THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL SUIT 2316 OF 2016

(FORMERLY NAKAWA HIGH COURT CIVIL SUIT NO.611 OF 2015)

NINA GRACE WANGO :: PLAINTIFF

VERSUS

JANE SSEWAGUDDE:: DEFENDANT
(Trading as Kazo Summit Primary School)

JUDGMENT

BEFORE: HON. MR., JUSTICE HENRY I. KAWESA

The Plaintiff brought this suit against the Defendant, and seeks;

a. An order for recovery of a piece of land situated at Kazo-Lugoba, Nansana Town Council in Wakiso District;

b. A declaration that the Defendant is trespasser on the suit land;

c. General damages in trespass.

In the alternative and without prejudice to the foregoing:-

d. A declaration that the tenancy agreement of 5/03/2013 between the Defendant and a one Juliet Galiwango over a piece of land in Kazo-Lugoba is *null* and *void* and of no legal effect,

e. A declaration that the Defendant's acts of constructing a perimeter wall around the suit land amounts to breach of the

agreement of 20/05/2009 and/or any agreements subsequent to and in line with it, between the Defendant and the late Mary Wango and is as such illegal and unlawful,

f. A declaration that the Defendant's acts of moving and/or removing boundary mark stones on the suit land are illegal and unlawful,

g. An order directing the Defendant to remove all of the illegal wall and/or structures put upon the suit land by herself or her agents/servants,

h. A permanent injunction restraining the Defendant, her agents and/or servants from further breaching the said agreement or otherwise dealing with the suit land without the consent and permission of the Plaintiff or the administrators of the estate of the late Mary Wango,

i. General damages in breach of the tenancy agreement of 20/05/2009 and/or the agreements subsequent to and in line with it,

j. General damages for the inconvenience, embarrassment, and mental stress brought about by the Defendant's illegal and unlawful conduct,

k. Interest on all general damages at a rate of 25% per annum from the date of judgment till payment in full,

l. Costs of the suit.

Plaintiff's Claim in the Plaint

She states that she and her brothers and sisters are children of the late Mary Wango who died intestate on 17th February 2021; and, therefore, a direct beneficiary of the estate of the said Mary Wango. That no one had obtained letters of administration of that estate at the time of filing this suit, although the process was ongoing.
That at the time of her death, the late Mary Wango owned a piece situated in Kazo Central Zone, Nabweru Town Council in Wakiso District; and that on or about 6th September 2000, she sold part of that land measuring 139feet by 160feet by67feet by 160 feet to the Defendant and an agreement was executed to that effect.

That on or about 20th May 2009, the same Mary Wango rented out the remaining part of her land to the Defendant/her school measuring 145feet by 127feet by 147feet by 130feet (**hereinafter the suit land**) and a tenancy agreement was executed to that effect. That the said tenancy agreement has since expired and no renewal has ever been made, but the Defendant is still occupying the suit land. That in the tenancy agreement, the Defendant was not allowed to carry on any developments on the suit land or carry out structural alterations without consent in writing of Mary Wango, the landlord.

That after the death of Mary Wango, the Defendant started removing boundary mark stones from the suit land to increase on the size of

her plot and reduce the size of the suit land. That the Defendant also went ahead and constructed a perimeter wall around the suit land without the consent of the administrator of the late Mary Wango because there is no administrator yet, and without the concerted efforts of all he beneficiaries of the estate of the late Mary Wango.

That she has demanded that the Defendant vacates the suit land or removes the perimeter wall and returns the mark stones but in vain. That when she complained to the Defendant, she, through her lawyers, flashed a purported tenancy agreement executed between herself and the late Mary Wango on 5th March 2013, and signed by a one Juliet Galiwango on the landlady's side yet she neither has powers of attorney nor letters of administration, or family consent to act on behalf of the estate of the late Mary Wango.

That as a result of the Defendant's acts, the estate of the late Mary Wango has been denied the right to occupy the suit land. Further, that they are losing land due to the Defendant's acts of removing boundary marks from the suit land.

That she, and other beneficiaries of the estate of the late Mary Wango, have also suffered embarrassment, inconvenience and mental stress due to the Defendant's permanent wall on the suit land without their approval and in breach of the earlier tenancy agreement. That they are in fear that the perimeter wall is likely, in future, to be a basis for the Defendant laying false claims of ownership over the suit land. That since the tenancy agreement of 2009 has never been renewed, the Defendant ought to have already vacated the suit land in her

favour and other beneficiaries of the estate of the late Mary Wango, the failure of which amounted to trespass. In the alternative, that if the said tenancy agreement still subsists, the Defendant breached it and she is liable to the Plaintiff.

Defendant's Defence in the Written Statement of Defence

The Defendant denied all the Plaintiff's allegations in the plaint hence putting them in issue. He stated that on the 6th September 2000, he bought land situated in Kazo Central Zone from Mary Wango measuring 139feet by 160feet by 67 feet by 160 feet at Ugx.10,000,000/- *(ten million shillings)* only. That on 20th May 2009, Mary Wango had rented the suit land to her, which is adjacent the land she initially bought, to be used as a school facility at a rental fee of Ugx.3,000,000/- *(three million shillings)* only per school term. Further, that she also bought another piece of land situated in the same area from Mary Wango measuring 145feet by 45 feet by 140 feet by 45 feet at Ugx.58,000,000/- (*fifty million shillings*) only.

That upon death of Mary Wango, her family, including the Plaintiff, being represented by a one Juliet Galiwango entered into a fresh tenancy agreement with the Defendant over the suit land where the rental fee was revised from Ugx.3,000,000/- (*three million shillings)* only to Ugx.5,000,000/- (*five million shillings)* only per term. That under the said agreement, that family allowed her to construct a perimeter wall over the suit land for safety of the school children. That she has faithfully paid the rent for the property as agreed between her and the family of the late Mary Wango.

That the Plaintiff indicated to her, and her other family members, that she wished to receive her share of the rental fee directly from her; and that she has been faithfully paying to the Plaintiff her agreed share of Ugx.550,000/- only per school term. Further, that the Plaintiff approached her demanding for an increment of the rental fee in respect of the suit land and she advised her to work it out with her other family members to streamline the administration of the estate of the late Mary Wango so as to facilitate a conclusive determination of the rental payment.

Further, that the Plaintiff has always acknowledged the Defendant's right to use the suit land as a tenant pursuant to a tenancy agreement executed between the family of the late Mary Wango and her, but sought to challenge the same after having disagreements with siblings over the administration of the estate of the late Mary Wango. That the tenancy agreement of 2009 was revised and replaced by another agreement of 2013 between her and the family of the late Mary Wango upon which the Plaintiff has been taking a benefit; and so she is estopped from challenging the validity of the said that agreement. Further, that she acted lawfully and within the scope of the said tenancy agreement.

She also stated that the suit land is a kibanja, and does not have any known mark stones, and denied removing/moving any mark stones or tampering with any boundary marks.

Scheduling Conference

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

1. That on 06th September 2000 the late Mary Wango sold part of her land measuring 139feet by 160 feet by 67 feet by 160 feet to the Defendant; and
2. That on or about 20th May 2009 the late Mary Wango also rented out the remaining portion of her land to the Defendant measuring 145feet by 127 feet by 147 feet by 130 feet and tenancy agreement was entered to that effect.

The parties also agreed on the following issues for determination by Court;

1. Whether the Defendant is a trespasser on the suit land.
2. Whether the tenancy agreement of 5th March 2013 between Juliet Galiwango and the Defendant over the suit land was lawful?
3. Whether the Defendant acted in breach of the tenancy agreement dated 5th March 2013 between Juliet Galiwango and the Defendant?
4. What remedies are available to the parties?
5. Whether there are any remedies available to the parties?

Trial of the Suit

The Plaintiff called one witness, and the Defendant called three witnesses.

The Plaintiff's witness was Nina Grace (PW1), that Plaintiff herself; and the Defendant's witness was the Defendant herself/Jane Ssewagudde (DW1), Mugerwa Meddi (DW2), and Juliet Galiwango (DW3).

Burden and Standard of Proof

It is provided by **Section 101(1) of the Evidence Act Cap 6** 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 applying that section, the Court in **Uganda Petroleum Co. Ltd versus Kampala City Council Civil Suit No.250 of 2005,** rightly held that in civil cases, the burden lies on the party who alleges and this must be discharged on the balance of probabilities.

As such, the Plaintiff has a burden of establishing his claim in the plaint and this must be discharged on a balance of probabilities.

Determination of Issues

Counsel for the parties filed written submissions which I have considered in determining the issues reproduced above.

I note that the submissions for Counsel for the Defendant, though related, are not on the issues as reproduced above. Counsel instead raised two preliminary objections and submitted on them in his submissions. The preliminary objections are to the effect that:

1. *The suit contravenes the doctrine of approbation and reprobation; and*

2. *The suit is an abuse of Court process; in particular, Section 6 of the Civil Procedure Act Cap.6 detailing the lis pendens rule.*

Having appreciated the pleadings and evidence of the parties, and their respective Counsel's submissions, I found that the submissions of Counsel for the Defendant should be considered while resolving the issues raised.

My reason for that is that the two preliminary objections argued therein could not have been sustained since their resolution required more evidence to substantiate on them. As regards this, the long standing principle is that a preliminary objection:

> *Is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion* (***Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696).***

In the instant case, it is clear that Counsel for the Defendant's arguments on the said objections are premised on the evidence of the parties taken at trial. As such, therefore, the arguments he makes cannot suffice as preliminary objections.

Be that as it may, I also have particular reservations for the second preliminary objection. The Defendant did not lead cogent evidence of the alleged suit between the parties herein to substantiate on the point that the instant suit was barred by **Section 6 of the Civil**

Procedure Act Cap.71. What is on record is only the Plaintiff's statement, during cross examination at trial and locus, that she lodged a complaint at the Chief Magistrate's Court of Nabweru at Nabweru against the Defendant in 2019, and 2020 for Ugx.4,000,000/- (*four million shillings)* only, she claimed under the tenancy agreement of 2009. The statement is, however, not enough for Court to resolve the said preliminary objection. More material was needed; at least the Plaintiff's pleadings filed in that Court. For that matter, therefore, the second preliminary objection could not have sufficed in the circumstances.

Pressing forward, I have noted that the second issue has a bearing on the first and third issue. I shall, therefore, resolve the three issue concurrently.

ISSUES NO.1, 2, 3:

1. *Whether the Defendant is a trespasser on the suit land?*
2. *Whether the tenancy agreement of 5th March 2013 between Juliet Galiwango and the Defendant over the suit land was lawful?*
3. *Whether the Defendant acted in breach of the tenancy agreement dated 5th March 2013 between Juliet Galiwango and the Defendant?*

Counsel for the Plaintiff cited the case of ***Justine E.M.N Lutaaya versus Sterling Civil Engineering Ltd SCCA No.11 of 2002*** to define trespass to land as a cause of action which "*occurs when a person makes an authorized entry upon another's land and thereby*

interfering with another person's lawful possession of land." He further cited the case of **Sheik Muhammed Lubowa versus Kitara Enterprises Ltd CACA No.4 of 1987**, where the Court of Appeal stated that in order to prove trespass to land, the Plaintiff must prove the three elements hereinbelow;

1. That the disputed land belonged to him or her;
2. That the Defendant had entered upon that land; and
3. That the entry was unlawful in that it was made without his/her permission or that the Defendant had no claim of right or interest in the land.

As far as the first and second elements are concerned; it was not disputed that the Plaintiff is a direct beneficiary of the late Mary Wango, who was the owner of the suit land. As a beneficiary, the Plaintiff is entitled to a share in the suit land, and therefore ownership to part of it. In addition to that, it was also not disputed that the Defendant occupies the suit land where she runs a school. As such, I find that the Plaintiff has proved the first and second elements of trespass to land on the balance of probabilities.

As regards the third element, more details have to be analysed before concluding on it.

It is not disputed that the Defendant initially entered the suit land under a tenancy agreement she executed on the 20th of May 2009 with the late Mary Wango, under whom the Plaintiff claims. This agreement was admitted as DEXH6.

Under DEXH6, the Defendant was supposed occupy the suit land for 2 years and pay a monthly rate of Ugx.750,000 only to the late Mary Wango. This means that the agreement was to expire on the 20th May 2011. But it is evident that the Defendant did not cease occupying the suit land after the expiration of that agreement.

Be that as it may, Plaintiff testified that the late Mary Wango died on the 17th March 2012. There is no indication that the late Mary Wango attempted to claim possession of the suit land from the Defendant between the 20th of May 2011 (expiration of DEXH6) and 17th March 2012 (up to the time of Mary Wango's death).

Counsel for the Plaintiff argued that the Defendant became a trespasser on the suit land upon expiration of the tenancy under DEXH6. But I, respectfully, do not agree with this arguments for the reasons below.

I note that Counsel for the Plaintiff relied on the **Halsbury's Laws of England, 3RD Edn., Vol. 38, at p.741, paragraph 1207,** where it is stated that:

> *If a tenancy determines by effluxion of time or otherwise and the former tenant remains in possession against the will of the rightful owner, the former tenant is, apart from statutory protection, a trespasser from the date of the determination of the tenancy.*

I do agree with the statement quoted above. In fact, the statement was approved by the Supreme Court in **Joy Tumushabe & Anor**

versus M/S Anglo African Ltd & Anor Civil Appeal 7 of 1999 when it was dealing with a scenario not far distinct to the one under consideration so far.

What I note, however, is that Counsel for the Plaintiff appears to have ignored one of the qualifications in the quoted statement. Under the quotation, except where there is a statutory protection, a tenant becomes a trespasser upon determination of a tenancy either by expiration or otherwise, if he or she remains in possession "*against the will of the rightful owner*" **(Halsbury's Laws of England, supra)**. There is some jurisprudence to support this.

In the case of **Joy Tumushabe & Anor versus M/S Anglo African Ltd & Anor (supra),** the Supreme Court dealt with an instance where a tenancy determined, not particularly by expiration, but by a general cause. That general cause is envisaged by the quoted statement, when the author stated that "*.... a tenancy determines by [effluxion of time or] otherwise*" **(Halsbury's Laws of England, supra)**. That cause, according to the case, was when the former tenants refused to pay rent and challenged their landlord's right to ownership of the suit property by way of a High Court suit and obtained a temporary injunction which was later vacated. The Court noted thus: "*Their challenge against the owner's entitlement to the suit premises and their refusal to pay rents due changed their status from lawful tenants to trespassers.*" Later it emphasized: "*in my opinion, when the appellants refused to pay rent or acknowledge the title of the rightful owner as landlord, they became trespassers*" **Joy Tumushabe & Anor**

versus M/S Anglo African Ltd & Anor (supra). The implication of the *ratio decidendi* of the case is twofold, that is; (1) that a tenancy determines once a tenant refuses to pay rent and challenges/refuses to acknowledge the title of the rightful owner; and (2) a tenant that remains in possession of rent premises after refusing to pay rent and acknowledge the title of the rightful is considered to be doing so against the will of the rightful owner. In short, once a tenancy determines, either by effluxion of time or otherwise, a former tenant who remains in possession of land must do something adverse to the title of the rightful owner to be changed into a trespasser. Refusing to pay rent per se may not suffice as an adverse act unless it is accompanied by a challenge to the title of the rightful owner.

In this case, there is no evidence that the Defendant, who remained in possession of the suit land, did something adverse to the title of Mary Wango. It is for this reason that I respectfully disagreed with Counsel for the Plaintiff's submission that the Defendant became a trespasser on the suit land upon expiration of the tenancy in DEXH6. It is needful to state that my view, with regards to that disagreement, is limited to the period between the 20th of May 2011(when DEXH6 expired) and 17th March 2012 (when the late Mary Wango died).

With regard to the period in the preceding paragraph, the Defendant qualified to a particular status under the law other than being a trespasser. There is no evidence that he continued to pay any rent to Mary Wango in that period notwithstanding the expiration of the

tenancy. As such, I cannot invoke the doctrine of estoppel to refer to him as a contractual tenant.

I have come across a case of my learned brother, Judge **Stephen Mubiru in Komakech Sam & Others versus Ayya Corina HCCA No.0028 of 2016**, where he suggests that the Defendant, in this case, would qualify as a statutory tenant. He expressed that a tenant that remains in possession of land at the expiration of a tenancy agreement becomes a statutory tenant, and is protected by the **Rent Restriction Act, Cap 231** whose provisions must be strictly complied with by the landlord. In the case, the Judge expressly differed from the Supreme Court decision in **Joy Tumushabe & Anor versus M/S Anglo African Ltd & Anor (supra),** expressing that it was decided per incuriam as far as **the Rent Restriction Act, Cap 231** is concerned.

In reaching his conclusion, the Judge adopted the Nigerian Supreme Court reasoning in **African Petroleum versus Owodunni (1991) 8 NWLR (pt.210) p.391**, where it was held that, once a contractual tenancy comes to an end by effluxion of time or otherwise and the tenant holds over, it is more proper to describe him or her as a statutory tenant and once there is an incidence of statutory tenancy, the tenant becomes a weekly, monthly or yearly tenant depending upon the term of the original grant. But it appears that there was a distinct flavour in that case upon which Court held as such.

According to its decision, the Court was clearly swayed by the fact that the **Rent Control and Recovery of Residential Premises Law (0.9) of 1976** conferred special protection to the Defendant/tenant

upon expiration of the contractual tenancy. It is certainly for that fact that the Court reasoned that:

> *But sometimes there is a statute which gives security of tenure to such a tenant after his contractual tenancy has expired. Where such a statute exists he now holds the premises no longer as a contractual tenant because there no longer exists a contract between him and the landlord. But he nonetheless retains possession by virtue of the provisions of the statute and is entitled to all the benefits and is subject to all the terms and conditions of the original tenancy. As Idigbe, J.S.C., stated in Pan Asian African Co. Ltd versus National Insurance Corp. (Nig.) Ltd. (1982) 9 S.C.I at p.13:*
>
> > *"Put simply, the statutory tenant is an occupier, who when his contractual tenancy expires, holds over and continues in possession by virtue of special statutory provisions. He has also been described as—"that anomalous legal entity,.....who holds land of another contrary to the will of that other person who strongly desires to turn him out. Such a person will not ordinarily be described as a tenant." (See Scrutton, L.J., in Shuter versus Hersh (1922) 1 K.B. 438, at 448.*

For this reason, it is an understatement to refer to the Defendant in this case as simply a tenant-at-sufferance. It is more correct to describe him as a statutory tenant, although the incidents may be identical. This is because in Lagos State, Rent Control and

*Recovery of Residential Premises Law (0.9) of 1976 has given him protection and security of tenure. Unless he decides to give up possession voluntarily, possession of the premises can only be wrested from him if the Court makes an order for possession against him after due notices to quit and of intention to apply for possession as prescribed for contractual tenants who hold an identical quantum of tenancy as himself (***African Petroleum versus Owodunni, supra).***

Unlike in the Nigerian case, I have not come across any statute that protected the Defendant upon the expiration of the tenancy under DEXH6 in this case. Accordingly, I find that the Defendant was not a statutory tenant within the period under consideration.

In **Komakech Sam & Others versus Ayya Corina (supra),** my learned brother Stephen Mubiru held that the **Rent Restriction Act, Cap 231,** reasoned that "t*he Rent Restriction Act, Cap 231 applies the terms of the former tenancy (which is contractual) to create a statutory tenancy, until an order of eviction is granted by a Court of law.*" I, however, respectfully disagree with this view; and I am constrained to make defence for the decision in **Joy Tumushabe & Anor versus M/S Anglo African Ltd & Anor (supra)** especially since I expressed support of its findings already.

For starters, I hold the view that that case was not decided *per incuriam.* I notice that in expressing that, that case was decided *per incuriam,* my learned brother put emphasis on another position in the quotation from the **Halsbury's Laws of England (supra),** that is;

"*apart from statutory protection*". But before quoting the whole statement, he stated that:

> *Whereas it true that at common law if a trespasser peacefully enters or is on a land, the person who is in, or entitled to, possession may request him to leave, and if he or she refuses to leave, that person may remove him or her from the land, using no more force than is reasonably necessary, I find myself unable, with utmost respect, to follow the decision in Tumushabe and another v. Anglo African Ltd and* another *for reasons that it was decided per incuriam since their Lordships did not take into account the provisions and purpose of The Rent Restriction Act, Cap 231 which provides in strict terms, the manner in which a landlord may recover his or her premises.*

It was after that that he quoted the **Halsbury's Laws (supra)** and stated thus:

> *Furthermore, their Lordships in Tumushabe and another v. Anglo African Ltd and another, cited Halsbury's Laws of England, Third Edition, vol.38, at p.741, paragraph 1207 in which the learned authors observe;*
>
> > *If a tenancy determines by effluxion of time or otherwise, and former tenant remains in possession against the will of the rightful owner the former tenant is, apart from statutory protection, a trespasser from the date of the determination of the tenancy (emphasis added).*

Although their Lordships cited that extract, they never expressed themselves as regards the proviso "apart from statutory protection." It is my considered view that section 6 (1) (f) (ii) of The Rent Restriction Act, Cap 231, affords such protection.

In my considered view, the facts in ***Joy*** *Tumushabe & Anor versus M/S Anglo African Ltd & Anor (supra)* were somewhat different from those in *Komakech Sam & Others versus Ayya Corina (supra)*, and the instant case.

In *Joy Tomushabe (supra),* it is certainly because the appellants had failed to not only pay rent to the rightful owner, but (of paramount importance) also challenged his right to ownership of the suit property. It is for this that the Supreme Court was moved to find that there was no landlord and tenant relationship existing between the parties. I quote its statements:

The argument of counsel for the appellants that since they did not at any time accept Laximides Dalia as the true owner of the suit premises indicates that the relationship of landlord and tenant did not exist between the parties is correct because they immediately became trespassers.

In addition to that, the Court later on stated that:

In any event, distress for rent is only permissible if the relationship of tenant and landlord exists between the parties but as I have shown, that relationship had ceased to exist as a result of the appellants' acts and conduct. In the result, distress for rent

in this case was effected against trespassers, and it could not have been possible for the persons who effected the alleged distress for rent to do so under the Act.

The proposition I can deduce from the above Court's statement is that because there was no landlord and tenant relationship existing between the parties in that case, there was no need to apply the **Distress for Rent (Bailiffs) Act, (Cap. 68)** because the Act only applies where there existed a landlord and tenant relationship between the parties. This view is proper for logical reasons, for a trespasser can hardly claim statutory protection. That same analogy can likewise be applied to **the Rent Restriction Act, Cap 231** within the context of the facts in ***Joy Tumushabe & Anor versus M/S Anglo African Ltd & Anor (supra).*** Thus, where a tenant refuses to pay rent and challenges the rightful owner's entitlement to the suit property, he or she immediately becomes a trespasser, and therefore the *Rent Restriction Act*, Cap 231 or Distress for Rent (Bailiffs) Act, (Cap. 68) cannot be applied to any controversy between the parties based on such facts.

The facts in *Komakech Sam & Others versus Ayya Corina (supra)* were clearly different from those in the instant case, and ***Joy*** *Tumushabe & Anor versus M/S Anglo African Ltd & Anor (supra).* Whereas there existed a tenancy relationship between the parties, and therefore a tenancy whose terms the tenant had breached in *Komakech Sam & Others versus Ayya Corina (supra)*; there existed no tenancy relationship between the parties in *Joy Tumushabe & Anor versus M/S*

Anglo African Ltd & Anor (supra), and those in the instant case between the 20th of May 2011(when DEXH6 expired) and 17th March 2012 (when the late Mary Wango died) given the evidence on record. Thus whereas it was proper, in *Komakech Sam & Others versus Ayya Corina (supra),* to apply the **Rent Restriction Act, Cap 231;** or as Court noted, that the landlord would properly resort to the **Distress for Rent (Bailiffs) Act, (Cap. 68)** and levy distress for rent against the tenant, it would not be proper for this Court to apply, or if the *Supreme Court* applied any of those Acts in *Joy Tumushabe & Anor versus M/S Anglo African Ltd & Anor (supra).*

Going forward, there is a common law principle that suggests that "*a person who enters on land by a lawful title and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance*" (***Halsbury's Laws of England,* 4th Edition; *Remon versus City of London Real Property Company Limited [1921] 1 KB 49 at 58; Havinder Jhass Singh versus Rosemary Asea & Anor HCCA No.0008 of 2016).*** This description fits the Defendant very well, in view of the evidence on record.

According to the case of *African Petroleum versus Owodunni (supra),* whose propositions I agree with, the following is true about a tenant at sufferance:

> *Though he no longer, strictly, has an estate, the law will deem his right to possession to have continued on the same terms and conditions as the original grant till possession has been duly and*

properly wrested from him by the landlord or reversioner. It is a form of tenancy which, as it were, depends upon the law and not the agreement of the parties and can only be determined either by the landlord's lawful act of forcible entry, where it is still possible, or by a proper action for ejectment after due notices as prescribed by law.

Considering the evidence on record, this Court finds that the Defendant was a tenant at sufferance between the 20th of May 2011(when DEXH6 expired) and 17th March 2012 (when the late Mary Wango died). Accordingly, it deems that she had a claim of right to possession of the suit land which continued on the same terms as the original tenancy in DEXH6.

Furthermore, there is no evidence (payment of any rent) accounting for the Defendant's occupation of the suit land between the 18th March 2012 and 5th March 2013 when another alleged tenancy agreement was executed between her, as a tenant on one hand, and DW2 as a landlady on another hand, standing in for the late Mary Wango. That agreement was admitted as DEXH8. In addition to that, there is also no evidence that any of the beneficiaries of the estate of the late Wango, the Plaintiff inclusive, ever duly and properly wrested the possession of the suit land from the Defendant within that period. In those circumstances, I am constrained to find that the Defendant continued to occupy the suit land as a tenant at sufferance within that period as well.

Again while she remained as such, she could only become a trespasser if she did any adverse act to the title of the rightful owner, in this case the beneficiaries of the estate of the late Mary Wango, including the Plaintiff. There is, however, no evidence that she ever did any such adverse act. As such, I find that she had a claim of right to possession of the suit land within the period in the preceding paragraph, which right continued on the same terms as the original tenancy in DEXH6.

With regard to DEXH8, the tenancy allegedly created thereunder is in respect to land measuring 97feet from the main road, 135 feet width downwards, 155 feet width opposite, and 95 feet length opposite. It is without doubt that the land described in DEXH8 is part of the suit land.

Whereas the Defendant accounts for his occupation of the suit land from the 5th of March 2013 onwards upon on DEXH8, the Plaintiff asserts that DEXH8 is null and void on ground that it was executed by DW2, her sister, without letters of administration, or family consent to act on behalf of the estate of the late Mary Wango. That notwithstanding, there is evidence that the Plaintiff reaped a benefit out of DEXH8.

The evidence shows that out of the Ugx.5,000,000/- (*five million shillings)* only agreed to under DEXH8 as a rental fee per school term, the Plaintiff used to get about Ugx.55,000/- (*fifty five)* only per school term and acknowledged receipt of that amount in writing on at least four occasions, that is; 11th November 2014; 28th May 2014; 27th May

2014; and 10th February 2015. Proof of that acknowledgment was admitted as DEXH1, DEXH2, DEXH3, and PEXH2 respectively. It suffices to add that the Plaintiff admitted, during cross examination, that she indeed used to receive a share of money out of the tenancy agreement under DEXH8, which she now seeks Court to declare null and void.

As Counsel for the Defendant argued, it is a settled principle of law that one cannot approbate and reprobate at the same time. Counsel cited the case of ***Golf View Inn (U) Ltd versus Barclays Bank (U) Ltd HCCS No.358 of 2009*** wherein Court well emphasized, "*a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.*" (See also ***Verschures Creameries, Limited versus Hull & Netherlands Steamship Company, Limited (1921) 2 KB at Pg. 612).***

In **Verschures Creameries Ltd.** (*supra*), a forwarding agent acting for the Plaintiffs delivered goods to one of their customers contrary to their instructions. The Plaintiffs then invoiced the goods to the customer, brought proceedings for the price of goods sold and delivered and recovered judgment against him. The customer failed to satisfy the judgment and was adjudicated bankrupt. The Plaintiffs then brought proceedings against the forwarding agents claiming damages for conversion by misdelivery. The Court in (***Bankes, Scrutton and Atkins, LJJ.***) held that by suing the customer for the

price of goods sold and delivered, the Plaintiffs had elected to treat the act of the forwarding agents in delivering the goods to him as lawful and could not in a later action against the agents treat it as unlawful.

In the instant case also, when the Plaintiff chose to receive a share of the rental fee agreed upon under DEXH8, he elected to treat the tenancy created thereunder as valid and recognized the Defendant's occupation of the suit land as a contractual tenant. She cannot now turn around and claim that DEXH8 is invalid for lack of authority by DW2, or that the Defendant was a trespasser on the land rented to her under DEXH8. Consequently, Court finds that DEXH8 is valid and binding on the Plaintiff. This resolves issue 2 in the affirmative.

Under DEXH8, the Defendant was to occupy the land described therein as a tenant for 2 years from the 5th March 2013. This means that the tenancy under DEXH8 expired on March 2015. However, the evidence shows, and the Court confirmed while at locus, that the Defendant is still in occupation of the suit land. But be that as it may, the Plaintiff testified, during her cross examination in 2019, that she is still entitled to receive a rental fee from the Defendant, as a beneficiary of the estate of the late Mary Wango.

Further, she also testified, as I noted before, that she lodged a complaint at the Chief Magistrate's Court of Nabweru at Nabweru against the Defendant in 2019, and 2020 for Ugx.4,000,000/- *(four million shillings)* only, which she erroneously claimed under the

tenancy agreement of 2009. All of this is an admission that she probably still regarded the Defendant as a tenant on the suit land for the period preceding the institution of the suit, notwithstanding that DEXH8 had expired. It is, therefore, proper for Court to *stop* the Plaintiff from claiming that the Defendant had no claim of right to possession of the suit land/ land described in DEXH8. In those circumstances, the Court finds that the Defendant possessed the suit land as a contractual tenant between the 5th of March 2013 and the time of institution of this suit.

Considering the above analysis, the Court finds that the third element of trespass to land as stated hereinabove is, therefore, lacking. Accordingly, it finds that the Plaintiff has failed to prove on the balance of probability that the Defendant is a trespasser on the suit land for the whole period preceding the institution of this suit. This resolves the first issue in the negative.

As regards the third issue, (whether the Defendant acted in breach of the tenancy agreement dated 5th March 2013 between Juliet Galiwango and the Defendant?), the Court is not certain of the nature of breach asserted by the Plaintiff upon which to determine this issue.

The Plaintiff's Counsel did not guide Court on the issue, save for submitting that the said tenancy agreement was illegal and void ab initio; and that, therefore, there was no need to submit on whether it was breached or not. Having ruled that the tenancy agreement in issue as valid and binding upon the Plaintiff, I am unable to agree with Counsel for the Plaintiff. Since there is no evidence of breach of

the said agreement, I find that the same was not breached. This resolves the third issue in the negative.

The conclusions above are strictly confined to the alleged trespass to land, as a cause of action, on the suit land preceding the institution of this suit. They do not touch the Defendant's allegation of ownership of land measuring 145 feet by 45 feet by 140 feet by 45 feet which she allegedly bought from the late Mary Wango on the 28th October 2010. The reason is that the suit was purely premised on trespass to land, since the issue on ownership of the said land did not suffice under the pleadings of the parties.

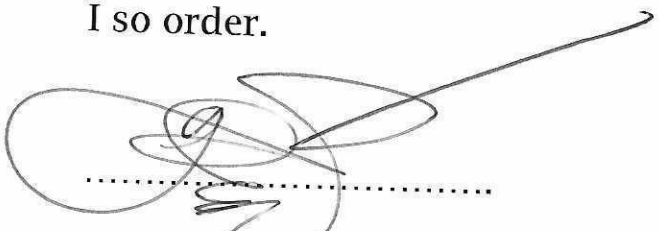
Issue No.4, and 5:

4. What remedies are available to the parties?
5. Whether there are any remedies available to the parties?

Considering the conclusions above, this Court finds that the Plaintiff is not entitled to any remedies.

Finally, the Plaintiff's suit is hereby dismissed for lack of merit. Its costs are awarded to the Defendant.

I so order.



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Henry I. Kawesa

JUDGE

10/11/2022

10/11/2022:

Mark Kalyango for the Defendant.

Jane Sewagudde; (Defendant)

Judgment delivered in Court to the parties present.

Sgd:

Butanula Rashida

ASST. REGISTRAR