

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA OF UGANDA AT KAMPALA

(LAND DIVISION)

HCCS NO.482 OF 2011

PRINCE KEFA WASSWA (SUING THROUGH HIS LAWFUL ATTORNEY KASUMBA GIDEON)]

PRINCE PHILLIP KATEREGGA]::~::~:PLAINTIFFS

VERSUS

JOSEPH KIYIMBA]::~::~:DEFENDANT

BEFORE THE HON. JUSTICE DR. HENRY PETER ADONYO

JUDGMENT

1. Background:

The plaintiffs jointly instituted this suit against the defendant originally seeking for several reliefs among which were a declaration that they were the lawful owners of the suit kibanja situated at Bunamwaya-Kikumbi Zone, Makindye Division Kampala District, The plaintiffs' then brought this against the defendant originally for declarations by this court for several reliefs including ;

- a. A declaration that they were the lawful owners of the suit kibanja situate at Bunamwaya-Kikumbi Zone, Makindye Division Kampala District,
- b. A declaration that the defendant is a trespasser on the suit kibanja,

- c. An order for the demolition of the defendant's illegal structures and buildings constructed on the suit kibanja,
- d. An order for vacant possession of the suit kibanja by the defendant or in the alternative,
- e. An order for full compensation for the loss of their kibanja,
- f. A permanent injunction restraining the defendant, his agents/servants, employees and any other person under him from any further trespass, alienating, laying false claim on the suit kibanja and interfering with the plaintiff's occupation and quiet enjoyment of the kibanja,
- g. General, Special and Exemplary damages for destruction of the plaintiff's property on the suit kibanja,
- h. Interest of 24% per annum on the damages claimed and,
- i. Costs of the suit.

2. Facts:

The cause of action upon which this suit is based that the first plaintiff alleges that he acquired the suit kibanja measuring approximately one acre from Princess Nalinya Ndagire who on behalf of Buganda Kingdom donated to him the contested piece of land as a reward for having built several palaces for Buganda Kingdom which piece of land he did occupy for a period of thirty (30) years going on to build on it a permanent home of five rooms, a servant quarters of three rooms, a shop of two rooms, a kitchen, latrine and a garden of banana plantations and planted a number of valuable trees and that being in possession of the suit land he gave a small portion of the land to the second plaintiff who his son who also developed the portion by erecting on it a permanent house of three rooms, a three roomed servants' quarters and a latrine.

The Plaintiffs allege that their quiet enjoyment of the land was rudely interrupted around the 5th of May 2005 when the defendant Joseph Kiyimba forcefully entered the land in May 2005 without the consent of the plaintiffs with graders and tractors, proceeded to evict the plaintiffs from it, demolished and destroyed all developments on it by pulling down all the structures and other developments on including plantations and eventually took possession of the land without any consideration of the plaintiffs interests with the consequence that the plaintiffs lawful occupation of the land being interfered for which they sought

several orders and declarations as against the defendant including general, exemplary and special damages with the first plaintiff claiming special damages of Ug.Shs.204, 981,000/-(Two Hundred Four Million Nine Hundred Eighty One Thousand shillings) and the second plaintiff claiming special damages of Ug.Shs.70, 000,000/- (Seventy Million Shillings).

The defendant denied knowledge of the plaintiffs including their claims stating that he properly bought the suit land from one Aloysius Ngobya when it was free of any structures, plantations and or occupants in July 2005 after which he registered the land in his names on the 1st September 2005 under instrument No.KLA279850 and thereafter took full possession of the same and utilized it as a bonafide purchaser for value for he went on to construct a block of apartments on it and even later sold the land without any claim against him until the plaintiffs brought this suit against him which he prays has no basis and should be dismissed with costs.

3. Preliminary Objection:

Before this suit could proceed to hearing, the defendant raised preliminary objections contending that the plaintiffs' suit against him was barred by sections 176 and 187 of the Registration of Titles Act (RTA) Cap. 230 for the plaintiffs' sought cancellation of his title which yet he was a registered proprietor of the suit property with no knowledge of fraud or any other exceptions under that law and further that the plaintiffs claim for damages was also time barred there being no pleadings to that effect. Arguments for and against the preliminary objections were heard court which subsequently ruled that by virtue of Section 176 of the Registration of Titles Act (RTA) the defendant could not be ejected from the suit land for he was a registered proprietor and therefore allowed partly this objection noting that the defendant was protected against ejection from the land by law making the plaintiffs' prayer for ejection unable to succeed as it was restricted by law. The court however, noted that the plaintiffs' were claiming to be bonafide and lawful occupants of the suit land which claim is protected by the Constitution under Article 26 and the Land Act 1998 noting that the RTA did not stop owner of an unregistered interest in a registered property from suing the registered owner for declarations by court to confirm those interests and possible ordering of compensation for unlawful deprivation of such interests. Therefore the court ordered the suit to proceed on the basis on this basis after appropriate amendment of the plaint to incorporate all the orders made in the ruling. An amended plaint was filed in court but a cursory look at it indicates very minor differences with the original plaint.

That notwithstanding, this court proceeds to resolve this matter as below.

4. Issues:

Three issues were framed during the scheduling of this suit which are adopted for the determination this dispute accordingly as below.

- a) Whether the plaintiff had any interest and or structures on the suit property at the time the defendant took occupation.
- b) Whether the defendant destroyed any property belonging to the plaintiffs.
- c) What remedies are available to the parties.

5. Representations:

The parties in this suit were represented as follows;

a. Plaintiffs Advocates:

The plaintiffs were represented by M/s Lukwago & Co. Advocates, 1st Media Plaza Building Plot 78, Kira Road Kamwokya P.O Box 980 Kampala jointly with M/s Heritage Associated Advocates 1st Floor, City Apartments, Bombo Road P.O Box 980 Kampala with appearance in court by Ms. Victoria Nassuna and Ms. Faridah Nabakiibi.

b. Defendant's Advocates:

The defendant was represented by M/s MMAKS Advocates, 3rd Floor, Diamond Trust Building, 17/19, Kampala Road with appearance being made by Mr. Isaac Walukaaga.

6. Documents:

a. Plaintiffs Documents:

The Plaintiffs tendered the following documents. Some exhibited with some only identified.

- a) Judgment of Buganda Road Court -(PEX. P1)

- b) List of Properties Destroyed- (PEx.2)
- c) Power of Attorney- (PEx.3)
- d) Photo of rumble with a lady- (PEx.4)
- e) Photo of rumble without a lady - (PEx.5)
- f) Photo where Ntale Wasswa appears- (PEx.6)
- g) Letter from Mwesigye & Co. Advocates- (PID.1)
- h) Eviction Notice - (PID.2)
- i) List of Items in the House - (PID.3)
- j) Letter from Presidential Advisor on land matters-(PID.4)
- k) Letter from RDC Wakiso dated 22nd May 2006 - (PID.5)
- l) Letter from RDC Wakiso dated 8th June 2006- (PID.6)
- m) Notice to halt developments- (PID.7)
- n) Letter to CM Buganda Road for a record of Court- (PID.8)
- o) Receipts jointly marked 'C'- (PID.9)

b. The defendants documents:

- a) Agreement for sale of Motor vehicle dated 12/07/2005- (EXD.1)
- b) Letter from Ag. Registrar of Titles dated 14/05/1969- (DEX.2(i))
- c) Letter from Ag. Registrar of Titles dated 19/03/1969- (DEX.2(ii))
- d) Letter from Ag. Registrar of Titles dated 15/07/1969- (DEX.2(iii))
- e) Letter from Aloysius Ngobya dated 15/02/1995- (DEX.2(iv))

- f) Letter from Registrar of Titles dated 7/04/1995- (DEX.2(v))
- g) Memorandum of sale dated 15/09/2005- (DID.1)
- h) Copy of Certificate of Title in the name of Kiyimba Joseph - (DID.2)

7. Witnesses:

The Plaintiffs called five (5) witnesses in the defense of their claims against the defendant including themselves as follows;

- a) Prince Kefa Wasswa Ntale (PW1),
- b) Prince Kateregga Phillip (PW2),
- c) Kasumba Gideon(PW3),
- d) Nansubuga Rose (PW4) and
- e) Abdul Noor Senkubuge (PW5).

The Defendant called two (2) witnesses including himself namely;

- a) Hassan Yiga and
- b) Kiyimba Joseph (DW2).

All the witnesses testified in court after their statements on oath had been filed in court which statements were admitted on record. Each of the witnesses examined accordingly in respect of their statements.

8. Burden of proof:

Section 103 of the Evidence Act (Cap 6) places the burden of proof on the party making the assertion which that party desires a court to believe as it provides as follows;

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

Paragraph 4 of the Amended plaint appears to be the gist of the basis of plaintiffs claim in this matter for it seeks among other things the declaration that they were the lawful owners of a Kibanja interest in property comprised in Kyadondo Block 265 plot 451 at Bunamwaya (“suit property”) at Bunamwaya –Kikumbi Zone. Although this claim is not specifically framed as an issue during the scheduling matter which could make it fall short of the holding by the Supreme Court in the case of **Interfreight Forwarders (U) Ltd v East African Development Bank SCCA No. 33 Of 1992** where it was held that a party is not allowed to set up a case which is not pleaded with litigants being bound by their pleadings with Justice Oder JSC (RIP) specifically holding that;

“A party is expected and is bound to prove the case as alleged by him and covered in the issues framed therein. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings....”,

This court, however, has by virtue of Article 139 (1) the Constitution Section 14 the Judicature Act and Section 98 of the Civil Procedure Act clothed with such general powers as may be necessary for the ends of justice to be met or to prevent an abuse of the court process accordingly. This dispute is thus resolved as a below bearing mind the powers this court.

9. Issue Number One: Whether the plaintiff had any interest and or structures on the suit property at the time the defendant took occupation.

The evidence of the parties to this dispute which is on record in summary is as follows.

a. The Plaintiffs Case:

The plaintiffs through their first witness Prince Kefa Wasswa Ntale (PW1) informed court that PW1 acquired interests in the disputed land via a donation from Buganda Kingdom in 1986 in appreciation for his having built five palaces for the said Kingdom through a Princess Nalinya Ndagire. That the donation was effected through a deed witnessed by a Prince Kiweewa Abdul Karim Luswata - an elder brother to the current Kabaka of Buganda, a Crown Prince Kayima of Gganda, a Prince Gobango – then the head of

the palaces in Buganda Kingdom at that time and Omuzana Nakasolya. According to the plaintiffs both the deed and even the witnesses could be produced in court as the deed was destroyed by agents of the defendant when they entered forcefully the disputed land and destroyed everything thereon while the witnesses to the deed had long since died.

In respect of occupation of the land, the plaintiffs through PW1 informed court that PW1 upon receiving the gift of the land constructed upon it a five roomed residential house with a three roomed servants' quarters in addition to an external kitchen, a two roomed shop (which became his source of income) and a store. Later on PW1 gave a portion of the land to his son Prince Phillip Kateregga (PW2) who likewise constructed on his portion a permanent house with three rooms, a servants' quarters of three rooms and a latrine and that both plaintiffs then continued to live on the disputed land peacefully on the land without any interruption.

Furthermore PW1 stated that as he was aware that he was a kibanja holder and as such was obligated to pay land rental fees known as Busuulu to his landlord which he considered was the Buganda Kingdom but added that while he was willing to do so he could not for by the time he received the land from Buganda Kingdom the Busulu and Envunjo law had been abolished and when it that was restored in 1998 he could not pay the fees for failed to the get hold of any representative of Buganda Kingdom.

In testimony as to how they got to be evicted from the land, PW1 narrated that around 2004 his son Prince Kateregga (PW2) informed him of having seen the LC.1 Chairman of the area with some people inspecting his land which event led to his receiving a letter in February 2005 from the law firm of M/S Muwema and Mugerwa Advocates requiring both him and his son to vacate the land within seven days which they did comply to until May 2005 when the Defendant appeared on the land and told them to leave or face forcible eviction which threat was made good on the 5th of May 2005 for when PW1 returned from prayers at a church at Najjanakumbi around 11.30 pm he found out that his houses and plantations had been demolished. In proof the demolition PW1 tendered Exhibits P4 and P5 which he said were photos of the debris following the demolition and so following this the next day he PW1, PW2 and Pw4 went on to report the matter to Prince Besweri Mulondo who was then senior presidential advisor on land matters who upon hearing them wrote to the Resident District Commissioner (RDC) of Wakiso requesting him to intervene and have the defendant compensate them for the damages caused. That the defendant ignored the request of the RDC Wakiso and continued to develop with no further action taken against him until both plaintiffs decided to lodge a complaint local government officials at Makindye Gombolola

which acted by sending representatives to the land who upon assessing the damages wrote to the defendant stopping him from further action on the land but to no avail forcing PW1 to relocate to Namasuba, Kikajjo Zone in Wakiso District where he rented a house to stay in from May 2005 to 2011 then later after failing to raise rental fees he shifted to the house Bukunya Jackson, a friend. PW1 put a figure Ug.Shs.204,981,000/- in special damages as the cost of the destruction of his properties. In addition he stated that he got psychologically tortured which resulted into his becoming sick.

PW1 insisted that it was the defendant whom he saw several times inspecting the land in dispute who removed him from the land and destroyed which though he could not produce documentary evidence to prove ownership of due to the fact the relevant documents got destroyed during the process of forceful eviction and demolition of his buildings.

When shown a title to the land which indeed did not have his names on it, PW1 acknowledged that indeed the land title was in some other person's name but went on to add as far as he was concerned his interests were not on the title but on the kibanja on the land to his knowledge was a traditional site of the royal family of Buganda Kingdom.

Prince Phillip Kateregga (PW2) the son of the first plaintiff confirmed the testimony of PW1 by adding upon receiving a portion of the suit kibanja from his father he went on to construct on it a three roomed residential house with a three roomed rental proceeding in which he resided peacefully till the 5th of May 2005 at around 7.00 am when he was forcefully removed by the defendant and his agents from the land in dispute whom he even saw using a tractor and grader to demolish the properties on the land even witnessed by Nansubuga Rose (PW3). PW2 confirmed that Exhibits P4 and P5 were photographs taken during the demolition process which demolition caused his father Prince Kefa Wasswa (PW1) to become traumatized and sickly that his mother and sister died from the effect of the trauma effect and therefore he asked court to declare not only that he was the bonafide and lawful occupant of the land in dispute but order the defendant to compensate him for lost properties in special damages amounting to Uganda Seventy Million One hundred and fifty (Ug. Shs. 70,150,000/-) based on the purchase prices of those items for him to recover the cost of renting alternative accommodation at Kitebi and Mugomba at Ug. Shs. 150,000/= a month to date.

The rest of the plaintiffs' witnesses Nansubuga Rose (PW3), Kasumba Gideon (PW4) and Abdul Nuru Senkubuge (PW5) confirmed seeing the plaintiffs as residents of the suit Kibanja but had no knowledge of

how the plaintiffs came occupy the land and none of them witnessed to the demolition while Abdul Nuru Senkubuge (PW5), also a son to PW1 merely indicating his suspicion of defendant being the one whom he believed demolished and destroyed the properties on the kibanja.

b. The Defendant's Case:

Joseph Kiyimba (DW2) the defendant denied that he evicted and even demolished the properties of the plaintiffs' stating that he entered only after purchasing it in July 2005 which land he found unoccupied and bushy and that he went on to register the land in his names, built on it apartments which he even later sold without any disturbance or hindrance until the plaintiffs came later claim interests in the land and sued him. The defendant called Hassan Iga (DW1) who testified that he was a neighbor to the suit land in dispute which he testified to belonging to the mother of Prince Phillip Kateregga (PW2) a one Mama Nansimbwa who only had a two roomed house on the land residing on which she resided with her son PW2 and a daughter and that Prince Kefa Wasswa (PW1) only occasionally came to the land and when he did so would reside with his son PW2 who had a one roomed house on the land.

This witness stated that on a date he could not remember at around 7-8 pm Mama Nansimbwa took all her household properties using two vehicles to her new place at Gangu, Namasuba having sold all of her interest in the suit land to the Defendant something which was confirmed to him by PW2

Furthermore DW1 told court that it was not the defendant who demolished the properties on the land in question for he stated that he did witness the demolition which was carried out on a Saturday in January, 2005 at around 11.00 am at a time when the land in question was vacant and bushy by a group of men who went on the land a van carrying pick axes and sticks. That firstly those men removed the house of Mama Nansimbwa and then that of the Kateregga (PW2) who even by then no longer residing on the land which he had voluntarily left it and was then residing at a neighboring land where he was guard from where he could regularly go to the suit land collecting building debris and then selling them to villagers to raise money to play the game of cards.

c. Resolution of the Issue:

The plaintiffs aver that they were bonafide/ lawful occupants on the suit property since they held customary land holding on it known as 'kibanja'. First and foremost the concept *kibanja* has roots mainly in the central region of Uganda especially Buganda. It should be noted that by virtue of the Uganda 1900

Agreement, the British colonialists had out huge chunks of land in form of square miles to those who assisted them in colonizing e Uganda. This agreement did not take into account those who were already settled customarily on such land. The coming into force the 1900 agreement subjugated the formerly customary tenants into finding themselves inside land belonging mailo land owners who then required them forthwith to pay rent for use of the land. The rents were no fixed and was arbitrarily increased by different mailo owners who charged differently leading to uncertainty and tensions in the rural areas. With increasing tensions becoming widespread leading to insecurity the then colonial government was forced to enact the Busuulu and Envujjo Law of 1928 which not only regulated the relationship between the two interests on a mailo land but provided security of tenancy to a customary tenant in addition to standardizing the rent payable to mailo land owners. This coming into force of this law prevented the creation of a landless peasant class in the rural areas giving them legal interests over mailo land which could even be succeeded by their heirs which interests from then could only be alienated through an order of court.

This position continued until the coming into force of the Land Decree of 1975 when all interest in land were centralized into the hands of government making everyone a tenant to government. From then on everyone was required to get a lease from government which effectively abolished the Busulu and Envujjo law with its requirement of one paying rent to a mailo land owner.

The promulgation of the Uganda Constitution of 1995 reverted this situation and made the people of Uganda owners of land and Article 237(8) lawful or bonafide occupation of land in form of Mailo, Freehold or Leasehold land tenure systems became recognised in Uganda .

Apparently it is from this position that is the basis the plaintiffs make their claim for both in their joint plaint avers that they are kibanja holders on the suit land as well as bonafide and lawful occupants. The legal regime in relations to these terms are found in the relevant provisions of the Land Act of 2008.

Section 29(1) of the Land Act, defines a **lawful occupant** to mean:

- i) a person occupying land by virtue of the repealed— (i) Busuulu and Envujjo Law of 1928; (ii) Toro Landlord and Tenant Law of 1937; (iii) Ankole Landlord and Tenant Law of 1937;*

ii) *a person who entered the land with the consent of the registered owner, and includes a purchaser; or*

iii) *a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.*

Section 29 (2) of the Land Act defines a **Bonafide Occupant** in the following terms:

(2) Bona fide occupant' means a person who before the coming into force of the Constitution –

(a) had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more or had been settled on land by the Government or an agent of the Government, which may include a local authority.....

The definition of who a bonafide occupant was under Section 29(2) of the Land Act was tested and confirmed by the High Court in its decision in the the case of **David Byatike Matovu (Administrator of the Estate of the late Nalinya Ndagire) versus Richard Kikonyongo, High Court Civil Appeal No.3 of 2014.**

The Land Act 2008 further recognizes and provides protection to a purchaser or otherwise who has acquired the interest of a person qualified to be bona fide occupant making such a person to be recognized likewise as a bonafide occupant. This position is provided as below;

Section 29(5) of the Land Act;

(5) "Any person who has purchased or otherwise acquired the interest of a person qualified to be a bona fide occupant under this Section shall be taken to be a bona fide occupant for the purpose of this Act."

The law thus recognizes and gives protection to whosoever claims to be either a lawful or a bonafide occupant of land with the holding of kibanja interests in land being one such recognized and protected interest and where there is a dispute then between a registered owner of land and the tenant as to who has interests in land then the above provisions of the law have be taken cognizance of.

Relating above position of the law to the instant matter, the record shows that Prince Kefa Wasswa (PW1) testified to his acquiring the suit land through a donation given to him by a representative of Buganda Kingdom donated to him by one Princess Nalinya Ndagire as a reward for services he rendered to Buganda Kingdom for constructing for it five palaces making him lay claim of having a kibanja interest in the suit land.

To prove this donation Prince Kefa Wasswa secured a deed witnessed by several persons including Prince Kiweewa Abdul Karim Luswata, an elder brother to the current Kabaka of Buganda, Crown Prince Kayima of Gganda, Prince Gobango, the head of the palaces at the time and the Omuzana Nakasolya. The deed was not produced in court neither were any of the witnesses to it with the explanation given by Prince Kefa Wasswa that the deed was destroyed during the demolition of the buildings in May 2005 by the defendant while all the witnesses to it had by the time the matter came to court had long since died.

The fact of Prince Kefa Wasswa building palaces for Buganda Kingdom seems to be corroborated by Abdul Nuru Senkubuge who testified as PW5 for in his testimony he avers that indeed he worked with Prince Kefa Wasswa during the 1980's constructing palaces for Buganda Kingdom.

This witness, however, does not know how Prince Kefa Wasswa came to occupy the land in dispute.

The question then would remain as to how Prince Kefa Wasswa got the land in question yet he is unable to produce the witnesses to how got the land or the document itself showing how he got the land.

While it could be true that he got the land from a representative of Buganda Kingdom this court finds it strange that Prince Kefa Wasswa having not secured the witnesses to the deed and the deed itself and brought them to court could not get this donation confirmed by someone from Buganda Kingdom which is in existence and having a fully-fledged land office called the Buganda Land Board. The fact that this could not be done leaves the issue of donation in doubt and therefore evidence to it would thus remain unconvincing and unreliable.

That notwithstanding, there is also the claim by the plaintiffs that they were lawful and bonafide occupants of the suit kibanja. This assertion has to be examined in light of the law relating to who a bonafide occupant.

Section 29(2) of the Land Act defines a bonafide occupant as one who has occupied a piece of land for an uninterrupted period of twelve years (12) or more before the coming into force of the Uganda

Constitution 1995. Prince Kefa Wasswa (PW1) testified that was donated the land in question and occupied it in from 1986. From 1986 to 1995 makes the first plaintiff to have occupied the suit land for a period nine (9) years which short of the constitutional requirement for to be termed a bonafide occupant of the land. This means that he fails the legal test also in this aspect and if he does so and so would the second plaintiff claims interests in the same kibanja arising from a donation given to him by the first plaintiff. The second plaintiff is the son of the first plaintiff. From his testimony given on the 11th of July, 2017 he confirmed that he was thirty (30) years old meaning that he was born during the year when PW1 allegedly got the land in question. Even if he was given the portion which he claims at that time, he would still fall short of the legal requirement of being a bonafide occupant of the land for similarly his stay on the land as of 1995 would remain nine (9) years like that that of his father.

This position being so I would find that the evidence to support the claim of bonafide occupant fall short for both plaintiffs for none of them qualify under the law. I would thus answer this issue in the negative.

10. Issue Two: Whether the defendant destroyed any property belonging to the plaintiffs.

The resolution of the preceding issue was conclusive enough to render this issue moot but suffice to add that the claim made before this court by the plaintiffs jointly is that at the time when the defendant took possession of the suit land both plaintiffs had properties on it in terms of buildings, crops and plantations which were destroyed by the defendant. This allegation is made both Plaintiffs and is confirmed by the evidence of PW2, PW3, PW4 and PW5.

The defendant on the other hand denies demolishing and destroying those properties stating that he came into the suit property in July, 2005 when it was empty and free. His witness Hassan Iga (DW1) , an independent neighbor to the suit confirms this position in addition to corroborating the fact of Kateregga (PW2) having had on the suit land owned by his (Kateregga's) mother a small house but that the two voluntarily left the land way back in January, 2005 after selling off their interests before the defendant came into the picture later on in July 2005 for when the defendant took possession of the land Kateregga was already residing in the neighborhood where he was a guard and his mother had shifted to Gangu at Namasuba.

Apart from DW1 who was an independent eye witness to the fact of the demolition, all the other witnesses especially PW1, PW2 and PW3 were blood relatives whose testimony can only be taken with a lot of doubt. The other witness who was said by Kateregga (PW2) to have seen the demolition is Nansubuga

Rose (PW3) who denied doing so meaning that the plaintiffs' claim of destruction of property is a fact only testified to by related persons whose testimony would require corroboration by an independent witness to make it believable for it is clear there is doubt created as to whether indeed the defendant evicted the plaintiff and demolished all their property on the 5th day of May 2005. .

Even the mode of demolition is doubtful for while Kateregga Phillip (PW2) states that it was done by a grader and a tractor Iga Hassan (DW1) states that it was done by men wielding pick axes and sticks yet these two seem to have been together on the day in question with Iga Hassan having nothing to gain from telling lies. Throughout his testimony, DW1's was unshaken and he looked truthful as I find that throughout his testimony, DW1's was unshaken and he looked the more truthful witness as to what happened than Kateregga who himself confessed of having got scared and ran away when he saw the people who had come to demolish the properties on the date in question and even hid away at a neighbor's.

From the above I would conclude the plaintiffs' story as testified to by their witnesses remains unverified and thus lack corroboration for this court to believe that it was indeed the defendant who evicted them and demolished their properties on the suit land.

Kateregga and his father owed the duty to this court to produce credible and independent witnesses who indeed witnessed the eviction and the demolition with such witnesses being either neighbors, the police and even local authorities for this court would not want to believe that the forcible eviction and the demolition of the properties could go unnoticed by neighbors or with arrest of the perpetrators by police. I find the plaintiffs' story more of a fantasy than reality and therefore unbelievable for I am more persuaded and believe the evidence of Hassan Iga (DW1) in this respect that by the time the defendant took possession of the suit property it was long since been vacated, bushy and vacant with no properties on the suit property at the time to be demolished or destroyed.

That being the case this issue is answered in the negative.

Since there was no property the defendant to demolish at the time when he took possession of the suit land this issue in the event be answered in the negative.

11. Issue Three: What remedies are available to the parties:

The plaintiffs sought several reliefs among which were:

- a) A declaration that the plaintiffs were the lawful owners of the suit kibanja situate at Bunamwaya - Kikumbi Zone, Makindye Division, Kampala.
- b) General, Special and exemplary damages for the destruction of the plaintiffs property on the suit kibanja.
- c) Interest on (b) at the rate of 24% per annum from the date of judgment till payment in full, and
- d) Costs of the suit.

I have already found that plaintiffs were not the lawful owners of the suit kibanja their failed to prove on a balance of probability that that they lawfully settled on for neither did they offer any documentary proof to that effect or got interests in the land by way of provisions of the land law which guarantees interests of bonafide land occupants as provided for under the Land Act, 2008. That being the case their such as claim for general damages cannot be granted for the position of the law is well settled that for an award of general damages granted the presumption is that those damages arose as natural consequence of the defendant's act or omission as was held by this court in the case **James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993**. Which in this case I have already found not true.

It is clear that the defendant was not the cause of the damage or loss that may have been suffered by the plaintiffs with the circumstances leading to their occupying the suit land and leaving it remaining mysterious but clearly their misery was not caused by the defendant.

That being the case no award of any general damages to the plaintiffs can be as against the defendant.

In regards to the claim for special damages the position of the law is that this is not inferred from the nature of an alleged act following ordinary course of event for they are exceptional in character meaning that they must be claimed specially and proved strictly. Because of this peculiar nature, the law requires a plaintiff to give warning in his pleadings of the items constituting his claim for special damages with sufficient specificity in order that there may be no surprise at the trial. This is position has been reiterated in he several decisions of the courts such as **Musoke v. Departed Asians Custodian Board [1990-1994] EA 219; Uganda Telecom v. Tanzanite Corporation [2005] EA 351; Mutekanga v. Equator Growers (U) Ltd [1995-1998] 2**

EA 219; Uganda Breweries Ltd Uganda Railways Corporation Supreme Court Civil Appeal No.6 of 2001 (unreported)

Relating the above legal position to the instant matter, it is true that the plaintiffs did in fact particularized items by tendering lists which tend to show what they lost following the act of demolition of their properties and the attachment marked 'L' to the plaint. What is of note, however, is the fact that no attempt was made to prove how the figures in the list was arrived at and neither was there any attempt to have the list marked L to be admitted in evidence with even the claim for rental costs allegedly incurred by the plaintiffs for alternative accommodation following the alleged demolition merely remaining in the realm of identified document as the document marked PID9 was never put on record as an exhibit but merely marked identified making fall short of the evidential value which would be placed on such a document.

In the result, therefore, no special damages can be awarded on the basis of unproven documents.

In regards to exemplary damages it is trite law that these are awarded in order not to enrich a plaintiff but to punish and deter defendant from repeating an unbecoming conduct as was pointed out by Katureebe JSC as he then was in his paper titled **Principles Governing The Award of damages in Civil Cases** at the induction of newly appointed judges at Entebbe on 18th June, 2008 with the learned justice citing the case of **Butterworth v Butterworth** noted that that the expression exemplary damages meant damages for '**example's sake**' which makes this kind of damages clearly to be punitive or exemplary in nature for they represent a penal sum of money awarded in addition to the compensatory damages for the pecuniary or physical and mental suffering.

In instant matter there could is remote possibility that the defendant caused the demolition of the plaintiffs' properties which led especially the first plaintiff to suffer any pecuniary, ill health or mental anguish considering that no iota proof has been adduced that the demolition was caused by the defendant. That being so no award punitive damages can be granted to the plaintiffs as against for the defendant did not evidently demolish the properties of the plaintiffs as alleged which even if put in context with the fact of the second plaintiff voluntarily leaving the suit property in question as stated by Iga Hassan (DW1) would tend to completely douse the plaintiff claim that that they deserve this award as against the suffering they met resulting from the defendant's action.

In the event would find nothing in this respect to make any award of exemplary damages in favor of the plaintiffs as against the defendant.

In relations to costs this is provided for by **Section 27 (1) of the Civil Procedure Act** provides thus:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of; and incident to all suits shall be in the discretion of the court or Judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid”. (Emphasis mine)

My having considered all the circumstances surrounding this suit and especially the fact that it is apparently clear that at one time or another the plaintiffs were indeed occupant of the suit land as is indeed testified to by witnesses from both side, I would, taking into account all the factual and proven circumstances which led the institution of this suit, exercise the discretion by making no order as to costs against any party.

12. ORDERS:

Noting that the plaintiffs have failed to prove their claims as against the defendant on a balance of probability as is the standard required in a civil matter I would dismiss with no order to costs.

I do so order accordingly.

HENRY PETER ADONYO

JUDGE

20TH SEPTEMBER, 2017