka’s submissions that there was nothing on record to prove that the 1st Defendant sought such consent of the then registered owner (Alexandra Kenyonyozi Ibingira) before the alleged purchase and entry on the suit land. PW2’s testimony was very instructive on the land in question. PW2 testified that the suit land had always been unoccupied and that the Defendants were neither known to him nor his family members Ms. Alexandra Kenyonyozi Ibingira inclusive.

Further, Learned Counsel Mr. Kankaka in his submissions submitted that the Defendants in their pleadings did not inform Court how the alleged vendor Mr. Kawuma Hakim came to own the 27 acres of kibanja and proof of his rights over the same. He relied on the case of ***Mugerwa vs. Kiganda (supra)*** where the Learned Judge found that the claimant was not a Lawful Occupant of the suit land because the Respondent failed to prove that his predecessors were Lawful Occupants of or Kibanja holders on the suit property.

Abandonment of the alleged Kibanja.

In resolving this sub issue, Counsel Kankaka submitted that even if the 1st Defendant could prove that she acquired and properly entered the land as a Kibanja owner, by law, she is deemed to have abandoned the alleged Kibanja. The law does not provide or envisage an absentee Kibanja owner as the kibanja interests are premised on occupancy of another person’s registered land.

Counsel for the Plaintiff cited **Section 37 (1) (a) and (2) (b)** of the Land Act Cap 227 as Amended which stipulates that where a tenant by occupancy voluntarily abandons the occupancy, the occupancy shall lapse. Abandonment of occupancy is defined therein to mean where a tenant by occupancy leaves the whole of the land unattended to by him or herself or a member of his family or her authorized agent for three years or more. There was ample evidence on record to prove that whatever the 1st Defendant’s interests may have been, the same were lost/ extinguished due to abandonment of the alleged occupancy.

Counsel Kankaka pointed out the 1st Defendant’s Affidavit in Reply in **Miscellaneous Application No. 529 of 2011**(which was an application for an Interim Order) marked as exhibit PEXH.6, under paragraph 5, she stated that she

carried out agriculture on the suit land until 2000 when she became a resident of the United Kingdom. This corroborated the Plaintiff's evidence (PW1) under paragraph 4 that upon execution of the Purchase Agreement in 2003, the vendor handed over vacant possession of the suit land. The Plaintiff further stressed in Paragraph 5 that the suit land was vacant without any developments whether agricultural or otherwise. The Plaintiff further testified under paragraphs 6, 7 and 8 that she had the suit land faced with no objection from any one, Transfer forms were signed and a copy of the Certificate of Title for the suit land issued to her.

Learned Counsel submitted that Alfred Ibingira (PW2), in his testimony under paragraph 4 stated that at the time the Plaintiff took possession of the Suit Land in 2003, it was vacant without any development whether agricultural or otherwise which all pointed to the fact that the 1st Defendant was never on the Suit land by the time the Plaintiff acquired her interest on the same land.

Materials contradiction with regard to the size of the alleged kibanja.

Mr. Kankaka submitted that the alleged Kibanja interest on the suit land was not only a suspicion but also a very mysterious one. According to paragraph 4 (a) of the Written Statement of Defence, it was alleged that the 1st Defendant purchased 16.5 acres of kibanja on the 14th of October 1998 and yet in paragraph 4 (b) it was further alleged that she purchased another 14.5 acres of kibanja on the 20th of October 1988 which gives a total of 31 acres of Kibanja! The Defendants again in a sudden turn of events alleged in paragraph 4 (c) that the 1st Defendant purchased a total of 27 acres of Kibanja. Learned Counsel for the Plaintiff submitted that the only logical explanation was that the alleged Kibanja was fraudulently concocted by the Defendants and poorly assembled before this Honorable Court with a sole purpose of defeating the Plaintiff's legitimate and Constitutional right to her property.

Fraudulent conduct of the Defendants.

Learned Counsel for the Plaintiff relied on the testimony of PW5 who stated that the 1st Defendant was of a fraudulent character as exhibited in his evidence. PW5 testified that that the 1st Defendant had forged a purported agreement between PW2 and herself in relation to the alleged kibanja on the suit property sometime back. It was PW5's testimony that because the 1st Defendant forged the purported agreement, she was arrested and prosecuted before the Entebbe Chief Magistrate which she jumped bail. In addition, Mr. Kankaka submitted that

it was unequivocally clear that the 1st Defendant never enjoyed a Kibanja interest in the suit property and her attempts to perfect her fraud ended in disaster as she was arrested, charged, jumped with bail which explains her ceased participation in the proceedings before this Honourable Court.

In his final submissions on whether the 1st Defendant holds any Kibanja interest in the suit land, Counsel Kankaka invited this Honourable Court to find in the negative.

Issue 2

Whether the Defendant trespassed on the Suit land

Regarding this issue, Counsel for the Plaintiff submitted that the Plaintiff as the registered owner of the land in 2003, fenced off her land immediately after she purchased it. Counsel Kankaka invited this Honourable Court to review the testimony of PW2 and PW4 to be corroborative to that of PW1. The Plaintiff testified that in August 2011, she was informed by Paddy Kitaka (PW4) that unknown persons were fencing off a big chunk of land the suit land inclusive. According to PW1, she took the Police Officer Mr. James Odongo to the suit land for inspection after which she filed a Criminal Trespass case with the Entebbe Police Post against the Defendants.

According to James Odongo (PW3), he testified that he came to know the Plaintiff in 2011 when she reported a Criminal Trespass case to her land comprised in Busiro Block 444 plot 1496 under Police file no. 49/18/2011 whereof after carrying on an inspection, he found a large piece of land including what was identified to him as the Plaintiff's land. It was Counsel Kankaka's submissions that PW3's testimony was that when he went back to the suit land on another day, the Defendants arrived in a car and introduced themselves as the rightful owners of a kibanja measuring approximately 27 acres.

The 1st Defendant in paragraph 7 of her Affidavit in Reply in **Miscellaneous Application No. 529 of 2011** stated that she started fencing off her kibanja and ferrying construction materials. This is corroborated by paragraph 5 (f) of the Plaintiff which is to the effect that the Defendants commenced ferrying construction materials like sand and stones onto the suit land. The photographs showing the same were admitted in evidence and marked as P.Exh3.

Mr. Kankaka relied on the case of ***Justine E. M. N Lutaaya vs. Stirling Civil Engineering Company Ltd SCCA No. 11 of 2002 (unreported)*** where Justice Mulenga J.S.C defined trespass to land as:

“Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person’s lawful possession of that land.”

In his submissions, Counsel for the Plaintiff submitted that the Plaintiff had proved that the Defendants trespassed on her land and interfered with her peaceful enjoyment and possession of the suit property. He cited the case of ***Mugerwa & Anor vs. Kiganda (supra)*** where it was held by Justice Monica K. Mugenyi that;

“Having found that the Respondent has not proved having any legally recognized interest in the suit land, it would follow that his unauthorized entry upon the suit land constituted the tort of trespass to land.”

Basing on the above submissions and authorities, Counsel for the Plaintiff submitted that the Defendants had no right whatsoever to enter the Plaintiff’s property and as such had committed trespass on the suit property. Counsel Kankaka prayed that this Honourable Court answers this issue in the affirmative.

Issue 3

Remedies to the Plaintiff

Learned Counsel Mr. Kankaka prayed that judgment be entered against the defendants jointly and severally.

- a) A Declaration that the Defendants’ actions on the suit land are illegal and in violation of the Plaintiff’s constitutional and legal right to a peaceful enjoyment of her property.
- b) A Permanent Injunction does issue stopping the Defendants and/or their agents/ servants from trespassing on the suit land in any manner whatsoever. (***See the case of Mugerwa & Anor vs. Kiganda (Supra)***).
- c) **Prayer on general damages**

Learned Counsel Mr. Kankaka stated that its trite law that general damages are awarded at the discretion of Court and are always as the law will presume to be the natural consequences of the Defendant's act or omission.

He cited the case of ***Katakanya & others vs. Raphael Bikongoro HCCA No.12 of 2010*** where Court observed that,

“General damages are awarded at the discretion of Court, and are as always as the law will presume to be the natural consequences of the defendant's act or omission. In the assessment of the quantum of damages, courts are guided mainly inter alia by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach..... Further still, general damages need not be specifically pleaded, particularized and proved before they can be awarded since they are as the law will presume to be the direct natural or probable consequence of the act or omission complained of. ”

Counsel submitted that the Plaintiff prayed for general damages relying on paragraph 6 of the Plaint where she stated that because of the Defendant's conduct, she had been exposed to great inconvenience, psychological suffering and mental anguish. That the fencing off of her land in 2011 by the Defendants and reporting of the matter to the Entebbe Police Post exposed her to fear, consumed her time and money in following up the case.

Counsel prayed that **UGX 60,000,000/= (Sixty Million Uganda Shillings Only)** as appropriate value for general damages.

It is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental stress, pain and suffering. General damages must be pleaded and proved. (***See Kampala District Land Board & George Mitala V Venansio Babweyana SCCA 2/2007; Assist (U) V Italian Asphalt & Haulage & Another HCCS 1291/1999; Moses Kizige V Muzakawo Batolewo [1981] HCB***). It must be noted that general damages are compensatory in nature in that they should

offer some satisfaction to the injured Plaintiffs. (***See URA vs. Wanume David Kitamirike Civil Appeal No. 43.2010***)

In the instant case the plaintiff cannot be without the remedy of an award of general damages where it has been proved to this Court that she has been denied her suit land by the Defendant. The Plaintiff must have clearly suffered inconvenience in terms of being dispossessed of her property and trying to claim it. The plot (suit Kibanja) is located in Mengo situate at Nkumba division in Kampala district where the demand for real property is high. I would in the premises, award the Plaintiff general damages of **UGX 60,000,000/= (Sixty Million Uganda Shillings Only)**.

d) **Prayer on exemplary damages**

“As is very well known, the function in the civil law is to compensate, while the function of the criminal law is to inflict deterrent and punitive penalties. Damages for breach of contract and tort are, or ought to be, fixed at a sum which will compensate the Plaintiff. In the case of tort, the damages should be fixed at a sum, so far as money can do so, to compensate the victim for all the injury which has been suffered. This compensation sum may be enhanced to cover the loss suffered as well as the injury to the Plaintiff’s feelings and reputation. On the other hand, there is the loss to the Plaintiff, and on the other, there is the conduct of the Defendant. The latter may have acted in a high-handed, insulting, malicious or oppressive manner. But then as tort is a wrong done to the Plaintiff, how would the Court prevent a wrong done repeatedly in disregard of the plaintiff’s rights? The notion arose that a further sum in damages could be meted out by way of punishment, or by making an example of the Defendant’s conduct. Hence this extra sum may be called punitive or exemplary damages”. See ***Esso Standard(U) Ltd v Semu Amanu Opio (Civil Appeal No.3 Of 1993)***,

The position of the law concerning exemplary damages is that they must be specifically pleaded together with the facts relied on. ***See Kasule v. Makerere University [1975] HCB 76; Beatrice Nakaye v. Kampala***

Municipal Council & A' nor [1972] HCB 11; Esso Standard Ltd. v. Semu Amanu Opio, S.C.C.A No. 69 1993.

It is necessary to plead a claim for exemplary damages so as to enable Court to form a view of the flagrancy of the Defendant's acts or omission, and the Plaintiff should give an indication that such damages should be awarded on inquiry as quantum. ***See Ongom v. Attorney General. [1979] HCB 267.***

Similarly, in the case of ***Vincent Okello Versus Attorney General (1995) III KALR 129*** which quotes the cases of ***Obonyo Vs. Municipal Council of Kisumu [1971] EA 91, KCC Vs. Nakaye [1972] EA 446*** and ***Joseph Lukwago Vs. AG HCCS No. 1156 of 1988*** in which the principles governing an award or otherwise of exemplary damages were set out as follows.

1. *The conduct of the servant of the defendant towards the plaintiff was oppressive, arbitrary, high handed or even unconstitutional; or*
2. *The conduct of the defendants servant was calculated by him to make profit for himself which may well exceed the compensation payable to the plaintiff; or*
3. *Where it is provided by law "Even in those situations, court still had to consider whether the plaintiff was the victim of the punishable behaviour. Ultimately, the court has discretion in the award of exemplary damages".*

Mr. Kankaka submitted that exemplary damages according to the **Black's Law Dictionary 9th Edition at pages 446 and 448** are defined as; *"damages awarded in addition to actual damages when the Defendant acted with recklessness, malice or deceit assessed by way of penalizing the wrong doer."*

Counsel also cited the case of ***Esso Standard (Uganda) Limited vs. Semu Amanu Opio SCCA No. 3 of 1993*** (Unreported), where the Supreme Court held

that exemplary damages can properly be awarded to teach a wrong doer that tort does not pay.

In support of the above, Learned Counsel stated that from the evidence of Richard Amvuku (PW5) a Police Officer and the Forensic Expert report by D/AIP admitted into evidence as P.Exh4 and P.Exh5 respectively, the Defendants, by perpetuating fraud and a criminal scheme of attempting to illegally assert the alleged kibanja interest over the Plaintiff's land forged Alfred Ibingira's signature in respect of a sale agreement that purported to sell off the Plaintiff's legal interest in the suit property. Mr. Kankaka prayed that the Plaintiff be granted exemplary damages for the recklessness, malice, deceit and illegal conduct exhibited by the Defendants.

I must point out that exemplary damages are 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. They are also awardable for the improper interference by public officials with the rights of ordinary subjects. Exemplary damages focus on the Defendant's misconduct and not the injury or loss suffered by the Plaintiff. They are in nature akin to a fine being imposed to appease the victim and discourage revenge. They also act as a warning to society that similar conduct will always be an affront to society's and also the Court's sense of decency. They may also be awarded to prevent unjust enrichment. They are awardable with restraint and in exceptional cases, because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract. **(See *Uganda Revenue Authority vs Wanume David Kitamirike CIVIL APPEAL NO.43 OF 2010*).**

In my opinion, I award the exemplary damages of **UGX. 10,000,000 (Ten Million Uganda Shillings Only)** as exemplary damages.

e) **Prayer for cost of the suit and interest**

Counsel prayed that the Plaintiff be awarded costs for the suit from the date of judgment at an interest of 27%, and interest on the general damages and

exemplary damages at the rate of 27% from the date of cause of action till payment in full.

The Plaintiff prayed for interest of 27% per annum from the date of judgment till payment in full. The principle is that interest is awarded at the discretion of Court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case. **See Uganda Revenue Authority v. Stephen Mbozi, S.C.CA No 01 of 1996, Liska Ltd.v.De Angelis [1969] E.A 6; National Pharmacy Ltd v. KCC [1979] HCB 256; Superior Construction & Engineering Ltd v. Notay Engineering Ltd. HCCS No. 24 of 1992.**

Section 26 (2) CPA cap 71 provides that;

(1) Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

In the case of Kimani Versus Attorney General (1969) EA 502, this was a case in which the Respondent was completely deprived both of ownership and possession of the land by the Kenyan government. The Court held that since the Respondent did not receive the value of the land on dispossession he should be awarded interest at 8% p.a from the date of dispossession until judgment.

Sir Charles New Bold P held that:-

“It’s obvious however that the plaintiff should have received the value as at the date of possession. He did not and his failure to

receive the compensatory damages on the date is normally met by the award of interest on the figure.”

An award of interest by a Court is governed by the provisions of S.26 (2) of the Civil Procedure Act which gives a particular Court the discretion to award interest as it deems fit although the discretion has to be exercised judiciously. **(See Superior Construction and Engineering Ltd v Notay Engineering Industries (Ltd) High Court Civil Suit No 702 of 1989).**

The basis of an award of interest is that the Defendant has kept the Plaintiff out of money and the Defendant has had to use it himself. So he ought to compensate the Plaintiff.

Section 27 (1) CPA cap 71 provides that;

(1) *Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.*

Further in the case of **Jennifer Behinge, Rwanyindo Aurelia, Paulo Bagenzi Vs School Out fitters (U) Ltd CACA No. 53 of 1999 (UR)**, Court held that,

“A successful party is entitled to costs unless there are good reasons to deny such party costs.”

It is however imperative to note that the discretion thus given to the court like other similar discretions must be exercised judicially and so we pray. In the case of **Kiska Limited V De Angelis [1969] EA 6**, the Justices of Appeal held that;

“With great respect, I can find no ground for depriving the successful defendant of his costs in this matter and in the absence of good reason he is entitled to them.”

Counsel Kankaka Prayed that this Honorable Court judicially exercises its discretion and award costs of the suit to the Plaintiff.

There is no reason to deny the successful Plaintiff who is the successful Party costs. In the premises, I am satisfied that the Plaintiff has formally proved his claim against the Defendants to the required standard of proof. I accordingly award the Plaintiff the costs in this cause. Consequently, Judgment is entered for the Plaintiff in the following terms:-

- 1) It is declared that the Defendants’ actions on the suit land are illegal and in violation of the Plaintiff’s Constitutional and legal right to a peaceful enjoyment of her property.
- 2) A permanent injunction issue restraining the Defendants, its agents, assigns, representatives from further interfering with the Plaintiff’s Constitutional and legal right to a peaceful enjoyment of her property.
- 3) General damages of UGX 60,000,000/= (Sixty Million Uganda Shillings Only)**
- 4) Payment of exemplary damages of UGX 10,000,000/= (Ten Million Uganda Shillings Only).**
- 5) An order that the Plaintiff is entitled to interest from time the suit land was taken till payment in full at the rate of 27%.
- 6) Costs of the suit are awarded to the Plaintiff.

Signed:.....

HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

J U D G E

5TH FEBRUARY, 2014