THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0008 OF 2016

VIVO ENERGY (U) LIMITED …..……..…….…….…… PLAINTIFF

VERSUS

1. SHIRE PETROLEUM COMPANY LIMITED }
2. AHMED ABDINASSIR } …..…… DEFENDANTS
3. ARUA DISTRICT LAND BOARD }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendants jointly and severally for cancellation of the certificate of tile over comprised in L.R.V. 2919 Folio 23 plot 17 Hospital Road in Arua Municipality measuring approximately 0.583 hectares registered in the name of the second defendant, an order of vacant possession, an award of general and special damages for trespass to that land, mesne profits from February 2007 to-date, interest and costs. The plaintiff's claim is that since May, 2001, it is the registered proprietor of the land comprised in that volume and folio. During or around June 2002, a business entity under the name and style of "Arua Bus Syndicate" applied for and was granted a lease over the same land by the third defendant who subsequently issued it with a certificate of title during or around November, 2006. The said business entity thereafter transferred that land to the second defendant during or around February, 2007. Both the first and second defendants are therefore trespassers on the plaintiff's land.

In his written statement of defence the second defendant refuted the plaintiff's claim and contended that he did not acquire the property in dispute by way of grant from the third defendant but rather by direct purchase from the then registered proprietor pursuant to the seller's Board Resolution to that effect made on 1st June, 2001. The second defendant's predecessor in title had been in possession of the land now in dispute since 10th August, 1946 and had become

registered proprietor thereof on 27th May, 1954. The second defendant is rightfully operating his business on the premises under the name of the first defendant and is therefore not a trespasser. It is the plaintiff's title that is void. He prayed that the suit be dismissed with costs. In its written statement of defence, the first defendant too refuted the plaintiff's claim and contend that it is in rightful occupation of the land, the second defendant having acquired the same by way of purchase from the then registered proprietor. It prayed that the suit be dismissed with costs.

P.W.1 Mr. Stephen Chomi, the plaintiff's company Secretary, testified that the plaintiff is the registered proprietor of the land in dispute by virtue of a title to that effect (exhibit P. Ex. 1). The duplicate certificate of title was issued on 21st September, 2001 indicating that the plaintiff was registered as proprietor thereof on 6th August, 2001 as lessee for 30 years with effect from 1st June, 2001. The lessor is the third defendant. The property was acquired for purposes of operating a fuel service station for sale of the plaintiff's petroleum products. The first and second defendants subsequently took possession of the land illegally, without the consent of the plaintiff and have since then refused to vacate the land. The first registered owner of the land was a one Singh to whom a title was issued on 28th September, 1954 and became registered as proprietor on 1st July 1964. That title expired in 2001 paving way for the plaintiff to acquire the land as registered proprietor.

Under cross-examination he stated that the plaintiff was granted the lease on 1st June 2001 for 30 years and as from that date the registered proprietor was Shell (U) Limited, from 2001 for 30 years. The total acreage of the land is 0.583 of an hectare. The plaintiff took physical possession of the part of the land, i.e. where the fuel service station is while the other part was occupied by a bus company which operates a terminal on the same land. There was a dealer running the fuel station before the plaintiff took possession. He did not know when or how the plaintiff subsequently lost physical possession of the land. Regarding exhibit P. Ex. 10, a letter written by the then Chief Accountant of the plaintiff stating that the Minister had cancelled a lease and management had decided not to contest the cancellation, he did not know why the plaintiff's management had taken that decision. At that time, M/s Kulubya and Company Advocates was a firm of advocates who were doing some work for Shell and BP Uganda Limited The first defendant is the entity in occupation, while the second defendant has a title to the same land.

The second defendant testified as D.W.1 and stated that he is a director of the first defendant and of Gateway Bus Services Limited. Sometime during the year 2006 he was approached by the directors of "Arua Bus Syndicate Limited" who offered to sell him the land comprised in L.R.V. 3639 Folio 15 plot 17 Hospital Road in Arua Municipality, measuring approximately 0.236 hectares. It is a 30 year lease with effect from He instructed his advocates to conduct a search of title following which he purchased the land in the first defendant's name on 6th August, 2006 and took physical possession of the land on 17th February, 2007. The search of title revealed that the plot had been re-surveyed and reduced in size from its original 0.583 hectares to its current 0.236 hectares for purposes of creating a road reserve and drainage. He sought and secured permission from the municipal authorities for renovation of the premises. To finance the purchase, he secured a mortgage from DFCU Bank Limited who now have custody of the duplicate certificate of title. On completion of the renovations, he let out part of the premises to tenants. It is during the year 2009 that he received the plaintiff's corresponding demanding that he vacates the land.

D.W.2 Mr. Aziz Alahai, testified that the property now in dispute originally belonged to "Arua Bus Syndicate Limited" which has occupied the premises since 1954. The company carried out various activities on the land including setting up commercial and residential buildings, office and garage premises. It is during the year 2006 that the company sold the land to the second defendant. Before that, a one Gurdawal Singh Atwal during 1964, without the consent of the company, fraudulently and unlawfully transferred the land to Shell Limited. From 1969 to 1980, the company sought and secured a reversal of that transaction. The then lawyers of "Shell BP Uganda Limited," M/s Kulubya and Company Advocates handled the transaction and billed the company for their services. The company initially offered to sell the land to the plaintiff and when they indicated they did not have plans of setting up business in Arua, the company applied for and was granted a renewal of a lease and sold the property to the second defendant. Shell Limited has never been in possession of the premises and neither did it construct any of the structures now on the land. Grant of a lease over the same land by the third defendant to the plaintiff was done in error since the land was not available for leasing.

D.W.3 Mr. Ameo Romeo Awinjo Palwak, testified that before his retirement, he was the District Land Valuer, Acting Secretary District Land Board and Acting District Land Officer of Arua

District Local Government from 1992 - 2012. In that capacity, he is aware that the thirty year lease over land comprised in plot 17 Hospital Road, Arua Municipality expired during the year 2001 but was renewed with effect from 1st June, 2001 for another thirty years in favour of "Arua Bus Syndicate Limited." Shell Uganda limited was registered as proprietor of the same piece of land on 21st September, 2001 and it is him who signed the lease agreement in exhibit P. Ex. 1. on 20th July, 2001. At one of its meetings, the third defendant realized that it had erroneously granted a lease over the same land to the plaintiff prompting the third defendant to revoke the grant to the plaintiff. However, at the time of revocation, the Commissioner Land Registration had already issued a certificate of title to the plaintiff.

D.W.4 Mr. Obiro Ekirapa Isaac, testified that he is the advocate that was retained by the second defendant to handle the transaction of purchase of the land in dispute from Arua Bus Syndicate. He investigated the seller's title by inspecting the relevant documents both at the Company Registry and at the Registry of Titles. He also conducted a physical inspection of the land. His inquiries revealed that it was by court order that the plaintiff had lost possession and title to the land during or around the year 2003 and that it was the seller's directors in physical possession of the land. The sellers also had in their possession the expired duplicate certificate of title, LRV 322 Folio 19, Plot 17 Hospital Road, in the names of Shell Uganda Limited. The seller had a valid title deed on basis of which the transaction ensued.

By the consent of both parties, the witness statement of D.W.5 Charles Haya, was received as his examination in chief although he was not called to appear in court as his testimony was un-contested. It is to the effect that he is the engineer whose firm on 25th August, 2010 entered into an construction agreement with Gateway Bus Services Limited for construction of a fuel service station on plot 17 Hospital Road in Arua Municipality. Construction works commenced during or around November, 2010 and were completed in December 2011. The works involved converting an old dilapidated building and car garage into a fuel service station. That was the close of the defence case. The plaintiff withdrew the suit against the third defendant.

In their joint scheduling memorandum which was adopted by court, the parties agreed the following issues for the determination of court;

1. Who, between the plaintiff and the second defendant has a valid title to the suit land?
2. Whether the first defendants are trespassers on the land.
3. What are the remedies available to the parties?

In his final submissions, counsel for the plaintiff Mr. Joseph Luswata assisted by Mr. Alan Waniala, argued that the second defendant's title is void for two reasons; it was procured by an entity with no legal existence and secondly, it was issued despite the existence of a valid title over the same land issued in the plaintiff's names. The plaintiff's title was issued on basis of a resolution of the third defendant at a Board meeting held in May 2001 while that of the second defendant was issued on basis of a resolution of the third defendant at its Board meeting held in June 2002. This was after expiry of the 49 year lease, on 31st May, 2001, that had been granted to the first proprietor, Gurdial Singh Atwal t/a Arua Bus Syndicate. The plaintiff applied for and was granted a renewal of the lease which the third defendant purported to revoke one year later to pave way for the grant to the second defendant. The plaintiff's contention is premised on the provisions of section 176 (e) of T*he Registration of Titles Act* allowing an action for ejectment to be maintained by a registered proprietor claiming under a certificate of title earlier in time than that of the occupant. In the result, the defendants are trespassers on the land since they do not hold a valid title to it. The plaintiff therefore is entitled to the reliefs sought.

In response, counsel for the defendants Mr. Okong Donman Innocent assisted by Mr. Abbas Nsamba, argued that the suit against the second defendant is misconceived in so far as the name of the registered proprietor on the title deed is Abdinassir Hussein and not Ahmed. On the other hand, whereas the plaintiff lost physical possession of the land in dispute in the year 2001, he filed the suit more than 14 years later, in July 2016 and therefore the suit is time barred. Moreover, there is no cause of action maintainable against the defendants since they are not privy to the transaction between the plaintiff and the third defendant. The second defendant purchased the land after conducting all due diligence. For a suit based on section 176 (e) of T*he Registration of Titles Act* to succeed, it must be shown that the subsequent title was acquired fraudulently and there has not been any fraud attributed to the second defendant in the process of acquisition of the property in dispute. Grant of the lease to the second defendant's predecessor in title was after the grant to the plaintiff had been revoked. In any event, the second defendant is a

bona fide purchaser for value without notice. He purchased the land after conducting all due diligences and thus his title is indefeasible. The plaintiff has never been in physical occupation of the land and therefore is not entitled to any of the reliefs sought. The second defendant has enjoyed quiet possession of the land for the last ten years and cannot be evicted while he is in possession of a valid certificate of title to the land. The plaintiff is barred by laches and estoppel from challenging the second defendant's title to the land. The plaintiffs' lease was revoked and thus the plaintiff has no valid title. The plaintiff's remedy is against Arua District Land Board and not any of the two defendants. He prayed that the suit be dismissed with costs.

In reply, counsel for the plaintiff submitted that the error in naming the plaintiff is a mere misnomer that can and should be corrected by amendment since the identity of the second defendant was not in doubt at all stages of the trial. The suit is not time in so far as trespass in a continuing tort and it is the two defendants, whose trespass commenced in 2007, that were sued. In an action founded on section 176 of *The Registration of Titles Act*, pleading or proving fraud is not a necessity for a subsequent title over the same piece of land to be cancelled or declared a nullity. In any event, the second defendant never pleaded nor proved the defence of bona fide purchaser for value, which is being raised at the stage of submissions for the first time. The second defendant cannot rely on the principle of indefeasibility of title. The equitable doctrines of laches and estoppel are inapplicable to the facts of the case.

First issue: Who, between the plaintiff and the second defendant has a valid title to the suit land?

The dispute between the parties arises from the fact that there are two leasehold title deeds in existence over what is more or less the same piece of land, in respect of a lease of the same duration (running for thirty years with effect from 1st June, 2001), granted by the same lessor, Arua District Land Board. The plaintiff's title deed is described as L.R.V. 2919 Folio 23 plot 17 Hospital Road in Arua Municipality measuring approximately 0.583 hectares, to which the plaintiff became registered proprietor on 8th August, 2001 (exhibit P. Ex. 1). On the other hand, the second defendant's title deed is described as L.R.V. 3639 Folio 15 plot 17 Hospital Road in Arua Municipality, measuring approximately 0.236 hectares to which the second defendant

became registered proprietor on 8th February, 2007. The plaintiff acquired its title deed by direct grant form Arua District Land Board while the second defendant acquired his by purchase from the lessee who had become registered proprietor thereof on 9th November, 2006 following a grant of the lease by the same Arua District Land Board. The variation in size from the original 0.583 hectares represented in the plaintiff's title to the 0.236 hectares represented in the second defendant's title was explained by D.W.1 Mr. Hussein Abdinassir, the second defendant, that it was as a result of a resurvey of plot 17 that there was a reduction in the size of the plot, so as to create space for an access road and drainage. This is corroborated by the instruction to survey of June 2002, contained in exhibit D. Ex. 6 and the instruction thereafter to issue deed plans contained in a letter of 13th August, 2006 (exhibit D. Ex. 27). Apart from this variation in size, I find that the land in dispute is otherwise for all practical purposes, one and the same. Resolving the dispute therefore is essentially hinged on the determination of the validity of either title deeds.

In extricating the two competing claims to validity of title over the same parcel of land, it is necessary first to trace the origins of each of the title deeds. It is common ground that the land in dispute is registered land and that it has been so for over half a century now. From the evidence available, it was first registered as LRV 322 Folio 19, Plot 17 Hospital Road. The first registered proprietor was a one Gurdial Singh Atwal as from 28th September, 1954 (see exhibit P. Ex. 5). The corresponding lease agreement was executed on the same day with the lessor being the Government of Uganda (see exhibit D. Ex. 16). Three persons, supposedly business partners, had sometime after 10th August, 1964 jointly applied for the plot under the business name of "Arua Bus Syndicate", for purposes of operating a motor garage and to serve as a residence. The three were to hold the property as tenants in common "according to shares in business" (see exhibit D. Ex. 15). The land was subsequently on 6th February, 1964 transferred into the names of Arua Bus Syndicate Limited and thereafter to Uganda Shell Limited (the plaintiff's previous name before change of business name) on 1st July, 1964.

The lease ran for 47 years with effect from 1st June, 1954 and therefore expired on 1st June, 2001. Between 1st July, 1964 when the plaintiff became registered proprietor and the expiry of the lease on 1st June, 2001, there were a number of correspondences exchanged between Arua Bus

Syndicate Limited and the then lawyers of the plaintiff M/s Kulubya and Company Advocates, concerning reversal of the transfer of the land from the plaintiff's names back to that of Arua Bus Syndicate Limited (see exhibit D. Ex. 9 - 12, 17 and 24). Whereas the plaintiff contends this was due to duress from the then military government and that the process was terminated, incomplete by then, upon the fall of that government in 1979 (see exhibits P. Ex. 9 - 13), the defendants on the other hand, on basis of the testimony of D.W.2 Mr. Aziz Alahai, contend it was because Gurdial Singh Atwal had during 1964, without the consent of the company, Arua Bus Syndicate Limited, fraudulently and unlawfully transferred the land to Uganda Shell Limited, necessitating a reversal thereafter. Only the plaintiff's version is supported by correspondences that are contemporaneous with the time in issue, expressing dissatisfaction with the attempted forced transfer of the land to Arua Bus Syndicate Limited .

Although I am inclined on basis of the available evidence to believe the plaintiff's version as compared to that of the defendants, I find it unnecessary for the purposes of this suit to determine which of the two versions is the correct one because proprietorship of registered land is proved by production of a certificate of title indicating a memorial entered onto it to that effect, not by correspondences demanding or instructing transfer. The status of being a registered proprietor of land cannot be inferred, it must be proved expressly because according to section 54 of *The Registration of Titles Act*, no instrument until registered in the manner provided by the Act, is effectual to pass any estate or interest in any land under the operation of the Act.

Despite the disparity of explanations given in clarification of the reasons behind the correspondences relating to the instructions that were given to M/s Kulubya and Co. Advocates, what is not in doubt is that the defendant did not adduce any evidence to prove that reversal of the transfer was ever achieved, from Uganda Shell Limited back to Arua Bus Syndicate Limited. The defendants presented a transfer instrument that is neither signed, dated, attested nor sealed by the company (exhibit D. Ex. 18), and two applications for consent to transfer, one dated 7th March, 1980 (exhibit D. Ex. 19) and the other 3rd May, 1990 (exhibit D. Ex. 20). None of these instruments is capable of contradicting the last entry on the proprietorship page of exhibit P. Ex. 5 since there is no evidence to prove that any of them was registered in accordance with the requirements of section 54 of *The Registration of Titles Act.* This is further corroborated by the

fact that when a year later Arua District Land Board attempted to offer the land to Arua Bus Syndicate for leasing, it offered a "fresh lease" rather than "renewal of lease" (see exhibit D.Ex.21). The implication is that the plaintiff and not the second defendant's predecessor in title, was the outgoing lessee. For that reason, I find that on basis of the last memorial on the proprietorship page of exhibit P. Ex. 5, at the time of expiry of the lease, the land was still registered in the names of Uganda Shell Limited, the plaintiff's previous name. The plaintiff though was not in physical possession of the land at that time.

It is after expiry of that lease that the plaintiff applied for its renewal on 19th April, 2001 (see exhibit P. Ex. 4), whereupon the plaintiff was on 22nd May, 2001 granted a new 30 year lease offer over the land with effect from 1stJune, 2001 (see exhibit P. Ex. 26). Upon the plaintiff paying the requisite fees on 8th and 15thMay, 2001 respectively (see exhibit P. Ex. 8), instructions were issued on 25thMay, 2001 by the Secretary of Arua District Land Board for preparation of deed plans and a lease agreement (see exhibit P. Ex. 7). The lease agreement was executed between the plaintiff and the lessor, Arua District Land Board, on 20th July, 2001. The plaintiff subsequently became registered as proprietor thereof on 6th August, 2001 following which the duplicate certificate of title was issued on 21st September, 2001 comprised in L.R.V. 2919 Folio 23 plot 17 Hospital Road. Still for unexplained reasons, the plaintiff did not secure possession of the land.

Thereafter, under unexplained circumstances, Arua Bus Syndicate Limited too applied for renewal of the lease in its name. The only indication as to when the application was made is contained in their then advocates' letter dated 23rd June, 2006 (see exhibit D. Ex. 28). In that letter, M/s Birungi & Company applied for a renewal of lease for plot 17 Hospital Road, while reminding the lessor, Arua District Land Board of the fact that it had during the year 2002 extended the lease in favour of Arua Bus Syndicate Limited under Min. 41/2002 (6) of 24.06.2002. They concluded by asking the Board to "re-offer" an extension of the lease in their clients favour because, unlike the previous offer of extension where they failed to raise the pre-requisite funds, this time round they would be in position to raise the funds.

That letter of application was followed by a letter of allocation of the plot dated 24th July, 2006 (exhibit D. Ex. 25) and a lease offer form dated 14th August, 2006 (exhibit D. Ex. 26). Although the application for a "re-offer" was made on behalf of "Arua Bus Syndicate Limited," the allocation and offere were issued in the name of "Arua Bus Syndicate" and it is in that name that the requisite fees and charges for processing the title deed were paid (see exhibit D. Ex. 26). Indeed the title deed when eventually issued sometime after 9th November, 2006 it was in the name of "Arua Bus Syndicate" and not "Arua Bus Syndicate Limited." The new lease was now comprised in L.R.V. 3639 Folio 15 plot 17 Hospital Road. The lease agreement was executed between Arua Bus Syndicate and the lessor, Arua District Land Board, on 15th September, 2006. Arua Bus Syndicate subsequently became registered as proprietor thereof on 9th November, 2006. All utility bills and municipal rates invoices in respect of the premises have from time to time been issued in the name of Arua Bus Syndicate (see exhibits D. Ex. 13). At all material time though, it is either Arua Bus Syndicate Limited and later Arua Bus Syndicate Limited, that have been in physical possession of the land.

It is noteworthy that in the defunct lease extension offer which Arua District Land Board advanced to Arua Bus Syndicate sometime during the year 2002 (exhibit D. Ex. 21), a caption was inserted towards the bottom reading as follows; "the lease offer that had been erroneously granted to M/s Shell (U) Ltd is hereby revoked. The Commissioner of Land Registration will be informed accordingly." This is despite the fact that the plaintiff's duplicate certificate of title over the same parcel of land had already been issued as far back as 21st September, 2001. Nevertheless, there does not seem to be any step that was taken either by Arua District Land Board or Arua Bus Syndicate to cause cancellation of that title. The implication is that even as Arua Bus Syndicate proceeded to process its title, it was aware that a title deed over that land was already in existence and that it had been issued to the plaintiff.

Nevertheless, upon obtaining a certificate of title in the names of Arua Bus Syndicate, it is instead Arua Bus Syndicate (1983) Limited which by its Board Resolution of 11th January, 2007 resolved to sell the land in dispute (see exhibit D. Ex. 21). Surprisingly, although the certificate of title comprising L.R.V. 3639 Folio 15 plot 17 Hospital Road in the name of Arua Bus Syndicate had been issued sometime after 9th November, 2006, less than two months before the

resolution was passed, by that resolution the company resolved as follows; "That the company sells and disposes off the Company property in Lease Hold Register Volume 322 Folio 19 Plot 17 Hospital Road." It was not explained why the resolution referred to the expired lease title, a title that had expired on 1st June, 2001, more than six years prior to that resolution rather than the title which had supposedly been issued sometime after 9th November, 2006, less than two months before the resolution was passed.

Be that as it may, that company Board Resolution was followed by actual sale of the land at a consideration of shs. 280,000,000/= by agreement dated 6th August, 2006 (exhibit D. Ex. 21), wherein the seller is named as Arua Bus Syndicate (1983) Limited and the buyer as Shire Petroleum Company Limited, the first defendant, yet it is the second defendant who on 8th February, 2007 became registered proprietor thereof and it is to him that the physical possession was eventually handed over in February, 2007 (exhibit D. Ex. 4). The second defendant then on 12th February, 2007 applied for permission from the Municipal authorities to renovate the building existing on the land (exhibit D. Ex. 7) and the authorization was granted on 13th February, 2007 (exhibit D. Ex. 8). The second defendant executed the works at a cost of about shs. 193,054,600/= (see exhibit D. Ex. 23) and has been conducting business thereon since then. The origins of each of the certificates of title having been outlined above, it now must be decided what the relevant principles of law and equity are that should guide the court in the determination of the question of their validity.

It is common ground that the land in dispute forms part of what before 1995 was categorized as Public Land out of which statutory leases were granted to urban authorities as controlling authorities. Upon the promulgation of *The Constitution of the Republic of Uganda, 1995*, leases in that category were revoked by article 286 thereby constituting such land as one not owned by any person or authority, which by virtue article 241 (1) (a) and section 59 (1) (a) of *The Land Act*, is held and allocated by the District Land Board. The land in dispute therefore is controlled and managed by Arua District Land Board as lessor.

It is trite that when a lease expires, the land automatically reverts to the lessor (see *Dr. Adeodanta Kekitiinwa and three others v. Edward Maudo Wakida, C.A. Civil Appeal No 3 of*

2007; [1999] KALR 632). Therefore upon expiry of the lease comprised in LRV 322 Folio 19, Plot 17 Hospital Road on 1st June, 2001, the land reverted to Arua District Land Board which then had the option to renew the lease in favour of the most immediate previous lessee (the plaintiff), re-allocate it to the person in physical possession (the second defendant's predecessor in title), or an entirely new applicant (a third party), in the event that multiple applicants did turn up at or around the same time. The law however does not specify the principles and criteria which should guide District Land Boards in their decisions to allocate land to competing applicants. There are nevertheless minimum expectations that can be gleaned by drawing inferences from various sources.

For example, based on the spirit of the chapter on National Objectives and Directive Principles of State policy of *The Constitution of the Republic of Uganda, 1995*, their decisions should take into account social, economic and environmental outcomes that may ensue as a result of an allocation. Allocation should be responsive to market supply and demand, as well as to the environmental and social benefits. Foreseeable future needs and opportunities should be considered in addition to present opportunities. Allocation should also be geared toward achieving public strategic direction and priorities, as may be expressed through declared goals and strategic plans of the central and local governments. Accountability may be achieved through such measures as ensuring compliance with tenure conditions and monitoring the results and effectiveness of allocation decisions. Such land should be managed for the benefit of the public and thus decisions should take into account planning laws (section 51 of *The Physical Planning Act, 8 of 2010*); guarantee the right to fair treatment of persons in public administrative decision making entails fairness in the allocation process and that decisions are timely, well-considered and transparent (Article 42 of *The Constitution of the Republic of Uganda, 1995*). Decisions are transparent when the decision-making process and the reasons for decision are clear to the applicant and the public. The Boards are expected in the first place to ascertain that the land is available for leasing.

Land is available for leasing by a District Land Board to an applicant when it is either; (i) vacant and there are no conflicting claims to it, (ii) or is occupied by the applicant and there are no adverse claims to that occupation, (iii) or where the applicant is not in occupation but has a

superior equitable claim to that of the occupant, (iv) or where the applicant is not in occupation but the occupant has no objection to the application. It is thus incumbent on a District Land Board when issuing a new lease, extending an existing one or renewing a lease to ascertain the availability of the land for that purpose.

The grant of L.R.V. 2919 Folio 23 plot 17 Hospital Road in Arua Municipality measuring approximately 0.583 hectares to the plaintiff, was characterized as a renewal of the lease. Renewal of a lease conceptually applies in respect of an outgoing lessee. Initiating the renewal of a lease will always be the responsibility of a lessee unless the parties expressly agreed otherwise but renewal is at the discretion of the lessor. The key considerations in taking the decision will usually include the suitability and desirability of maintaining the applicant as a lessee as well as the state of the lessee's improvements and fixtures on the land. Suitability and desirability depend on the manner in which the lessee observed the conditions and covenants of the expired lease. The standard terms which are negotiable on a lease renewal are rent and term other than that, the general rule is that the terms of the existing or expired lease stay in force and are not negotiable (see *O'May v. City of London Real Property Co. Ltd, [1983] 2 AC 726*).

The evidence before court does not disclose the considerations that guided Arua District Land Board in taking the decision to renew the lease in favour of the plaintiff. All there is, is a minute reference made as an endorsement on the lease agreement contained in the plaintiff's title deed as; DLB. 12/2001 (9) of 10/05/2001. This indicated that it is on 10th May, 2001 that the Board resolved to renew the lease. There is nothing on the face of the certificate of title itself that could cast doubt on its authenticity. The plaintiff is named proprietor and according to section 46 (4) of *The Registration of Titles Act*, a person named in any certificate of title as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate or instrument is deemed and taken to be the duly registered proprietor of the land.

It is trite that by virtue of section 59 of *The Registration of Titles Act*, a certificate of title is conclusive proof of ownership (see *Kampala Bottlers v. Damanico (U) Ltd, S. C. Civil Appeal No. 22 of 1992* and *H. R. Patel v. B.K. Patel [1992 - 1993] HCB 137*). It can only be impeached on grounds of illegality or fraud, attributable to the transferee (see *Fredrick J. K Zaabwe v.*

Orient Bank and 5 others, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v Damanico (U) Ltd., S.C. Civil Appeal No. 22of 1992)*. Suffice to comment at this point that the defendants did not present a counterclaim with their defence seeking to secure a cancellation of the plaintiff's title. Even in the body of their written statement of defence, they did not plead that there was any fraud involved in the plaintiff's acquisition of its title. Anyone impeaching a registered title must prove actual fraud on part of the registered proprietor, i.e. dishonesty of some sort, and not constructive or equitable fraud.

In view of the above, the fact that there exists another certificate of title over the same parcel of land raises both a validity and priority dispute over the legal estate in the land. A priority dispute is essentially an argument which arises where two or more persons hold property interests in a piece of land which are inconsistent, making it necessary to determine who has the superior right to the land. In some cases, the priority of one party will not necessarily result in the other party losing the full proprietary interest claimed. For example, if the interest which has gained priority is of a lesser status than the subsequent interest, the subsequent interest will not be absolutely destroyed; it will only be limited or extinguished to the extent of the prior interest. Hence, if priority is given to a leasehold interest over that of a freehold, the holder of the freehold will only have his interest limited for the duration of the lease; it will not be completely extinguished.

The result will be different where the disputants claim a similar estate or interest, under the same tenure in the same parcel of land. For example in the instant case, each of the parties claims a 30 year lease over the same piece of land, varying only in acreage, commencing on 1st June, 2001, each emanating from the same lessor; the plaintiff's interest having been created on 10th May, 2001 while that of the second defendant's predecessor in title was created one year later, on 26th June, 2002. At common law, ownership of an estate is absolute. Only one fee simple estate may exist against any single piece of land. It is not possible for two estates, both vesting the same title and possession, to exist in the same parcel of land.

Hence, if a registered owner of land confers a fee simple in land to another absolutely, according to the common law, the transferee holds the only fee simple in the land. It may be possible for the transferee to co-own the fee simple with another person, but no other person can claim a

separate right to the fee simple, because it is already vested in the transferee. A legal estate will confer upon the grantee all of the rights, title and interest associated with that estate and only the grantee (whether that be one person or a number of persons in co-ownership) can hold that estate. It is not possible to confer two identical legal estates to separate persons; technically, therefore, priority disputes between legal estate holders do not exist, there exists only one title. Any subsequent title raises not a priority but rather a validity dispute.

With regard to a lease (akin to a fee tail estate that is created within an existing estate, usually fee a simple), it too being a legal estate, there cannot exist in respect of the same land, two leases with the same commencement date and of similar duration, but vested in different persons, except if they are co-lessees. At common law in relation to legal estates, upon the execution of the first deed of conveyance, the legal estate in the specified parcel of land will pass from the owner to the transferee. This means that the owner has nothing to pass over to any subsequent transferee, and even if the deed of conveyance to the second transferee is valid, it is impossible to convey a legal estate in land when the owner no longer holds one. The *nemo dat* principle applies to prevent any priority dispute between two identical legal estates from arising, because a grantor who has already transferred his or her legal estate to a grantee cannot execute a subsequent grant of that estate; the grantee cannot give away what he or she does not possess (see *Mwebesa and three others v. Shumuk Springs Development Limited and three others, H.C. Civil Suit No. 126 of 2009*). The inevitable consequence of this is that, once created, a legal interest will prevail against any purported creation of a subsequent legal interest, to the extent of any inconsistency.

This is to some extent illustrated in *Shale v. Limema and others [2015] LSCA 20,* where the Court of Appeal of Lesotho considered a case whereby two leases were granted to two persons over one piece of land in Maseru Urban Area by the same Land Administration Authority (LAA). The 1st respondent had been given a 90 year lease which was approved on the 26th June, 2013 by one Commissioner of Lands (LAA) while the appellant had been given a 60 year lease which was approved on 1st August, 2013 by another Commissioner of Lands (LAA). It was not in dispute that whereas the first respondent in fact applied for her lease well before the appellant's, the appellant's application for lease was approved and granted by the LAA on

20/12/2013. The same LAA granted lease on the same site to the first respondent on the 26/6/2013. It was in March 2013 that the first respondent first knew of the double allocation. Under cross-examination the appellant had admitted that he applied for his lease he knew that someone had already applied for a lease in respect of the same site. The evidence before court having established this as a double allocation, the court decided that no double allocation on one site can ever confer good and lawful lease on the site. The 1st respondent's lease therefore was found to have preference over that of the appellant's.

In the instant case, the evidence before court does not disclose the considerations that prompted Arua District Land Board in deciding to issue the subsequent lease, of similar duration, over the same piece of land but in favour of the second defendant's predecessor in title, Arua Bus Syndicate. All there is, is a minute reference made as an endorsement on the lease agreement contained in the plaintiff's title deed as; DLB. 14/2002 (6) of 26/06/2002. This indicates that it is on 26th June, 2002 that the Board resolved to grant the lease to Arua Bus Syndicate. This resolution was made slightly over one year following the grant they had earlier made to the plaintiff. Arua District land Board attempted to sanitize the subsequent grant by a half-hearted attempt to revoke the earlier grant. According to D.W.3, the decision was taken at one of the Board's meetings when it realised that it had erroneously granted a lease over the same land to the plaintiff prompting it to revoke the grant to the plaintiff. As to why the Board considered the earlier grant erroneous, was never explained. This half-hearted attempt at revocation is manifested in exhibit D. Ex. 21 adverted to earlier in this judgment.

Noteworthy about that attempted revocation is the fact that no specific minute of the board is cited. As it stands, reference to revocation is a mere insertion to the document communicating an offer for a lease extension that was directed to Arua Bus Syndicate. The only minute cited in that document is DLB. 14/2002 (6) of 26/06/2002 approving Arua Bus Syndicate's application for "a fresh lease of thirty years effective from the expiry date endorsed." There are spaces provided for insertion of the requisite fees that were never filled in, yet in one of the subsequent paragraphs it is stipulated that "the fees must be paid within one month from the date. Failure will be construed as loss of interest in the same. The Board will then have no option but to revoke the offer."

It was not explained how an offer that was meant to be open strictly for one month, with the danger of being revoked if not accepted by way of payment of the requisite fees within that time period, remained open for the next four years until 23rd June 2006 when M/s Birungi & Company Advocates sought to revive it (see exhibit D. Ex. 28) yet the offeree had not complied within the period stipulated. At common law, if an offer is not accepted within the stipulated time and not revoked earlier, it lapses on expiration of such duration (see See Caldwell v. Cline, 156 S.E. 55 (W. Va. 1930). Where no duration is specified, the offer lapses on expiration of reasonable time. What is reasonable time is a question of fact and varies from case to case.

For example in *Ramsgate Victoria Hotel v. Montefoire (1866) LR 1 Ex 109*, the defendant offered to purchase shares in the claimant company at a certain price. Six months later the claimant accepted this offer by which time the value of the shares had fallen. The defendant had not withdrawn the offer but refused to go through with the sale. The claimant brought an action for specific performance of the contract. It was held that the offer was no longer open as due to the nature of the subject matter of the contract, the offer lapsed after a reasonable period of time. Therefore there was no contract and the claimant's action for specific performance was unsuccessful. In the instant case, I find that the period of four years is too long for an offer of land by a District Land Board to remain open for acceptance. It would be against public policy and interest if District Land Boards are permitted to depart from the duty to make timely, well-considered and transparent decisions in land allocations. I therefore find that by the time the second defendant's predecessor purported to accept an offer of a "fresh lease" that had been extended to it four years before, the offer had lapsed.

Be that as it may, the offer was made contemporaneously with the attempted revocation of the earlier one to the plaintiff, who by then had already secured a duplicate certificate of title to the land, the same having been issued on 21st September, 2001. Counsel for the defendants argued that the second title is valid by reason of the fact that it was issued after the offer to the plaintiff had been revoked. A lease is a contract and in the law of contract, unless an offer is irrevocable, it can be revoked at any time before acceptance, without incurring liability (see *Dickinson v. Dodds (1876) 2 Ch D 463*) and in any event, notice of revocation must be communicated to the

offeree yet there is no evidence before court that it was communicated to the plaintiff before the Board proceeded to grant the fresh lease to Arua Bus Syndicate.

On the other hand, a lease being a bilateral agreement, one party cannot unilaterally "revoke" it, terminate it, or transfer its responsibilities to another, except in accordance with its terms, or else the "revocation" will constitute a breach since an offer is irrevocable after acceptance (see *Byrne & Co v. Leon Van Tien Hoven & Co [1880] 5 CPD 344*). Arua District land Board having executed a lease agreement with the plaintiff on 26th July, 2001, was incapable of revoking that lease unilaterally a year later as it attempted to do so, by way of an insertion in exhibit D. Ex. 21 that is more or less a footnote or postscript to the main purpose of document. In the result, the land in dispute did not at any point after adoption of the resolution contained in DLB. 12/2001 (9) of 10/05/200, revert to the Board.

I therefore find in conclusion that at the time Arua Bus Syndicate purported to obtain the lease title issued to it, by virtue of the *Nemo dat quod non habet* principle, Arua District Land Board no longer had the capacity to lease out the land since that land was no longer available for leasing. Board minute DLB. 14/2002 (6) of 26/06/2002 on basis of which L.R.V. 3639 Folio 15 plot 17 Hospital Road in Arua Municipality, measuring approximately 0.236 hectares to which the second defendant became registered proprietor on 8th February, 2007 was created, was an exercise in futility. A grantor can only convey what he has (see *Boulos v. Odunsi (1959) S.C.N.L.R. 591; Coker v. Animashawun (1960) L.L.R. 71; Adamo Akeju, Chief Obanikoro v. Chief Suenu, Alimi Kuti & Chief Oluwa (1925) 6 N.L.R. 87*). That lease is accordingly declared null and void. The only valid title to the land is that comprised in L.R.V. 2919 Folio 23 plot 17 Hospital Road in Arua Municipality measuring approximately 0.583 hectares.

It was argued further by counsel for the defendant that for the plaintiff's action to succeed against the second defendant, it must be shown that he acquired the title fraudulently and that since there has not been any fraud attributed to the second defendant in the process of acquisition of the property in dispute, the suit should fail. He contended further that in any event, the second defendant is a bona fide purchaser for value without notice. He purchased the land after conducting all due diligences and thus his title is indefeasible. I find that the question of

indefeasibility of title does not arise with regard to the second defendant's purported title. For the reasons I have explained above, L.R.V. 3639 Folio 15 plot 17 Hospital Road was a mere document that could not and did not vest title. The title envisaged and protected by section 56 of *The Registration of Titles Act* is one that passes a legal estate in land, which the that title deed could not because the lessor did not pass any estate to Arua Bus Syndicate.

On the other hand, section 37 (3) of *The Registration of Titles Act* envisages that it is names of "persons" that may be entered in the Register Book as proprietors of any land. Such persons can only be natural ones (human beings) or legal persons (corporate entities). A business name such as "Arua Bus Syndicate," is neither of those and thus does not have legal capacity to be registered as proprietor of land. Its registration as proprietor was erroneous and did not confer upon it, any interest in the land. Therefore, had an estate in land come into existence with the creation and issuance of L.R.V. 3639 Folio 15 plot 17 Hospital Road, which it did not, still Arua Bus Syndicate, not being a corporate entity, did not acquire or have the capacity to be registered proprietor and to convey title to the second defendant in that name. Not being a corporate entity, registration ought to have been in that names of the natural person(s) trading under that name as it had been done previously with regard to LRV 322 Folio 19, Plot 17 Hospital Road, by instrument No. 41237 of 28th September, 1954 when the first registered proprietor, a one Gurdial Singh Atwal, was registered in his personal name but with the addition; "carrying on business as Arua Bus Syndicate" (see exhibit P. Ex. 5).

It was the testimony of the D.W.4 Mr. Obiro Ekirapa Isaac, the advocate that was retained by the second defendant to handle the transaction of purchase of the land in dispute from Arua Bus Syndicate (1983) Limited, that before advising the second defendant to purchase the land, he investigated the seller's title by inspecting the relevant documents both at the Company Registry and at the Land Registry. During that investigation, he discovered that "Arua Bus Syndicate," the name that was on the title as registered proprietor, "Arua Bus Syndicate Limited" with which the plaintiff had exchanged correspondences during the late 1970s and early 1980s, and "Arua Bus Syndicate (1983) Limited" that sold the land to his client, were one and the same entity by virtue of the fact that the membership and directorship was the same such that disparity in name was a mere misnomer. He further stated that he considered registration of "Arua Bus Syndicate," on the

title was a mere mistake within the land registry as the intended proprietor had been "Arua Bus Syndicate Limited," that there had been a change of name over the time duly registered and finally that it was the members of the seller that were in physical possession of the land.

Although he attached some annexure to his witness statement, I find aspects of his testimony relating to the membership of the various entities, and change of name especially from "Arua Bus Syndicate" to "Arua Bus Syndicate Limited" as hearsay, in absence of copies of the records from which he drew those facts and the aspect regarding the alleged mistake in the Land Registry an opinion unsafe to rely on in absence of copies of the records on basis of which he formed that opinion. The annexures attached to his witness statement are uncertified. I as well find his opinion that because the membership of the various entities is the same, and that therefore the variations in name are mere misnomers, to be incredible in light of the well known legal implications of incorporation of a business association that confers upon such entity a legal existence separate from its membership. Although it is possible that the transition from "Arua Bus Syndicate Limited" to "Arua Bus Syndicate (1983) Limited" could have been achieved by way of change of business name, none of the two corporate entities was at any one time registered as proprietor of L.R.V. 3639 Folio 15 plot 17 Hospital Road, yet according to section 92 (1) of *The Registration of Titles Act*, it is only a registered proprietor of land who has capacity to transfer the land. Had the title been valid, none of the two entities would have had that capacity.

What the testimony of D.W.4 reveals is that he became privy to all these anomalies prior to advising the second defendant to purchase the land. He had constructive notice of the fact that there was a title deed in existence, whose offer the District Land Board had attempted to revoke five years before during the year 2002. Constructive notice applies if a purchaser knows facts which made "it imperative to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper" (see *Macmillan v. Bishopsgate Investment Trust (No. 3) [1995] 1 WLR 978*). He acquired knowledge of circumstances which would put an honest and reasonable man on inquiry (see *Baden v. Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA, [1993] 1 WLR 509*), and yet he did not undertake the necessary inquires. Had he made the necessary inquiries at the

land registry, he would have discovered that L.R.V. 2919 Folio 23 plot 17 Hospital Road in Arua Municipality measuring approximately 0.583 hectares had never been cancelled.

When a person willfully abstains from inquiry to avoid notice, such person cannot claim to have acted in good faith (see *The Zamora [1921] AC; Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 AC 378 at 812* and *English and Scottish Mercantile Investment Co v. Brunton 1982] 2 QB 700*). At common law, imputation charges a principal with the legal consequences of knowledge of a fact known by an agent when knowledge of the fact is material to the agent's duties to the principal and to the principal's legal relations with third parties. D.W.4 having been engaged by the second defendant as his agent in handling the transaction, his knowledge, actual or constructive, is imputed to the second defendant.

According to section 77 of *The Registration of Titles Act*, any certificate of title, entry, removal of encumbrance, or cancellation, in the Register Book, procured or made by fraud, is void as against all parties or privies to the fraud. Similarly, section 176 (b) of *The Registration of Titles Act* allows actions for recovery of land against the person registered as proprietor under the Act where that person was registered as proprietor of that land through fraud. For that reason, any person who fraudulently procures, assists in fraudulently procuring or is privy to the fraudulent procurement of any certificate of title or instrument or of any entry in the Register Book, or knowingly misleads or deceives any person authorised to require explanation or information in respect to any land or the title to any land under the operation of the Act in respect to which any dealing is proposed to be registered, that person commits an offence by virtue of section 190 (1) of *The Registration of Titles*. The combined effect of all these provisions is that fraud in the transaction will vitiate a title.

A person becomes privy to a fraudulent transaction either by being an active participant in its perpetration by action or omission, or when having acquired knowledge of its perpetration by others or third parties, knowingly and willfully seeks to take benefit from it. A transferee who knowingly takes advantage of the illegalities committed by a transferor, becomes privy to the illegalities and thus cannot claim to be a bonafide purchaser for value without notice. The recitals

and one of the last clauses of the agreement of sale (exhibit D. Ex. 2) are insightful on this point. It was therein stated as follows;

> A. The vendor has been allocated a thirty year lease on land known as plot 17 Hospital Road Arua (hereinafter referred to as "The premises") vide Arua District Land Board Minute No. 41 / 2002 (6) of 24/06/2002. A Photostat letter of allocation is attached hereto and marked as Annexure "A".
>
> B The vendor is in the process of obtaining a certificate of title for the premises for the said 30 years.
>
> 6. The vendor warrants that it has good title to the premises and shall refund the sums paid under this agreement to the purchaser should there be any defect or want of title or any other encumbrance whatsoever AND it is further agreed that the current directors of the vendor shall sign guarantees undertaking to personally refund the sums paid under this agreement should there be any defect in title or any other encumbrance whatsoever.

Although covenants of indemnity of this type are ordinarily intended to bring home to the purchaser the fact that that the vendor has not personally done anything, or is not aware of anything, which would make their title defective, the fact that it expressly referred to Arua District Land Board Minute No. 41 / 2002 (6) of 24/06/2002 with the actual document attached as an annexure, the second defendant was put on notice at the very inception of the transaction, of the fact that the vendor was relying on a stale offer of a lease to process the title that would eventually be transferred to him. The second defendant was put on notice of the illegalities involved in the vendor's process of acquisition of the title henceforth. Within the context of the facts of this case, This covenant meant that the vendor could not guarantee good title of the property, in spite of which the second defendant went ahead to transact without making the necessary further inquiries that would be expected of a prudent purchaser. Merely because the vendors eventually alienated the property under a registered document and mutation entries, that in no way changed the character of the transaction. It was tainted with fraud. The only question that remains is whether the defendants possession of the land conferred unto them. any equitable interests.

By virtue of sections 64 and 176 (e) of *The Registration of Titles Act*, a registered disposition for valuable consideration will take priority over unprotected interests. According to D. J.

Bakibinga, *Equity & Trusts*, (Law Africa, 2011), at Page 46 & 47, it is generally recognised that a legal interest is valid and enforceable against the whole world (*in rem*). This means that if, subsequently, a person obtains a legal or equitable interest in the same property, his or her interest is subject to the interest of the first owner. Where there is a conflict between two competing equitable interests in property and the general rule is that equitable interests in property take priority according to the order in which they are created (see as well, *John Katarikawe v. William Katwiremu [1977] H.C.B 187*). The question then is whether by the purported purchase, the second defendant acquired any equitable interest in the property, or otherwise whether the plaintiff obtained title subject to interests of adverse possessor.

The equitable jurisdiction assumes a different perspective to land ownership. Equitable interests are either created or imposed on the basis of fairness. While it is not possible to confer two identical legal estates in the same land upon separate grantees, it is possible for successive legal and equitable interests to exist over a single piece of land. Equitable interests are created according to justice and fairness, and may be expressly created, implied by the circumstances, or imposed by a court; their existence does not conflict with legal ownership because they are recognised and enforceable in a separate jurisdiction.

It is on that basis that in cases such as *Kampala Distributors Land Board and Chemical Distributors v. National Housing and Construction Corporation S.C. Civil Appeal No. 2 of 2004*, the Court of Appeal held that the sitting tenants should be given the first priority to buy land if it is being sold. This was an equitable interest imposed by court on the basis of fairness. Similarly in *Kampala District Land Board and Chemical Distributors v. National Housing and Construction Corporation, S.C. Civil Appeal No. 2 of 2004*, where the respondent in that appeal was in possession of the suit land when it was offered by Kampala District Land Board to the second appellant, the Supreme Court held that the respondent was a bona fide occupant and was entitled to the first option to be leased the land.

In both cases, the occupants were bonafide in occupation of the land in dispute and on that account equity was invoked to protect their rights of occupancy against persons who acquired title for the dominant or sole purpose of evicting them. In the instant case, although it would

seem that the second defendant's predecessors in title were in possession at the time Arua District Land Board granted a renewal of the lease to the plaintiff, it has not been shown that the plaintiff secured that renewal with the dominant or sole purpose of evicting them. On the other hand, the lawfulness of "Arua Bus Syndicate's" possession of the land as the second defendant's predecessor it title appears to have been based on their claimed status as lesees under LRV 322 Folio 19, Plot 17 Hospital Road (exhibit P. Ex. 5), since it is the same title that is referred to in the Board Resolution of 11th January, 2007 by which "Arua Bus Syndicate Limited" resolved to sell the land in dispute (exhibit D. Ex. 21). That lease had expired on 1st June 2001. On the other hand, it has been shown by evidence that both "Arua Bus Syndicate Limited" later known as "Arua Bus Syndicate (9183) Limited" and the second defendant were complicit in the dishonest acts intended to secure their respective possession of the land. Equity cannot aid the fraudulent to retain possession to the detriment of a registered proprietor.

It is trite that upon the expiry of a lease, the land reverts to the lessor and the leseee who remains in occupation after a lease term has expired, but before the lessor demands the lessee to vacate the property, is a tenant at sufferance (see See *Remon v. City of London Real Property Co. Ltd., [1921] 1 KB 49, 58*) and *Halsburys Laws of England (4th Edition) Vol. 18 para. 16*) . A tenancy at sufferance arises by implication of law not by contract. A tenant at sufferance acquires no interest in the land he or she occupies and according to the Court of Appeal in its decision of, *Hajati Mulagusi v. Pade C.A Civil Appeal No. 28 of 2010*, a tenant at sufferance is not entitled to compensation. It would seem therefore that the claim by Arua Bus Syndicate Limited to possession has no basis in law or equity. It is trite that "possession is good against all the world except the person who can show a good title" (see *Asher v. Whitlock (1865) LR 1 QB 1, per Cockburn CJ at 5*). That possession may thus be terminated by any person with better title to the land. It follows that when in February 2007 Arua Bus Syndicate (1983) Limited handed over physical possession of the land to the second defendant, it neither conferred a legal nor an equitable interest in the land. In conclusion, the first issue is decided in the plaintiff's favour. The only valid certificate to the land is the one that was issued to the plaintiff as comprised in L.R.V. 2919 Folio 23 plot 17 Hospital Road. The certificate of title in possession of the second defendant comprised in L.R.V. 3639 Folio 15 plot 17 Hospital Road is accordingly declare invalid.

Second issue: Whether the first defendants are trespassers on the land.

Trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). In the instant case, the defendants entered into physical possession of the land during or around February 2007 (see exhibit D. Ex. 4), by which time the registered proprietor of the land was the plaintiff as from 6th August, 2001. They did so without the consent of the plaintiff and have remained in possession since then to-date. In their own admission, they operate business from there. Having found in resolving the first issue that the defendants have no claim of right over the land whether in law or equity, this issue too is answered in the affirmative. The defendants are trespassers on the land.

Third issue: What are the remedies available to the parties?

It was contended in the submissions of counsel for the defendants that the plaintiff is not entitled to any relief for two reasons; the plaintiff sued the wrong parties and the plaintiff's action is time barred or barred by limitation or laches.

As regards the question of the defendants being the wrong parties to the suit, the main reason advanced in favour of the second defendant is that he was incorrectly named in the plain. I agree with the submissions of counsel for the plaintiff on this point on account of the fact that at no stage of the trial was ever the identity of the second defendant in issue. Having defended the suit under that name and there being no doubt that he is the person named as registered proprietor of the contested and now annulled title comprised in L.R.V. 3639 Folio 15 plot 17 Hospital Road, this is a situation of a mere misnomer. I am inclined to follow the decision in J. *B. Kohli and others v. Bachulal Popatlal, [1964] EA 219* to find so and order that the second defendant's name be corrected from Ahmed Abdinassir to Abdinassir Hussein.

As regards the question of limitation, this was filed as an action for ejectment under section 176 (e) of *The Registration of Titles Act*. The defendants' trespass on the land began sometime in

February 2007 and the suit was filed on 29th July, 2016, approximately nine years after the event. Being in the form of an action for recovery of land, an action for ejectment is subject to the 12 year limitation period stipulated in section 5 of *The Limitation Act*. Therefore on the face of it, the action is not time barred. Section 6 (1) of that act is inapplicable to the facts of this case for purposes of reckoning time back to the period of occupation of Arua Bus Syndicate (1983) Limited since the second defendant does not "claim through" that company. In the result, both objections are overruled.

In its plaint, the plaintiff sought an order for cancellation of the certificate of tile comprised in L.R.V. 2919 Folio 23 plot 17 Hospital Road, an order of vacant possession, an award of general and special damages for trespass to that land, mesne profits from February 2007 to-date, interest and costs. Having found that the impugned title is invalid and that the defendants are trespassers on the land, the order of cancellation of the title is granted and so is that of vacant posession.

Regarding the plaintiff's claim for mesne profits, the moment someone proves a better title against the person who was in prior possession, he or she is entitled to compensation against the unlawful possessor of property. Mesne profits are one such mode of compensation that can be claimed against a person in unlawful possession. It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property. The law has reached this conclusion by giving to the concept of loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owner's financial position after the wrongdoing with what it would have been had the wrongdoing never occurred. Furthermore, in such a case it is no answer for the wrongdoer to show that the property owner would probably not have used the property himself had the wrongdoer not done so (see *Stoke City Council v. W and J Wass, [1988] 1 WLR 1406*). When damages are claimed in respect of wrongful occupation of immovable property on the basis of the loss caused by the wrongful possession of the trespasser to the person entitled to the possession of the immovable property, these damages are called mesne profits.

In assessing mesne profits, the proper starting point is the value of the land encroached upon. The court may then take into account the extent to which the piece of land encroached upon has enhanced the amenities of the defendant's own user (see *Inverugie Investments Ltd v. Hackett [1995] 1 WLR 713*). Mesne profits are in a way payment by the defendant in respect of the benefit he or she has gained out of the trespass. They are in general awarded because the defendant has made improper use of an asset of the plaintiff. In economic terms, there has been a transfer of value for which the wrongdoer must account (see *Devenish Nutrition Ltd v. Sanofi-Aventis Sa (France) and others, [2009] Ch 390, 2009] 3 WLR 198, [2009] 3 All ER 27*). The court though should be mindful that in cases of trespass of this kind there is no right to a share in, or account of, profits in any conventional sense. The only relevance of the defendant's profits is that they are likely to be a helpful reference point for the court when seeking to fix upon a fair price for a notional licence (see *Severn Trent Water Ltd v. Barnes, [2004] EWCA Civ 570*).

Since mesne profits are the profits, which the person in unlawful possession actually earned or might have earned with the ordinary diligence, they may also be awarded on the basis of market rent even if the plaintiff would not have let the property if vacant (see *Swordheath Properties Ltd v. Tabet [1979] 1 WLR 285; Whitwham v. Westminster Brymbo Coal and Coke Co, [1896] 2 Ch 538* and *Attorney General v Blake [2001] 1 AC 268*). They are measured as the amount that might reasonably have been demanded by the plaintiff as payment for the user of the land for the period of trespass. Mesne profits do not include profits due to improvement made in the property by the person in wrongful possession.

The court may be guided by profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but should not include profits due to improvements made by the person in wrongful possession. Determination of the quantum of mesne profits is left at the discretion of the court and being in the nature of damages, the Courts have not laid down any invariable rules governing award and assessment of mesne profits in every case. There is no uniform criteria for the assessment of mesne profits. The quantum depends upon the facts and surrounding circumstances of each case. The Court may mould awards and assessment of mesne profits according to the justice of the case. It is settled principle of law that in case of mesne profits the

burden of proof rests on the plaintiff. The onus of proving what profits the defendant might have received with the ordinary diligence lies on the plaintiff. The plaintiff may also adduce evidence to prove that the defendant was not diligent and might have obtained greater profits by proper diligence.

While assessing the quantum, factors such as location of the property, comparative value of the property, condition of property in question, profits that are actually gained or might have been gained from the reasonable use such property are generally taken into consideration by the courts. The key criteria for the calculation of mesne profits is not what the owner loses by the deprivation of possession but profits should be calculated on the basis of what the person in wrongful possession namely, the defendant had actually received or might with ordinary diligence have received therefrom. In *Waters and ors v. Welsh Development Agency, [2004] 1 WLR 1304*, the method adopted was the "open market value" approach where compensation was assessed by reference to the price a willing seller might reasonably expect to obtain from a willing buyer and consideration given to the enhanced value of the land because of its location or attraction to a particular buyer or class of buyers or its value to an adjoining landowner.

In the instant case, the plaintiff adduced evidence of rental income of comparative properties within the municipality, put to a use similar to that the defendants put the land in dispute (see exhibit P. Ex. 17). By that evidence, the rental income is placed in the region of shs. 1,000,000/= per month. I find this to be a reasonable estimate of income which the defendants might with ordinary diligence have received from the property for the duration of their occupation. They have been in occupation from February, 2007 to-date, a period of ten years and eleven months. At the rate of shs.1,000,000/= per month, this translates into shs. 131,000,000/= which is accordingly awarded as mesne profits. That sum shall carry interest at the rate of 10% per annum from the date of judgment until payment in full.

Concerning the claim for general damages, from its plaint and testimony of its witness in court, the basis for the plaintiff's claim for general damages, in addition to mesne profits, is premised on the loss of use and enjoyment of its land. The reality is that the plaintiff's rights were invaded and was deprived of the use and enjoyment of its property. Nevertheless, I am not satisfied that

this is a case which warrants an additional award of damages for loss of use and enjoyment. I am of the opinion that recognition of the infraction of the plaintiff's legal rights or loss of use and enjoyment is reflected and subsumed in the amount awarded as mesne profits. The plaintiff has not proved any actual damage as would entitled it to receive such an amount other than loss of use and enjoyment. The Court is unable to agree with the plaintiff's contention that it is entitled to an additional substantial amount for loss of use and enjoyment separate and apart from the amount awarded for trespass in the form of mesne profits. To award general damages, in addition to mesne profits for the same factors would, in my view amount to double benefit and or unjust enrichment. In the premises, the claim for general damages for loss of use and enjoyment is disallowed.

In summary, judgment is entered for the plaintiff against the first and second defendants jointkly and severally in the following terms;-

a) An order of cancellation of the certificate of title comprised in L.R.V. 3639 Folio 15 plot 17 Hospital Road.
b) An order of vacant possession of the land comprised in plot 17 Hospital Road, Arua Municipality
c) mesne profits of shs. 131,000,000/=
d) Interest on the award in (c) above at the rate of 10% per annum from the date of judgment until payment in full.
e) The costs of the suit

Dated at Arua this 11th day of January, 2018 ……..

Stephen Mubiru
Judge,
11th January, 2018.