THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

LAND DIVISION

CIVIL SUIT NO. OF 533 OF 2016

WALUGEMBE MOSES .....PLAINTIFF

VERSUS

1. **DR. MWESIGYE FRANK**
2. **HOPE MWESIGYE..... .....DEFENDANTS**

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT:

Introduction:

The plaintiff, Mr. Walugembe Moses is the registered proprietor of the property comprised in ***Kyadondo Block 29, plot 537 land at Mulago***. He filed this suit against the defendants whom he claimed had had no interest in the property but nevertheless had refused to vacate the suit property.

That the defendants have continued to collect rent from the property and prevented the plaintiff from accessing the suit property and that their actions on the land were high handed and intended to deprive him of his property.

The plaintiff therefore sought orders that the defendants were trespassers on the land; a permanent injunction against any further trespass; a declaration that the plaintiff was the rightful owner of the suit land; an order for refund of monies illegally collected from the suit land; general and punitive damages; and costs. They also sought an eviction order from the suit property.

Representation:

The plaintiff was represented by ***M/s Joshua Musinguzi Associated Advocates,*** jointly with ***M/s Mpagi Sunday & Co. Advocates.***

The defendants on their part, were represented by ***M/s Kateera & Kagumire Advocates.***

Facts of the case:

The facts as summarized in the Joint Scheduling Memorandum are that the plaintiff is the registered proprietor of the property comprised in ***Kyadondo Block 29 plot 537 land at Mulago*** *(suit property)*, having purchased the same from one Senyumba Christopher Zaake.

The plaintiff challenged the defendants' refusal to vacate the suit property even after 2018 after the lease under which they claim possession had expired. That despite the fact that he had made it so clear to them that he did not recognize their lease interest they continued to collect from the tenants who were in occupation of the property, thus preventing him from putting his property to proper use. It was the plaintiff's case therefore that the defendants had no interest enforceable at law and no valid claim in the suit property since their occupation was illegal.

The defendants on their part denied the claim that they were trespassers on the suit land, having been in possession of the suit property for a period of 41 years and that their lease had expired on 15th September, 2018. That the plaintiff became a lessor in 2016 by reason of having acquired the head title in respect of the land.

As the lessees on that land they had a right to use the suit land for their own benefit. They also claimed to have made developments on the residential house which altogether was valued at ***Ugx 530,730,000/=.***

The defendants also exercised their right of option to renew the lease, a year prior to the expiry of the lease. Having exercised that option as per the lease agreement, the plaintiff as lessor was obliged to renew the lease on similar terms and conditions as in the lease due to expire.

The defendants did not file a counter claim.

Agreed facts:

At scheduling, the following were identified as the agreed facts:

1. *The suit property is comprised in* ***Kyadondo Block 29 plot 537 land at Mulago.***

2. *The lease agreement in respect of the suit property commenced on 15th September, 1969 for term of 49 years which expired on 15th September 2018.*

3. **Clause 4(a)** *of the lease agreement provided that the lessee was entitled to ask the lessor for the renewal of the lease at least one year prior the expiration of the lease whereupon the lessor would renew the lease on the same terms and conditions as the lease which was due to expire.*

4. *A dispute arose between the plaintiff and the defendant on the terms of the renewed lease.*

5. *The lease agreement provides that any dispute arising out of the lease agreement be referred to arbitration.*

Preliminary objection by the plaintiff:

The plaintiff in his submissions in rejoinder raised a preliminary objection to the amended defence claiming that no leave had been sought by the defendants before filing the amended defence.

However as submitted by the defendants in their response, the court record shows that on 13th November, 2020 the defendants had filed ***MA No. 1676 of 2020*** for leave to amend their WSD and that on 27th November, 2020 the two parties had consented to the filing of the amended WSD. This therefore settles that objection.

Issues:

The following issues were the issues to be resolved by this court:

1) ***Whether the plaintiff has a cause of action against the defendants***

2) ***Whether the defendants having exercised their option to renew the lease agreement prior to its expiry are in trespass.***

3) ***What are the remedies available to the parties.***

Analysis of the law and evidence:

Issue No. 1: Whether the plaintiff has a cause of action against the defendants.

The case for the plaintiff was led by the plaintiff as the sole witness in his claim. He testified as ***Pw1***.

Similarly for the defendants the 1st defendant testified as ***Dw1***. He claimed that they held a lease registered on the plaintiff's certificate of title for the suit land, acquired in 1969 for a period of 49 years and expiring on 15th September, 2018. That as defendants they had acquired it in 1998.

In the submissions by the defendants' counsel the claim was that the plaintiff had failed to make any pleading over their lease; that plaintiff made admissions of the existence of the defendant's purported lease; that the property did not revert to the plaintiff and that the plaintiff departed from his pleadings. Accordingly that the plaintiff had no cause of action pleaded against them in respect of the lease.

The plaintiff in his rejoinder however denied all the above claims.

Consideration of the issues by court:

I have carefully considered the pleadings and points raised by the counsel in their respective submissions. I will not repeat them here since they are on record.

The law:

Section 101 of the Evidence Act provides that 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 and the burden of proof lies on that person.

Section 103 further stipulates that:

> ***"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence."***

For court to satisfy itself that there is a cause of action, three essential elements must be satisfied: that the plaintiff enjoyed a right; the right was violated and that the defendant was liable. ***(Ref: Auto Garage Vs Motokov (1971) E.A 519).*** In

The plaintiff in this case had the burden to prove that trespass had been committed on the land by the defendants.

In ***Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4 of 1987, the East African Court of Appeal*** the court noted that in order to prove the alleged trespass, it was incumbent on the party to show that the disputed land belonged to him; that the defendant had entered upon that land; and that the entry was unlawful in that it was made without his permission; or that the defendant had no claim or right or interest in the land. (***Ref:also: H.C.C.S No. 118 of 2012, Tayebwa Geoffrey and Anor Vs Kagimu Ngudde Mustafa; Justine E.M.N. Lutaaya Vs Sterling Civil Engineering Co, SCCA No. 11 of 2002).***

It is an agreed fact in this case that the plaintiff acquired mailo interest in land comprised in ***Block 29 plot 537 land at Mulago Kampala***, the same land over which the defendants claim to have held a valid lease as registered proprietors of land, comprised in ***LRV 732 Folio 19 plot No. 537 Kyadondo Block 29***, land at Mulago. ***(Ref: PExh 1).***

By way of some background, the plaintiff filed this suit in 2016 while the said lease was still running. The matter continued in court for a period of four years after the lease had expired, as the parties waited for the outcome of the dispute on rent and of this suit.

The said dispute had been referred to CADER for arbitration as per the arbitration clause of the lease agreement, which lease the plaintiff sought to challenge. However, despite several orders and reminders CADER never up with any solution.

Analysis of the evidence:

The plaintiff testified as ***Pw1*** and presented to court a certificate of title for the mailo land interest acquired by him, comprised in ***plot 537 of Block 29, Kibuga, land at Mulago,*** covering an area of 0.15 hectares, ***(PExh1),*** proof that he was the owner of the land.

A perusal by court of the certificate revealed that the first registered owners appearing on the title were the administrators of estate of the late Tamukedde who got registered onto that title on 23rd September, 1995. On that same day, Mr. Semei Tamukedde and Mr. Serufusa Zake were entered on the title as the registered owners of the suit land.

On 20th January, 2014, Mr. Senyumba Christopher Zaake got registered thereon and some two years later on 26th May, 2016 sold the mailo interest to the plaintiff. Contrary to the claims by the defendants, the certificate presented as ***PExh 1,*** indicated clearly on the page reserved for encumbrances that a lease had been registered under the names of Mrs Raj Kaur, and was to run for 49 years, from 15th September, 1969.

PExh 2 is the lease agreement between on the one hand, Mr. Joswa Serufusa Zaake and Mrs Raj Kaur in consideration of the surrendering of another lease comprised in ***LRV 383, Folio 16*** by her husband, Pritam Singh.

In the terms of that lease agreement now under dispute, a yearly rent of ***Ugx 275/=*** was payable by the lessee at the beginning of each year. Other terms and conditions were also spelt out in the lease, some of which the parties invariably sought to rely on to advance their respective arguments in this suit.

Court however observed that although the lease had been signed between Mr. Joswa Serufusa Zaake as the lessor and Ms Raj Kaur the name of Joswa Serufusa Zaake did not however feature anywhere on ***PExh 1*** as the individual owner of that property.

His names appeared as J. Serufusa, one of the administrators of the estate of the late Tamukedde, which estate was the first registered owner of the suit property as reflected on that title.

Court was not availed with any explanation as to how he alone had become a lessor in 1969 and 26 years later became registered on that same land as a joint administrator of the estate of the late Tamukedde.

For the defendants, ***DExh 1*** was presented as the certificate of title for the suit land under which the said lease was registered. The title was issued on 15th September 1969, also reading Raj Kaur as the initial lessee for land described as ***plot 537 of Block 29, Kibuga, land at Mulago. (comprised in LRV 732 Folio 19).*** Thus ***DExh 1 and PExh 1*** were two different titles issued over the same piece of land, with each bearing separate entries.

For ***DExh 1*** various lessees were entered on the certificate, the first being Raj Kaur who held the lease from 1969 up to 1973 when Siraj Muyombya Bakulu Mpagi Wamala took over from her. . Three other persons had obtained the registration in the period between January, and April, 1978.

The very last entry on the title ***(DExh 1)*** was that of the defendants as joint owners. The two obtained registration on that lease on 10th May, 2007, having bought Abdalatif Juma's interest in 1998. ***(Ref. DExh 3)***. The circumstances under which each of these successive lessees had secured their respective interests were however not made known and/or disclosed to court.

In dealing with this matter, court noted that a number of points of law were raised by the defendants which I need to consider first.

(1) The alleged departure by the plaintiff from the pleadings:

It the defendants' claim that the plaintiff did not raise or include in his pleadings the issue of validity of the lease agreement or any breach of the covenant in ***clause 1 (e)*** of the lease agreement which he now seeks to raise.

In raising it later, the plaintiff had departed from the pleadings thus offending the rule under ***order 6 of the CPR*** (on pleadings) as well as the principles as highlighted in the Supreme Court decision of ***Interfreight Forwarders (U) Ltd vs EADB; SCCA No. 33 of 1992.***

It was declared in that case that a party is expected and bound to prove the case as alleged by him and as covered by the issues as framed. A party will not be allowed to succeed on a case not set up by him/her and at trial change the case or set up a case inconsistent with what was alleged in the pleadings. He/she can only do so by way of amendments to the pleadings.

Accordingly that in this case the issue on the consent to transfer and the alleged invalidity of the lease were a departure from the pleadings since nowhere in the plaint had he made the inference that the defendants had breached the lease agreement. It follows therefore that the arguments were more or less raised as an afterthought, which court ought to disregard.

Counsel for the plaintiff however in countering that argument made reference to *paragraph 7* of the plaint, which reads:

> *The plaintiff shall aver and contend that the defendants have no claim whatsoever in the suit property.*

That the said issue had emanated from the defence on the existences, not the existence and validity of the lease and it became a matter to be tried and determined by court, and as such it did not constitute a departure from the pleadings.

It is a correct position of the law and I could not agree more, that a party is bound by its own pleadings. ***Order 6 rule 6 of the CPR*** is intended to avoid a situation where a party is taken surprise when new or unpleaded fact is introduced.

However in the same Supreme court decision as cited by the plaintiff's counsel in ***SINBA K Ltd and 4 others vs UBC Civil Appeal No. 3 of 2014*** the court duly recognized as good law the principle in ***Odd Jobbs vs Mubia [1970] E. A 476,*** that a court can decide an un pleaded matter if the parties have led evidence and addressed court on the matter in order to arrive at a correct decision in the case and to finally determine the controversy between the parties.

In the more recent Supreme Court decision of ***Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu: SCCA 15 of 2019***), the same court expressed the view that a court has the duty to adjudicate matters in accordance with the law, values and norms and aspirations of the people and this duty should never be abrogated.

The superior court went on to state that the Court of Appeal in that case had been right in identifying the real matter in controversy between the parties though unpleaded and in attempting to resolve the same. That in any case the parties had led evidence on the issue of ownership. Doing otherwise would amount to abrogation of court's duty.

The obligation is therefore cast on court to read the pleadings, listen to the evidence and determine with the assistance of the learned counsel for the parties, material proposition of fact or law on which the parties are at variance. The parties and their counsel are bound to assist

court in this process. ***(Mundua Richard vs Central Nile Transporters Association HCR No. 003 of 2017.)***

In any case as pointed out by counsel for the plaintiff in rejoinder, in *paragraph 7* of the plaint, the plaintiff had pleaded that the defendants had no claim whatsoever in the suit property. This brought to the fore all such evidence and averments considered as necessary to prove the matter.

Thus also in deciding the question of whether or not the plaintiff had a cause of action in trespass, or whether or not they had protectable interest in the suit property, court had to consider all matters collateral to the ownership of the suit property and validity (or otherwise) of that lease.

(2) Whether or not admissions were made by the plaintiffs:

The defendants' counsel submitted that in view of the agreed facts, a clear admission was made that at the time of filing the suit the lease was still running and a valid lease at the material time. That the defendant's lease and covenants therein are deemed to have become known to the plaintiff when he was purchasing the suit property in June, 2016.

Furthermore, that it is also trite law that agreed facts need no further proof. ***(Ref: imperial Bank (U) Ltd vd T-Bucks EA Ltd & 2 others HCCS No. 637 of 2013 and section 57 of the Evidence Act, Cp. 6***).

In reply however, the plaintiff refuted the claim that admissions under the agreed facts had been made in acknowledgment of the defendants' interest in the lease. With all due respect however to the defendants' arguments on the alleged admissions, judgment on admission as provided for under order ***13 rule 6 of CPR*** requires a party at any stage of the suit to apply to the court for such judgment **o**r order on admission.

In the wording of that rule, the provision may not appear to be mandatory but in court's view, once a party seeks to rely on it he or she is under obligation to file an application before the court is to grant any such order.

It is also trite that a judgment on admission must not be implied. It must be specific, unambiguous and sufficiently clear so that the issue in question can be said to be closed. The rules do not envisage a situation where the admission is inferred from the pleadings.

There should not be any doubt that it was intended to be an admission. ***(Ref. also to: Nasra Ali Warsam vs Osege Rajab Civil Suit No.0003-2013***). In light of the above, and from the perusal of the facts as agreed upon, there is no indication that any such admission was ever intended or made by the plaintiff.

(3) Requirement for consent to acquire the lease:

This sub-issue 3 touches on the merit of this case.

It was the plaintiff's contention that the lease relied on by the defendants was illegal and as such therefore the defendants had no interest in the land, having unlawfully acquired it. Counsel relied on the case of ***Uganda Broadcasting Corporation vs SINBA (K) Ltd and Others CACA No. 12 of 2014*** to support the position that once the illegality was brought to its attention, a court ought not to allow itself to be made an instrument of enforcing any such obligations arising out of such a contract or transaction.

Furthermore, that where a person invoking the aid of the court is so implicated the court of law would not come to his assistance; and that it matters not whether or not the illegality has been pleaded. (***Active Automobile Spares vs Crane Bank & Rajesh Pakesh SCCA No. 21 of 2011).***

The illegality alluded to in this instant suit was premised on the alleged failure by the defendants to secure prior consent of the land owner before acquisition and possession, in compliance with ***clause 1(e)*** of the lease agreement, ***(PExh 2).***

It states:

'The lessee hereby covenants with lessor as hereunder:

> ***Not to assign sublet or part with the possession of the land leased without the written consent of the lessor; provided however that such consent shall not be unreasonably withheld in case of respectable and responsible person and that .....***

In the spirit of ***section 10(1) of the Contracts Acts 2010*** a contract is defined as:

> ***'an agreement made with a free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound'.***

It is now settled law that once a contract is valid, it automatically creates reciprocal rights and obligations between the parties thereto and when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms. (***See: William Kasozi versus DFCU Bank Ltd High Court Civil Suit No. 1326 of 2000).***

In the present arrangement, neither the plaintiff nor the defendants were parties, witnesses or signatories as lessor or lessees under the agreement. They could not at any stage invoke any of the clauses within that agreement in pursuit of their respective interests.

Such a contract was not enforceable against either party since there was never at any time any intention to be legally bound or any meeting of the minds for that matter. There were no reciprocal rights and obligations which were created for the benefit of the third parties.

Had there been a valid contract between them, then the narrative would have been quite different and an action for breach would be justified against one or the other party. Breach of contract presupposes that a valid and binding contract did exist in the first place.

It occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. ***See: Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690.***

With all due respect therefore the parties in this suit were not only total strangers to each other but also to the lease agreement; and neither could be bound by it or derive any benefit out of it.

In absence of any such express intention, the law ordinarily governing the relationship between the two parties is the ***Land Act, Cap. 227.***

Section 31 (1) of the said Act, guarantees security of occupancy on any registered land to a tenant by occupancy. Similarly, ***section 29 (2) of the Act*** accords protection to any party who qualifies under the definition of a *bona fide* occupant. If a party occupied the land, utilized it or developed it unchallenged by the registered owner or agent of that owner for a period of 12 years he/she is considered to be a *bona fide* occupant.

In ***section 29(5),*** any person who purchases or otherwise acquires the interest of a person qualified to be a *bona fide* occupant is also taken to be a *bonafide* occupant and therefore equally derives protectable interest under the Act.

Furthermore, by virtue of ***section 34 and 35 of the Land Act, Cap. 227*** prior consent must be secured from a registered owner by a tenant in occupation wishing to assign, sublet or subdivide the tenancy. ***(Section 34(1)).***

He/she is under obligation to give the first option to the owner (***section 35 (1)).*** In a similar way, where the registered owner intends to sell the reversionary interest in the land he/she must give the first option of buying that interest to the tenant by occupancy. ***(section 35 (2).).*** Under those circumstances, the new owner is obliged to respect the existing interests.

A perusal of the record indicates that the 49 year old lease had been created in 1969, and had expired in 2018. The validity of the title held by the plaintiff was not in contention. No counter claim was filed by the defendants and similarly no fraud had been pleaded against the defendants' title.

However upon comparison of the two titles and as deduced from the years of registration appearing on each certificate of title, all the lessees appearing on that title had acquired their respective interests long before the changes in ownership in the mailo interests were made by the plaintiff's predecessors in title.

As pointed out earlier, the first registered mailo owner appearing on the plaintiff's title were the administrators of the estate of the late Tamukedde in 1995. In 1973 however, and later on in 1978 the defendants' predecessors in the lease title were already on that land. This was long before the plaintiff's predecessors had acquired their respective interests as the mailo owners on that same land.

No information was availed to explain how this had happened and how such acquisition by the 'lessees' and their possession of land had remained unchallenged for that long. But even more pertinent to the plaintiff's argument, it was not known whether or not prior consent was obtained from those owners before the respective lease assignments were made.

It is clear therefore that the defendants' occupation and utilization of the land as lessees had been and remained peaceful until 2016 when the plaintiff purchased the property as a mailo interest owner.

The equitable doctrine of proprietary estoppel becomes applicable in circumstances where there are parallel interests running over a single asset: the owner and the occupier. An owner may decide to remain passive in respect of his/her claims.

A passive *owner* would be deprived of such ownership in favour of an *occupier* of land in possession, who may be under a mistaken belief of his or her own inconsistent legal right, thus making it unconscionable for the owner to reassert his or her title ***(see: Willmott v. Barber (1880) 15 Ch D 96 and Taylors Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1982] QB 133)***.

Proprietary estoppel/acquiescence would require proof in the first place that:

a. *The occupier made a mistake as to his legal rights.*

b. *The occupier must have expended some money or must have done some act on the faith of his or her mistaken belief.*

c. *The owner of the legal right, must know of the existence of his or her own right which is inconsistent with the right claimed by the occupier.*

d. *The owner of the legal right, must know of the occupier's mistaken belief of his or her rights.*

e. *The owner of the legal right, must have encouraged the occupier in his or her expenditure of money or in the other acts which he or she has done, either directly or by abstaining from asserting his or her legal right.*

If the legal owner stands by and allows the claimant to, for example, build on his or her land or improve his or her property in the mistaken belief that the claimant had acquired or would

acquire rights in respect of that land or property then an estoppel will operate so as to prevent the legal owner insisting upon his strict legal rights.

It applies where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act.

In the Supreme court decision earlier cited ***(Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu: SCCA 15 of 2019***), the concept of adverse possession which I find applicable to this case was discussed at length.

The court gave guidance on the preconditions in Uganda that must exist before one can be considered to be an adverse possessor. These were:

1) ***Factual possession of the land. There must be physical control of the land in issue. The person in occupation must be dealing with the land as owner might be expected to, and no one else must be doing the same;***

2) ***The possession must be a continuous period of at least 12 years uninterrupted.***

3) ***Animus possidendi: an intention to possess the land to the exclusion of all others, including the legal owner.***

4) ***The possession must be adverse, ie without legal entitlement or without the owner's consent; (emphasis mine)***

5) ***The possession must be peaceful, exclusive, open and notorious so as to put the owner of the land on notice of the possessor's intention;***

6) ***The possession must start with a wrongful disposition of the rightful owner.***

The title of adverse possessor rests on the infirmity/failure of the right of others to eject him. The owner is therefore under duty to protect his interest in the land; not just look on when his rights are either infringed or threatened by third parties such as squatters and trespassers occupying his or her land.

Failure to do so would mean that the owner of the land has abandoned the property to the adverse possessor or has acquiesced to the hostile acts and claims of the person in possession.

Section 78 of the RTA recognizes adverse possession in the terms below:

A person who claims that he/she has acquired title by possession to land registered under this Act may apply to the registrar for an order vesting the land in him /her for an estate in fee simple or other estate claimed.

Court added another aspect to the effect that the law does not make it a necessity for the claim of adverse possession to be by one person for the whole period; as long as the period of possession is continuous, the period of possession of successive squatters may be aggregated. The said judgment of the superior court is binding to this court.

The plaintiff in the present case found the defendants in quiet possession of the land which they had held on continuously and exclusively for decades including making repairs, without interruption or consent of owner.

The authority ***Dr. Deodata Kekitinwa & 3 others vs Edward Haudo Wakida CACA No. 3 of 1997,*** relied on by counsel for the plaintiff is to the effect that a person who initially had a lease became a trespasser when the lease expired. The question remains however whether or not it applies to the specific circumstances of this case.

It is not in doubt that the defendants had already entered the premises, having lived on the suit land for several years, enjoying quiet and uninterrupted possession thereof under successive mailo owners, though under the mistaken belief that they were operating under a valid lease and therefore in legal occupation of the suit property.

In yet another authority cited by the defendants: ***Justine E.M.N Lutaya vs Sterling Civil Engineering Co. Ltd Civil Appeal No. 11 of 2002,*** the Supreme Court had this to say:

....the tort of trespass to land is committed, not against the land but the person in actual or constructive possession of the land. At common law the cardinal rule is that only the person in possession of land has such capacity to sue in trespass.

Deduced from the authority above, it is only the owner of an unencumbered land who has the capacity to sue in an action for trespass. By maintaining an action in trespass the plaintiff seemed to suggest that the land was not encumbered. He was fully aware that the defendants were in physical possession and had even lodged a caveat on that land.

An encumbrance as would disentitle the owner from suing may include an unexpired lease. It may also include the equitable interest acquired over a period of time through proprietary estoppel, as in this present case.

Although the plaintiff therefore had a title which the defendants did not seek to challenge, as the owner, he was never in physical possession of the disputed property at any material time.

In light of the above it is the firm view held by this court that the plaintiff's right as mailo owner were subject to the existing equitable interests on the suit land, and in respect of which ***section 35 (8) of the Land Act, Cap.227*** applies.

The section stipulates that a change of ownership of title effected by the owner by sale, grant and succession or otherwise shall not in any way affect the existing lawful interests or *bonafide* occupant.

In the circumstances, the plaintiff could therefore neither sue for trespass nor could he therefore sue for the recovery of land since the latter is restricted by the law on limitation.

Section 5 of Limitation Act which governs the limitation period for recovery of land provides as follows:

> ***"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."(emphasis added).***

It is the established law that a suit which is barred by statute where the plaintiff has not pleaded grounds of exemption from limitation in accordance with ***Order 7 r.6 Civil Procedure Rules S.I 71-1*** must be rejected because in such a suit the court is barred from granting a relief or remedy. ***See: Vincent Rule Opio v. Attorney General [1990 – 1992] KALR 68; Onesiforo Bamuwayira & 2 Others v. Attorney General (1973) HCB 87; John Oitamong v. Mohammed Olinga [1985] HCB 86.***

Section 6 of the Limitation Act (supra) of the same Act provides:

> ***"The right of action shall be deemed to have accrued on the date of the dispossession."***

The direct import of ***section 5 and 6*** is, first, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued.

It dates back to the time when the right first accrued to the person who ought to have brought the action. In the case of ***F. X Miramago v. Attorney General [1979] HCB 24***, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Since the plaintiff in any case was never in possession, he could not claim to have been dispossessed of the suit land.

Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff unless by reason of disability, fraud or mistake the operative facts were not discovered immediately.

The cause of action for recovery of land by the original owner in this case accrued in 1973 when without consent of the owner Raj Kaur had sold her lease interest to Siraj Bakulumpagi Wamala. Within the year 1978 three other transfers of lease interests were made between third parties and no action for ejection was ever taken against any of the occupants by the respective owners.

As against the defendants themselves it would seem that the defendants first made the purchase from Abdalatif Juma, their predecessor who had held the lease from 24th April, 1978, secured by him from Raj Kaur.

In 1998 the irregularity continued unabated when without consent of the owners he sold the lease to the defendants, who got duly registered on the lease title on 2007. ***DExh 3*** is proof that Abdalatif Juma had sold his purported lease interest to the defendants on 3rd February, 1998.

The same exhibit serves as proof that prior to the plaintiff's purchase of the land in 2016, the defendants were already in possession and their stay remained unchallenged for a period of 18 years.

The cause of action thus accrued as early as 1998 and by the time the plaintiff acquired interest in the land the defendants were already occupants thereon. Neither Juma's purchase of the lease nor his subsequent assignment of interest to the defendants were ever challenged by the plaintiff's predecessors.

As gathered from the plaintiff's arguments, a 'non-official' search had been carried out at the land office. The plaintiff's point was that he did not come across any lease in the names of the defendants registered on his title.

The 'non-official' search was however neither properly explained nor backed by any evidence. It was proof that no search was ever carried in the land office and more likely than not, the plaintiff never carried out any search on the ground before purchasing the property.

As a prospective purchaser, the plaintiff faltered when he failed to secure consent of the defendants before purchasing the land in 2016. He ought to have addressed the issue of the defendants' persistent occupation and possession with the person who sold him the land, in a bid to have the matter resolved, before entering into the commitment to purchase the property.

No sale agreement for the mailo interest between Joswa Serufusa Zaake the original mailo owner and the plaintiff was availed to court to demonstrate that any such steps to address the defendants' occupation had been considered.

The above would imply that the defendants were never involved in the prior engagements between the vendor and the purchaser of the property which they had occupied for decades. It would also imply that in disregard of the requirements under ***section 34 and 35 of the Land Act,*** they

were not given the first option to purchase that land as sitting tenants. These were matters that could have been brought out clearly by the defendants by way of a counterclaim.

The issue of absence of consent and the validity of the lease therefore impacted not only the defendants but the plaintiff as well since both were strangers to that agreement. Both did not comply with the requirements of consent under the Land Act.

Issue No. 2: Whether the defendants having exercised their option to renew the lease agreement prior to its expiry are in trespass.

By their amended WSD filed 27th November, 2020, the defendants pleaded that in 2017 which was a year prior to the expiry of the lease they exercised their option and right under ***clause 4(a) (a)*** of the lease agreement to renew the lease agreement at the end of the said lease on 15th September, 2018.

That the plaintiff was therefore under obligation to do renew the lease under the same terms and conditions as provided in the expired lease, for a further 49 years. As such therefore his point was that the issue of trespass did not arise, since the defendants had remained in lawful occupation pending the decision from CADER.

The defendants also relied on ***DExh 5,*** a letter addressed to them, which indicates the following proposals that were made by the plaintiff:

> *i. That a new lease is negotiated between the parties;*
>
> *ii. That you pay USD 2000 as rent per month*
>
> *iii. That premium is negotiated and agreed upon for the new lease.*

The alternative as offered by the plaintiff in that letter was to require the defendants pay *USD 3000,* each month under a tenancy agreement. In their response however, the defendants declined to take up the offer claiming that the amount was excessive. (***DExh 4).***

The plaintiff however maintained their stand that the defendants derived no benefit from a lease they were not parties to and that the arguments by the defendants should be disregarded by court.

Resolution by court:

Clause 4 (a) states as follows:

> ***The lessee shall have the option or right to renew the lease on some terms and conditions herein stated for a further period of 49 years at the end of the demise of the notice sent to the lessor a year before the end of the demise hereunder before created. PROVIDED that such extension as hereunder mentioned beyond 49 years be subject to further consent of***

the necessary authority or the Minister as the case may be which may be obtained after the expiry of the 47th year of the demise hereunder granted.

The issue of the validity of the lease has already been dealt with and concluded by this court.

The defendants just like the plaintiff, could not invoke any clause out of a non-existent or invalid lease with the objective of gaining advantage or benefit from it, and only when it suited them. As strangers to the agreement, the option or right to renew the lease was not available to them.

Their argument therefore on the point that the plaintiff was under obligation to renew the lease after they had exercised that option was neither tenable nor helpful to their case. Correspondences between the parties in this suit ***DExh 4*** (dated 25th July, 2017), and ***DExh 5*** (dated 19th July, 2017) during the time when the lease was still subsisting were not evidence of its validity or intended renewal or admission of the defendants' rights as lessees on the land. These were mere negotiations for a fresh lease, but without any such backing from the lease.

The submissions made by the defendants on their purported tight or the option to renew the said lease; and the reference of the dispute resolution for arbitration were therefore disregarded by this court.

Taking into consideration all the above factors, the exercise of the option to renew was a preserve of Raj Kaur who (up to the time she disposed of her interest) had been recognized as the legitimate owner of that lessee.

In conclusion:

In the premises:

- The plaintiff succeeded in proving that he was the registered owner of the property in dispute and that upon expiry of the lease in 2018, the title had reverted to him.

- There was non-compliance with the requirement for consent under the ***Land Act***, ***Cap. 227*** in respect of the transactions made in this suit by both parties.

- The parties in this suit could not rely on the lease agreement, invoke any clause or derive any benefit out of it since they were both strangers to the agreement. The only recourse open to them was to negotiate and enter into a fresh lease if they wished to retain the relationship of land lord and tenant.

- The defendants derived interest in the suit property under the doctrine of proprietary estoppel which accorded them protection on the suit property as the sitting tenants. It

served as an estoppel against the plaintiff's denial of the defendant's possession, stay and utilization of the land.

Issue No. 3: Possible remedies:

The plaintiff sought for a declaration that he is the rightful owner of the suit property; damages for trespass; a permanent injunction; and eviction of the defendants from his land.

Valuation of the property:

- ***DExh 6*** is a valuation report dated 21st March, 2018 which was presented by the defendants. It was addressed to the accredited mediator of this division and filed in court on 5th April, 2018.

  It indicates that:

  a) a caveat had been lodged by the defendants on 8th July, 2016:
  b) the value of the suit land was ***Ugx 299,979,400/=;*** the value of the buildings ***Ugx 187,546,560/=.;*** receivable income for the remaining rental period ***Ugx 43,200,000/=.***

  However the defendants in *paragraph 7* of their amended WSD referred to a figure of ***Ugx 500,000,000/=,*** assessed in the report as the value of the property.

  On the other hand however, according to the pleadings under the plaint filed in 2016 the estimated figure that was given at the time was ***Ugx 60,000,000/=*** which amount was challenged by the defendants.

  DExh 7 is a copy of the transfer form for the suit property signed by Ssenyumba Christopher Zake as the transferor and the plaintiff as the transferee. The consideration for the suit property was indicated as ***Ugx 15,000,000/=.***

  The above inconsistencies in the value of the suit property could not be reconciled by this court.

  From what court was able to see at the *locus* visit, the premises were located in a prime area.

Outstanding rent arrears:

Regarding outstanding rent payable, in the valuation report filed in court on 5th April, 2017(***DExh 6)*** as already noted, the receivable rental income from the suit property was assessed as ***Ugx 43,200,000/=.***

However, it was the claim by the plaintiff that the defendants have continued to collect rent from the property. He therefore prayed for a refund of ***USD 132,000.*** That the said amount was based on ***Dw1's*** statement made at the *locus* that they had been receiving rent from the tenant at ***USD 1700*** per month. This was not documented.

However as pointed out by counsel for the defendants, special damages must be specifically pleaded. In addition, they must also be specifically proved. ***(Gapco (U) Ltd vs A.S Transportes (U) Ltd CACA No. 18/2004.***)

Court also noted during the *locus* visit that the premises had an old but well-kept building which was enclosed in a perimeter wall, recently repaired and maintained by the defendants.

However contrary to the claims made by the plaintiff, the premises were not in use. The estimate for actual rent that ought to have been paid to the plaintiff as the owner was therefore left to the discretion of this court.

In light of all the above findings and conclusions, the rest of the prayers made by the plaintiff for eviction, general and punitive damages against the defendants could not be sustained.

In the premises, this court makes the following orders and declarations:

1. ***Following the expiry of the lease on 15th September, 2018, the land comprised in Kibuga Block 29, plot 537, land at Mulago reverted to the plaintiff as the mailo owner.***

2. ***The defendants shall pay the estimated rental arrears owed to the plaintiff amounting to Ugx 60,000,000/= (at a rate of 20,000,000/= per year, covering a period of 3 years.***

   The said amount takes into account a number of factors: the inflation; the consideration that this was prime area; possible loss of income during covid 19 endemic and the period of time the suit has spent in court).

3. ***Unless the parties through joint agreement agree on the terms and conditions for a fresh lease, the suit property is to be sold at the prevailing market value with the first option to purchase it to be given to the defendants as the sitting tenants and holders of an equitable interest on the suit land.***

4. ***The defendants shall within a period of three months' pay all the outstanding dues and property rates including all arrears, in respect of the property to be assessed by the KCCA.***

5. ***Each party to meet its own costs.***

Alexandra Nkonge Rugadya

Judge

06th July, 2022.

Delivered by email

7/7/2022.