



**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable  
Civil Suit No. 059 of 2011

In the matter between

1. **WOKORACH JUSTINE** }  
2. **Ocaya GEORGE** } ..... **PLAINTIFFS**  
3. **ANGEE DEROSIA** }  
and **337 OTHERS** }

**VERSUS**

1. **DR. LUKA OKECH ABE** }  
2. **DR. BENJAMIN OMARA ABE** }  
3. **FRANK OKELLO ABE** } ..... **DEFENDANTS**  
4. **AMURU / NWOYA DISTRICT** }  
**LOCAL GOVERNMENTS** }

**Heard: 9 May, 2019.**

**Delivered: 30 May, 2019.**

**Land Law** — *A suit to quiet title is one filed to establish ownership of land—Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure—possession is good against all the world except the person who can show a good title—the grant of public leases is governed by considerations of both public law and private law—A District Land Board manages land entrusted to it for the public good—The Constitutional doctrine of public trust engenders the idea that the public has a right to expect certain principles to guide the Board in its land management decisions—land entrusted to it must be managed to the maximum long-term economic advantage of the people—The Constitutional public trust doctrine foremost protects the intergenerational public interest in access to and use of that land—Renewal of a lease creates a new lease agreement—An expired lease cannot be extended—the District Land Board is a trustee of former public land on behalf of the public—It is land in respect of which the public has residual claims of a collectivity which entails the right of citizens to complain about any acquisition that is made for wasteful or other improper purposes —illegality in the transaction voids the title irrespective of the fact that the transferee may not be at fault—a person in possession of land is entitled to legal protection until displaced by one with a better title.*

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## JUDGMENT

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**STEPHEN MUBIRU, J.**

Introduction:

- [1] As representatives of 337 others, the plaintiffs jointly and severally sued the defendants jointly and severally for a declaration that they are the rightful customary owners of their various holdings, constituted within land comprised in LRV 1077 Folio 22 situated at Opok Kalanga Amar Parish, Koch Goma sub-county, Nwoya District, an order of cancellation of that title, general damages for trespass to land, a permanent injunction, interest and costs.
- [2] Their claim is that they have been in occupation of their respective holdings since 1971. Several of the plaintiffs' forefathers were during the mid 1980s wrongfully arrested for alleged criminal trespass onto the land, at the instance of the defendants' late father Julius Peter Abe. They were surprised when the second defendant wrote to them collectively a letter dated 10<sup>th</sup> January, 2009 requiring them to vacate the land or face forceful eviction there from. The plaintiffs convened a meeting on 24<sup>th</sup> February, 2009 at which they resolved not to vacate the land. The plaintiffs discovered that the defendant's late father had in 1977 fraudulently acquired a leasehold title over the land they occupy, which lease had expired in 1982. The first three defendants nevertheless on 7<sup>th</sup> October, 2010 obtained extension of the expired lease to full term by the 4<sup>th</sup> defendant, which extension they contest.
- [3] The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint written statement of defence. The first three defendants denied the plaintiffs' claim in toto. They contend instead that their late father, Julius Peter Abe acquired the land, measuring approximately 2628 hectares, and a leasehold title deed thereto lawfully from the Uganda Land Commission. The land was vacant at the time and it is only during the insurgency of the Lord's Resistance Army that the plaintiffs trespassed onto the land. Their

late father did not engage in any fraudulent acts as alleged or at all. The defendants lawfully secured extension of the lease to full term. The plaintiffs have no rightful claim to the land on which they are trespassers who have mobilised themselves into a mass bent on defeating the defendants' title. They therefore counterclaimed against the plaintiffs for a declaration that the land belongs to the defendants, general damages for trespass to land, a permanent injunction, interest and costs.

- [4] In its written statement of defence, the fourth defendant too denied the plaintiffs' claim in toto. It contended instead that grant of the lease by the Uganda Land Commission to late Julius Peter Abe was done lawfully after he had satisfied all the necessary procedures and requirements. The claim by the plaintiffs is barred by limitation. The fourth defendant's communication to the Uganda Land Commission leading to the extension of lease on 7<sup>th</sup> October, 2010 was proper and the plaintiffs have no cause of action against the 4<sup>th</sup> defendant. The suit should therefore be dismissed with costs.

The plaintiffs' evidence;

- [5] In his testimony, P.W.1 Wokorach Justine stated that it was after the coup of 1971 that the defendants' late father Julius Peter Abe sought refuge with his cousin, the late Ojara Batulumayo then resident at Kalak Opok village. He was given a garden measuring approximately two acres to farm. During the early 1980, the late Julius Peter Abe commenced a process of causing the arrest of several persons with customary holdings situate within the over 6,000 acres constituting Amar Parish, claiming they had trespassed onto his land. All were acquitted of the trumped up charges and allowed to return to their respective holdings. He nevertheless caused the forceful eviction of several persons closet to him and established a farm on approximately 200 acres of that land. They were surprised when the second defendant wrote to them collectively a letter dated 10<sup>th</sup> January, 2009 requiring them to vacate the land or face forceful

eviction there from, yet they and their forefathers were all born raised on and continue to live on that land.

[6] Although in 1984, the then District Commissioner Lubanga Kiwanuka had come to the area and directed people to leave what he described as the late Julius Peter Abe's land, it is on basis of the attachment to the notice given to them by the letter dated 10<sup>th</sup> January, 2009 that the plaintiffs first became aware of the fact that the defendants' father the late Julius Peter Abe had secured a leasehold title over land, which included that which the plaintiffs occupy. The plaintiffs convened a meeting at which they resolved not to vacate the land, hence the suit.

[7] P.W.2 testified that from around 1982 onwards, the late Julius Peter Abe commenced a process of causing the arrest of several persons with customary holdings situate. This prompted the then District Commissioner Lubanga Kiwanuka to visit the area on 27<sup>th</sup> July, 1984 to establish what was causing the numerous arrests, in a bid to resolve the dispute. The defendants failed to produce a title deed to the land prompting him to direct that the occupants could continue occupying the land. There was no more harassment until 2009 when the defendants issued a notice to the plaintiffs to vacate the land. Their search at the land office yielded information to the effect that the late Julius Peter Abe applied for 8,000 acres on 25<sup>th</sup> October, 1971. In 1977, he acquired a title for an initial term of five years. There was no evidence to show that the land was ever inspected before the offer of a lease. The plaintiff's have no claim to the approximately 200 acres popularly known as "Abe Farm." By the time the then District Commissioner Lubanga Kiwanuka visited the area on 27<sup>th</sup> July, 1984 the defendants' title deed had expired.

[8] P.W.3 Deresiya Angee testified that the land she occupies originally belonged to her father Ronaldo Otto. She was born on that land in 1944 and was raised on it. When her father died during the late 1980s, he was buried on that land. It was

after the coup of 1971 that the defendants' late father Julius Peter Abe sought refuge with his cousin, the late Ojara Batulumayo then resident at Kalak Opok village, about five kilometres from the home of her father. It is when the late Julius Peter Abe was appointed the District Commissioner of Gulu that he began claiming land, including that occupied by her family. He brought tractors and forcefully took over gardens of occupants closet to him. When the then District Commissioner Lubanga Kiwanuka visited the area, the late Julius Peter Abe did not disturb the occupants again. All the rest of the plaintiffs live on the land now claimed by the defendants. It is in 2009 that the defendants initiated harassing the plaintiffs again.

- [9] P.W.4 Ojok Collins testified that he is the son of the late Ojara Batulumayo of Kalak Opok village and was born on the land in dispute in 1962. That it is during 1971 that the defendants' late father Julius Peter Abe sought refuge at the home of Ojara Batulumayo, who gave him two acres to farm. The late father Julius Peter Abe was later appointed District Commissioner of Gulu. He then claimed to have been allocated the land occupied by the late Ojara Batulumayo and demanded that he vacates. He brought a tractor and began to forcefully plough the late Ojara Batulumayo's gardens, destroying his crops in the process. He extended the area of encroachment into the neighbouring gardens. He threatened the occupants demanding that they should leave the land and he began causing their arrests. This prompted the then District Commissioner to visit the land and directed the occupants near the Abe's to vacate the land. Some shifted others did not. In 1984 another District Commissioner came to the land and stopped Abe's activities of displacing occupants. The occupants enjoyed quiet use of their holdings until the period of insurgency. They returned after the insurgency but found the defendants had cut all their mango trees apart from one. The defendants destroyed their house they had constructed. In 2009 the defendants issued a notice to vacate, claiming to be owners of 6000 acres, yet the land they claim has never been inspected. The plaintiffs convened a meeting at which they resolved not to vacate the land, hence the suit.

[10] P.W.5 Ocaya Kenneth testified that he inherited the land he occupies from his late grandfather. It was after the coup of 1971 that the defendants' late father Julius Peter Abe sought refuge with his cousin, the late Ojara Batulumayo then resident at Kalak Opok village, who gave him two acres to farm. Later he appointed District Commissioner of Gulu. In 1978 he began evicting people from the land within a radius of three miles from the two acres he had been given originally. In the process he evicted thirteen families. He cut down the mango trees they had planted, levelled the graves of their deceased relatives buried on the land and razed their homes to the ground. They shifted to other locations, but still within the boundaries of the land now in dispute, from where the defendants still want to evict them. Their attempts to return to their original homesteads in 1988 resulted in arrests and prosecution. A District Commissioner came to the land and stopped Abe's activities of displacing occupants since he had no land title. Most of the plaintiffs returned to the land in 2002 after the LRA insurgency.

The defendants' evidence;

[11] In his defence, D.W.1. Frank Okello Abe testified that the land in dispute is their family farmland, which he has farmed since his childhood. He first visited the land in 1971 at the age of six years when his late father was a District Commissioner. There were huts and storage barns already established on the land. His late father used to hire tractors and had established gardens over approximately 200 acres of the land. Before his father picked interest in the land, it was wild, uninhabited, hunting ground. By the time he applied for a lease over the land, it was free of occupation. He was granted a five year lease over 2628 hectares (6,491 acres) comprised in LRV 177 Folio 22. In 1973 he fled into exile but returned in 1979 and re-established the farm. In 1987 he was driven off the farm by soldiers of the National Resistance Army. They did not return to the farm because of the LRA insurgency, until the year 2007 and found the land still vacant. It is in 2008 that they renewed their farming activities on the land and applied for extension of the lease to the full term of 49 years. They continued to

pay ground rent for the land even during the period they were not in occupation. During the 1980s, all illegal occupants were directed by two successive District Commissioners to vacate the land, and they left. It is only during the previous six years prior to the filing of the suit, around 2008, that the plaintiffs have re-occupied the land as trespassers, thereby disrupting the defendants' farming activities.

[12] D.W.2. Luka Okech Abe testified that he is one of the administrators of the estate of his late father Julius Peter Abe. His late father acquired the land in dispute during the year 1971, free of occupants while it was used only as a hunting ground. Although he was ordinarily resident abroad, when he first visited the land in 1979, he found that his father had established on it a farm with huts and storage barns. The land was free from occupants. It is during the year 1987 that his father vacated the land due to insurgency. When acquiring the land, his father obtained a lease offer dated 19<sup>th</sup> February, 1980 (exhibit D.2), pursuant to the meeting of the Uganda Land Commission under MIN 88. NA/W-124 (exhibit D.12), and executed the lease agreement on 10<sup>th</sup> April, 1980 (exhibit D.3). A title deed was issued on 6<sup>th</sup> May, 1980 for a five year initial term with effect from 1<sup>st</sup> February, 1977 (exhibit D.5). The leasehold title expired in 1982. On 12<sup>th</sup> February, 2010 they applied to Amuru District Land Board for an extension of the lease (exhibit D.6). The District Land Board granted the extension on 15<sup>th</sup> June, 2011 (exhibit D.7). They were not required to re-open the boundaries during the process of securing extension of the lease. They have paid ground rent for the land since the year 2010 (exhibit D.11). Although in 1982 the District Commissioner met the occupants and asked them to leave the land, some of them did not.

[13] D.W.3. Kitale J.B. Lapiem Obong, Secretary to Amuru District Land Board, testified that he receive the defendants' request for an extension of the lease over the land in dispute. Although Nwoya District had been created in 2007, it did not have a land board and it is Amuru District Land Board that was still in charge

of land matters of Nwoya District until the year 2012. Based on the fact that the defendants had the expired title deed, the lease offer and the lease agreement, and after confirmation of the status of registration at the land registry, the Board on 7<sup>th</sup> October, 2010 decided approve an extension of the defendant's lease to the full term of 49 years. The defendants paid ground rent to that year. There was no need to re-open the boundaries since the extension would have been granted whether or not there were occupants on the land. The defence then closed its case.

The Court's visit to the *locus in quo*;

[14] Visiting the *locus in quo* was then fixed for 31<sup>st</sup> March, 2015 but for unexplained logistical reasons, it could not take place until four years later on 4<sup>th</sup> April, 2019. The Court began by inspecting the location where P.W.4 Ojok Collins claimed his parents' home was initially before they were evicted by the defendants' father and forced to relocate to another part of the land. At the spot, there was one mango tree still visible. He claimed that the rest had been mowed down by the defendants' father. It was the only mango tree within sight over a radius of over half a kilometre. There were also fragments of what appeared to be broken burnt bricks within fifteen meters from the mango tree, which he said marked the location of one of the graves that had been levelled by the defendants' tractors. The location along the road where he claimed the actual house used to stand had nothing left of it to be seen.

[15] The court then proceeded to the second site, the location of the defendants' farm houses which is about 300 meters from the first site. There both D.W.1. Frank Okello Abe and D.W.2. Luka Okech Abe demonstrated to court the location of their old farm hoses. There were remnants of cement blocks. They also showed the court a grinding stone that used to exist in the compound of the farm houses. There is a new kraal, a brick farm building, a bore hole and produce store.

Several head of cattle were seen together with farm workers. In the background was a forest.

[16] Thereafter the court proceeded to the last site located over five kilometres away from the defendants' farm buildings, where P.W.3 Deresiya Angee demonstrated the location of her late fathers' homestead. There were two new huts one of which is occupied by her brother said to be mentally disturbed. There were remains of what she said was their granary. She showed the court the grave of her father. At one end of the compound, was a line of quite big and mature acacia trees capable of yielding timber which in the estimation of court were over twenty five years old. About four hundred meters from that home, she also showed court a line of old barbed wire fencing, parts of which over time had become embedded up to two inches into the bark of tree trunks to which it had been nailed, that her father had put in place to prevent the defendants' father's cattle from straying into his garden. Scattered in between these three locations were homes and pockets of gardens with seasonal crops said to belong to some of the plaintiffs. The court did not have time to inspect the rest of the plaintiffs' holdings because of the distances between them and their sheer large number. In the court's estimate, the land in dispute covers almost the entire parish, most of which is uncultivated and uninhabited.

The issues for Court's determination;

[17] In their joint scheduling notes filed in court on 24<sup>th</sup> October, 2012, the following issues were raised for the determination of court;

1. Whether the suit is time barred.
2. Whether the plaintiffs are bona fide customary owners of the different parts of the land.
3. Whether the defendants fraudulently acquired the suit land.
4. What remedies are available to the parties.

Submissions of the plaintiffs' counsel;

[18] In his final submissions, counsel for the plaintiffs argued that although some of the plaintiffs had in the past been forced to relocate from portions of land near the defendants' farm houses, they relocated and still occupy other parts of the land in dispute under a claim of right by virtue of the fact that from time immemorial their forefathers had lived on that land. All the plaintiffs occupy land under customary tenure. Each of that has had a long period of occupation and usage that court was able to confirm during the visit to the *locus in quo*. The defendant's father acquired title fraudulently without knowledge or participation of any of the plaintiffs yet they lived on the land. The land was never inspected. The plaintiffs only came to know of the existence of the title deed in 2009. They then secure extension of what was an expired lease. The 4<sup>th</sup> defendant did not have the capacity to extend what was practically at the time an expired lease. They should have required the defendants instead to apply for renewal of a lease which would have required the defendants to go through the process of inspection and boundary opening. In the alternative, by reason of the long periods of occupancy over multiple generations, the plaintiffs are adverse possessors whose continued occupancy cannot be defeated by the defendants' title. The plaintiffs are therefore entitled to the relief they claim

Submissions of the defendants' counsel;

[19] In response, counsel for the defendants submitted that the plaintiffs' claim that they had occupied the land in dispute before 1971 is contrary to their pleadings and should be rejected since it is a departure from their pleadings. The plaintiffs did not demonstrate how they acquired customary tenure over the land. The plaintiffs acknowledged though that the defendants' father the late Julius Peter Abe resided on the land in dispute with his cousin, the late Ojara Batulumayo as way back as 1971. At the time of the grant of the lease, the law in force at the time vested that power in the Uganda Land Commission. Anyone who wished to

acquire customary tenure over public land at the time had to seek permission of the authorised persons and bodies. Mere long periods of user and occupation could not confer interests of a customary nature. The defendant's father acquired the lease lawfully and when it expired the land reverted to the District Land Board which had the authority to extend the lease. The plaintiffs have not proved any fraud in the process leading to the acquisition and extension of that lease. The plaintiffs cannot seek to challenge the validity of a title deed that was issued more than thirty years ago. The plaintiffs as tenants at sufferance on the land are not entitled to any relief. They have instead refused to vacate the land since they were directed to do so in 1978 by the then District Commissioner Lubanga Kiwanuka causing the defendants extreme inconvenience for which they should be granted the remedies sought in the counterclaim.

**First issue; Whether the suit is time barred;**

[20] The issue was raised at the instance of court by the then trial Judge. It arises from the fact that the evidence reveals rights over parts of this land have been in contention since the mid to late 1970s, yet under sections 5 and 6 of *The Limitation Act*, actions for recovery of land must be commenced within a period of twelve years from the date of adverse possession. In paragraph 5 of the plaint, the plaintiffs seek declaratory relief. Under Order 2 rule 9 of *The Civil procedure Rules*, no suit may be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

[21] Under *The Limitation Act*, there is no limitation period specifically directed at a suit for declaratory judgment. A relief or redress by way of a declaration is not founded on tort or contract but is a cause of action in itself akin to specific performance, injunction or other equitable relief and is therefore exempted from the limitation periods prescribed by the Limitation Act (see *Western Highland*

*Creameries Ltd. and another v. Stanbic Bank Uganda Ltd. and two others, H. C. Civil Suit No. 462 of 2011).*

- [22] The issue in this suit then is whether a plaintiff can simply walk around the time limits applicable to the different causes of action by seeking declarations instead of substantive relief. On the one hand, access to justice considerations may suggest that the availability of declaratory relief should not be fettered by reference to limitations that may apply to the pursuit of substantive relief for wrongs. On the other hand, it seems somewhat incongruous that the growing ascendancy of declaratory relief should render the rules applicable to the pursuit of substantive relief obsolete.
- [23] It is an established principle in equity that where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by a statute of limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords, the same limitation because "it would have been a blot on our jurisprudence if those selfsame facts give rise to a time bar in the common law courts but none in a court of equity" (see *Knox v. Gye HL (1872) LR 5 HL 656*; *Couthard v. Disco Mix Ltd. [2001] 1 WLR 707 at 730* and *Companhia De Seguros Imperio v. Heath (REBX) Ltd. and others [2001] 1 WLR 112*). Although in such cases the equitable claim is not expressly subject to the same limitation period imposed by the Act as claims in tort or contract, a court exercising an equitable jurisdiction should apply similar periods.
- [24] The person instituting a suit for a declaratory judgment must in the first place have a substantive right as the foundation for the action. Suits for declaratory judgment are unique, in that the Court will actually examine the substantive nature of the claims and the relief sought to determine which limitation period applies. Where a declaration can be made with no consequential relief, issues of limitation need not arise (see *Guaranty Trust Company of New York versus Hannay and Company Limited [1915] 2 KB 536* and *Gouriet v. Union of Post*

*Office Workers and others [1977] 3 All ER 70*). But where consequential relief is sought in addition to the declaration, and the Court determines that the underlying dispute could have been resolved through another proceeding for which a specific limitation period is statutorily provided, the Court will apply that limitation period. Where the consequential relief sought flows from the declarations of right prayed for, the applicable period of limitation in the declaratory judgment suit is determined by the substantive nature of the claim. Therefore a suit barred by limitation cannot lead to a declaratory judgment.

[25] In the instant suit, on basis of the declaratory judgment sought, the plaintiffs seek the substantive relief of general damages for trespass to land but do not in their pleading disclose in facts constituting trespass nor disclose the date when it occurred. To the contrary, their claim is substantially an attempt to prevent a threatened eviction contained in a letter from the defendants dated 10<sup>th</sup> January, 2009 (annexure "B" to the plaint), which is in effect a threatened infringement of their claimed rights in the land. Their claim therefore is essentially for a declaration and safeguarding of rights from a threatened future violation.

[26] When an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that is a case where the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else (see *Gouriet v. Union of Post Office Workers and others [1977] 3 All ER 70*). The right to sue for a declaration is founded on subsisting legal rights, or where there are contested legal rights, declarations may be made affecting subsisting or future rights.

[27] Any person entitled to any right as to any property, may institute a suit against any person denying, or interested in denying, his or her title to the right, and the Court may in its discretion make therein a declaration that he or she is so entitled, and the plaintiff need not in such suit ask for any additional relief. When a person is in lawful or peaceful possession of a property and such possession is disturbed or threatened by the defendant, a suit lies for a declaration of title and consequential relief of injunction (see *Anathula Sudhakar v. P. Buchi Reddy*, AIR 2008 SC 203; *Ellis v. Duke of Bedford* (1899) 1 Ch 494 and *Guaranty Trust Company of New York v. Hannay and Company Limited* [1915] 2 KB 536). A declaratory judgment is one that defines the legal relationship between parties and their rights in a matter before the court. Typically it states the court's authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything but sometimes a declaratory judgment may be made along with other relief, e.g. damages or injunctions (see *Osborn's Concise Law Dictionary*, Eleventh Edition (2009)).

[28] Where the plaintiff is in possession, but his or her title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he or she is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction (see *Sikuku Agaitano v. Uganda Baati Ltd* H. C. Civil Suit No. 298 of 2012). Such a suit is also known as a "Quiet Title" suit.

[29] A suit to quiet title is one filed to establish ownership of land (which includes the improvements affixed to that land). The plaintiff in a quiet title suit seeks a court order that (a) establishes the plaintiff's dominant title rights and / or (b) prevents the defendant(s) from making any subsequent claim to the property. A quiet title suit also is known as "a suit to remove a cloud in title." A cloud is any claim or potential claim to ownership of the land. The cloud can be a claim of full

ownership of the land or a claim of partial ownership, such as an easement that purports to give the defendant the right to use the land in some fashion.

[30] In the instant case, the threat against the plaintiffs' continued possession of the land arose from the letter of 10<sup>th</sup> January, 2009 requiring the plaintiffs to vacate the land or face forceful eviction there from. The suit was filed slightly over two years later, on 16<sup>th</sup> November, 2011, which is within the twelve year period of limitation. The suit would still be within time even if it were for substantive remedies arising out of rights to land. The suit therefore is not time barred.

**Second issue;**     Whether the plaintiffs are bona fide customary owners of the different parts of the land;

[31] Customary tenure is characterised by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that specific land in accordance with those rules (see section 1 (l) of *The Land Act*, Cap 227).

[32] Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply. The rules must be shown to apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules. The onus of proving customary ownership thus begins with establishing the nature and scope of the applicable customary rules and their binding and authoritative character, and thereafter

evidence of acquisition in accordance with those rules, of a part of that specific land to which such rules apply.

- [33] Although evidence of user of unregistered land may in some circumstances be sufficient to establish customary ownership of such land (see *Marko Matovu and two others v. Mohammed Sseviiri and two others*, S.C. Civil Appeal No. 7 of 1978), and possession can sometimes be used as an indicator of ownership or even to create ownership, proof of customary tenure at the least requires evidence of a practice that has attained such notoriety that court would be justified in taking judicial notice of it under section 56 (3) of *The Evidence Act* (see *Geoffrey Mugambi and two others v. David K. M'mugambi and three others*, C.A. No. 153 of 1989 (K) (unreported), Otherwise, the specific applicable customary rule should be proved by evidence of persons who would be likely to know of its existence, if it exists, or by way of expert opinion adduced by the parties, since under section 43 of the *Evidence Act*, the court may receive such evidence when the court has to form an opinion as to the existence of any general custom or right, such opinions as to the existence of that custom or right, are relevant (see *Ernest Kinyanjui Kimani v. Muira Gikanga* [1965] EA 735 at 789).
- [34] Proof of mere occupancy and user of unregistered land, however long that occupancy and user may be, without more, is not proof of customary tenure (see *Bwetegeine Kiiza and Another v. Kadooba Kiiza* C.A. Civil Appeal No. 59 of 2009; *Lwanga v. Kabagambe*, C.A. Civil Application No. 125 of 2009; *Musisi v. Edco and Another*, H.C. Civil Appeal No. 52 of 2010; and *Abner, et al., v. Jibke, et al.*, 1 MILR 3 (Aug 6, 1984). *Possession or use of land does not, in itself, convey any rights in the land under custom.* That occupancy should be proved to have been in accordance with a customary rule accepted as binding and authoritative.

- [35] Under section 1 of *The Land Reform Decree of 1975*, the law in force then, all land in Uganda had been declared public land to be administered by the Uganda Land Commission in accordance with *The Public Lands Act* of 1969, subject to such modification as were necessary to bring the Act into conformity with the Decree. Under both *The Public Lands Act* and *The Land Reform decree, 1975*, occupants, including customary tenants on public land, were only tenants at sufferance and controlling authorities had power to lease such land to any person.
- [36] Regulation 1 *The Land Reform Regulations 1976* (S.I 26 of 1976) in force at the time provided that any person wishing to obtain permission to occupy public land by customary tenure had to apply to the sub county chief in charge of the area where the land is situated. The applicant then had to be registered as a customary occupant of land by the sub-county Land Committee according to Regulation 3. Since there was no evidence that the plaintiffs undertook any of this, the plaintiffs were barred from acquiring interest in the land of a customary nature by section 5 (1) of *The Land Reform Decree* which prohibited the occupation of unoccupied public land by customary tenure without permission of the prescribed authority, and Section 6 which made it an offence for one to do so (see *Paul Kisekka Saku v. Seventh Day Adventist Church Association of Uganda, S. C. Civil Appeal No. 8 of 1993*). Any customary occupation without consent of the prescribed authority was declared unlawful (see also *Tifu Lukwago v. Samwiri Mudde Kizza and Nabitaka S. C. Civil Appeal No. 13 of 1996* and *Paul Kiseka Ssaku v. Seventh Day Adventist Church S. C. Civil Appeal No. 8 of 1993*).
- [37] In addition, the plaintiffs did not lead such evidence, neither by themselves nor of persons who would be likely to know of the existence of such customs as they claim, that guided their acquisition of the various portions of land they hold currently. When the court visited the first site where P.W.4 Ojok Collins claimed his parents' home was initially before they were evicted by the defendants' father

and forced to relocate to another part of the land, it was persuaded to believe him since there was one old mango tree still visible, which appeared to have been planted and not one that grew wild. It was the only mango tree within sight over a radius of over half a kilometre. There were also fragments of what appeared to be broken burnt bricks within fifteen meters from the mango tree, which fit the description of the location of a grave.

[38] At the last site inspected during the court's visit to the *locus in quo*, P.W.3 Deresiya Angee demonstrated the location of her late fathers' homestead. Existence of the remains of what was their granary, the grave of her father and the big, mature acacia trees planted in a line, existence of a line of old barbed wire fencing, parts of which over time had become embedded up to two inches into the bark of tree trunks to which it had been nailed, all combined persuaded court to believe that occupancy of that part of the land by her family was in excess of twenty five years. Scattered in between these two locations were homes and pockets of gardens with seasonal crops said to belong to some of the plaintiffs.

[39] Although the court was unable to inspect the rest of the plaintiffs' holdings because of the distances between them and the sheer large number of home involved over a wide expanse of land, the court takes the two extremes to be representative of the rest of the plaintiffs. On the one hand are plaintiffs who in the past were forced to relocate to other parts of the land and only remnants of their dwellings still exist on the land, while others have never left their current holdings, save for the period of insurgency. The plaintiffs' evidence therefore established only the fact of possession of their respective holdings but not the fact that they are customary owners of the land. That said, 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*). Possession may thus only be terminated by a person with better title to the land.

To be entitled to evict the plaintiffs from the land, the defendants must prove a better title to the land.

**Third issue;**            Whether the defendants fraudulently acquired the suit land;

[40] It is on that account that the defendants rely on the Leasehold title deed comprised in LRV 1077 Folio 22, land at Tim Opok, Omoro, West Acholi (exhibit D.5). The title deed sought to be relied upon is an expired lease title whose term ran for the initial term of five years, from 1<sup>st</sup> February, 1977 to 1<sup>st</sup> February, 1982. Although the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants tendered in evidence correspondence and minutes of the 4<sup>th</sup> defendant to show that the term of that lease was extended to the full term of 49 years (exhibit D.6 being the minutes of the meeting of Amuru District Land Board of 14<sup>th</sup> - 15<sup>th</sup> June, 2011), it would seem that to-date the title deed for the full term has never been issued, since it was never tendered in evidence during the trial.

[41] Section 59 of *The Registration of Titles Act*, guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*, which essentially relate to error, fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker [1967] AC 569*).

[42] Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practices to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick,

cunning, disabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya* S.C. Civil Appeal No. 36 of 1995).

[43] In seeking cancellation of title on account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents (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. 22 of 1992). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited* [1987] HCB 130 and *M. Kibalya v. Kibalya* [1994-95] HCB 80).

[44] It is the plaintiff's contention that the defendants fraudulently procured extension of LRV 1077 Folio 22, Block 3 Nwoya County, Amuru District, a lease that ran from 1<sup>st</sup> February, 1977 for the initial five year term that expired on 1<sup>st</sup> February, 1982. It is their contention that the purported extension to the full term of 49 years under Min. ADLB (2) Min. 4(84) as shown by the minutes of the meeting of Amuru District Land Board of 14<sup>th</sup> - 15<sup>th</sup> June, 2011 (exhibit D.6), was fraudulent, inter alia, for inclusion of their respective holdings in the land allotted to the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, and not affording them an opportunity to be heard before the decision for extension was made, yet they were in possession of parts of the land.

[45] The law in force at the time the lease for the initial term was granted was *The Land Reform Decree of 1975*. Under section 1 thereof, all land in Uganda had

been declared public land to be administered by the Uganda Land Commission in accordance with *The Public Lands Act* of 1969, subject to such modification as were necessary to bring the Act into conformity with the Decree. Upon the promulgation of *The Constitution of the Republic of Uganda, 1995*, according to article 241 (1) (a) thereof and section 59 (1) of *The Land Act*, the power to hold and allocate land in the district “which is not owned by any person or authority,” was vested in the District Land Boards (see *Kampala District Land Board and another v. National Housing and Construction Corporation S. C. Civil Appeal No.2 of 2004*). In this case, the one in dispute was vested in the fourth defendant Amuru District Land Board, which by operation of law became a successor in title to the Uganda Land Commission in respect of former public land and land which is not owned by any person or authority or which had not been granted or alienated to any person or authority.

i. Duties of a District Land Board in the grant of "public leases."

[46] For want of a better expression, I have chosen to refer to leases granted by the District land Board over former public land or land within the district which is not owned by any person or authority, as "public leases," in contradistinction with leases by private persons and entities over land that is privately owned. Whereas the allocation, appropriation, disposal and use of land under a private lease is governed almost entirely by private law, public leases at the stage of land administration, before that of registration, are governed by considerations of both public law and private law. The contentions raised by the plaintiffs call into question the role and duties of a District Land Board in transactions of this nature and whether or not the fourth defendant lived up to them in the manner in which it went about the extension of the lease to the land now in dispute.

[47] According to article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* (reproduced in section 59 (1) (a) of *The Land Act*) one of the cardinal functions of District Land Board is "to hold and allocate land in the district which

is not owned by any person or authority." Save for the requirement that in the performance of its functions, a district land board shall take into account "national and district council policy on land" (see article 214 (2) thereof), and "the particular circumstances of different systems of customary land tenure within the district" (see section 60 (1) of *The Land Act*), *The Constitution* and *The Land Act* do not provide any further guidelines.

[48] Be that as it may, part XXVI (i) on "Accountability" in the National Objectives and Directive Principles of State Policy, comprised in the preliminary section of *The Constitution of the Republic of Uganda, 1995*, emphasises the fact that all public offices are "held in trust for the people." This concept of "public trust" entails functions in which the society at large has a stake and which in the scope of land administration and management warrant recognition, promotion, and protection by ensuring sustainable land use and development throughout their area of jurisdiction, as well as conservation of the environment.

[49] A District Land Board is entrusted with powers only of Land administration which include; - management, allocation and disposing of former public land or land in the district which is not owned by any person or authority, as well as leasing and effecting change of user in respect of such land. In exercise of those powers, section 59 (8) of *The Land Act* provides that;

The board shall hold in trust for the citizens the reversion on any lease to which subsection (1) (c) relates and may exercise in relation to the lease and the reversion the powers of a controlling authority under *The Public Lands Act, 1969*, as if that Act has not been repealed; but subject to the foregoing, that Act shall, in respect of any such lease or reversion, have effect with such modifications as may be necessary to give effect to this Act and shall be subject to the provisions of the Constitution (emphasis added).

[50] The fact that the Board holds the reversion "in trust" for the citizens implies that it is the duty of a District Land Board to manage land entrusted to it, for the public

good, in the sense that it is land in which the public has an interest, or some interest by which their legal rights or liabilities are affected (see *Black's Law Dictionary*, 6<sup>th</sup> Edition, St. Paul, Minn. West Publishing Co. (1990). The law thus creates a special trust that imposes fiduciary duties upon the Board, such as the duty of good faith, fair dealing, full disclosure and loyalty, which require it to exercise its discretion or expertise in the best interests of the citizens. The decisions of a district Land Board should therefore be founded on the principles underlying good governance in the management of such land which are; legitimacy, accountability, fairness and participation. The Board should be a reliable and trusted institution in land management and delivery of security of tenure, equity in land distribution, and the promotion of sensible and attractive development such that public benefits are maximised. Ultimately, the Board should aim to use its powers of land administration as a means of achieving sustainable development.

- [51] Public land management focuses on establishing and sustaining an optimum balance of use, conservation and development of resources, in harmony with the values and needs of society. The Board should in all its decisions primarily aim to promote public welfare as opposed to decisions that benefit one or a few individuals. As aptly stated by the Private Sector Foundation, Uganda in its *Review of the Legal Framework for Land Administration: Final draft issues Paper*, (August, 2010) at p. 19;

With increasing populations, demands for industrialisation and development, and for environmental conservation, public land management practices and policies must address a wider range of competing demands. These include access to land for the land-poor and other pro-poor agendas, agricultural uses, industrial uses, commercial uses, recreation, and conservation of selected public land locations. Underlying these competing and sometimes irreconcilable demands is a requirement to balance development and conservation of the land with long-term sustainability.

[52] The challenge of the District Land Board as the resource manager is to "read" when and where different rights regimes, as between the private, the commons and the collective, may be appropriate to support poverty alleviation and sustainable rural livelihoods more generally. Whereas, article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* charges a District Land Board with the management of land by holding and allocating land in the district which is not owned by any person or authority, the Board ought to be mindful of the fact that administrators of land have an impact on land tenure systems in their area of jurisdiction. They have a special responsibility to society. They cannot perpetuate a system of allocation, appropriation, disposal or use of such land that is devoid of accountability or methodology. Holding such land in trust for the citizens of Uganda imposes upon the Board an obligation to manage it in an equitable and efficient manner that guarantees sustainable productivity. The Board should be keen on ensuring that individuals or corporations who own large tracts of land put it to sustainable productive use.

[53] Weak governance in the system of allocation, appropriation, disposal or use of such land has direct and indirect implications for citizens, and broader effects on economic development, political legitimacy, peace and security and development cooperation (see Willi Zimmermann, *Effective and Transparent Management of Public Land Experiences; Guiding Principles and Tools for Implementation*, a paper presented at the FIG/FAO/CNG International Seminar on State and Public Land Management in Verona, Italy, 9-10 September, 2008). This is further echoed in *The Uganda National Land Policy* (February, 2013 at p 4) thus;

One of the major concerns in the land sector at present is the allocation of government land, public land, and natural resources held by the State in trust for the citizens for private investment. Such land allocations have taken place amidst an environment of incoherent and / or non-existent and / or non-transparent processes and procedures. This in effect, has weakened institutions governing the use and management of these lands and natural resources. Some of the allocations have not considered ecological, environmental, economic

and social impacts; and as such have displaced vulnerable land and natural-resource-dependent communities whose rights to land access, food security and livelihoods are lost. Whereas private sector investment in land and natural resources is necessary and should be promoted, safeguards ought to be put in place to ensure a transparent process with due diligence so that the land rights of vulnerable sections of society and the environment are not compromised.

[54] The basic reason that societies manage land is to satisfy human needs. Having a secure home, or even a secure place to sleep or work, satisfies fundamental necessities of life, just as guaranteeing a harvest to the sower of grain delivers food security (see Ian Williamson et.al.; *Land Administration for Sustainable Development*, Esri Press, 380 New York Street, Redlands, California 92373-8100 (2010) at p 15). A sustainable system of land administration requires that the institutions that interact with the citizens who are its intended beneficiaries do so in ways that build their confidence, particularly by negating disputes and managing points of tension relating to landownership, use, and availability. For example providing gender inclusiveness in access to land can benefit families, communities, and the nation through;- increased economic opportunities, increased investment in land and food production, improved family security during economic and social transitions, and better housing and land stewardship. Land is also required for:- (i) direct developmental benefits for the country through improved food security; (ii) infrastructural developments which benefit the public; or (iii) activities with strong linkages to other industries in the country that generate substantial foreign exchange. Such benefits, however, can only be fully realised if the Board is sensitive to all these dimensions.

[55] Under article 421 (1) (b) of *The Constitution of the Republic of Uganda, 1995* and section 59 (1) (b) and (c) of *The Land Act*, the Board has the power to facilitate the registration and transfer of interests in land and take over the role and exercise the powers of the lessor in the case of a lease granted by a former controlling authority. It may be inferred from those provisions that it has the power of alienation of such land. With the responsibility of protecting and

overseeing the public's rights and interests in such transactions, it is therefore the duty of the Board to develop guidelines on the procedure to be followed, and factors to be considered in the extension and renewal of leases. These roles are the preparatory steps towards the registration of a title. Land Registration (the process of determining, recording, updating and disseminating information about the ownership, value and use of land), is outside the Board's scope of duties but affects the legitimacy of the title. A title may be vitiated by fraud, error or illegality manifesting itself at any stage of the whole process leading to and including the final registration and issuance of title.

- ii. Perspectives of Public Law in the allocation, appropriation, disposal and use of land under "public leases."

[56] Article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act* infuse the Constitutional doctrine of Public Trust into the duties of the District Land Board. In essence the Public Trust Doctrine makes the District Land Board the public guardian of Land entrusted to its supervision which must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. The Board is a trustee of land in which by its nature the public has an interest, i.e. former public land, and land in the district which is not owned by any person or authority.

[57] The land entrusted to the management of the District Land Board is a hybrid property regime of mixed public-private or collective rights situation, giving rise to a complexity of property rights through time and space, related to access, withdrawal, management, exclusion and alienation of that land or parts of it as a public resource. The essential import of this doctrine is that the land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development.

- [58] When the court is concerned, as it is here, with the alienation by a State agency into private hands of an irreplaceable public resource, a different standard must control. This property is *sui generis* which transcends the ordinary rules of land law. This Constitutional doctrine of public trust engenders the idea that the public has a right to expect certain principles to guide the Board in its land management decisions so as to match land-use rights with land-use options for achieving sustainable development objectives. On basis of 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.
- [59] 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.
- [60] The District Land Board, as a state agency, therefore needs to set general parameters for the management, allocation, acquisition, user and retaining such land in a manner that is consistent with the principles of sustainable

development, poverty reduction and good governance. Within this context, land entrusted to it must be managed to the maximum long-term economic advantage of the people, in a manner that honours social and environmental objectives, that provide adequate facilities for users, and respects other relevant government policies. The Board should set forth the criteria for deciding who is to benefit from how much of this resource, for how long and for which purposes. The development objectives of growth, poverty reduction and revenue generation need to be balanced and made compatible. Arbitrary allocation of land fuels rather than manages tensions introduced when changing the tenure structure.

[61] According to section 59 (8) of *The Land Act*, a District Land Board is authorised to exercise as holder of the reversion, in relation to subsisting leases over former public land, the powers of a controlling authority under *The Public Lands Act, 1969*, as if that Act has not been repealed. The procedures of allocation, renewal and extension of leases though are not stated in either Act. Nevertheless, under *The Public Lands Rules S.I 201-1* (later revoked in March, 2001 by rule 98 of *The Land Regulations, S.1. 16 of 2001* which in turn were subsequently on 16<sup>th</sup> December, 2004 revoked by rule 96 of *The Land Regulations, S.1. 100 of 2004*), there were prescribed forms and procedures out of which were developed standard terms and conditions of every grant of public land. These were well thought out and covered the whole country. They made land administration easier and did not leave too much procedural discretion to public officials.

[62] These standard forms, terms and procedures pale in comparison to the more explicit *Land (Extension and Renewal of Leases) Rules, 2017; S.I. No. 281 of 2017* (made under section 13 (2) of *The Land Act, 2012; Act No. 6 of 2012*) of the Republic of Kenya, which are aimed at achieving greater transparency in the lease renewal and extension processes, by streamlining a detailed procedure. This court is inclined to adopt some of the criteria therein as guides for the decision to renew or extend a public lease.

- [63] The citizens must be able to remain informed if they are to retain their interest in land managed by the District Land Board. Two of the key tools used in securing the public interest in the activities of the District Land Board in the allocation, acquisition, management and retention of land, which tools are aimed at achieving transparency and accountability in its methodology, are public notices and hearings. The purpose of public noticing is to alert affected or interested parties that an application is being considered so that they may contribute their feedback to the review process. The notice ought to be published within the local community, in a newspaper with wide circulation in the district and by such other means as are likely to draw the matter to the attention of persons likely to be affected by the application within the district and copies sent to the neighbouring property owners. The notice must include reference to the date, time and location of the meeting. Public hearings serve as a forum for the Board and public to review and comment on the application and proposed user.
- [64] This legislative intent may be gleaned from declarations clearly set forth in provisions such as regulations 17, 23, 26 and 75 of *The Land Regulations, 2004, S.I No. 100 of 2004* in relation to the publication of notices and regulations 21 and 22 thereof, in relation to the conduct of proceedings at public hearings. When the Board lets citizens know when they are meeting and the issues to be addressed, it takes an important first step in establishing a climate of land management based on respect for the citizens' judgment. By facilitating public attendance at its meetings, the Board can ensure the circulation of first-hand information about why it acted as it did, and prevent the spread of misinformation.
- [65] On the other hand, the Constitutional doctrine of public trust embedded in article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act*, constitutes such land into a category of a collective asset or common property or common heritage of the citizens. Perceived from that perspective, once a thing is held in common, the claims of non-possessors are

more insistent. It suggests that members of the public can reasonably expect the District Land Board to respect its trustee obligations, by observing the public's protected interest holder status. This public trust creates a beneficiary interest in the public, present and future, in the land as a protected property right enforced through the right to a hearing. It guarantees a measure of adjudicative procedures prior to the creation of private interests in such land by guaranteeing the consideration of the purposes, means, and various public and private interests at stake.

[66] The District Land Board has to reconcile its actions with the public purpose requirements of the Public Trust Doctrine. Not doing so would be arbitrary or capricious action. It is in that regard that although article 237 (5) of *The Constitution of the Republic of Uganda, 1995* and section 28 of *The Land Act*, permit the conversion into freehold of any lease which was granted to a Uganda citizen out of public land, the public trust doctrine in article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act*, may militate against the conversion of certain tracts of former public land.

[67] For example in *The Uganda National Land Policy* (February, 2013 at p 21) it is recommended that leaseholds granted out of former public land without any customary rights should not be converted to freehold; since the land was not customarily owned at the time of the grant of the lease, thus they should continue to run as leasehold, with the state holding reversionary interest on behalf of the citizens of Uganda. This is because of the fact that the nature of this public trust requires a heightened public purpose that accounts for intergenerational public interests in the property, as a justification for the alienation into private property. Since the land is a public trust resource, then the District Land Board is required to undertake its actions to serve the proper public purpose of intergenerational use and access.

[68] In light of the general principle that the State cannot abdicate its trust over property in which the whole people are interested so as to leave them entirely under the use and control of private parties, a grant of a fee simple absolute title by way of conversion into freehold, which in effect abolishes those interests, would in some circumstances be an irrational means of achieving the public end. On the other hand, a grant in accordance with the right to a hearing and with the condition subsequent that the land continues to serve its public purpose, would rationally promote that end. Although conversions to freehold are primarily commenced with a view to the private advantage of the applicant, there should be demonstrable utility inuring to the public in the proposed conversion. There should be a convergence of private profit and public benefit.

[69] Categorisation of this land a public trust creates residual claims of a collectivity which give rise to the right of citizens to complain about any acquisition that is made for wasteful or other improper purposes, hence the right to be heard whenever allocations, conversions, extension of user or grants of fresh leases over such land are to be made. The Constitutional public trust doctrine foremost protects the intergenerational public interest in access to and use of that land. It demands that any regulation, conservation, or alienation of this land serves the public's beneficiary interest. It requires the District Land Board to consider both present and future interests. Parcels of such land can be disposed of only if that is possible without impairment of the public interest in what remains. In order to promote its most effective use, the public, as represented by the community living on or within the vicinity of such land, must have a say in the process by which and the terms upon which the land in question, which is owned by the collectivity, may become vested exclusively in a single member thereof.

a. Implications of Public law in the extension of a public lease;

[70] At common law, the option to extend a lease is a unilateral contract under which the lessee retains a right to seek extension of the lease during the option period.

Generally speaking, the word "renewal" with reference to a lease implies the execution of a new lease. Although in respect of ordinary leases by private persons the word is not a technical one and is frequently used as synonymous with "extension," that is not true with leases granted by statutory bodies created for the management of land. The lessor has the right to exercise the option of extension for so long as the relation of landlord and tenant exists under the original lease or an extension of it. Unlike a lease renewal, an extension of the original lease is a continuation of the original lease, without interruption and no new agreement is entered into by the parties. It is in essence a contract for an additional period of time with the same terms and obligations as a prior contract and does not confer new obligations or rights.

[71] Accordingly, if the initial five year term of a lease expires on 31<sup>st</sup> December, 2019, then the extension of lease will come into effect on 31<sup>st</sup> December, 2019, for a further 44 years if the approved term for the extension is 49 years; and it does not result in preparation and registration of a new lease and issuance of a certificate of lease for the extended period. The initial term lease includes benefits to the tenant that are meant to expire after the initial term of the lease. Every term of the original lease once extended, continues or is extended.

[72] In the absence of a specific time designation in the lease, an option to extend remains effective only during the term of the lease. When a lease stipulates that an option to extend must be exercised "at the end of" or "at the termination of" the lease, the lessee must exercise the option on or before the day the original lease expires (see *Max Norton and Long Outdoor Advertising v. John McCaskill, dba City Sign Co.*, 12 S.W.3d 789, 793-94 (Tenn.2000)). Once the lease expires, the relation of landlord and tenant ceases and in that case the lease can only be renewed. The characteristics of a lease extension are; (i) the application may only be made before expiry of the lease; (ii) once approved, such extension takes effect on the last day of the unexpired term and does not extinguish the unexpired term.

- [73] Provisions designating a time frame within which notice to extend must be given are strictly construed. Unless the actions of the parties subsequent to the expiration of the option for extension afford the lessee some kind of equitable relief, and absent any “equitable circumstances” appearing from the conduct of the parties, the option for extension provided by the lease is ineffective to extend the term after it has expired. The reasoning behind this view is that the option to extend is part of the lease and therefore expires at the same time the lease expires.
- [74] However, where the tenant holds over after the expiration of the initial term, and continues to pay the original rental, which is accepted by the lessor, under such circumstances, the lessee holds over and will occupy the status of a tenant at will. In a proper case, an option to extend at the expiration of the original lease may be effectively exercised by the lessee's holding over, without express notification by way of an application for extension. In such a situation the lessor could elect to treat the lessee as a trespasser or to waive the notice requirement and treat the lease as having been extended.
- [75] Although there is no published set of guiding criteria, by operation of the Constitutional doctrine of Public Trust embedded in article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act*, before granting extension of a lease, the Board should at a minimum;- (i) confirm that all outstanding land rates and rents have been settled; (ii) determine whether or not there are existing encumbrances on the leasehold title deed for which an extension of lease is being sought. Having encumbrances should not adversely affect the application for extension of the term of a lease, but rather, it is meant to ensure that where there is a valid encumbrance, then that encumbrance is reflected in the event that extension of the lease is approved; (iii) evidence that the landowner has complied with the terms and conditions of the existing lease.

[76] This could involve submission of building approvals and plans where the existing lease has a condition requiring the landowner to develop the property in accordance with approved plans; (iv) whether the extension is beneficial to the economy and the country; (v) whether the proposed user is in accordance with national / local policies; (vi) and whether the extension is in the public interest, public safety, public order, public morality, public health and land use planning. The land's use has to continue to serve the grant's original public purpose because the land remains subject to the public trust after the grant. Where a private person was granted the use of certain previously public land for a purpose in the public interest, there is an implied condition in the grant that the private person cannot retain the land granted without using it for the purpose for which it was granted.

[77] Various factors will be considered on lease extension, e.g. whether serious breaches of conditions and covenants exist under the original lease; if the lease was granted on policy considerations for promoting certain objectives such as commercial agriculture or industrial development, whether the policy consideration is still valid, and so on. When these considerations are subjected to public participation, although the concerned citizens may not have been permitted to participate in the debate on a particular issue, and may in fact not agree with the Board's decision, they will nonetheless have had the opportunity to participate in and witness the decision-making process, and, possibly to hear the true rationale behind the decision.

b. Implications of Public law in the renewal of a public lease;

[78] Renewal denotes the re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract (see *Black's Law Dictionary* 1410, 9<sup>th</sup> ed. 2009). Renewal of a lease creates a new lease agreement. With renewal of a lease, there is a legal instant in time between the expiry of the original term and the

commencement of the renewal term. Due to this brief cessation of a leasing relationship between the parties, a lease renewal legally creates a new lease agreement between the parties.

- [79] The practical implications of renewal of a lease are; (i) the application may be made either before or after expiry of the lease; (ii) once approved, renewal of a lease takes effect immediately; (iii) it results in the issuance of a new lease offer (letter of allotment); (iv) the land will then be re-valued to determine the payable land rent and other requisite fees, re-surveyed and geo-referenced and the lessee surrenders the existing title or lease certificate in consideration for a new lease; and (v) it results in the preparation and registration of a new lease; thereafter, a new certificate of title is issued for the renewed term.
- [80] Although there is no published set of guiding criteria, by operation of the Constitutional doctrine of Public Trust embedded in article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act*, before granting renewal of a lease, the Board should, in addition to the criteria for extension, in the first place ascertain that the land is available for leasing. It should thus take into account factors such as would guide the grant of a new lease where none existed before.
- [81] At a minimum, the Board ought to ascertain that either; (i) the applicant is in effective, exclusive possession of the entire land and there are no conflicting or adverse claims to that occupation, (ii) or where the applicant is not in occupation, that the applicant has a superior equitable claim to that of the occupant, (iv) or where the applicant is not in occupation, that the occupant has no objection to the application. It is thus incumbent on a District Land Board when renewing a lease to ascertain the availability of the land for that purpose.
- [82] When considering renewal of public leases, various factors will be taken into account, including;- giving the first-option-of-renewal to the outgoing lessee;

whether the land is required for a public purpose upon expiry of the lease; or whether serious breaches of conditions and covenants exist under the expired lease; if the lease was granted on policy considerations for promoting certain objectives; whether the policy consideration is still valid; whether the conditions will be different from those in the expired lease, such as the need to impose periodic reviews to enforce compliance with use and development conditions in leasehold covenants upon renewal, and so on. Where the use of public or publicly-granted land changes over time, the District Land Board must approve the changed use. Just as it is with extensions, when these considerations are subjected to public participation, although the concerned citizens may not have been permitted to participate in the debate on a particular issue, and may in fact not agree with the Board's decision, they will nonetheless have had the opportunity to participate in and witness the decision-making process, and, possibly to hear the true rationale behind the decision.

- iii. Legality of the lease extension granted in respect of LRV 1077 Folio 22 at Opok Kalanga Amar Parish, Koch Goma sub-county, Nwoya District."

[83] An option to extend a lease is a unilateral contract under which the lessee retains a right to seek extension of the lease during the option period. The right to seek extension will be lost, however, if the lessee fails to give timely notice in accordance with the terms of the option. Absent unusual circumstances, the option to extend a lease must be exercised prior to the expiration of the lease. The title deed sought to be relied upon is an expired lease title whose term ran for the initial term of five years, from 1<sup>st</sup> February, 1977 to 1<sup>st</sup> February, 1982. The 1<sup>st</sup> to 3<sup>rd</sup> defendant's failure to affirmatively exercise that option prior to 1<sup>st</sup> February, 1982 allowed the entire lease including the "option to extend" provisions to expire on 1<sup>st</sup> February, 1982.

[84] It is trite that when a lease expires, the land automatically reverts to the lessor (see *Dr. Adeodanta Kekitiinwa and three others v. Edward Maudu Wakida, C.A.*

*Civil Appeal No 3 of 2007; [1999] KALR 632*). Therefore upon expiry of the lease comprised in LRV 1077 Folio 22\_ on 1<sup>st</sup> February, 1982, the land reverted to the Uganda Land Commission (and by virtue of section 59 (8) of *The Land Act*, to the 4<sup>th</sup> defendant, Amuru District Land Board) which then had the option to renew the lease in favour of the most immediate previous lessee (the 1<sup>st</sup> to the 3<sup>rd</sup> defendants), re-allocate parcels of it to persons in effective physical possession respectively (the plaintiffs as well as the 1<sup>st</sup> to the 3<sup>rd</sup> defendants), or to an entirely new applicant (a third party), in the event that multiple applicants did turn up at or around the same time.

[85] In the instant case, there is no evidence to show that between 1<sup>st</sup> February, 1982 upon expiry of the initial term and 15<sup>th</sup> June, 2011 (exhibit D.7) the date of the purported extension of the expired lease, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants were in effective possession of the land. To the contrary, D.W.1. Frank Okello Abe testified that in 1973 his late father, the lessee, fled into exile but returned in 1979 and re-established the farm. In 1987 he was driven off the farm by soldiers of the National Resistance Army. They did not return to the land because of the LRA insurgency, until the year 2007. This evidence shows that for the 29 years that elapsed between the expiration of the initial five-year term and its purported extension, the defendants were not in continuous use and occupancy of the land leased under the original initial term lease agreement.

[86] To the contrary, the evidence before court shows that in the process of obtaining the initial offer, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' late father forcefully evicted some of the families closest to where the main operations of his farm were based. Political instability which thereafter engulfed the region where the land is located, led to the displacement of many of the families that once lived on the land, to different locations on the same land and beyond. There has been re-settlement on the land upon the end of that insurgency. The insurgency may also have resulted in several others to have re-located onto this land after displacement during the period of insurgency. This set of facts of itself ought to have prompted

the 4<sup>th</sup> defendant to re-visit and inspect the land, establish the state of affairs and existing competing interests and realities on the ground, and also conduct a public hearing in respect thereof before determining whether or not it was still in the public interest to renew the lease in favour of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, or on the same terms or at all.

[87] Although D.W.1. Frank Okello Abe testified that they fully paid annual ground rent during the years that followed expiry of the lease, even when they were not in occupation, the documents presented show that they paid ground rent for the land for the years 2010 and 2011 only (exhibit D.11), as a pre-condition for the extension. This shows that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, and their father before them, did not hold over after the expiration of the initial term. There is no evidence to show that they continued to pay the original rental, and that it was accepted by the lessor, to qualify them to the status of tenants at will. Indeed exhibit D10 shows that the land had to be re-valued before the assessment of the rent paid for the years 2010 and 2011 (exhibit D.11). Whereas under the initial term the agreed annual ground rent was shs.2,200/= per annum, yet the payments made for the years 2010 and 2011 show a sum of shs.650,000/= per annum was paid. That sum was arrived at after a process of re-valuing of the land, a step that is undertaken only when a lease is being renewed. The 4<sup>th</sup> defendant in effect purported to extend the lease to the full term using a method applicable to renewal of a lease.

[88] In its position as trustee of former public land on behalf of the public, the District Land Board in dealing with the land is under a duty to the public, who are the beneficiary, to deal fairly with the public and to communicate to the public all material facts in connection with the transaction which the Board knows or should know. In the instant case, the entire process of extension of the lease is devoid of any notice to the public or participation of representatives of the public (people living on and within the vicinity of the land), yet by virtue of article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land*

Act, the 4<sup>th</sup> defendant was dealing with a collective asset or common property or common heritage of the citizens.

[89] It is land in respect of which the public has residual claims of a collectivity which entails the right of citizens to complain about any acquisition that is made for wasteful or other improper purposes. Hence it entails the right to be heard whenever allocations, extension of user or grants of fresh leases over such land are being considered. The public, as represented by the community living on or within the vicinity of the land the majority of whom are the plaintiffs, were as result denied a say in the process by which and the terms upon which the land in question, which is owned by the collectivity, became vested exclusively in the 1<sup>st</sup> to the 3<sup>rd</sup> defendants for the extended period.

[90] With the state of affairs following massive displacements and resettlements in the area as a result of insurgency, the need for broader public participation becomes apparent and cannot be overstated, yet the 4<sup>th</sup> defendant not only failed to develop regulatory policies fully responsive to the prevailing public needs and the public interest, but also failed to implement the basic ones in existence. Its perspective was clearly limited by the scanty information that was available to it through correspondences. Broadened public participation is clearly desirable whenever an agency such as the 4<sup>th</sup> defendant is classifying the use to which public land may be put. The 4<sup>th</sup> defendant should have attempted to make a broad attempt to encourage individuals and groups, whether or not directly affected by the proposed extension of the lease, to present information, views, and arguments relating to the proposed extension of the lease.

[91] At common law, the duration of a lease may be extended provided that both parties agree to the extension prior to the expiration of the contract term (including extension options stated in the contract). In the instant case, extension of the lease was sought approximately 28 years after expiry of both the initial term and the option to for extension. If the contract has expired, then it no

longer legally exists and therefore it follows that, if it doesn't exist, it cannot be extended. The lease terminated on 1<sup>st</sup> February, 1982, the option was no longer in force and the fourth defendant's attempt to extend it 29 years later on 15<sup>th</sup> June, 2011 (exhibit D.7) was ineffective. An expired contract means that there is no document to amend or extend. Once an agreement has expired, the parties cannot revive it. In legal terms, it no longer exists. What the parties can do, however, is create a new contract with a new term.

[92] Ordinarily under the private law of contract, if both parties continue "business as usual," upon expiry of the contract, this will suggest that the parties intended to have the contract's old terms dictate their relationship. The court will then decide as to whether the entire expired contract applies or only parts. However in the instant case, since this land is managed "in trust" for the citizens, and in light of the legal effect of the resultant Constitutional doctrine of public, the court will be slow to infer that the lease continued between the parties either on the same terms or varied terms simply on account of the lessee's holding over.

[93] Furthermore, it is generally against public policy for a public agency to extend an expired contract. If an agency were to assume that an expired contract could lead to amendments or extensions, then the agency would never be required to conduct competitive solicitation or invite public participation. Rather, they could just amend contracts that have previously expired. In case there are exceptional reasons, then the agency needs to put in writing the reasons why this was necessary in the specific case. Whatever the case may be, the longer it has been since a contract expired, the more difficult it would be for a public agency to justify its resurrection by way of extension after its expiry.

[94] No person can lawfully do that which has a tendency to be injurious to the public or against the public good. "Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. It must fluctuate with the circumstances of

the time.....New heads of public policy come into being, and old heads undergo modification.....As a general rule, it may be said that any type of contract is treated as opposed to public policy if the practical result of enforcing a contract of that type would generally be regarded as injurious to the public interest" (see *Fender v. St John-Mildmay* [1938] AC 1, at 13–14, 18).

- [95] Aware that the court "should use extreme reserve in holding....a contract to be void as against public policy, and only do so when the contract is incontestably and on any view inimical to the public interest," (see Asquith LJ in *Monkland v. Jack Barclay Ltd* [1951] 2 KB 252, at 265), I ma of the view that to allow the extension of LRV 1077 Folio 22 to stand would be tantamount to lending the authority of court to assist the defendants to violate or breach the policy behind article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act* which entrusted the management of this land to the 4<sup>th</sup> defendant "in trust for the citizens."
- [96] The Courts will not lift a finger to help any person who claims under a contract which is against public policy; they will not, even indirectly, assist any person to violate or breach law or the policy behind a law. This is a case where the court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced (see *Hardy v. Motor Insurers Bureau* [1964] 2 QB 745 at 767–8). The instant case is one where subordination of private right to public interest is necessary for purposes of upholding the law.
- [97] Performance which contravenes a statute involves contracts which are *prima facie* legal, and which are concerned with the achievement of an objective which is legal, but which contravene a statute by the way in which they are performed. Where the object of the statute is to protect the public interest, then the contract is illegal. For example in *Re Mahmoud and Ispahani* [1921] 2 KB 716, the contract was for sale of linseed oil. It was a statutory requirement that both seller

and buyer should be licensed. The seller was licensed, but the buyer was not. The buyer nevertheless told the seller that he was licensed. When the buyer refused to take delivery, the seller sued. It was held that the seller could not enforce the contract because of its illegality, despite its reasonable belief that the defendant was licensed. Considering that the policy underlying the regulation was to prevent trading in linseed oil other than between those who were licensed, the innocence of the seller was irrelevant to that policy.

[98] Similarly in the instant case, the 4<sup>th</sup> defendant was required by law to take into account public interest in the management of the land. It proceeded to extend a lease that had expired nearly three decades before, in a manner that is injurious to that public interest. It does not matter that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants are not at fault in the process that led to the 4<sup>th</sup> defendant's decision to extend the expired lease. If a contract is found to be void for illegality, then this will, in general, mean that specific performance will be refused. This is so even if neither party has pleaded illegality (see *Tinsley v. Milligan* [1993] 3 WLR 126). It is trite that an illegality once brought to the attention of Court, supersedes all matters of pleadings, including any admission made thereon, and can be raised any time (see *Makula International v. His Eminence Cardinal Nsubuga* [1982] HCB.11 and *M/s Fang Min v. Balex Tours and Travel Ltd, S.C. Civil Appeal Nos. 6 of 2013 and 1 of 2014*).

[99] Therefore, unlike fraud as a factor vitiating title that must be attributable to the transferee by being brought home to the person whose registered title is impeached, or to his or her agents, illegality in the transaction voids the title irrespective of the fact that the transferee may not be at fault. In any case, where both parties know that though *ex-facie* legal a contract can only be performed by illegality, or is intended to be performed illegally, the law will not help the parties in any way that is a direct or indirect enforcement of rights under the contract. No valid title can arise from an illegal extension of a title that expired almost three

decades before. Consequently the 4<sup>th</sup> defendant's extension of LRV 1077 Folio 22 is declared null and void. The title is vitiated, not for fraud, but for illegality.

**Fourth issue; What remedies are available to the parties.**

[100] The plaintiffs seek an order of cancellation of LRV 1077 Folio 22, general damages for trespass to land, a permanent injunction, interest and costs. On the other hand the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' counterclaim is for a declaration that the land belongs to them, general damages for trespass to land, a permanent injunction, interest and costs while the 4<sup>th</sup> defendant claimed that the plaintiffs have no cause of action it. Together, the four defendants prayed that the suit should be dismissed with costs.

[101] A title deed that is procured illegally may be cancelled. I am persuaded by decisions by the High Court of Kenya such as that in *James Joram Nyaga and another v. The Hon. Attorney General and Another, H.C. Misc Civil Application No. 1732 of 2004(K)*, to the effect that any alienation of land that is in contravention of provisions of *The Constitution*, though the title is registered under *The Registration of Titles Act*, since the Act is subordinate to *The Constitution*, such registration would not grant indefeasibility of unconstitutional land allocations. The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility (see *Chemei Investments Limited v. Attorney General and Others, H. C. Civil Petition No. 94 of 2005(K)*).

[102] Registration of a title to land is not absolute and is defeasible where the creation of such title was not in accordance with the applicable law. A title deed issued in disregard of the applicable law and the public interest will be cancelled (see *Milan Kumar Shah and two others v. City Council of Nairobi and another, H.C. Misc Civil Application No. 1024 of 2005(K)*). The purported title will be declared null and void, irrespective of the fact that there is no proof that the title holders

were party to any fraud or misrepresentation (see section 91 (2) (e) and (f) of *The Land Act* and *C.R. Patel v. The Commissioner Land Registration and two others*, *H.C. Civil Suit No. 87 of 2009 (U)*). Having decided before that the 4<sup>th</sup> defendant's extension of LRV 1077 Folio 22 was null and void, the plaintiffs are entitled to the relief of cancellation of that title and an order to that effect is hereby accordingly issued.

[103] As regards the claim for general damages for trespass to land, an action in trespass is in enforcement of a possessory claim. It is possessory action and remedies can only be granted after proof of a possessory interest. There is need to prove actual possession by the plaintiff at the time of the defendant's unlawful entry. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised in the sense that the defendant should not have had any right to enter onto plaintiff's land. The plaintiff must prove that; he or she was in possession at the time of the defendant's entry; there was an unlawful or unauthorized entry by the defendant; and the entry occasioned damage to the plaintiff.

[104] Actual possession therefore is established by evidence showing sufficient control demonstrating both an intention to control and an intention to exclude others. At the first site inspected during the visit to the *locus in quo*, where P.W.4 Ojok Collins claimed his parents' home was initially, before they were evicted by the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' father and forced to relocate to another part of the land, apart from one mango tree and fragments of what appeared to be broken burnt bricks within fifteen meters from the mango tree, which he said marked the location of one of the graves that had been levelled by the defendants' tractors, the court established that none of the plaintiffs was in possession of that particular location. There was evidence of actual possession at the second site where the court found the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' farm houses, remnants of their old farm houses, a grinding stone that used to exist in the compound of the

farm houses, a new kraal, a brick farm building, a bore hole and produce store. Several head of cattle were seen together with farm workers. There was also evidence of habitation and possession at the third site where P.W.3 Deresiya Angee demonstrated the location of her late fathers' homestead.

[105] Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19<sup>th</sup> edition (London: Sweet & Maxwell, (1987) 46). The plaintiffs claim is substantially founded on the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' threat to evict them contained in a letter from the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' dated 10<sup>th</sup> January, 2009 (annexure "B" to the plaint). Their claim is in effect founded on a threatened infringement of their claimed rights in the land and on actual acts of trespass. The plaintiffs have not proved that any of the defendants has, following that letter of 10<sup>th</sup> January, 2009, trespassed on the land they respectively occupy. Neither did they demonstrate such acts of trespass during the court's visit to the *locus in quo*. Their claim for general damages for trespass to land therefore fails.

[106] Similarly, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' counterclaim was based on the fact they are the holders of leasehold title LRV 1077 Folio 22 which has been declared was null and void. During the court's visit to the *locus in quo*, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants were unable to demonstrate acts of trespass by the plaintiffs in respect of the land they phonically occupy. Considering that the court has granted the plaintiffs the relief of cancellation of the title, the foundation of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' counterclaim for general damages for trespass to land fails too.

[107] On the other hand, all that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants have proved is that they were lessees who have since the year 2007 re-gained possession of part of the land following the expiry of the lease for the initial five year term on 1<sup>st</sup> February, 1982. While a lessee "holding over" is a lawful occupant as he or she continues

to retain possession with consent from the lessor, a lessee who continues to retain possession without the lawful consent (whether implied or explicit) from the lessor does so unlawfully and is a tenant at sufferance. As no lawful tenancy stands created in favour of a tenant at sufferance, he or she cannot maintain an action in trespass to land.

[108] The only difference is that whereas the plaintiff's claim is based on the fact of being in possession on account of custom which has not been proved, that of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants has its root founded on a defective title and is thus clearly at sufferance. Consequently, neither the plaintiffs nor 1<sup>st</sup> to the 3<sup>rd</sup> defendants acquired any valid legal interest in the disputed land, which for all intents and purposes, according to article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (1) of *The Land Act*, remains land located in Nwoya District "which is not owned by any person or authority," and by law is vested in Nwoya District Land Board, for allocation as it may deem fit, subject to the requisite procedures and limitations.

[109] Be that as it may, possession is generally perceived to be the root of title. "That [which] gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the substance of the earth itself; which excludes everyone else but the owner from the use of it" (see Sir William Blackstone *Commentaries on the Laws of England*, vol.1). If someone is in possession and is sued for recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them (see *Ocean Estates Ltd v. Pinder* [1969] 2 AC 19). Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. The plaintiff must

succeed by the strength of his or her own title and not by the weakness of the defendant's.

[110] Consequently, a person in possession is entitled to legal protection until displaced by one with a better title. The plaintiffs' claim is essentially for a declaration and safeguarding those possessory rights from a threatened future violation by the 1<sup>st</sup> to the 3<sup>rd</sup> defendants. When an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that is a case where the jurisdiction to make declarations of right can be most usefully invoked. Therefore until displaced by a person with a better title, it is declared that the plaintiffs are entitled to retain possession of their respective holdings of the land in dispute and that possession is protected by a permanent injunction hereby issued against the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, their agents, employees or persons claiming under them, restraining each of them from interference with the plaintiffs' quiet possession and enjoyment of their respective holdings.

Order :

- [111] In the final result, the counterclaim is dismissed and judgment is entered for the plaintiffs against the defendants jointly and severally for;
- a) A declaration that the plaintiffs are entitled to retain possession of their respective current holdings of the land in dispute.
  - b) A permanent injunction against the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, their agents, employees or persons claiming under them, restraining each of them from interference with the plaintiffs' quiet possession and enjoyment of their respective current holdings.
  - c) An order directed to the Commissioner Land Registration for cancellation of the defendant's title to land comprised in LRV 1077 Folio 22.
  - d) The costs of the suit and of the counterclaim.

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Stephen Mubiru  
Resident Judge, Gulu

Appearances:

For the plaintiffs : Mr. Boris Geoffrey Anyoru.

For the 1<sup>st</sup> - 3<sup>rd</sup> defendants : Mr. Oyet Moses.

For the 4<sup>th</sup> defendant : Mr. Mukasa Fred Lugalambi.