THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION

CIVIL SUIT NO.0058 OF 2014

1. **MADINA KIBIRIGE**
2. **KIBIRIGE ALI**
3. **SHARIFU ASUMAN KIBIRIGE**
4. **HALIMA KIBIRIGE**
5. **AISHA KIBIRIGE**
6. **HAJARA KIBIRIGE**
7. **HAJANI KIBIRIGE**
8. **ABBASI KIBIRIGE**
9. **ABU KIBIRIGE**
10. **ASUMAN KIBIRIGE**
11. **SULA KIBIRIGE**
12. **SALIM KIBIRIGE**
13. **REHEMA KIBIRIGE ::PLAINTIFFS**

VERSUS

JOHN BOSCO MUWONGE::DEFENDANTS

JUDGMENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

The Plaintiffs instituted this suit against the Defendant claiming that;

i) They are the rightful owners of a kibanja, and;

ii) Trespass to land located at Mengo Kisenyi measuring about 100 feet by 120 feet (*hereinafter the suit property*).

iii) They also claim that the suit property was developed with a Commercial House with thirty-five rooms.

It is their claim that the suit property belonged to the late Hajji Haruna Kibirige, a husband to the 1st Plaintiff, and father of the 2nd to 13th Plaintiff, and that he purchased the same in 1984. That the 1st Plaintiff established a Hardware shop in one of the thirty-five rooms on the suit property; and that the 2nd Plaintiff resided in one of the said rooms. They allege that in the month of December, 2013, the Defendant and/ or his agents, without any authority, trespassed on the suit property, demolished the commercial building with the said thirty-five rooms and destroyed the properties therein. Further, that the Defendant fenced the entire suit property with iron sheets and poured thereon clay with the intention of carrying out developments. As such, they seek several reliefs against the Defendant's, to wit;

1. A declaration that the Plaintiffs are bonafide/customary tenants on a piece of land located at Mengo Kisenyi measuring about 100 feet by 120 feet;

2. A declaration that the Defendant is a trespasser on the suit property;
3. An eviction order against the Defendant;
4. General and aggravated damages;
5. Compensation for the structure that was demolished by the Defendant;
6. Costs of the suit.

The Defendant filed a written statement of defence denying all the Plaintiffs' allegations thereby putting them in issue.

A scheduling conference was conducted and the parties agreed upon the following issues;

1. **Whether the Plaintiffs are the lawful owners of the suit property**
2. **Whether the Defendant illegally demolished the Plaintiff's property**
3. **Whether the Defendant is a trespasser on the suit property**
4. **What are the available remedies?**

The Plaintiffs called four witnesses, to wit; Kabogozza Ibrahim (PW1), Madina Kibirige (PW2), Katende Abdul (PW3), Kibirige Ali (PW4); and the Defendant called one witness, to wit; Onyango Patrick (DW1).

Counsel for both parties filed written submissions, which I shall consider but shall not reproduce.

It is worth noting that the Defendant filed witness statements of three witnesses. But at trial, he only called one witness for cross examination. This led Counsel for the Plaintiffs to urge Court, in his submissions, to expunge witness statements for the uncalled witnesses from the record. That would actually be the consequence, according to **O.18 r.5A (5) of the Civil Procedure Rules, as amended.** But Counsel for the Defendant raised several preliminary matters related to the same, among others, and I find it necessary to address them before proceeding forth.

Counsel for the Defendant submitted that the Defendant's oral testimony was shut out at the prompting of Counsel for the Plaintiff and yet the defence never claimed that its witnesses were either unavailable or unwilling to testify. He apparently meant to say that the Defendant was denied his right to be heard. As such, he

submitted that the Defendant filed an application vide **Misc. Apln., No2400 of 2021** in pursuit of the said right, and that his submissions on the issues above were made without prejudice to the said application.

I have looked at **Misc. Apln., No.2400 of 2021.** It seeks to reopen the defence case. The record however, indicates that no step has ever been taken by the Defendant to prosecute it. In fact, Counsel for the Plaintiffs denied knowledge of application since it has never been served upon his clients.

Further the record of the main suit indicates that the Defendant had the opportunity of calling witnesses. It indicates that after calling DW1, the Defendant's Counsel prayed for an adjournment to call two more witness, which was granted, but with a caution that he produces them at the next hearing. This was undone. Only Counsel appeared, and he explained that the Defendant was at the High Court at Mukono appearing in **Civil Suit No.18 of 2019**, although no evidence of this was given. This prompted Counsel for the Plaintiffs to pray that the defence case be closed. The said prayer was granted and the matter was given another date for mention.

On the mention date again, that is 26th of November, 2021, neither did the Defendant nor his Counsel in personal conduct of the matter appeared. It was instead another Counsel who appeared on brief for the Defendant and he agreed with the Plaintiffs' Counsel that the defence case is closed. He even asked for timelines to file submissions and the same were given.

All of the above revelations indicate that the Defendant had the opportunity to fully exhaust his case by calling other witnesses, but he opted not to. In this direction, I find the proposition relied upon by Counsel for the Plaintiff sound. Once a party has been afforded an opportunity to present his case and he opts to the contrary, he cannot be said to be a victim of procedural irregularity nor complain that he was not afforded an opportunity to be heard (***Yoweri Serwanga versus Hanifa Tamale & Others HCMA No.403 of 2011***).

It suffices to mention that Misc. Appln. No.2400 of 2021 was filed on the 15th of December, 2021; making it 17 days after Court directed the parties to file written submissions, and 7 days after the Plaintiffs had filed their submissions. This to me implies laxity on the part of the Defendant. He ought to have intimated to Court that he intended

to file the application at the last appearance when times lines for filing submissions were given, and atleast filed it shortly thereafter. But filing it (1) 17 days thereafter, (2) after the Plaintiffs filing their submissions, and (3) doing nothing thereafter to prosecute it, seems an afterthought and a delaying tactic, as Counsel for the Plaintiffs intimated in his submissions.

This is a very old case and should be completed. The fact that the Defendant had earlier on been cautioned makes it even worse. He ought to have taken the matter seriously. At this point, he should not be asking Court to reopen his case after all that laxity on his part.

In the circumstances, therefore, for reasons above, this Court disallows the application. As a consequence, the witness statements of John Bosco Muwonge and Nyiro Joseph are hereby expunged from the record under **O.18 r.5A (5) of the Civil Procedure Rules, as amended**.

The application is accordingly dismissed with each party bearing its own costs.

This Court now moves to determine the main suit. Counsel for the Defendant also submitted that the Plaintiffs' Counsel departed from pleadings by arguing unpleaded matters, say; fraud, and illegality of the contract of sale of land between the Defendant and Spidiqa Foundation. Counsel for the Plaintiffs had argued in his submissions that the said contract is void for being contrary to **Section 35 of the Land Act Cap.227**.

I have appreciated the submissions of both Counsel on this matter. I note that the matter raised in the aforesaid submission touches a third person who is not a party to this suit. Since determining that matter might affect the said person without being heard, I find it improper to delve into it. I therefore agree with Counsel for the Defendant that it was improper for the Plaintiffs' Counsel make submissions on matters of fraud and illegality. This Court shall, thus, disregard such submissions.

Next is Counsel for the Defendant's submissions that the Defendant is entitled to a summary judgment against the 11 Plaintiffs who never testified in the matter. Counsel for the Plaintiffs replied to this

submission by arguing that there is no requirement that all Plaintiffs in the matter must testify. I do agree with the latter argument.

I do not think that each of the Plaintiffs needed to give evidence in the matter especially if they considered that the evidence already on record, given by PW1, PW2, PW3, and PW4, was sufficient to prove their case against the Defendant. What would be the use of each of the Plaintiffs giving a testimony, except repetition. In that case, therefore, the argument of Counsel for the Defendant on this matter is hereby rejected.

Further, Counsel for the Defendant also submitted that Court ordered that the record of High Court, Civil Division, Companies Cause No.012 of 2008 (***In the Matter of Mohamed Zziwa Kizito & Others versus Spidiqa Umma Foundation***), be made part of these proceedings, and ordered the Registrar of this Court to avail the said record, but that the same has never been availed. In reply, Counsel for the Plaintiffs' implored Court to look at the record for clarification.

I have looked at the record of 20th of March, 2019 as regards the same. Court never ordered as Counsel for the Defendant submitted. It

ordered that the record be availed through the Registrar, after Counsel for the Defendant praying that the same be retrieved from the Civil Division. If it was never retrieved then that might be because the Defendant never followed up on that matter; and I do not see how this stops this Court from determining the issues of this matter. This Court, therefore, finds no merit in this matter as well.

Having addressed the preliminary matters raised by the Counsel for the Defendant, I shall now determine the issues raised in the matter.

In the case of ***Uganda Petroleum Co. Ltd versus Kampala City Council; Civil Suit No.250 of 2005***, it was held that *in civil cases the burden lies on the party who alleges to prove his or her case on the balance of probabilities.* Additionally, it is also provided by **Section 101(1) of the Evidence Act cap 6** which provides that; *whoever desires 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.* In this case, the Plaintiffs bear the burden of proving the above issues on the balance of probabilities.

Issue No.1:

Whether the Plaintiffs are the lawful owners of the suit property

PW2 testified that she is the widow of the late Haruna Kibirige, and a mother of the 2nd to the 13th Plaintiffs. That the Plaintiffs inherited the suit property, having belonged to late Haruna Kibirige who purchased it from the late Rajabu Semakula. *'A copy of a land sale agreement dated 28th June, 1984, was admitted as PEX1'.*

It suffices to state that PW2 authenticated PEXH1, since he witnessed its execution. But that notwithstanding, Counsel for the Defendant argued that PEXH1 is a forgery. His submission was that an examination of the stamp affixed to PEXH1 shows an inscription of Muzaana RC.1, Kampala (II), and a dated of 28th of June, 1984, but that in 1984, R.Cs (*Resistance Councils*) did not exist until the 26th day of January, 1986, when the National Resistance Movement took power. He thus implored Court to take judicial notice of historical records and notorious facts to find that PEXH1 is a forgery.

In response, Counsel for the Plaintiffs whilst admitting that Resistance Councils did not exist until 1986, he argued that

inscription R.C.1 on PEXH1 does not mean Resistance Council 1, as Counsel for the Defendant interpreted, but Residential Council 1, the English word for 'Mayumba Kumi', which existed by the 1980s.

PEXH1 does not state the full meaning of R.C.1. Neither did PW2 testify about its meaning. It is Counsel for the Defendant who gave it Resistance Council, as its full meaning. But as he himself submitted, Resistance Councils did not exist in 1984. I cannot be sure what caused it to believe that the inscription meant so, especially since it could still mean something else (as the Plaintiffs' Counsel elaborated). What I am sure of however, is that PW2 was never cross examined by Counsel for the Defendant to establish the full meaning of abbreviation. This being so, I am constrained to believe that Counsel for the Defendant assumed a fact, upon failing to establish it. This Court finds this inappropriate; and shall thus consider PEXH1 as it is in determining this issue. The submission that it is a forgery is dismissed for lack of sufficient proof.

I shall now proceed with the evidence.

PW2 also testified that since 1984 until the 27th of December, 2013, she had been living on the suit property together with the other

Plaintiffs. That the suit property measures 100 feet by 120 feet. The whole of her testimony was corroborated by PW1, and PW4.

The evidence that the late Haruna Kibirige owned the suit property was never rebutted by the Defendant nor discredited during cross-examination. In this direction, Counsel for the Plaintiff cited ***Sonde Martin versus Uganda CACA No.278 of 2003***, (which followed the decision of the Supreme Court in ***James Sawoabiri & Anor versus Uganda SCCA No.5 of 1990***) wherein it was observed that "*an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted.*" I shall remain alive to this proposition in as afar as the Defendant is concerned.

I must add that DW1 testified also that he carried out the boundary opening exercise of Kibuga Block 12 Plot 925 and prepared a report. This report was admitted as DEXH5 and is dated the 2nd of July, 2013. It is shown in one of the diagrams attached to this report that the late Haruna Kibirige, through whom the Plaintiffs claim the suit property, had a house on the said plot; and Counsel for the Plaintiffs argued that the Plaintiffs must succeed on the basis of this admission. I

however, decline to follow this line of thinking. This is because in their evidence, the Plaintiffs (specifically PW2, PW4) claim that the late Haruna Kibirige's house was situated on Kibuga Block 12 Plot 1580 not plot 925.

The Defendant's claim of possession of Block 12 Plot 925 is undisputed by the Plaintiffs. What they dispute is that the Defendant also took possession of their alleged kibanja situated on plot 1580, which is next to plot 925. If the diagram on DEXH5 (suggesting that the Plaintiffs alleged kibanja falls on plot 925) is taken for granted, the implication would be that the Plaintiffs admit having no interest at all in plot 925 and so their suit against the Defendant is unfounded, but other circumstances of the case do not support this view.

Further to the above, is that all the Plaintiffs' witnesses testified that the Defendant is in possession of both plot 925 and their kibanja. It was their evidence also that the Defendant is currently operating a taxi park business on plot 925 and their alleged kibanja, which evidence was not disputed.

Secondly, the record indicates that this Court issued an order (dated the 21st day of September, 2017), directing the parties to jointly carry

out a survey of plot 925 and ascertain its size, and actual acreage of land currently occupied by the Defendant. The undisputed evidence of the Plaintiffs, given by PW4, is that the Defendant refused to cooperate with them in order effect the said order of Court. In proof of this, the Plaintiffs adduced a copy of a letter written by their Counsel to the Defendant's Counsel seeking his cooperation, PEXH6. The question now is: 'Why would the Defendant refuse to cooperate with the Plaintiffs in that matter'?

Is it not that the survey would have established that his taxi park business stretches beyond plot 925 into what the Plaintiffs claim to be their kibanja? And wouldn't that be against him? This then casts suspicion on partisan DEXH5. It leaves me with no choice, but to reject DEXH5 and consider the Plaintiffs' evidence that the late Haruna Kibirige's alleged kibanja was situated on Kibuga Block 12 Plot 1850.

In their pleadings, the Plaintiffs claim to be *bonafide* occupants/customary tenants of the suit land. According to **Section 29(2) of the Land Act**, a *bona fide* occupant means a person who before the coming into force of the Constitution—

(a) *had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or*

(b) had been settled on land by the Government or an agent of the Government, which may include a local authority.

Further, the provisions of a customary tenant are captured under **Section 29(1) of the Land Act**. It is trite that a person claiming to be a customary tenant must, among others, prove that in the area where the suit land is located, it is a custom that whoever carries out certain activities for a specific period of time becomes a customary owner. This position was re-affirmed by the Supreme Court in the case of ***Kampala District Land Board & Another versus Venansio Babweyaka & 3 Others SCCA No.2 of 2007***.

Furthermore, in another binding authority **of *Uganda Electricity Board versus GW Musoke SCCA No.30 of 1993*,** the *Supreme Court* opined that;

'A native custom must be proved in evidence by a party intending to rely on it, where such is neither notorious nor documented'.

In this case, the Plaintiffs cannot be bonafide occupants, under the above provisions, as they fall outside the required twelve years prior to the coming into force of the 1995 Constitution. This is contrary to their Counsel's submission that the 12 years period was met, since a count from the 28th of June, 1984, when the late Haruna Kibirige bought the suit property, to 1995 when the Constitution came into force, makes it 11 years.

In addition to the above, the suggestion by Counsel for the Plaintiffs that the predecessor to the late Haruna Kibirige had occupied the suit property prior 1984 and so such period should be reckoned so as to consider the Plaintiffs as bonafide occupants under **Section 29(5) of the Land Act** is without merit. There is no evidence that the said predecessor occupied the suit property as a bonafide occupant to pass on that status onto the late Haruna Kirige/Plaintiffs. Only the period the late Haruna Kibirige occupied the suit property can be considered.

Further, the Plaintiffs cannot also be customary tenants on the suit property having led no evidence that it is a custom that whoever carried out certain activities in the area where the suit property is located became a customary owner or evidence of a custom.

In the circumstances, therefore, I find that the Plaintiffs were neither bonafide occupants nor customary tenants on the suit property. Consequently, the are not lawful owners of the suit property.

This issue is thus found in the negative.

Issue No.2:

Whether the Defendant illegally demolished the Plaintiff's property

Having found issue 1 in the negative, it might be a waste of energy to embark on this issue, but since issue 3 may have a bearing on it, I shall resolve the latter issue first.

Issue No.3:

Whether the Defendant is a trespasser on the suit property

I start by stating that trespass to land is a claim against possession, not ownership of the land, and so only a person who has exclusive possession or an immediate right to possession of land may sue

(*Nakagiri Nakabega and Others versus Masaka District Growers [1985] HCB 38*). This is why it occurs "*when a person makes an unauthorized entry upon land, and thereby interfering, or portends to interfere, with another person's lawful possession of that land*" (***Justine E.M.N. Lutaaya versus Sterling Civil Engineering Co. SCCA No.11 of 2002*****).**

Possession of land may be in a person who has no legal title to it and is himself or herself in wrongful occupation as regards another **(*Newington versus Windeyer (1985) 3 NSWLR 555*).** Rejecting the proposition that legal title is necessary before an action for trespass can be brought, ***Lord Kenyon CJ*** in ***Graham versus Peat*** **[1801] 1 East 244** said: "*Any possession is a legal possession against a wrongdoer.*" As such, a squatter is an exclusive possessor although, as between himself or herself and the rightful owner, he or she has no right to exclusive possession until his adverse possession has ripened into ownership. But, just as legal title to land without exclusive possession does not support an action of trespass to land against third persons, so exclusive possession without legal title thereto is sufficient **(*National Provincial Bank Ltd versus Ainsworth***

[1965] AC 1175**:** a wife with no proprietary interest in matrimonial home).

Hence, a Defendant cannot set up the right of the true owner in order to justify his infringement of the Plaintiff's de facto possession: he cannot plead the so-called *jus tertii*, that is, assert that another has a better right to possession than the Plaintiff, unless he committed the entry by his or her authority **(*Nicholls versus Ely Beet Sugar Factory [1931] 2 Ch 84*).** The reason is that it is more conducive to the maintenance of order to protect *defacto* and even wrongful possession against disturbance by all and sundry than to deny legal aid to a squatter merely because of the flaw in his or her claim to the land.

In this case, I have established that the Plaintiffs have no ownership whatsoever in the suit property. But this does not defeat their claim of trespass to land against the Defendant considering their plea of prior possession of the suit property. It suffices to note that the Defendant does not also claim any ownership of the suit property. As such, he cannot set up the defence of jus tertii, especially since he never pleaded dispossessing the Plaintiffs by the owner's authority.

This implies that the issue is to be decided on the basis of: who had exclusive possession of the suit property prior the other.

PW2 categorically testified she had been living on the suit property together with the other Plaintiffs since 1984. She also added that the suit property was developed with a Commercial House with thirty-five rooms from which they collected rent.

Further, that on the 27th day of December, 2013, the Defendant ordered his agents to demolish their house on the suit property because it was near his plot and thereafter ordered them to construct an iron sheets fence around it to block them from accessing it.

Lastly, but not least, that the Defendant currently operates a taxi park business on his land and the suit property. All of this evidence was corroborated by PW1, PW3, and PW4.

It suffices to mention that the Plaintiffs' evidence was not disputed by the Defendant. The inference, therefore, is that the Plaintiffs possessed the suit property prior the Defendant. As regards this finding, *Justice Mubiru* persuasively elaborated, in ***Omito Luka &***

Others versus Attorney General HCCS 073 of 2004, that possession signifies an appropriate degree of exclusive possession, and it is proved by showing that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so (*See* also ***Justine E.M.N. Lutaaya versus Sterling Civil Engineering Co.*** *Supra*).

The Plaintiffs' evidence demonstrates that they stayed on the suit property, collected rent from rooms established thereon, and also carried thereon business in other rooms. This indicates that they dealt with the suit property as an occupying owner might have been expected to deal with it. As such, this Court finds that the Plaintiffs had exclusive possession of the suit property against the Defendant.

Having also proved on the balance of probabilities that the Defendant entered onto the suit land without their authority and interfered with their possession of the same, Court finds that the Defendant committed trespass to land.

This issue is found in the affirmative.

Issue No.2:

Whether the Defendant illegally demolished the Plaintiff's property

PW2 and PW4 testified that demolition of structures by Court bailiffs on plot 925 (which is undisputedly owned by the Defendant) took place on the 26th day of December, 2013. That Court bailiffs never demolished their house on plot 1580 because they knew that it was not the Defendant's land. That on the 27th day of December, 2013, the Defendant instructed his agents to also demolish their house and thereafter ordered them to construct an iron sheets fence around the suit property. Similarly, PW1 and PW3 also alluded to the same.

There is no doubt that the demolition of structures on plot 925 was carried out in pursuance of a warrant of vacant possession vide EMA No.2335 of 2013. As regards that, I agree with Counsel for the Defendant's submission that the said exercise was lawful.

But the Plaintiffs' also led evidence that there was another demolition of structures carried out on plot 1580 on the 27th of December, 2013. Like with the rest of the evidence, the Defendant never rebutted this evidence. With this in mind, I am constrained to find that whoever

demolished the structures on plot 1580 did so illegally. The question now is: who did so?

The evidence led by the Plaintiffs is that said demolition was conducted by the Defendant's agents, but there is no direct evidence in proof of the alleged agency between the Defendant and his alleged agents. The rest of the evidence on the said alleged agency was indirect; and I note that some of this indirect evidence is heresy, and thus inadmissible as Counsel for the Defendant argued. For instance, PW3 testified that the alleged agents told him that they demolished their house on instructions of the Defendant.

Differingly, PW2 also testified, during cross examination, that those who demolished their house were agents of the Defendant because the Defendant phoned her in the night asking her to sale the suit property to him and that the demolition happened the next day. This does not however establish any nexus between alleged agents and the Defendant.

The above notwithstanding, I observed that the Defendant's taxi park business probably stretches beyond plot 925 into the suit property where the Plaintiffs' house was. The demolition therefore benefited

the Defendant. With this in mind, I find no logical inference, but one that whoever demolished the Plaintiffs' house did so on instructions of the Defendant.

In the circumstances therefore, this Court believes the Plaintiffs' evidence that the Defendant's agents demolished their house on the suit property. Consequently, I finds that the Defendant illegally demolished the Plaintiff's house.

This issue is also found in the affirmative.

Issue No.4:

What are the available remedies

The Plaintiffs sought remedies listed above, which I shall now consider.

To start with the remedy of a declaration that the Plaintiffs are bonafide/customary tenants on a piece of land located at Mengo Kisenyi; Court declines to grant this remedy, issue one having been found in the negative.

Secondly, issue three having been found in the affirmative, this Court hereby grants the Plaintiffs a declaration that the Defendant is a

trespasser on land located at Mengo Kisenyi measuring about 100feet by 120 feet.

The Plaintiffs also sought for an eviction order against the Defendant. By seeking such an order, they are in essence asserting a right to enter into possession of the suit property, which is a specie of an action of recovery of land. This is supported by the fact that to evict, according to the **Black's Law Dictionary (1991), 6th Edn., at page 526**, is "*to recover anything from a person by virtue of the judgment of a Court*….", and an action for eviction is the same as action for recovery of land **(***See* **Black's Law Dictionary (1991) at p.516).**

It is a general principle that in an action for recovery of land/eviction, the Plaintiff recovers possession by the strength of his or her own title, without any regard to the weakness of the Defendant's title. The result is that where a Plaintiff is seeking an order of eviction against the Defendant, he or she must prove a better title to the land than the Defendant. However, this general rule has two important exceptions. One is that whenever a person has acquired possession through another whose title is defective, that person cannot set up the defect against the other or anyone claiming through him or her, although he

or she can prove that such title has since expired or been parted with. This is a simple application of the principle of estoppel; and is better demonstrated by **Section 115 of the Evidence Act, Cap.6,** with the rule that a tenant is estopped from denying his or her landlord's title (*See*; ***Does D. Johnson versus Baytup (1835) 3 A. & E. 118 and Clarideg versus MacKenzie (1842) 4 M. & G. 142*****).** The second exception is that if the Defendant's possession is wrongful as against the Plaintiff, the Plaintiff can only succeed if the Defendant cannot show any title or possession in anyone prior to the Plaintiff.

In ***Asher versus Whitock (1865) L.. 1 Q.B.1*****,** it was held that if the Plaintiff takes possession of a waste land without any other title than such seizure, he can recover possession against the Defendant who subsequently enters on the land and who cannot show title or possession in anyone prior to the Plaintiff **(***See* also ***Fawley Marine (Emsworth) Ltd versus Gafford [1968] 2Q.B 618*****).**

I already found, in this case, that the Plaintiffs have no interest in the suit land, and therefore, no better title than the Defendant. They could apparently fall under the second exception, but the Defendant proved, through DW1 and DEXH6, that the title of plot 1580 is vested

in Boost Investments Ltd, a lessee, since the 21st day of August, 2009, having obtained a lease from the Kabaka of Buganda, who probably had a mailo title by 1984 when the late Haruna Kibirige purportedly acquired the suit property.

It is trite that a registered proprietor of land has legal possession of it (*See* ***Justine E.M.N. Lutaaya versus Sterling Civil Engineering Co.*** *supra*). As such, I find that the Kabaka of Buganda had possession of the suit property prior the Plaintiffs, or the late Haruna Kibirige, through whom they claim.

Consequently, the Plaintiffs do not fall under any exception. They cannot, therefore, recover possession of the suit property. Ultimately, an eviction order is declined.

Turning now to the remedy of general and aggravated damages. As regards general damages, Counsel for the Plaintiff properly stated the principles applicable to them. One is that general damages are granted upon Court's discretion, and an innocent party is entitled to them, even without proof since they are presumed to be the natural and probable result of the wrong doing. Further, that general

damages are only intended to put the innocent party in a position he or she would be had the wrong not happened; and that in their assessment, Court takes account of the factor of; (1) the value of the subject matter, (2) the economic inconvenience suffered by the innocent party, and (3) the extent of the breach. He ably supported these principles with the case of ***Charles Acire versus Myaana Engola HCCS No.143 of 1993*** *and* ***Uganda Commercial bank versus Kigozi [2002] 1 EA 305*****.**

In the circumstance of this case, it is natural to presume that the Plaintiffs were inconvenienced by the Defendant's actions. As such, they are entitled to general damages, but these shall be determined only in respect of the claim of trespass to land which succeeded.

I am now on the assessment of general damages; and on the first factor, above, in particular. It suffices to note that the full value of the suit property is to be considered notwithstanding that the Plaintiffs have no ownership in it. This is because a *de facto* possessor of land is entitled to recover the same measure of damages as if he or she were the owner, for possession is, as against the wrong doer, *prima facie* evidence of ownership, which cannot be displaced

by merely showing that the possession was not derived from any person with ownership **(*Eastern Construction Co versus National Trust Co. [1914] A.C. 197*).**

I note that the suit property is located in the heart of Kampala. PW4 testified that its value could have been Shs.600,000,000/- (*six hundred million shillings only)* by now, and the Plaintiff's Counsel added that it is probably Shs.1,000,000,000/- (*(one billion shillings only)* presently. But all these figures were neither pleaded nor was evidence of valuation of the suit property led.

I am, therefore, unable to act upon them. That said, that does not of itself imply that this factor shall be disregarded. I am mindful of the prices of land in Kampala, and can estimate what a 100 feet by 120 feet unregistered plot of land could cost. I shall be mindful of this, therefore.

On the factor of economic inconvenience, the Plaintiffs led evidence that they carried out economic activities on the suit land, and that they also collected rent from some rooms thereon. That said, the amount of rent collected per month was not proved satisfactorily, although they endevoured to suggest some figures. Like on factor

one, I also decline to follow the suggested figure, but shall take account economic realities of rent in Kampala; and the fact that the Plaintiffs have not collected the said rent for 8 years now since the Defendant's actions.

Lastly is the factor of extent of breach. I already found the Defendant liable for trespass to land, and for wrongfully demolishing the Plaintiffs' house. Additionally, the Plaintiffs' led undisputed evidence that the said demolition was highhanded and happened at about 3:00 am. It cannot be denied that the Plaintiffs have been through pain owing to the Defendant's callous behavior.

Considering all the relevant factors and principles, this Court awards Shs.400,000,000/- (*Four hundred million shillings only*) to the Plaintiffs as general damages.

Turning now to aggravated damages. The principle applicable to them is that **"**… *when damages are at large and a Court is making a general award, it may take into account of factors such as malice or arrogance on the part of the Defendant and this injury suffered by the Plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being*

essentially compensatory in nature" ***(Spry, V.P, in Obongo versus Kisumu Municipal Council [1971] EA 91, at page 96, approved by the Supreme Court in Fredrick Zaabwe versus Orient Bank Ltd and Ors SCCA No. 4 of 2006*).**

In the circumstances of this case, my view is that the Plaintiffs ought to receive aggravated damages not only for the trespass to land by the Defendant, but also because of his callous conduct and apparent arrogance.

In considering an award of aggravated damages, "*I must take into account the station in life….*" of the Plaintiffs (***Fredrick Zaabwe versus Orient Bank Ltd and Ors SCCA No. 4 of 2006*).** Some of them lived on, and others, apparently, derived a substance from, the suit property from which they were dispossessed. They must have suffered much humiliation and distress. For about 8 years now, they have been put out of possession of the suit land. As such, I award to the Plaintiffs Shs. 200,000,000/- (*two hundred million shillings only*) as aggravated damages.

The Plaintiffs also sought for compensation for the structure that was demolished by the Defendant. In his submissions, Counsel for the

Plaintiffs added other claims for which compensation is sought. But since these were not pleaded, I shall stick to what was pleaded for parties are bound by their pleadings.

PW4 testified that their demolished building costed about Shs.400,000,000; and no other evidence was led in rebuttal of this. In the absence of the contrary, this Court awards to the Plaintiffs Shs.400,000,000/- (*four hundred million shillings only*) as compensation for the structure demolished by the Defendant.

Lastly, this Court awards the Plaintiffs costs of this suit.

I so order.

……..

Henry I. Kawesa

JUDGE

14/02/2022

14/02/2022

Andrew Wamina for the Defendant.

Defendant absent.

Kiweewa Ismail for the plaintiffs; on brief for the plaintiffs.

Court:

Matter for judgment.

Judgment read to the parties above.

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Henry I. Kawesa

JUDGE

14/02/2022