



consent and approval of the plaintiffs the registered owners. In an attempt to deprive the  
25 plaintiffs of the suit land, the defendant approached one Godfrey Kazibwe a Resident District  
Commissioner (RDC) of the area. The plaintiffs contend that through duress, coercion, and undue  
influence the RDC caused the plaintiffs to sign a document that they have relinquished all their  
claims in the suit land to the defendant. The plaintiffs contend that since their signatures on the  
document were forcefully obtained, the same is null and void and of no legal effect as no  
30 consideration in any case flowed from the defendant to the plaintiffs the registered owners.

For his part, the defendant denied the plaintiffs' allegations. He averred that the late Yudita  
Nalongo Nagadya was the owner of the suit land by virtue of *Succession Certificate No. 4169*  
issued to her by the Administrator General, her being the daughter to the late J.B. Kagolo who  
originally owned the suit land. The defendant further contends that he purchased the suit land  
35 from the late Yudita Nalongo Nagadya in early 2001 by effecting part payment of the agreed  
purchase price before the execution of the sale agreement. That subsequently on 28/9/2001,  
together with one Yosiya Bamushabe and Mishaki Lwamukaaga, they executed a sale agreement  
for purchase of the suit land from Yudita Nalongo Nagadya. Further that on 19/3/2001 the  
defendant and one Yokana Buhanyizi lodged a caveat on the suit land vide; *Instrument No. KLA*  
40 *223277* which was, however, unlawfully vacated even before the plaintiffs got registered. Also,  
that the plaintiffs had no right to obtain Letters of Administration for the estate of the late Yudita  
Nalongo Nagadya and to administer the suit land since it had been sold by the deceased owner.  
The defendant also contended that the plaintiffs signed the documents in question voluntarily  
without any coercion or duress.

45 The following facts were agreed upon by the parties at scheduling conference;

1. *The plaintiffs are the registered proprietors of land comprised in Gomba Block 23 Plot 1 at Nabuguyo.*
2. *The said land formerly belonged to one John Baptist Kagolo the plaintiff's father.*
3. *The plaintiffs are the Administrators of the Estate of the late John Baptist Kagoro.*
- 50 4. *The defendant is in occupation of part of the suit land.*

The issues which were agreed and framed for court's determination at the scheduling conference are as follows;

**1. *Whether the defendant is a trespasser on the land comprised in Gomba Block 23 Plot 1 at Nabuguyo.***

55 **2. *What remedies are available to the parties?***

The plaintiff's adduced evidence of three witnesses to wit; Gatrida Nalwoga (PW1), and Kazooba Yowasi Nsubuga (PW2) and Mwesigye Amos (PW3). The defendant adduced evidence of three witnesses to wit; Amos Rwamashodi (DW1), Steven Musisi (DW2) and Katalimulingo Israel (DW3).

60 On 28/05/2015 when the case came up for hearing, neither the defendant nor his counsel appeared. Court noted that the previous adjournment was made in presence of defence counsel. Further that it was ordered that should the defence fail to produce its last witness, the case for the defence would close and case would proceed for submissions. Indeed on the due date of 28/05/2015 when the case came up for hearing, neither the defendant nor his counsel appeared.

65 The court ordered that the parties file written submissions to argue the case and also set a date for judgment. The record shows that at the time only Counsel for the plaintiffs filed written submissions as ordered by court and served Counsel for the defendant.

The defendant later changed lawyers and sought to re – open the case and call additional defence witnesses. The application was unsuccessful for the reasons which court stated in its ruling also  
70 on court record. The defendant yet again filed an application to be allowed to file written submissions out of time. The application was conceded to by Counsel for the plaintiffs. The submissions of Counsel for the defendant are on court record and have also been taken into account arriving at the decision in this judgment.

***Evidence:***

75 Gatrida Nalwoga (PW1) testified that the suit land belonged to her late father J.B. Kagolo. That together with Nsubuga Kazooba they acquired Letters of Administration for the estate of the late J.B. Kagolo and had the suit land registered in their names by virtue of the Letters of Administration. PW1 stated that before the suit land was registered in their names, they paid off a mortgage that was registered as an encumbrance on the title. PW1 also stated that the late  
80 Nalongo Nagadya was their sister and that she passed away in 2004. That she was neither an administrator to the estate of their late father, the registered proprietor of the suit land, nor a customary heir since she was a woman.

PW1 further testified that the defendant, who is their neighbor, trespassed and encroached on the suit land. That they tried to stop him from further acts trespass but instead he took them to the  
85 RDC around 2007/2008 where they were forced to sign a document *Exhibit P3* at gun – point, stating that the suit land belonged to the defendant. Further, that the defendant is currently grazing his livestock on 40 acres of the suit land.

PW1 also testified that the defendant hired Policemen who broke into the 2<sup>nd</sup> plaintiff's house and took away the certificate of title for the suit land. That the 2<sup>nd</sup> plaintiff filed an application,  
90 vide *HCMA No. 83 of 2009* in which he sought a judicial review against Government for the

actions of the Policemen, and the case was decided in favor of the plaintiffs and they got back their title.

PW1 maintained that late Nagadya was not the heir to the late J.B.Kagolo and that she has never acquired a *Certificate of Succession*. PW1 also stated that the defendant was present when they  
95 went to the RDC where they were forced to sign a document *Exhibit P3* on gun – point that they had relinquished their interest in the suit land. PW1 stated that they did not report the incidence to Police but opted to file a court case after one week. That at the time of Nagadya’s death, the defendant was not even staying on the suit land.

PW2, Kazooba Yowasi Nsubuga, corroborated much of the testimony of PW1. He stated that  
100 they got to know about the suit land through clan meetings and the documents that were in a file which was in possession of the late Nagadya. That the late Nagadya was at the time living on the suit land with her husband and that after she died, PW2 started staying on the suit land. PW2 maintained that by the time they took over administration of the suit land in 2006, it was vacant, and that the defendant put up a structure at the boundaries much later.

105 PW3, Mwesigye Amos, a neighbor to all the parties testified that the he knows that the suit land belongs to the plaintiffs and that he got to know about this in 2006. That the defendant encroached on about 30 acres of the plaintiffs’ land, but that he did not know whether the defendant was still on the suit land. PW3 also stated that the defendant is his immediate neighbor and that they are separated by about 100 meters in relation to the suit land. PW3 also stated that  
110 the defendant is grazing cattle on the suit land and that he fenced it off with a barbed wire in 2011.

The defendant, Amos Rwamashodi (DW1) testified that the late Nagadya sold to him the suit land measuring 653 acres in 1991 at a consideration of Shs. 4,900,000/=. That they executed an

agreement (*Exhibit DID1*) in Luganda language before the LC1 of Nabuguyo in presence of the  
115 local people – the Bataka. That the title to the suit land was in the names of Kategaya Kagolo,  
and that late Nagadya had succeeded him. DW1 also testified that it is the name of his father late  
Yokaaka Buhanguzi that appears on the sale agreement as the purchaser since he had jointly  
bought the land with the defendant and they paid the last installment in 2001. Further, that late  
Nagadya showed him a *Certificate of Succession (Exhibit DID2)* verifying her interest in the suit  
120 land. DW1 further stated that he transferred the suit land into the names of late Nagadya in 2000.  
DW1 clarified that late Nagadya died in 2004 and that he transferred the land into her names  
after she had died. He also stated that the transfer occurred in 2001, or 2002 or 2007 even though  
the document reads 2002. DW1 stated that when the plaintiffs encroached on the suit land, he  
went to Godfrey Kazibwe the former RDC of Kampala in 2007, who summoned the plaintiffs  
125 and the plaintiffs made an agreement voluntarily giving back the land to the defendant.

DW1 further stated that at the time the transfer form, *Exhibit D1*, was signed for him, the late  
Kagolo was still the registered proprietor and the certificate of title was still in the possession of  
late Nagadya. DW1 stated that even by the time late Nagadya died she had not given him the title  
to the suit land.

130 DW1 Also testified that he saw copy of the Will of the late J.B Kagolo and that it was read to  
him by late Nagadya. DW1 also stated that late Nagadya was the heir and administrator of the  
estate of the late J.B Kagolo who was her paternal uncle. DW1 stated that late Nagadya gave a  
copy of the Letters of Administration which she had to the lawyer the day she made the last  
agreement with the defendant. That despite the suit land having two caveats lodged on it, he still  
135 grazes his cows on it. DW1 conceded that he at one time used one Simon Kuteesa, a Police  
officer, to stop the plaintiffs from encroaching on the suit land and also to retrieve the certificate

of title from them. DW1 stated that he does not know where the certificate of title is now despite the court order that he should return it. It is noted that the court tasked the defendant to call Simon Kuteesa as a witness and also bring the certificate of title but failed to do so.

140 DW2 Steven Musisi a lawyer testified that the defendant was referred to him by a colleague to render legal services in 2001. That the defendant was buying the suit land from the late Nagadya. That he prepared a sale agreement, *Exhibit D.2*, which he signed and witnessed. DW2 also stated that late Nagadya did not have the certificate of title to the suit land but that she had a *Certificate of Succession (DID2)*. Further, that the consideration was to be paid in installments though the  
145 payments were completed much later than stipulated in the agreement. DW2 also stated that he attempted to obtain a title for late Nagadya by presenting the *Certificate of Succession* to Land office but it was rejected and they were advised to obtain Letters of Administration for the estate of the late J.B Kagolo.

DW2 also stated that they approached the Administrator General's office which was reluctant to  
150 issue a *Certificate of No Objection* for Nagadya because they had stated that the suit land was already given to Nagadya and did not form part of the estate of late J.B.Kagolo. DW2 stated that he prepared a transfer which late Nagadya signed in 2002.

DW2 clarified that he did not look at the Will of the late J.B Kagolo. That the parties could not read Luganda, but that he explained the contents of the sale agreement to them though he did not  
155 make a certification on it that he had translated the contents of the sale agreement to the parties. DW2 stated that the agreement mentioned Nagadya as the registered proprietor although she was not.

DW3 Katalimulingo Israel testified that late Nagadya sold the suit land to the defendant and Buhamiza (the defendant's father). DW3 further stated that he was called to the LC as a resident

160 to be a witness to the transaction. That the late Nagadya showed them a copy of the certificate of  
title at the time of signing the sale agreement. DW3 also testified that at the time of sale, the LC  
Vice Chairman Kuteesa Eriafazi, the Treasurer Rwamashodi, and the Secretary Miyungu Joseph,  
were all present and that they all signed on the agreement, *Exhibit D2*. DW3 also stated that  
Buhamiza paid Shs.1, 900,000/= leaving a balance of Shs. 500,000/= which was to be paid on  
165 20/2/2009. That the suit land was handed over to the buyers and that they have been staying there  
since then.

DW3 stated that he could not remember who wrote the agreement but that he was the one who  
included the insertions therein. DW3 also stated that his land shares boundaries with the suit land  
and he confirmed that the balance of Shs.500, 000/= was supposed to be paid on 20/2/ 2009.

170 ***Resolution of the issues.***

***Issue No.1: Whether the defendant is a trespasser on the land comprised in Gomba Block 23  
Plot 1 at Nabuguyo.***

In the case of *Justine E. M. N Lutaaya vs. Stirling Civil Engineering Company Ltd SCCA 11  
of 2002* it was held that;

175 ***“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. Needless to say, the tort of trespass to land is committed, not against the land,  
but against the person who is in actual or constructive possession of the land. At  
common law, the cardinal rule is that only a person in possession of the land has  
180 capacity to sue in trespass... In two leading authorities in East Africa, it was held that  
a person holding a certificate of title to land, has legal possession of that land... in***



***absence of any other person having lawful possession, the legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser.”***

185 As applicable to the agreed facts in this case and evidence, the plaintiffs are the current registered proprietors of the suit land. Proof of this is their possession of a certificate of title, *Exhibit P1*, in their names. This invariably means that they have legal possession of the suit land. As to whether the defendant is liable in the tort of trespass, the evidence led by the defendant is to the effect that he purchased the suit land from Yudita Nagadya. As proof of that transaction he  
190 adduced in evidence copies of the sale agreements in *Exhibit D3* dated 1991, and *Exhibit D2* dated 2001. It is, however, important to note that at the time of the alleged sale transaction between the defendant and the late Nagadya, the suit land was registered in the names of J.B Kagolo according to the certificate of title, *Exhibit P1*. Therefore, the onus rested on the defendant to show that late Nagadya had the right to sell the suit land even if it was not  
195 registered in her names. This is the position of the law under Section 101 of the Evidence Act, Cap. 6 which provides that;

***“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.***

200 ***(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”***

Furthermore, Section 102 provides that;

***“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”***

205 The defendant contends that the late Nagadya was heir to the late J.B. Kagolo. This was vehemently rebutted by the plaintiffs who led evidence to show that the heir to the late J.B. Kagolo was in fact Kazooba Yowasi Nsubuga (PW2). That in Buganda customs, a female could not be heir to her late father. This evidence was not challenged by the defendant.

The defendant also contends that the late Nagadya was named in her late father's Will as the sole  
210 beneficiary of the suit land. DW1 testified that the Will existed and he promised to avail it in court. However, by the close of the defence case, no such copy of the alleged Will was tendered in evidence by DW1 despite having claimed that it existed. DW1 also stated that he did not look at the copy of the Will.

The defendant also stated that the late Nagadya had Letters of Administration for the estate of the  
215 late J.B. Kagolo. DW1 stated that he saw copies of the same. However, when asked to produce the copies he failed to do so. He instead conceded that he was aware that the plaintiffs were the ones who had Letters of Administration for the estate of the late J.B. Kagolo. Further, that the Administrator General refused to grant a *Certificate of No Objection* in favor of Nagadya. This clearly proves that late Nagadya never acquired the alleged Letters of Administration, and  
220 therefore could not have been the administrator of the estate of the late J.B. Kagolo.

Also the contention of the defendant that late Nagadya had a *Certificate of Succession* was not supported by any evidence. The court record only bears a document that was tendered in only for identification purposes marked as "DID2" purported to be a Certificate of Succession. The law on such identification of documents, and indeed on all articles of identification in evidence, was  
225 stated in the case of *Sharma vs. Regina (1953)20 EACA 310*. It was held that;

***"...there is a distinction between exhibits and articles for identification. Articles of identification cannot be relied upon as evidence."***

Therefore, “*DID2*” (supra) cannot be relied upon as it was under the law not an exhibit adduced as such in evidence. Even assuming that “*DID2*” were to be considered as an exhibit for  
230 purposes of evidence, it would still fail the reliability test under the rules of evidence in light of the evidence of DW1 that it was rejected by the Land office as it was not considered a registrable document.

In the instant case, the evidence of the defendant as to when the late Nagadya signed the transfer forms cannot be relied upon since it was riddled with major contradictions that go to the root of  
235 the case. From the evidence, it is clear that the late Nagadya had no right to sell the suit land to the defendant. As a result she could not pass any interest in the suit land to the defendant.

Regarding the plaintiffs’ evidence that they were coerced into signing *Exhibit P3* by the RDC at gun – point, and that the defendant with help from the Police used force to retrieve the certificate of title from the 2<sup>nd</sup> plaintiff’s home, it is noted that these allegations and the testimony to  
240 support them were not contested by the defendant. If anything, the defendant led evidence tending to corroborate the particular allegations. For instance he stated that he used one Kuteesa a Police officer to retrieve the title from the plaintiffs’ premises. There is also the unrebutted evidence that a suit was filed against the Attorney General for judicial review owing to the actions of the Police of unlawfully interfering in the matter and taking the title by force. The case  
245 was decided in favour of the plaintiffs. This further reinforces the plaintiffs’ evidence that the defendant was totally bent on defeating the plaintiffs’ interest in the suit land. In the result, the defendant’s action of grazing his cattle and constructing a hut on part of the suit land amounts to nothing short of trespass. *Issue No.1* is answered in the affirmative.

***Issue No.2: What remedies are available to the parties?***

250 In the case of *Justine E. M. N Lutaaya vs. Stirling Civil Engineering Company Ltd* (supra) it was further held that trespass is actionable par se without proof of damages, but where actual damage has been occasioned, the plaintiff is entitled to the award not only for the trespass but also for the damage.

The other remedy that ordinarily pursuant to the finding of trespass is an order eviction against  
255 the trespasser. In this case having found that the defendant is a trespasser on the suit land, an eviction order doth issue against him to vacate the suit land or any part thereof.

The plaintiff also prayed for the award of general damages. The position of the law, as was stated in *James Fredrick Nsubuga vs. Attorney General, HCCS No. 13 of 1993*, is that the award of general damages is in the discretion of court, and is always as the law will presume to be the  
260 natural consequence of the defendant's act or omission. The Supreme Court also held in *Robert Cuossens vs. Attorney General, SCCA No. 08 of 1999* that;

*“The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered....”*

In *Kibimba Rice Ltd. vs. Umar Salim, SCCA No.17 of 1992* it was further held that a plaintiff  
265 who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong.

In determining the quantum of damages, a party claiming damages should lead evidence or give an indication as to what the amount of damages ought to be awarded on inquiry as the quantum. See: *Robert Cuossens vs. Attorney General*, (supra); and *Ongom vs. Attorney General. [1979]*  
270 *HCB 267.*

The plaintiffs also prayed for *mesne* profits. Section 2(m) of the Civil Procedure Act (Cap. 71) defines *mesne* profits as;

275 *“Those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession.”*

In the case of *George Kasedde Mukasa vs. Emmanuel Wambede & 4 Others HCCS No. 459 of 1998*, it was held that wrongful possession of the defendant is the very essence of a claim for *mesne* profits.

280 **BASHAIJA K. ANDREW**  
**JUDGE**  
**9/02/2017**

Mr. Wilfred Nuwagaba Counsel for the plaintiffs present.

285 Mr. Gabriel Byamugisha Kamugisha Counsel for the defendant present.

1<sup>st</sup> plaintiff present.

Mr. Godfrey Tumwikirize Court Clerk present.

Court: Judgment read in open Court.

290 **BASHAIJA K. ANDREW**  
**JUDGE**  
**9/02/2017**