

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 1471 OF 2014

JOHN KIVUMBI

..... **PLAINTIFF**

VERSUS

KAMPALA CITY COUNCIL

..... **DEFENDANT**

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

In 1995 the World Bank advanced a loan to the Defendant for the redevelopment of St. Balikuddembe Market (formerly Owino Market). Under the loan agreement, the World Bank would meet the cost of developing the infrastructure and main structures of the market; while the market vendors, under the Market Development Steering Committee, were responsible for the construction of shops in areas specifically allocated to each of them for that purpose. Under that arrangement, in 1996 the Plaintiff constructed a storeyed shop at St. Balikuddembe Market but upon completion thereof the Defendant allegedly took over the ground floor of the shop and let it out to other vendors without any compensation to the Plaintiff. To date, the said vendors continue to utilise the ground floor of the shop (hereinafter referred to as ‘the suit premises’) and pay rent to the Defendant.

In a joint Scheduling Memorandum dated 25th October 2013, the parties framed the following issues for determination:

1. Whether the suit is time-barred by law.
2. Whether the suit is *res judicata* by reason of a Consent Judgment that was filed in **High Court Civil Suit No. 947 of 2001**.
3. Whether the Plaintiff has any proprietary interest in the market.
4. Whether the Defendant permitted the Plaintiff to construct a shop in Owino Market for his exclusive ownership and use.

5. Whether the Defendant unlawfully deprived the Plaintiff of the shop premises described in the Plaintiff.
6. Whether the Plaintiff is entitled to the remedies sought.

At trial, the Plaintiff was represented by Ms. Hellen Kutesa, while Mr. Joash Sendege appeared for the Defendant. Upon the conclusion of oral evidence in this matter, the parties were ordered to file written submissions as follows: the Plaintiff was to file his submissions by or on 13th November 2014 and serve the same on the Defence; the Defence was to file its submissions by or on 4th December 2014 and the serve the same on opposite Counsel, and any reply thereto was to be filed by or on 11th December 2014. As it transpired, the Defence filed its written submissions on 16th December 2014 without the benefit of the Plaintiff's submissions owing to the latter's failure to adhere to the above schedule of filing. The Plaintiff's submissions were filed 3 days thereafter with an explanation from learned Counsel therefor that a misunderstanding had arisen between the advocate's firm and client that initially led to the withdrawal of the former's professional services to the latter, but had since been resolved. Counsel volunteered to cede her right of reply given the circumstances. The question is whether this situation is tenable under our rules of procedure.

Closing arguments or submissions are addressed in Order 18 of the Civil Procedure Rules (CPR). For ease of reference I reproduce the pertinent rules thereof.

“Order 18 rule 1:

The plaintiff shall have the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he or she seeks, in which case the defendant shall have the right to begin.

Order 18 rule 2:

- (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove.**

- (2) **The other party shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case.**
- (3) **The party beginning may then reply generally on the whole case; except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply.**

From the foregoing rules of procedure, it seems to me that Order 18 rule 1 of the CPR prescribes the plaintiff as the party with 'the right to begin' in civil proceedings, which is also the party with the first right to production of evidence as stated in Order 18 rule 2(1). Following the presentation of the plaintiff's evidence, the defence may then produce its evidence and 'address the court generally on the whole case.' See *Order 18 rule (2)*. Therefore, although the plaintiff is the party with the right to begin production of evidence, the defence has the right to begin with regard to closing arguments or submissions. The plaintiff then has a general right of reply as provided in Order 18 rule 2(3). The foregoing position would be the general rule, subject to the exception in Order 18 rule 1, as well as the proviso in Order 18 rule 2(3). This, in my view, would be the literal and strict interpretation of Order 18 rules 1 and 2 of the CPR.

However, the courts have historically applied the foregoing rules liberally. Thus in the case of **Iron & Steelwares Ltd vs. C. W. Martyr & Co. (1956) 23 EACA 175 (CA-U)** the then East African Court of Appeal held that the High Court had inherent jurisdiction to waive the strict application of Order 18 rule 2 of the CPR, and had a duty to ensure that each party was given a fair opportunity to state its case and answer the case against it. Indeed, in that case it was held that rules of procedure were '**intended to be handmaidens of justice, not to defeat it.**' Similarly, in the earlier case of **Kendal vs. Hamilton (1878) 4 AC 504 at 525** it was held:

"Procedure is but a machinery of the law after all, the channel and means whereby it is administered and justice reached. It strangely departs from its proper office when instead of facilitating it is permitted to obstruct and even extinguish legal rights and thus made to govern where it ought to subserve."

It would appear, then, that procedural law should provide the process by which the rights embedded in substantive law are pursued but should not be construed in such a manner as to defeat substantive justice. Be that as it

may, the circumstances of the present case are that the parties inadvertently complied with the strict application of Order 18 rules 1 and 2 of the CPR. The Defence unwittingly exercised its right to address this Court in closing arguments upon closure of its evidence as provided by Order 18 rule 2(2) of the CPR, and the Plaintiff exercised his right of reply as stipulated in Order 18 rule 2(3). I find that no prejudice has been suffered by either party nor can it be opined that either of them has not had the opportunity to aptly state its case. I would therefore accept both sets of submissions on the Court record as presented.

Both parties argued the issues of law together, prior to a consideration of the issues of fact. I propose to adopt the same approach.

Issues 1 & 2: *Whether the suit is time-barred by law & Whether the suit is res judicata by reason of a Consent Judgment that was filed in High Court Civil Suit No. 947 of 2001.*

The Defence abandoned the issue on limitation of time, but strongly argued the issue of *res judicata*. Learned Defence Counsel argued that the Plaintiff in the present case had been the first Plaintiff in an earlier case, **Civil Suit No. 947 of 2001** (hereinafter referred to as ‘the former suit’), which had been settled out of court. Counsel contended that in the former suit, the Plaintiff had *inter alia* sought a declaration that they were the lawful owners of the suit land stated therein, but the suit was settled in the following terms:

- i. *The 12th plaintiff be and is hereby added as a party to the suit.*
- ii. *The 12th plaintiff company (hereinafter referred to as ‘the co-operative’) and/ or its individual members merges with St. Balikuddembe Market Stalls and Lock Up Shop Owners Association Limited within 30 days hereof.*
- iii. *St. Balikuddembe Market Stalls and Lock Up Shop Owners Association Limited calls an Extraordinary General Meeting and amends its Memorandum and Articles of Association within 30 days hereof to reflect merger with the members of the 12th plaintiff and inter alia the following:*
 - a. *Share capital and share value*
 - b. *Qualifications, composition and appointment of Board of Directors to include members of the 12th plaintiff.*
 - c. *Any other matter.*

- iv. *The 12th defendant (sic) adopts a new name to be agreed to at the said general (sic) meeting.*
- v. *That the City Council of Kampala (1st defendant) grants a lease in the names of the company referred to in clause 4 above.*
- vi. *The register of all individual persons operating a stall, lock up or registered space in St. Balikuddembe Market be compiled and filed with KCC and the High Court and further, that the said individuals be admitted as members of the company referred to in (4) above within 30 days hereof.*
- vii. *That the 1st defendant shall pay Ushs. 15,000,000/= (Fifteen million) as costs to Counsel for the plaintiffs.*

Mr. Sendege argued that by virtue of the consent judgment highlighted above, the Plaintiff herein had ceded whatever interests he individually had in the market to a company called St. Balikuddembe Market Stalls and Lock Up Shop Owners Association Ltd. Counsel further argued that typically consent judgments entailed concessions and compromises by parties, including the complete abandonment of certain claims as was, in his opinion, the position in the above consent judgment with regard to the present Plaintiff. Citing 'Explanation 5' in section 7 of the Civil Procedure Act (CPA), Learned Counsel argued that in the former suit the present Plaintiff had sought to have the present Defendant evicted from the suit land and restrained from interfering with his (Plaintiff's) proprietary interest but, given that the said claim was not mentioned in the consent judgment, under 'Explanation 5' it was deemed to have been refused for purposes of the bar of *res judicata*.

Conversely, it was argued for the Plaintiff that the former suit had been instituted by several owners of lock up shops in St. Balikuddembe Market, who sought leases in respect of the spaces they occupied therein; the present Plaintiff was a party to that suit by virtue of the portion of his space that was not taken over by the Defendant, and that suit had nothing whatsoever to do with the subject matter in contention presently, namely, the 2 lock up shops that were constructed by the Plaintiff but occupied by different persons. Ms. Kuteesa contended that the present suit was filed well before the former suit, and therefore could not have been intended to circumvent the consent judgment therein as alleged by the Defence. Learned Counsel argued that the former suit did not resolve the issues in the present suit and, even if the Plaintiffs in the former suit had been granted the land and injunction sought, the Plaintiff's right to the lock up shops currently in issue would not have been resolved.

For ease of reference, I reproduce section 7 of the CPA below.

“No court shall 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.

***Explanation 1.*—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.**

***Explanation 2.*—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

***Explanation 3.*—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

***Explanation 4.*—Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.**

***Explanation 5.*—Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.**

***Explanation 6.*—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

Section 7 of the CPA designates the following parameters as a basis for a finding of *res judicata*:

1. The existence of a former suit that has been finally decided by a competent court.

2. The parties in the former suit should have been the same as those in the latter suit, or parties from whom the parties in the latter suit, or any of them, claim or derive interest.
3. The parties in the latter suit should be litigating under the same title as those in the former suit.
4. The matter in dispute in the former suit should also be directly and substantially in dispute in the latter suit where *res judicata* has been raised as a bar.

See also **Karia & Another vs. Attorney General & Others (2005) 1 EA 83 at 93** (Supreme Court, Uganda) and **Lotta vs. Tanaki & Others (2003) 2 EA 556 at 557** (Court of Appeal, Tanzania).

The doctrine of *res judicata* is premised on two (2) maxims of Common Law: first, ***interest reipublicae est ut sit finis litium*** - it is in the public interest that there be end to litigation, and secondly, ***nemo debet bis vexari pro eadem causa*** - no one should be in jeopardy twice on the same ground. It is common ground in the present suit that there was a former suit that was akin to the present suit that spelt out the present Plaintiff as one of the Plaintiffs therein. What is in issue presently is whether the matter in dispute in the former suit is also directly and substantially in dispute in the present suit. I have carefully evaluated the pleadings in the former suit, which were admitted on the present record as Exhibits D1 and D2 respectively, against the pleadings in the present suit. I have also considered the oral evidence on record in the present suit. Paragraphs 3(i), (ii) and (iii) of the Plaintiff in the former suit read:

“The Plaintiffs claim against the Defendant is for:

- i. *A Declaration that they are the lawful owners of land and developments adjacent to the boundary wall of Owino Market (as it then was, and hereinafter referred to as such, otherwise renamed ‘St. Balikuddembe Market’ by the Defendant) Plot 24 Nakivubo Place;*
- ii. *A permanent injunction restraining the Defendant from interfering, alienating and/ or disturbing the Plaintiff’s enjoyment thereof by virtue of being the lawful/ bonafide occupants;*
- iii. *A permanent injunction restraining the Defendants by themselves or through its servants or agents from levying*

charges, rates and/ or taxes pursuant to the Plaintiffs' lawful occupancy, which are not creatures of law."

On the other hand, paragraph 3 of the Plaint in the present suit reflects the present Plaintiff's claim as follows:

"The Plaintiff's claim against the Defendant is for an Order to evict the Defendant from the Plaintiff's premises, General Damages, Mesne Profits and Costs for (sic) this Suit."

In paragraph 4(a) of the same Plaint, the Plaintiff describes the land in dispute therein as follows:

"The Plaintiff was in 1996 allowed by the Defendant to construct shop No. 1 on Plot 24 Owino Market, under a World Bank Project for the development of markets in Kampala."

The same World Bank Project is alluded to in paragraph 4(c) of the Plaint in the former suit, as well as both parties' oral evidence.

It seems to me that although the matters in dispute in both suits relate to shops in St. Balikuddembe Market, they nonetheless relate to different matters. Whereas the Plaintiffs in the former suit collectively sought recognition from KCC of their interest in the spaces they had developed into shops and which they were in occupation of; the present Plaintiff seeks the eviction of KCCA from space that he similarly developed but is not in occupation of or, in the alternative, compensation for his developments on the said land. Indeed, in his oral evidence the Plaintiff did testify that he has always been in occupation of half of the double-storeyed shop that he constructed. It cannot be said, therefore, that the subject matter of the present suit is subsumed in the suit land that was in dispute in the former suit. Certainly the reliefs sought in the 2 suits are different. Further, I am alive to the fact that the former suit herein was not 'heard and finally decided' by a court as prescribed under section 7 of the CPA. Rather, the said suit terminated by consent order. **Mulla's Code of Civil Procedure, 16th Ed., Butterworths, p.297** states:

"A compromise decree or order does not operate as res judicata, because the compromise decree or order is merely the record of a contract between the parties to a suit, to which is superadded the seal of the court and the court does not decide anything."

I therefore find that the bar of *res judicata* does not apply to the present suit. The defence of estoppel is not tenable either because the terms of the consent judgment and the matters that were in issue therein do not have a direct bearing on the present suit for the reasons highlighted earlier in this judgment. I so hold.

Issues 3, 4 & 5: *Whether the plaintiff has any proprietary interest in the market; Whether the defendant permitted the plaintiff to construct a shop in Owino Market for his exclusive ownership and use, & Whether the plaintiff unlawfully deprived the plaintiff of the shop premises described in the Plaintiff.*

It was submitted for the Defence that the present suit should be dismissed owing to the omission by the Plaintiff to join the occupants of the suit premises as parties to the suit. Mr. Sendege did also argue that the Market Development Steering Committee that was responsible for the allocation of space to market vendors did not allocate the suit premises to the Plaintiff because he was not in occupation of the said premises before the market was developed, therefore allocating the said space to him would have displaced the present occupants who were already in occupation thereof. Counsel contended that it was the said Committee and not the Defendant that should be held responsible for the allocation of market space but, in any event, following the execution of the consent judgment in the former suit, the entire market land had been leased to the vendors' umbrella body, St. Balikuddembe Market Stalls and Lock Up Shops Owners Ltd.

Conversely, Ms. Kuteesa advanced the curious argument that the Plaintiff did not seek to evict the occupants of the suit premises but, rather, sought to have his right of ownership thereof restored and the Defendant either evicted or ordered to recompense the Plaintiff for his developments on the premises. Learned Counsel further argued that the Plaintiff was authorised to construct a shop in the market and thus acquired a beneficial interest therein, but he had been denied occupation thereof by the Defendant. In agreement with learned Defence Counsel's reliance on the Markets Act, Ms. Kuteesa lay the responsibility for the management of markets as provided thereunder squarely at the feet of the Defendant.

Section 1(2) of the Markets Act, Cap. 94 provides:

“The administration of a district may establish and maintain markets within the area of its jurisdiction and shall control and

manage such markets or shall vest their control and management in such person or authority as it may deem fit; except that in the urban areas mentioned in the Schedule to this Act, markets shall be established, maintained, controlled and managed by the municipal council or town council, as the case may be, established in the area.”

The Schedule to the Markets Act designates the City of Kampala as an urban area, the City Council of which may establish, maintain, control and manage markets as provided under section 1(2) of the Act. Clearly, therefore, Kampala City Council (KCC) - the precursor entity to the present Defendant does bear the responsibility for the management of the St. Balikuddembe Market that is in issue presently, and that party was properly sued as such.

The question as to the Plaintiff's alleged interest in the suit premises was attested to by both parties. The Plaintiff testified that he constructed a storeyed shop at St. Balikuddembe Market pursuant to a World Bank Project on market development but before he could install doors in the structure, the Defendant re-allocated half of his shop to other vendors. In turn, PW2 - a surveyor that prepared a valuation report in respect of the Plaintiff's alleged developments testified that from the information given to him by the Plaintiff, he deduced him to have been a licensee on the suit premises. PW3, on the other hand, testified that he and the Plaintiff (alongside other vendors) were permitted by KCC to construct their own shops at St. Balikuddembe Market but the Plaintiff had been denied occupation of half of the ground floor of his shop. Conversely, DW1 - the Chairman of the St. Balikuddembe United Market Vendors Association and Coordinator of the St. Balikuddembe Market Development Project testified that the Plaintiff originally operated a shop built by KCC that was among 11 shops located outside the St. Balikuddembe perimeter wall; the area that the Plaintiff now lay claim to was inside the market and was in 1996 occupied by other persons, and when the market re-development was concluded the shops on the inside of the market were allocated to those persons that had previously occupied them.

Under cross examination, DW1 contradicted himself when he asserted that the Plaintiff was in occupation of all the shops he constructed, which was at variance with his evidence in Examination in Chief where he testified that the disputed area was allocated to its previous occupants. DW1's evidence was also at variance with the Defence submissions which recognised the

occupation of the suit premises by other occupants. I am therefore inclined to attach very little evidential value to this piece evidence. I would not go so far as to expunge the witness' entire testimony but rather shall evaluate it against the evidence adduced for the Plaintiff to ascertain its evidential worth. In that regard, there was a minor disparity between the Plaintiff's evidence and that of PW3 with regard to how much of the premises constructed by the Plaintiff he was deprived of. Whereas the Plaintiff claimed to have been deprived of half his shop, PW3 attested to only half of the ground floor having been taken. This Court does, however, find that PW3's evidence is well corroborated by a valuation report that was admitted on the record as Exhibit P2 and is, therefore, the more credible evidence on this issue. I am satisfied that it duly establishes the Plaintiff's *locus standi* in the present suit.

It was also well ceded ground between the parties that the Plaintiff was authorised to construct shops at St. Balikuddembe Market, including the disputed premises. This was attested to by the Plaintiff and PW2, and conceded by DW1. It is also alluded to in a letter to the Plaintiff that was admitted on the record as Exhibit D6, in which the KCC Town Clerk made reference to the allocation of spaces to individuals to develop lock up shops. In Exhibit D6, the legal status of the shop operators viz a viz the land was clarified as follows:

"When City Council was allocating individuals the spaces to develop thereon lockup shops, it did not at any one time intimate the creation of a relationship of a lessor and lessee. The letters clearly indicated that you are going to be allocated lockup shops and not the land. The land remained the property of Kampala City Council."

Section 1(2) of the Markets Act does permit a controlling authority, such as KCC was at the time, to vest or delegate its function to another authority or body. In the instant case, KCC vested its functions during the re-development of St. Balikuddembe Market to the Markets Development Steering Committee. This is borne out by the Committee's Terms of Reference (TORs), which were admitted on the record as Exhibit D5. Clause 2.1.4 thereof specifically relegated the function of allocation of stalls and shops to the Committee. The Defendant did, however, maintain responsibility for the actions of the Committee as is intimated in the text of Exhibit D6 highlighted above. I am, therefore, satisfied that the Defendant permitted the Plaintiff to construct shops at St. Balikuddembe Market.

On the other hand, Clause 2.1.3 of the Committee's TORs reads as follows:

"To help vendors in the self-help investment component in the putting up of lockup shops and the stall fittings in view of the fact that the project does not provide for the construction of lockup shops and setting up fittings for the stalls."

A purposive reading of that term of reference would, in my view, reveal an in-built mechanism whereby vendors were permitted to take responsibility for the construction of the stalls and shops that they would utilise and occupy. Juxtaposed against the contents of Exhibit D6, it becomes apparent that the spirit and letter of the Markets Project was to licence vendors to utilise the shops they had constructed although the ownership of the land on which the shops were built would remain with KCC.

A licence is defined as permission to enter or occupy a person's land for an agreed purpose. It does not usually confer a right to exclusive possession of the land, nor does it convey any estate or interest or interest in it. It is merely an arrangement (written or otherwise) between the licensor and the licensee. See **Oxford Dictionary of Law, Oxford University Press, 2009, 7th Ed, p.325**. Indeed, although the Land Act does recognise lawful and bonafide occupants on land as having a legitimate interest therein, under section 29(4) it expressly excludes licensees from the definition of lawful or bonafide occupants. Section 29(4) reads:

"For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section."

Accordingly, I find that the Plaintiff had no proprietary interest in the suit premises or any land in St. Balikuddembe Market, and would answer Issue No. 3 in the negative.

However, I am hard pressed to appreciate learned Defence Counsel's submission that the Plaintiff was permitted to *'build a slab overhanging the area in question so as to enable him to put a structure on top of it which he is now using. He is obviously abusing the generosity of the Committee and the five people occupying the space below that slab.'* First and foremost, this submission is not borne out by any evidence whatsoever. PW3's uncontroverted evidence was that the Plaintiff currently utilises space at the lower and upper levels of his storeyed shop, and thus negates the notion advanced by learned Defence Counsel that the Plaintiff was only in

occupation of the upper level of his storeyed shop. Indeed, it was testified by DW1 that the Market Development Steering Committee allocated the suit premises to its present occupants because they had been in occupation thereof prior to the market's re-development. The witness clearly explained that the Plaintiff had a shop outside the 'old' market, while the area he now sought to lay claim to was inside the old market. I find no reason to disbelieve this evidence.

Therefore, this Court is faced with a scenario where one party was permitted to undertake construction works on the suit premises, and other parties were authorised to occupy the constructed premises. Such an eventuality was not provided for anywhere in the Market Development Steering Committee's TORs. To my mind, this was an illogical, unfair and unjust course of action by the Committee. Having established the Plaintiff as having been a licensee at St. Balikuddembe Market, he was entitled to utilisation of the shops he had constructed within the framework of the Market Development Project. It follows, then, that his deprivation of the suit premises was unlawful. I so hold.

Finally, although the Defence sought to deny responsibility for the allocation of the suit premises to its present occupants attempting to shift responsibility therefor to the Market Development Steering Committee, it is the position herein that the delegation of KCC's shop allocation function to the said Committee did not negate the institution's responsibility for the Committee's actions. Indeed, the letter of the Town Clerk (Exhibit D6) does recognise this position. In any event, the un-impugned evidence on record does establish that the occupants of the disputed premises paid and continue to pay rent to KCC(A). This was attested to by the Plaintiff and PW3. I am satisfied, therefore, that the Defendant was responsible for the unlawful deprivation of the suit premises that has been established herein, and would answer Issue No. 5 in the affirmative.

Issue 6: *Whether the plaintiff is entitled to the remedies sought.*

The Plaintiff seeks the eviction of the present occupants from the suit premises or, in the alternative, compensation for the construction work undertaken thereon; as well as mesne profits; general damages, and costs of the suit.

Although this Court has found that the Plaintiff was unlawfully denied utilisation of the suit premises having constructed the same, it has also been established that the present occupants of the suit premises were

entitled to allocation thereof having been in occupation of the same well before the Plaintiff. In the circumstances, an order for their eviction would be tantamount to sanctioning further injustice in this matter. Nonetheless, the interests of justice dictate that the Plaintiff be compensated for the monies he genuinely expended on the construction of the suit premises. I would, therefore, grant the alternative remedy prayed for herein. In proof thereof, the Plaintiff did furnish a valuation report that was admitted on the record as Exhibit P2. That report purported to establish the value of the Plaintiff's construction works at Ushs. 15,000,000/= in 2003, 6 years after they were undertaken. Further, it is clear from the report that at the time it was made, the suit premises were already occupied by the present occupants. (See photographs attached thereto.) The report did not attempt to distinguish the developments that were undertaken by the Plaintiff from the improvements made by the present occupants, if any. It is, therefore, quite inconclusive in that regard.

On the other hand, the Plaintiff's claim for mesne profits was premised on the definition thereof in section 2 of the Civil Procedure Act (CPA). Mesne profits are defined in section 2(m) of the CPA as **'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, but shall not include profits due to improvements made by the person in wrongful possession.'** I have carefully considered the Plaintiff's evidence. I find no evidence of the profits which the occupants of the suit premises actually received. I do note that PW3 did attest to the earnings from his shops, which would be a possible indicator of the monies the occupants of the suit premises might with ordinary diligence receive from the premises. However, there is no evidence that the present occupants of the suit premises were engaged in the same trade as PW3 or that the profits enjoyed by the said occupants do not include profits that accrue from improvements made to the suit premises, which are negated by section 2(m) as cited above. In the premises, I find that the evidence on record does not sufficiently justify a claim for mesne profits. I therefore disallow the said claim.

With regard to the claim for general damages, I do recognize the rationale for such a claim as was aptly stated in **Vol. 12 Halsbury's Laws, 4th Edition, para. 1202** as follows:

“Damages are pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him.”

In the instant case, having established an actionable wrong by the Defendant as against the Plaintiff, it does follow that the Plaintiff is entitled to recompense for the damage, loss or injury suffered by him.

Similarly, section 26(2) of the CPA makes provision for interest on claims for monetary payment. Further, it is now well established law that costs generally follow the event. See **Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989** (SC) and **Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35**. In the case of **Sutherland vs. Canada (Attorney General) 2008 BCCA 27** it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a ‘reasonable expectation’ of obtaining an order for costs. In the instant case, the Defence was successful on the third issue, while the Plaintiff emerged successful on the outstanding issues. This would be borne in mind during consideration of an award of costs.

In the result, judgment is entered against the Defendant with the following orders:

1. The Defendant is ordered to compensate the Plaintiff in the sum of Ushs. 10,000,000/= being representative of the value of his expenditure on the construction of the suit premises.
2. Simple interest is granted on the above monies at 3% p.a from the date of filing of this suit until payment in full.
3. General damages are hereby awarded to the Plaintiff in the sum of Ushs. 7,000,000/= payable at 8% interest from the date hereof until payment in full.
4. The Plaintiff is awarded four-fifth of the costs hereof, and the Defendant is awarded one-fifth thereof.

Monica K. Mugenyi
JUDGE

30th January, 2015