

The defendant on the other hand claimed that she conducted a land and property valuation of the suit kibanja for purposes of compensation and came up with a total sum of UGX 4,661,800/= which was disclosed to the plaintiff. The defendant argued that the claim of UGX 500,000,000/= for compensation of the
5 suit land and the cost of relocation of the said cultural site is enormous and unjustified.

The defendant added that claim of a tree as a source of traditional interest by the plaintiff is not justifiable since the tree is not declared as a protected object under the Historical Monument Act Cap 46. That in the circumstances the plaintiff is
10 not entitled to any compensation sought. However, the defendant is willing to effect compensation to the owner of the suit land.

The plaintiff in reply to the defendant's Written Statement of Defence averred that he has always had a preference of preserving his traditional/cultural site given the cultural heritage value he attaches to it. That the said cultural site is an
15 intangible and if the road is not redesigned then the plaintiff should be adequately compensated to relocate the site.

Issues:

1. Whether the suit kibanja constitutes a cultural site?
2. Whether UGX 4,661,800/= the assessed value of the suit Kibanja is
20 adequate?
3. Whether the defendant is a trespasser on the suit land?
4. What are the remedies available to the parties?

Representation:

Mr. Golooba Muhammed and Mr. Nsimbe Musa represented the plaintiff while
25 Mr. Titus Kanya and Ms. Lucy Namuleme of the Directorate of Legal Services with Uganda Nation Road Authority together with Mr. Richard Adiole, Principal

State Attorney and Mr. Franklin Uwizera, State Attorney represented the defendant.

Submissions:

Both parties made oral submissions before Court.

5 **Resolution of Issues:**

Having carefully listened to the oral arguments made by Counsel for both parties, I resolve the above issues as follows;

Issue 1: Whether the suit kibanja constitutes a cultural site?

10 It was submitted for the plaintiff that he had been going to that area since time immemorial to perform cultural rituals. That Paragraphs 1 to 11 of his witness statement explain how the place came to be a cultural site. This evidence was corroborated by the evidence of PW2 Daudi who stated that the cultural site has been there for many years. Also, corroborated by PW3 in Paragraph 3 of his witness statement where he stated that the place has a cultural site which was
15 sold to them by the Lugave clan. That when the plaintiff would come to perform the rituals, they would destroy his plantation. That PEX1 the sale agreement shows that the reason for purchasing was because the land comprised Nabukalu and the plaintiff being the caretaker wanted to perform the rituals freely without any disturbance. That when court visited the locus, it observed some features
20 showing that since time immemorial people were there performing rituals. The whole set up showed a cultural site.

Counsel for the plaintiff added that the site ought to be protected and cited a number of laws in that regard including but not limited to the Constitution of the Republic of Uganda, 1995, Universal Declaration of Human Rights, among
25 others.

Counsel further submitted that DW1 did not take into account the issue of cultural sites. Based on the historical nature, the place is a cultural site which has been there since the inception of Buganda Kingdom, protected by the Constitution & International Convention.

5 Counsel for the defendant on the other hand submitted that the evidence adduced by the Plaintiff and his witnesses before court showed that the Plaintiff performs spiritual rituals at the suit kibanja, however this is not a protected cultural site under the laws of Uganda. That according to paragraphs 6 of the Plaintiff (PW1's) witness statement is hearsay evidence because the Plaintiff did not
10 perceive the events therein, contrary to **Sections 57, 59** of the Evidence Act, Cap 6 (See: **Chaudrasekera v R (1937) AC 220**).

Further, that it was the plaintiff's evidence that the late Nabukalu Nnabuto was not buried by the king of Buganda which led her spirit to find a resting place in a tree at Mabuye Katende. He stated that all lineal descendants from the Mutuba of
15 Kakiika Mbega started congregating at the said site to seek divine assistance and this is what turned the site into a cultural site.

However, that in cross examination he admitted that this evidence was based on information he received from communication with medium spirits. Considering that he is 42 years, the evidence he adduced in support of this tree being a
20 cultural site was hearsay since the events alleged to have taken place as said in paragraphs 2-7 took place in the 1800's. The tree and suit kibanja cannot be said to be a cultural site for the Lugave clan when it was owned for a long time by people outside the Lugave clan.

Counsel cited **Section 3** of the Historical Monuments Act which provides for
25 protected objects, and under the said section the Minister is required to declare any object of archaeological, paleontological, ethnographical, traditional or historical interest to be a protected object through a statutory instrument.

Counsel added that it is trite law under **Sections 101, 102 and 103** of the Evidence Act Cap 6 that he who alleges a fact ought to prove it. (**See: Nsubuga v. Kavuma [1978] HCB 307**). In civil Cases, the burden lies on the plaintiff to prove his/her case on the balance of probabilities. That in the instant case the Plaintiff failed to discharge the burden laid upon him by law to prove that the tree on the suit land was a cultural site.

Analysis of Court:

The plaintiff in the instant case averred that he is the owner of the suit land having purchased the same from Ngondwe Pontiano Mayega and is a devoted traditionalist who has powers to speak to spirits and in particular his ancestors. And he is apparently the only one who can communicate with Nabukalu who is found at the suit property. The plaintiff claimed that the suit property has served as a cultural site since the 1800s and he therefore purchased the same for purposes of preservation for himself and his lineage. The plaintiff in his evidence continuously referred to the suit land as his cultural site as opposed to referring to it as the Lugave clan cultural site.

I also note that the plaintiff brought a lineal head as one of his witnesses however, this witness was not possessed with any information in regard to how long the cultural site had been in existence nor could he state the kind of cultural rituals that are performed at the site. His statement was full of blank statements and no evidence that could guide court in determination of this case as none of it corroborated the plaintiff's evidence. The evidence in no way proved that the suit land was a cultural site belonging to the lugave clan and had been in existence since 1800s.

I take cognizance of the fact that customs and cultures of our diverse ethnicities are upheld and promoted by the Supreme law of our land which is the Constitution of the Republic of Uganda, 1995 as long as they do not contravene

and are consistent with the fundamental rights and freedoms, human dignity, democracy and the law.

In addition to that, this Honourable Court takes cognizance of the international instruments which recognize the protection of cultural heritages and I will
5 briefly highlight them, below;

The Universal Declaration on Human Rights (UDHR), 1948

This was the first internationally recognised legal instrument to provide for the protection and promotion of cultural heritage through cultural rights, which came into existence partly as a result of the desire to protect the cultural rights of
10 people from the effects of wars, was adopted by Uganda and is member state of the United Nations (UN) since 25 October 1962. Under **Article 27 (1) and (2)** it states that:

(1) “Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its
15 benefits”

(2) “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”

The Declaration provides guidelines for international conventions relevant to the
20 protection and promotion of cultural rights, such as the 2005 UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions.

The International Covenant on Economic, Social and Cultural Rights, 1966

The Government of Uganda ratified this Covenant in 1987. The Covenant
25 emphasizes that all people have the right of self-determination.

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 15 of the Covenant urges the State Parties to the Covenant to recognise the right of everyone to take part in cultural life.

- 5 1) To enjoy the benefits of scientific progress and its applications;
- 2) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The Covenant also urges State Parties to:

- 10 1) Undertake to respect the freedom indispensable for scientific research and creative activity.
- 2) Recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Article 27 of UDHR and **Article 15** of ICESCR recognise everyone's right to freely
15 participate in cultural life.

The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage which was ratified by the Government of Uganda in 1987.

The Convention encourages State Parties to conserve and protect their heritage.

It provides for the protection of both natural and cultural aspects of heritage.

20 It also laid the foundation for other international and national legal instruments related to culture.

However, the framers of the Convention then did not consider new categories of heritage/heritage sites for instance, the mixed sites and the intangible cultural heritage such as that claimed by the plaintiff.

It was only at a later stage that UNESCO State Parties realised that heritage is dynamic; hence new heritage categories and conventions are continually introduced, to provide adequate protection depending on the prevailing situation.

Furthermore, **The 2003 UNESCO Convention for Safeguarding the Intangible Cultural Heritage (ICH)** was ratified by the Government of Uganda in 2009.

State Parties are required to identify, define and devise appropriate means of preserving Intangible Cultural Heritage (ICH).

The Convention offers an opportunity to Uganda to derive benefits from sharing international best practices, and ensuring its heritage is protected and recognised in global development.

The Convention provides possibilities to “decolonise” Uganda’s heritage, which has been for many years dominated by museums and monuments.

Therefore, Customary laws and protocols are recognised as central to the very identity of many local communities. The above laws, conventions and protocols concern many aspects of their lives. They can define rights and responsibilities on important aspects of life, culture, use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage, and many other matters.

I will proceed to the **Constitution of the Republic of Uganda, 1995** which is the first legal instrument in the history of Uganda to directly provide for the protection and promotion of our heritage.

Under the National Objectives and Directive Principles of state Policy,

Objective III (iii), it provides for National Unity and stability and states that everything be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other’s customs, traditions and beliefs.

Objective XXIV of the Constitution thus states that “cultural and customary values that are consistent with the fundamental human rights and freedoms, human dignity and democracy and with the Constitution of Uganda may be developed and incorporated in all aspects of Ugandan life”.

5 *Objective XXV* mandates the State and citizens to preserve and protect and generally promote the culture of preservation of public property and Uganda’s heritage.

With regard to the right to culture and similar rights, the Constitution under **Article 21** states that all persons are equal before and under the law in all
10 spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law”.

Article 37 states that:

15 *“Every person has a right as applicable to belong to enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.”*

Article 247 of The Constitution of the Republic of Uganda, 1995 requires courts to construe existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution bearing in mind as well that **Article 126 (1)** too requires such application to be in
20 conformity with law and with the values, norms and aspirations of the people.

All these Articles read together, provide a basis in our national laws as to one’s belief, practice and preservation of a cultural heritage or site.

In addition, the National Land Policy, 2013, the Land Acquisition Act, the
25 National Environment Management Act and the Local Government Act 1998 are all a reflection of these attributes.

Having established that the plaintiff is free to hold belief and preserve his cultural heritage. I will now turn to the law that recognizes and regulates the gazetting of cultural heritages in Uganda which is the **Historical Monuments Act, of 1967**. This Act provides for the preservation, protection and promotion of historical
5 monuments and objects of archaeological, paleontological, ethnographical and traditional interest. The Act further provides for means to list objects on the national list and stipulates how these should be protected and maintained.

Section 1 (1) of the **Historical Monuments Act, of 1967** states that;

10 *“The Minister may, by statutory instrument, declare any object of archaeological, paleontological, ethnographical, traditional or historical interest to be a preserved object for the purposes of this Act”*

Section 8 of the same Act also provides for the maintenance of the objects (including sites, places, fortification etc) as follows:

15 *“For purposes of maintenance and inspection of any preserved or protected object there shall be an inspector of monuments who shall be appointed by the Minister and shall be a public officer.”*

20 It can be seen in the light of the above, that the law recognizes the fact that cultures and customs in our Country are part and parcel of our livelihood. One may say we breathe and live our respective cultures and customs in the way we relate with one another as Ugandans of various ethnicities.

Section 14 of the Judicature Act states that Subject to the constitution and this Act, the jurisdiction of the High Court shall be exercise Subject to any written law and in so far as the written law does not extend or apply, in conformity with any established and current custom or usage and that where no express law or rule is
25 applicable to any matter in issue before the High Court, in Conformity with the principles of justice, equity and good conscience.

Furthermore, **Section 15 of the Judicature Act** provides that;

“Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible directly or by necessary implication of any written law.”

5

A cultural site can be defined as an area of great importance to the cultural heritage of every people, including monuments of architecture, art or history whether religious or secular, archaeological sites, and groups of buildings which as a whole are of historical or artistic interest.

- 10 The dignity of Ugandans is observed and protected under **Chapter 4** of the Constitution of the Republic of Uganda, 1995 and it provides for the protection and promotion of fundamental and other human rights and freedoms.

Article 26 of the Constitution of the Republic of Uganda, 1995 provides for Protection from deprivation of property and it states that;

- 15 (1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

- 20 (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—

- 25 (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

The plaintiff in his evidence stated that the above suit land constitutes of a traditional cultural site called Nabukalu where he is the caretaker of the same.

5 Having purchased it from PW3 who corroborated his evidence however, the said agreement is null and void for failure to seek consent from the Land lord as per Section 34 (3) of the Land Act. The plaintiff also attached letter from Mbegerere the clan head at Kakiika in which the elders allegedly conferred authority to him to represent them in this matter affecting this cultural site. However, minutes
10 with the signatures or resolution by the alleged clan elders was not adduced in evidence. The plaintiff therefore did not attach any other evidence or bring a competent witness to satisfy this court that the above letter was authentic.

I, therefore, disregard the above letter presented by the plaintiff on grounds that he failed to prove to this court its authenticity yet he bears the evidential burden
15 to prove the same.

The plaintiff also presented PW2, Daudi Mutyaba who is purportedly the lineal head of the clan, however the same was not proved to satisfaction of this court because the witness had no documents or any other tangible evidence from the clan that could prove that he is the lineal head and could give competent
20 guidance to this court to determine this matter.

The defendant on the other hand argued that the above suit land does not have a cultural site as the same is not gazetted according to the Historical Monuments Act, 1967. **Section 1(1)** of the Historical Monuments Act, 1967 states that the Minister may, by statutory instrument, declare any object of archaeological, paleontological, ethnographical, traditional or historical interest to be a
25 preserved object for the purposes of this Act. This was also confirmed by the plaintiff and his witnesses during cross examination when they stated that they had no idea whether the

cultural site was gazetted and neither did they have any proof to show that it was.

Furthermore, during cross examination, the plaintiff stated that this cultural site has been on the suit land for over 800 years. One would wonder why a cultural site that has been there for that long is not gazetted and neither does it have any permanent structures to at least prove that it is of great importance to culture. The plaintiff first stated that this cultural site belonged to him as an individual and its only later on when he changed to the fact that the same cultural site belonged to the lugave clan which is a contradiction on his side.

It is the duty of the plaintiff to prove his case to the satisfaction of this court on a balance of probabilities under **Sections 101, 102, 103** of the Evidence Act. The Plaintiff did not bring any witnesses from the Buganda Kingdom to confirm the existence of cultural site for the Lugave clan, the plaintiff did not bring any elders from the lugave clan, nor did he bring any of the people who are said to always be going to the site for healing. It was only at locus that court found some individuals who were said to be interested in testifying yet the same were never witnesses during the hearing of the case.

It is also puzzling that the plaintiff in his evidence confirmed that the suit land was in the possession of members of the Nyonyi clan since 1975 as opposed to the land being lugave clan land. The land lord of the suit land a one Luzinda Aisha was not brought to court to prove the existence of the suit land. It was also the evidence of DWI that the time the assessment was being conducted the tree was not wrapped with any pieces of cloth. That the alleged spirit which was said to be residing in the cloth that was not found wrapped around the tree was done after the officials of the defendant had visited the suit land.

The plaintiff also in an attempt to prove the existence of the cultural site produced a document downloaded from <http://www.buganda.com/lugave.htm>. This was found with no evidential value as the author of the same did not testify

in court and it was not tendered in as evidence. It is however, not in dispute that the Lugave clan does exist as the document detailed.

It is my finding and holding that the plaintiff did not prove to the satisfaction of this court that there is a cultural site on the suit land. Nor does the same belong
5 to the Lugave clan, this is land individually owned by the plaintiff for his traditional practices as a lugave clan member. The plaintiff also failed to prove that the tree was indeed a recognizable cultural site. The plaintiff continuously referred to the Suitland as his cultural site but did not provide court with any license that enables his practice as a traditional healer. This issue is accordingly
10 resolved in the negative.

Issue 2: Whether UGX 4,661,800/= the assessed value of the suit Kibanja is adequate?

Counsel for the plaintiff submitted that DWI confessed that she valued the land as normal land, valued the tree as a normal tree. She did not put into account
15 that the land is a cultural site. That she did not know the value of cultural sites and after knowing that this is a cultural site, she did not go to investigate further.

That PEX3, the budget for shifting the cultural site was not challenged. That they expected DWI to get an expert, but this was not done.

Counsel quoted the case of **UNRA v. Irumba Constitutional Appeal No. 2/2014**,
20 where the Land Acquisition Act **Section 7(1)** was declared to be inconsistent with **Article 26(2) (c)** of the Constitution of the Republic of Uganda, 1995. That for the Government to acquire somebody's land, adequate compensation is an essential requirement for shifting the cultural site to another place as laid out in PEX3. That without that then the defendant cannot acquire the property. The
25 value of UGX 4,661,800 is inadequate and should be substituted with the value that appears in PEX3.

Counsel for the defendant on the other hand submitted that According to DWI the suit kibanja and tree there on were valued at UGX 4,661,800/=which valuation was approved by the chief Government Valuer as adequate compensation. The Plaintiff did not adduce evidence of a certified valuer in order to challenge the valuation of the Chief Government Valuer.

DWI testified that in carrying out the valuation of properties, they base on the prevailing market rates to determine the appropriate compensation to be paid to each affected person.

According to DWI Market value under the International Valuation Standards (IVS) is defined as the estimated amount for which a property should exchange hands on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion. The applicable market values for compensation are therefore, based on prevailing prices of land, which are governed by the following factors.

- a) Location in relation to urban centres.
- b) Economic activity in the area
- c) Physical and geographical factors.
- d) Population density.
- e) Vicinity to services such as water electricity and roads.

DWI further testified that other project affected persons in the suit land areas including the registered proprietor and PW3 accepted and were duly compensated the assessed sums based on the same rates in the area. That he Plaintiff's kibanja measuring 0.083 acres was valued at UGX 4,661,800/= (Uganda shillings four million six hundred sixty one thousand eight hundred only) as follows:

ITEM	QTTY	VALUE/AWARD
Land	0.083	3,486,000
Muwagu (Cultural tree)	1No.	100,000
Subtotal		3,586,000
Disturbance allowance	30%	1,075,800
Grand total		4,661,800

Further that it should be noted that the Plaintiffs suit kibanja has a very small area of 0.083 acres which is only 8.3 decimals. Considering that the plaintiff was a kibanja owner he was entitled to 70% of the value of the land and the 30 % was paid to the registered proprietor Luzinda Aisha. Therefore, the market rate of 3,486,000/= was adequate for the suit kibanja.

Counsel for the defendant noted that the tree on the suit land is not a cultural site nor is it a protected object under the law. Therefore, as stated by DW1 it was valued based on the prevailing district rates for similar trees at the time of assessment , UGX 100.000 was adequate for the said Muwafu tree.

According to DW1, there is a 30% disturbance allowance provided for under the **Section 77 (2)** of the Land Act which is means to cater to any inconvenience, disruption, movement, relocation expenses by the project affected person. Therefore, the UGX 1,075800/= assessed for the plaintiff as a disturbance allowance is adequate for all disruptions caused to the Plaintiff.

Considering that the total value of UGX 4,660,800/= was approved by the Chief Government Valuer on the 8th October, 2018 and was rejected by the Plaintiff upon disclosure, the value to be awarded by court should be the then prevailing market rate and not the current rate since the delay to accept payment was of the plaintiff, who has also objected to applications to have the same deposited in court. It is noteworthy that following approval of the

valuation sum and disclosure to the plaintiff, several engagements were held with the plaintiff which culminated in the plaintiff writing to the Defendant on the 17th September, 2019 vide PEX3 requesting to instead be paid UGX 500,000,000/= as compensation. Yet on the 8th October, 2018 the valuation was approved by the Chief Government Valuer. The total valuation of UGX 4,661,800/= offered to the Plaintiff for the suit land was therefore adequate.

In respect to the Plaintiff's claim for the compensation of UGX 500,000/= as per PEX 3, it was abundantly clear in cross examination of PW1 and DW3 that details of this claim were figures based on speculation and a wish list of the plaintiff. According to the evidence of DW1 valuation principles recognize compensation of the like and like items of what is existent on the land at the time it is affected by a project. Therefore, the plaintiff can only be compensated for the immovable properties and area of land that were in the suit kibanja.

Analysis of court:

The plaintiff alleged that he was the owner of the kibanja situate at Mabuye Katende in Mpigi. He supported this claim with a purported sale agreement wherein he bought the suit land from PW3, a one Pontiano Mayega. During cross examination the defendant contested the above sale agreement on grounds that it had no signature of the LC1 of the area and that it did not have the consent of the land lord.

The plaintiff noted that he was not aware that the LC1 had to witness the agreement and neither was he aware of the fact that the landlord had to consent to the sale in line with **Section 34 (3)** of the Land Act which provides that; prior to undertaking any transaction to which subsection (1) refers, the tenant by occupancy shall submit an application in the prescribed form to the owner of the Land for his or her consent to the transaction.

Section 34 (9) of the Land Act further provides that; no transaction to which this section applied shall be valid and effective to pass any interest in land if it is undertaken without a consent as provided for in this section, and the recorder shall not make any entry on the record of any such transaction in respect of
5 which there is no consent.

The plaintiff adduced evidence through PW3, Pontiano Mayega who confirmed selling the suit land to the plaintiff.

Furthermore, there was no other person challenging the said sale or claiming to have any interest in the suit land.

10 I agree with the contention of the defendant's counsel that any person who is buying land has to consult the area LC1 for purposes of due diligence, however there is no specific law that makes the same mandatory. A party may decide to consult the local leaders of the area or not.

I will now turn to the **Guidelines for Compensation Assessment under Land**
15 **Acquisition** at page 17, 6.6, where it is stated that an asset is valued on the basis of fair value without consideration of the decrease or increase in value due to reasons that led to the acquisition.

It goes on to state that the special value to the owner in most cases is excluded and that **there is no formal guidance on the assessment of "cultural" or "sacred"**
20 **value for the developments.** If cultural heritage or sacred sites cannot be avoided, the most appropriate compensation approach should be the replacement method.

Be that as it may, I take cognizant of the fact that while the compensation for crops and houses can be based on market values, the compensation for the
25 destruction of sites of cultural importance is more difficult since the assessment of cultural heritage claims is not a straightforward task.

The parameters of what should be protected as cultural are not clearly discernible in law and fact. The Constitution of Uganda sets out that the state shall promote and preserve cultural values and practices as long as these do not challenge fundamental rights and freedoms, human dignity, or democracy (1995 Constitution: Objective XXIV). The recognition of cultural heritage claim implies rights to compensation. These rights can come into conflict with cost calculations of very many government projects such as the Busega Mpigi expressway road project.

The plaintiff in the instant case claimed that the suit land has a cultural site of the Lugave clan with the “Nabuloli” spirit which is intangible and the defendant only valued what was tangible on the suit kibanja to wit; the suit kibanja and a Muwafu tree. The plaintiff however, did not satisfy this Honorable Court that the suit land has a cultural site on it and therefore the same cannot be claimed or valued by the defendant for compensation. Therefore he cannot claim the sum of UGX 500,000,000/- (Uganda Shillings Five Hundred Million Only) as compensation as seen in his requisition to the defendant PEX3. There was no basis for this assessment and the plaintiff himself could not tell court as to how he arrived at this figure save for saying that he spoke to the spirits and they are the ones that made the demands.

The defendant on the other hand clearly guided court on how the figure of UGX 4,661,800/= as compensation was arrived at. The defendant, on the other hand added that the plaintiff if dissatisfied should have appealed to the Chief Government valuer for re-assessment which was not done. Much as High court has unlimited jurisdiction it is clogged up with so many cases and backlog. Where there are other mechanisms to be followed such as appealing to the Government Valuer in this case, then it should have been exploited first before the plaintiff could come to court. (See: **Kihunde Sylvia & Another v. Fort Portal Municipal Council and Another, HCMA No. 0061 of 2016**).

I accordingly find and hold that the assessment by the defendant was proper and adequate in the circumstances considering the market value of land and the tree species at the time the assessment was conducted. The plaintiff in my view did not adduce adequate evidence for his claim of the destroyed banana plants even
5 when locus in quo was visited.

This issue is therefore, resolved in the affirmative.

Issue 3: Whether the defendant is a trespasser on the suit land?

Counsel for the Defendant submitted that the defendant embarked on construction of the Kibuye Busega Mpigi Expressway Project as a government
10 National Road Project under compulsory land acquisition, by virtue of which it was required to compensate of all project affected persons. According to PW3, the defendant assessed, valued and verified the properties and persons affected by the construction of the Kibuye Busega Mpigi Expressway (the Project Affected Persons) (PARS) who included the Plaintiff. The Plaintiff's kibanja
15 measured only 0.083 acres (8.3 decimals) and was valued at UGX 4,661,800/= which value was rejected by the plaintiff. The Defendant was consequently prevented from taking possession of the suit kibanja by the Plaintiff who declined the value of the compensation he was offered by the defendant.

Further that, according to Juliette Oyella DW1's testimony, the contractor M/s
20 China civil engineering construction corporation in Joint venture with China railway 19th Bureau Group Co. Ltd only cleared the right of way that has been paid for by the Defendant and left the Plaintiff's suit kibanja intact since compensation has not yet been paid to him. She testified that at the time they carried out the inspection and assessment of the suit kibanja for valuation
25 purposes in 2018, the suit/ kibanja only had a Muwafu tree and a bush/wild vegetation which is still intact to date. It should be noted that the contract between the Defendant and contractor was only signed on 18th June, 2019, long after the valuation of the suit kibaja.

Counsel added that according to DW1 ,Luzinda Aisha the registered proprietor of the suit land and PW3 are among the project affected persons that were duly compensated by the Defendant.

5 Counsel also noted that the defendant filed miscellaneous application No.195 of 2021 to deposit the compensation sum of UGX 4,661,800/= in court and be allowed to proceed with the construction on the suit land, which has not yet been disposed of. Consequently, the contractor has not yet proceeded to construct on the suit kibanja. Indeed, the inspection of the suit kibanja confirmed that the same is intact and has not been constructed upon by the said contractor. Thus,
10 the defendant has not trespassed on the suit land.

Trespass to land was defined in the Supreme Court decision of **Lutaaya v. Sterling Civil Engineering Co. Ltd C.A NO.11 of 2011** where Mulenga JSC at page 8 held that;

15 *“Trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere, with another person’s lawful possession of that land; it is committed against a person in possession. Needless to say, the tort of trespass to land is committed not
20 against the land but against the person who is in actual and constructive possession of the land.”*

20 The plaintiff during cross examination stated that the defendant destroyed part of the banana plantation on the suit land and some ancestral part of the spirit. The plaintiff however did not attach any evidence to back his accusation and this court cannot act on mere speculations.

25 **Article 237 of the Constitution** provides that Government can only take over someone’s land if it is in the interest of the public. In **Bhatt & Another v Habib Rajani [1958] EA**, public interest was defined to mean the same purpose or

objective in which the general interest of the community as opposed to the popular interest of individuals is directly and virtually concerned.

Thus **Articles 26 and 273 of the Constitution of the Republic of Uganda, 1995** only allows Government to use its coercive power to force a transfer in
5 public interest and upon fair and prompt and adequate compensation.

In **UEB v Launde Stephen Sanya CACA No.1 of 2000**, UEB which was a Government Corporation entered on land, destroyed trees, crops and building materials and placed thereon survey marks and high voltage power lines thereon without the consent of the land owners. **Twinomujuni JA** held that UEB could not
10 just enter on anybody's land without first acquiring it and paying compensation thereby contravening **Articles 26(1) (2) and Article 237 of the same Constitution**. The Court further held that UEB should have first notified the persons affected before taking over the land which they did not do.

In the instant case the evidence on record clearly shows that the Plaintiff's
15 kibanja was compulsorily acquired following the defendant's construction of the Kibuye-Busega Mpigi Expressway road as indicated in the defendant's exhibit DEX 3 to wit a survey or sketch map of the road project, DEX 6 and DEX 7 to wit the Contract Agreement for Multinational Uganda/Rwanda: Busega Mpigi and Kagitumb Kayonza-Rusomo Road Project Construction of Busega-Mpigi
20 Expressway.

On the face of the above exhibits and the contract between the defendant and M/s China Civil Engineering Construction Corporation in Joint venture with China Railway 19th Bureau Group (U) Ltd, it would be correct to say that the construction of the Kibuye-Busega Mpigi expressway by the Government of
25 Uganda through its independent organ the defendant is lawful because it is an issue of public interest.

The law requires that certain procedures ought to be followed before compulsory acquisition can be lawful. (See: **Uganda National Roads Authority v. Irumba Asumani & Peter Magelah, Supreme Court Constitutional Appeal No.2 of 2014**).

In the instant case, it was the contention of the Plaintiff that the defendant without his consent, drew its plans for the construction of the Kibuye Busega Mpigi expressway road through his kibanja and that they have started demarcating the same for that purpose. The plaintiff further contended that the defendant has also threatened to demolish and remove his cultural site for purposes of its road construction to his detriment.

10 **Section 42 of the Land Act** provides for the acquisition of land by the Government. It further stated that the Government or a local government may acquire land in accordance with **Articles 26 and 237(2)** of the Constitution.

Furthermore, in the Computation of compensation, **section 77 of the Land Act** which I will state verbatim provides;

15 (1) The district land tribunal shall, in assessing compensation referred to in section 76(1)(b) take into account the following—

(a) in the case of a customary owner, the value of land shall be the open market value of the unimproved land;

(b) the value of the buildings on the land, which shall be taken at open market value for urban areas and depreciated replacement cost for the rural areas;

20 (c) the value of standing crops on the land, excluding annual crops which could be harvested during the period of notice given to the tenant.

(2) In addition to compensation assessed under this section, there shall be paid as a disturbance allowance 15 percent or, if less than six months' notice to give up vacant possession is given, 30 percent of any sum assessed under subsection (1).

(3) The rates set out in the list of rates of compensation referred to in section 59(1)(e) shall be used in determining the amount of compensation payable.

In a nutshell, according to DEX 5, to wit the Final Valuation Report for Properties Affected by the Proposed Kibuye Busega—Mpigi Express Highway, which was tendered by the defendant without any objection from the plaintiff, the defendant followed the procedure of acquisition of the suit land. He therefore cannot claim trespass to land against the defendant.

In the instant case, therefore the circumstances under which the Plaintiff's land was taken, was in conformity with the provisions of the Land Act and the 1995 Constitution of the Republic of Uganda and his land which is 0.083 acres was valued at Ugx. 3,486,000/- (Uganda Shillings Three Million Four Hundred Eighty Six Thousand Only), Muwafu (cultural tree) at Ugx. 100,000/- (Uganda Shillings One Hundred Thousand Only) and disturbance allowance of 30% amounting to Ugx. 1,075,800/- (Uganda Shillings One Million Seventy Five Thousand Eight Hundred Only).

Notwithstanding, nothing in line with the procedure of acquisition of the plaintiff's suit kibanja is in contention it is only the amount of compensation that the plaintiff contended as inadequate.

This court therefore finds that there was no trespass on the plaintiff's land as no evidence was adduced to prove the same. The defendant in her submissions also stated that the suit land has never been taken over or entered and is still intact as the road project had not yet gone through it.

This issue is hereby answered in the negative.

Issue 4: What are the remedies available to the parties?

The plaintiff attached a requisition letter in which he seeks for a compensation of UGX 500,000,000/= for the cultural site so that he is able to shift the spirits to another location. The plaintiff in the same requisition seeks for 2 acres of land

where he can shift the spirits and I wonder how he came up with such calculations because the purported suit land where the “spirits” are located is less than an acre. When the plaintiff was asked by Counsel for the defendant on how he came up with the amount in the requisition letter, he claimed that the spirits had told him. I find that this argument is baseless on ground that it has not
5 be proved before this honorable court.

Therefore, the plaintiff is not entitled to the amount of compensation sought in his requisition letter and the same is baseless. The plaintiff was also unable to – prove that there were any graveyards at the suit property, nor did he adduce any
10 evidence in regard to the destroyed banana plants. The plaintiff’s claim in my view is an individual claim and not one for the benefit of the lugave clan.

I also note that it is mind boggling that the plaintiff claims six main houses yet the suit land was not in possession of even a single grass thatched house to say the least. And since this court cannot hear from spirits as it only bases on viable
15 evidence adduced before it, I am unable to find the claim for UGX 500,000,000/= justifiable. Not to mention that the plaintiff failed to prove to this court the existence of a cultural site for the lugave clan on the suit land for which he sought this enormous compensation.

It is rather gluttonous of the plaintiff to want to reap from what he did not sow.
20 And it was the evidence of the defendant that when compensation is being assessed it is done based on the features/properties on the land and not the unseen of emotional and sentimental value of the same.

The defendant is hereby allowed to pay the plaintiff the compensatory amount of **UGX 4,661,800/=** due to him over the suit land and if he refuses to take the said
25 money let it be deposited in court. The defendant can proceed with the road construction over the suit land.

I hereby find in favour of the defendant and dismiss this suit. For purposes of reconciliation and harmony I make no order as to costs. **(See: Prince J.D.C MPugu Rukidi v. Prince Solomon Iguru and Another, Supreme Court Civil Appeal No. 18 of 1994).** I so order.

5 Right of Appeal explained.



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OYUKO ANTHONY OJOK

10 JUDGE

10/03/2022