

It is the plaintiff's further claim that the defendants have also failed to heed to the Kampala Capital City Authority's warning to stop the illegal activities, to the detriment of the plaintiffs.

5 The defendants were served with the notices of the court process. The 2nd defendant filed her defence but as noted from the court record on several occasions failed to respond to the summons.

At some point when they appeared it became clear that they had issues with their lawyers which prompted court to allow them to get services of another lawyer on a *pro bono* basis, which still failed.

10 On 27th April, 2021, when the matter was called for hearing neither the defendants nor their counsel were in court upon which the court made an order to proceed *ex parte*.

15 On the 21st February, 2023, this court after notifying the defendants, visited the *locus*. The 1st plaintiff and the 2nd defendant and her daughter (who is not party to the suit) were in attendance.

The 2nd defendant in her defence and counterclaimant contended that she was a *bonafide* occupant and that her husband had acquired the *kibanja* from one Nzera Namatovu Sebukule, one of the wives of the late Sekabaka Mutesa II of Buganda. She had lived on the land since time immemorial.

20 That the land at the time it was acquired by the plaintiffs was not surveyed. The plaintiffs' claim of encroachment according to her was unfounded. Furthermore, that the survey on that land as instructed by the plaintiffs was intended to deprive them of the *kibanja* and therefore fraudulent.

25 During the visit, the defendants who contended that they were not aware of the proceedings this far were accommodated when this court which directed them to file an application to be allowed to reopen case and testify.

No such application was however filed. It is against that background that the proceedings were closed by court, and the plaintiffs' side subsequently filed submissions, as per the directives of court.

The plaintiffs were represented by **M/s C. Mukiibi Sentamu & Co. Advocates.**

- 5 The defence and counterclaim was filed by **M/s Balondemu, Candia & Wandera Advocates** and later **M/s Candia & D. W Oundo Advocates** on 24th August, 2017 filed a notice of change of instructions to represent the 2nd defendant.

Attempts at mediation however did not succeed.

10 **Issues:**

The specific issues to be determined by court in this suit are as follows:

1. ***Who is the rightful owner of the suit land and whether the defendants are trespassers?***

- 15 2. ***What remedies are available to the parties?***

Resolution of the issues:

1. **Who is the rightful owner of the suit land and whether the defendants are trespassers?**

- 20 **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 burdens of proof lies on that person.

Section 102 of the Evidence Act places the burden of proof on such party as would fail if no evidence at all were given by either party.

- 25 Trespass as defined in the Supreme Court decision of **Justine E. M.N. Lutaaya versus Sterling Civil Eng. Civ. Appeal No. 11 of 2002**, held that trespass to land occurs when a person makes an authorized entry of the land.

In **George Kasedde Mukasa v. Emmanuel Wabende & Others, Civil Suit No. 459/1998** trespass to land was held to be committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another.

- 5 The operative word in the tort of trespass to land is “unlawful”, which denotes that which is contrary to the law and for which the trespasser is ultimately liable. (**Kailash Mine Limited versus B4S Highstone Ltd Civil Suit No.139 of 2012**).

The plaintiffs in this instant case had to prove that the land in dispute belonged to them; that the defendants had entered upon that land; and that the entry was
10 unlawful in that it was made without their permission; and that the defendants had no claim or right or interest in the land. (**Sheik Muhammed Lubowa Versus Kitara Enterprises Ltd EACA No. 4 of 1987**).

To prove the assertions in this claim, the plaintiffs relied on the evidence of three witnesses to wit – Orena Bills John Charles, Sam Ssenyondo Noah and the 2nd
15 plaintiff who testified as **Pw1**. Each of these filed witness statements.

Pw1, the 2nd plaintiff a business woman from Iran, and wife to the 1st plaintiff informed court that the couple and their children came to settle in Uganda in 1996.

It her evidence that they identified the suit land, entered into an agreement with
20 Michael Odongo, the previous registered owner of the suit land; paid the full consideration and put a fence around it, leaving a portion on the outside which borders with the defendants’ land where they had planned to plant flowers and trees. The plaintiffs however discovered later that the 1st defendant, a son of the 2nd defendant was pursuing the title for the land.

25 **PExh 2** a certificate of title tendered in court by the plaintiffs indicates that the lease term granted to the plaintiffs was 38 years, w.e.f from 1st April, 2004. The land leased to them had an approximate area of 0.182 hectares. As per the title, the plaintiffs had acquired registered ownership on 30th November, 2007.

The land was sold to the plaintiffs by Michael Odongo as per the sales agreement **PExh 1**, dated 7th June 2002, at a total consideration of **Ugx 25,000,000/=**. According to the agreement, the land was free of encumbrances and squatters.

5 **Pw2**, Sam Ssenyondo Noah, a broker with *M/s Interland Associated Ltd* was a witness to the said transaction and his evidence in collaboration with that of **Pw1** was that he was approached by the plaintiffs to help them look for land to buy. He identified the suit land, which belonged to one Odongo Michael.

10 The plaintiffs claimed that during the term of their lease Buganda Land Board (BLB) discovered that they had been issued with the wrong plot number belonging to another distant neighbor. They returned the title and were reissued with the **plot No. 124** where they have put up their home.

PExh 3 is a permit of occupation issued to the plaintiffs on 11th December, 2005, by Kampala City Council, for the storied residential house. The document indicates that the plan for the house was approved on 15th October, 2002.

15 The plaintiffs further claimed that the defendants started erecting makeshift structures including a kraal which extended to part of their land, without the permission of the plaintiffs.

20 They wrote to the LC 1 Chairman of the area on 15th June, 2012, requesting him to prevail upon the defendants to cease the illegal activities. (**Ref. PExh 4**). The plaintiffs went on to draw the attention of the KCCA to the illegal structures, as shown by their letter received by KCCA on 21st August, 2012 (**PExh 5**), urging them to stop the defendants from continuing with the illegal constructions.

25 On 22nd August, 2012 they also wrote to the Chief Executive Officer of Buganda Land Board to register their frustration and sought guidance from them regarding the matter. (**PExh 6**).

PExh 8 is a notice from KCCA in response to the plaintiffs' complaint, addressed to the proprietor of **plot 112, Block 255 Munyonyo**, dated 18th February, 2013 which directed the occupants to discontinue with the construction. The notice

gave them 28 days after which KCCA would demolish the illegal structures and prosecute the defendants.

PExh 7 is another complaint dated 13th June, 2013, this time addressed to the Town Clerk of Makindye Division, bringing to his attention the findings on the encroachment by the defendants as shown by the survey report.

The survey report, **PExh 9**, was filed by Orena Bills John Charles who testified as **Pw3**.

Pw3, a surveyor with **M/s Associated Engineering Surveyors Ltd**, duly registered with the Surveyors' Registration Board informed court that he had been instructed by the plaintiffs to open boundaries of the suit land sometime in 2012.

That he conducted the exercise in the presence of the neighbours, the LCs and OC Munyonyo, as well as the representative from Buganda Land Board. He relied on a cadastral print and control data procured from the Department of Surveys and Mapping, to carry out the survey.

In his report dated 6th September, 2012, he noted among other things, the following:

- *The land comprised in Munyonyo LRV 3808 Folio 2 block 256 plot 124 measuring approximately 0.182 hectare which is fenced leaves out an area of 0.042 hectares.*
- *House 1 and other various houses marked as H2 encroach onto plot 124.*
- *The house marked H3 is built on top of the mark stone*

The contents of that report, just like the rest of the plaintiffs' evidence were not contested by the defendants as they did not turn up in court for their defence despite their knowledge of the existence of this suit.

The particular acts of fraud alluded to in the counterclaim were as follows:

1. Conducting an unauthorized boundary opening exercise on the 2nd defendant's kibanja while the counterclaimant was in full possession.
2. Entering onto the kibanja with their surveyors without her knowledge and stealthily measuring off a portion of her kibanja to claim it.
- 5 3. Securing and presenting a fake and fraudulent boundary opening /survey report.
4. Shifting and or extending boundary marks into the counterclaimants plot or/kibanja.
- 10 5. Including and engulfing the counterclaimants' unregistered interest in their certificate of title and claiming the same to be theirs.

The defendants also claimed that acts of trespass were committed in respect of which they claimed special damages of **Ugx. 31,000,000/=**, among other prayers.

15 A certificate of title is conclusive evidence of title and takes priority over any adverse claims. By virtue of **section 176 of the Registration of Titles Act, Cap 230 (RTA)**, save for fraud, it is also an absolute bar and estoppel to an action of ejectment or recovery of any land. (**Refer also S. 64 (1) RTA**).

20 The term *fraud* has been defined to imply an act of dishonesty. (**Kampala Bottlers Ltd. vs. Damaniaco (U) Ltd SCCA No. 2 of 1992.**); an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right.

25 Fraud unravels everything and vitiates all transactions. (**Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994]KARL 307**). It is also trite law that that fraud that vitiates a land title of a registered proprietor must be attributable to the transferee. **See: Wambuzi C.J, Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 2012.**



The tort of trespass to land is committed not against the land, but against the person who is in actual or constructive possession of the land. **HCCS No. 22 of 2015 Ababiri Muhamood & Four Ors versus Mukomba Ananstansia & Taita Wilfred**

- 5 An allegation of fraud is grave and therefore must be specifically pleaded and also strictly proved, the burden being heavier than on a balance of probabilities generally applied in civil matters. **(Kampala Bottlers Ltd. Vs Damaniaco (U) Ltd (supra)).**

10 In the summary of evidence attached to the 2nd defendant's WSD, the list of documents they intended to rely on for their defence and counterclaim included a document portrayed as an agreement between the previous owner of the *kibanja*.

It was a copy of handwritten Luganda document, attached to the WSD as **Annexure A**. The original of this document and its translation were not availed
15 to court.

Since the details of the plot number and block on which the *kibanja* was seated and the title owner as well as the actual size of the *kibanja* were all not disclosed. It was therefore not easy to ascertain the authenticity of the origin of the claim and how it related to the suit land.

- 20 In the summary of evidence, the defendants made reference to letters of administration; bills of quantities and receipts; KCC City Hall documents, none of which were however attached or availed to court. It is not clear who had letters of administration, if at all had been granted; and indeed did not file the defence/counterclaim as administrators of the estate of the late husband to the
25 2nd defendant.

The 2nd defendants/counterclaimant contended that the counter defendants had entered her *kibanja* without consent and knowledge and demolished the 2nd defendant's structures for which they held the plaintiffs liable.



As noted by court, they were neither parties to the handwritten agreement from which they claimed to have derived ownership. Neither had been a witness to the said transaction. They did not summon any witnesses from the elders on the suit land, LCs or any of those who had witnessed the transaction at the time.

- 5 No valid document was availed to court or presented as an attachment as proof of how the family had acquired the *kibanja*. They failed to turn up in court to prove the nature of interest acquired on that land or what authority they relied on to manage the estate of the 2nd defendant's estate.

- 10 From the defence/counterclaim there was nothing that could move court to think that it was the plaintiffs who had committed trespass; fraudulently entered and surveyed part of their *kibanja* measuring 0.042 hectares.

- On the other hand however, their own acts of construction of the servants' quarters on the land and the grazing of cows and the emission of an unpleasant smell from the dung constituted unauthorized entry onto the plaintiff's land, 15 which actions not only violated the plaintiffs' rights but also caused a nuisance to them.

- If the defendants disputed the measurements and presented by the plaintiffs, there is nothing from the record that could be seen as having prevented them from conducting their own survey to disprove the findings on which the plaintiffs 20 had based their claims of unauthorized entry.

Thus as submitted by counsel, this has substantially interfered with the plaintiffs' use and quiet enjoyment of their land as the undisputed lawful owners of land comprised in **Munyonyo LRV 9808 Folio 2 Block 256 Plot 124** (suit land).

- 25 The plaintiffs' proprietary rights implied that they had exclusive right to possess, use and enjoy their land which rights were violated by the defendants, as confirmed by the court during the locus visit.

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Issue No. 2: Remedies are available to the parties?

5 It was submitted by counsel in this case that the plaintiffs have suffered loss and damage as a result of the defendants' actions as they have been deprived of the use and enjoyment of their land.

They have had to endure the noise and smell caused by the grazing cows and considerable inconvenience and distress, out of which acts they are entitled to compensation.

10 The defendants have further failed to heed the warning issued by the Kampala Capital City Authority to stop their illegal activities, a clear disregard for the rule of law and the authority of the regulatory bodies, and further exacerbates the harm caused to the plaintiffs.

General damages:

15 Among the prayers sought was the award of general damages. Counsel referred to the case of ***Takya Kushwahiri & Another versus Kajonyu Denis CACA 85 of 2011*** where it was held that general damages should be compensatory in nature in that they should restore some satisfaction as far as money can do it to the injured plaintiff. of the breach or injury suffered".

20 General damages are those that the law presumes to arise from direct, natural or probable consequences of the act complained of by the victim. These follow the ordinary course or relate to all other terms of damages whether pecuniary or none pecuniary, future loss as well as damages for paid loss and suffering. **See; Uganda Commercial Bank Vs Deo Kigozi [2002] EA 293.**

25 ***Black's Law Dictionary 9th Edn at page 445*** defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the direct probable

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consequence off the act complained of. Ref: *Storms versus Hutchison* (1905) AC 515.

In the case of ***Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35*** it was held that the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering.

In his submission on this point, learned counsel requested court to award the plaintiffs a satisfactory amount in damages for the inconvenience that the plaintiffs have suffered.

It is the finding by this court that the plaintiffs have suffered considerable loss and damage as a result of the defendant's actions. They have been deprived of the use and enjoyment of their land, and have had to endure the nuisance noise and smell caused by the feeding cows which has caused them considerable inconvenience and distress, for which they are entitled to compensation of **Ugx 15,000,000/= (shillings fifteen million).**

Accordingly, the following are the orders of this court:

1. The plaintiffs are declared as the rightful owners of all the land comprised in Munyonyo LRV 3808 Folio 2 Block 256 Plot 124.

2. The defendants are trespassers onto the plaintiffs' land, measuring 0.042 hectares, having unlawfully entered onto the plaintiff's land and interfered with their use and enjoyment thereof.

3. An eviction order issues against the defendants from the suit land, measuring 0.042 hectares.

4. A permanent injunction issues, restraining the defendants, their agents assignees, legal representatives or transferees from any further trespass and/or claim onto the land or any part of it putting

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thereon any developments comprised in the suit land measuring 0.042 hectares.

5 5. Ugx 15,000,000/= (shillings fifteen million) is awarded to the plaintiffs as general damages with interest payable at a rate of Ugx 15 per cent per annum, payable from the date of delivery of judgment till payment is made in full.

6. Costs:

10 Its trite law that costs follow the event and the successful party is entitled to costs. (**Section 27 of the Civil Procedure Act**)

Accordingly, costs of this suit are awarded to the plaintiffs.


Alexandra Nkonge Rugadya

15 **Judge**

9th August, 2023

*Delivered by mail
Chabale G
9/8/2023*