THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

LAND DIVISION

CIVIL SUIT NO. 635 OF 2020

LAMECK NKANGA NSERIBETYA.....PLAINTIFFS.

VERSUS

NABIMANYA NATHAN .....DEFENDANT

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

Introduction:

The plaintiffs filed this suit as sons/beneficiaries of the late Yonasani Nseribetya. They contended that the defendant's occupation of the suit land comprised in ***Mitala Kyakamuli Bulemeezi Block 598, plot 1 measuring 374 acres or 151.0 hectares (suit land)*** is unlawful and prayed for a declaration that they are the rightful owners of the suit land; a permanent injunction; vacant possession, mesne profits; general damages and costs of the suit.

The defendant's case is that the 2nd plaintiff is not a beneficiary of the estate of the late Yonasani Nseribetya since he was not listed as one of the children of the late in his will provided in the pleadings.

That he was entitled to the use and occupation of the suit land as adverse possessor, having come onto the land in 1996 as a purchaser; and the plaintiffs have since 1996 had knowledge of his occupation of the suit land.

That he lodged a caveat to protect his interest, has greatly developed the suit land by establishing thereon a permanent house, banana plantation and a livestock farm.

That he purchased the suit land *bonafide* from the registered proprietor known as Yokana Nsubuga without knowledge of fraud (if at all any) by him.

That the cause of action arose in 1996 when he took possession of the suit land and not in 2019 as alleged by the plaintiffs who in any case were not in physical possession at the time of the defendant's occupation.

Representation:

The plaintiffs were represented by ***M/s Kajeke, Maguru & Co. Advocates*** while the defendant was represented by ***M/s Bashasha & Co. Advocates***.

Issues:

1) ***Whether the suit discloses a cause of action.***
2) ***Whether the suit is barred by law of limitation.***
3) ***Whether the plaintiffs have interest in the suit land.***
4) ***Whether the defendant's occupation of the suit land is lawful***

Issue No. 1: Whether the suit discloses a cause of action.

And

Issue No. 2: Whether the suit is barred by law of limitation;

The defendant's contention was that not only was the suit time barred but also that the plaintiffs had no cause of action against him, claims which the plaintiffs however denied.

In both instances, ***Order 7 rule 11(a) and (d) of the Civil Procedure Rules*** would apply as it grants power to court respectively, to reject a plaint which fails to disclose a cause of action or one which appears to be barred by any law.

In his evidence at trial, the defendant in turn also refuted the plaintiffs' claim that they got to know about his occupation of the land in 2019 and maintained that the suit was time barred.

That the plaintiffs no longer had any valid interest in the suit land, if at all any did exist. That the current suit was only intended to resurrect a claim that was extinguished.

The law:

Limitation:

Section 5 of Limitation Act (supra) which governs the limitation period for recovery of land provides as follows;

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

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

Section 6 of the Limitation Act (supra) of the same Act further provides;

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

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

Thus in the case of ***F. X Miramago v. Attorney General [1979] HCB 24***, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed.

Further, ***section 25 of the Limitation Act*** is to the effect that in actions founded on fraud, the period of limitation does not begin to run until the plaintiff has discovered, or could with reasonable diligence have discovered the fraud.

It is also the settled position that in determining the period of limitation, court looks at the pleadings only, and no evidence is needed. ***See: Polyfibre (U) Ltd v. Matovu Paul & 3 others (supra); Madhivani International S.A v. Attorney General (supra).***

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims. (***See Dhanesvar V. Mehta v. Manilal M Shah [1965] EA 321; Rawal v. Rawal [1990] KLR 275, and Iga v. Makerere University [1972] EA 65)***.

Cause of action:

In the present case, the plaintiffs in *paragraph 17* pleaded that the cause of action arose in 2019 when they discovered the fraud and trespass committed by the defendant on the suit land.

A cause of action is said to be disclosed where three essential elements are pleaded that is: existence of the plaintiff's right; violation of that right, and the defendant's liability for that violation. (Refer also to: ***Auto Garage vs Motokov (No. 3) [1971] E. A. 514,*** *at 519).*

The question as to whether a plaint discloses a cause of action must be determined upon perusal of the plaint with its attachments. ***(Kebirungi vs Road Trainers Ltd & 2 others [2008] HCB)***.

Trespass:

The plaintiffs claimed that the cause of action against the defendants was trespass to land which they discovered in 2019.

The operative word in the tort of trespass to land is "unlawful"; which simply denotes that which is contrary to the law and for which the trespasser is ultimately liable. (***See: Kailash Mine Limited versus B4S Highstone Ltd Civil Suit No.139 of 2012).***

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.

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. (***Ababiri Muhamood & Four Ors versus Mukomba Ananstansia & Taita Wilfred HCCS No. 22 of 2015).***

It is thus a general rule applicable to all suits in which the claim is for possession of land, based on the title of ownership, ie proprietary title, as distinct from possessory rights that no person shall bring any action to recover after the expiration of twelve years from the date on which the right of action accrued to him or her, or if it first accrued to some person through whom he or she claims, to that person. ***Section 5(1) of the Limitation Act.***

As noted earlier in accordance with ***section 6 of the same Act,*** the right of action in trespass would be deemed to have accrued on the date of dispossession or when the act of adverse possession occurs.

The question of whether or not the alleged acts in trespass first accrued in 1996 and questions surrounding its discovery in 2019 can be determined from the chronology of events as pleaded.

It is important to note at this point that what is not in contention is the fact that the defendant purportedly bought the suit land in 1996 from one Yonasani Nsubuga; and that soon thereafter as per ***DExh 2*** in 1997 went on to lodge a caveat thereon on a certificate of title which did not bear the names of the purported vendor.

Chronology of events:

In the chronology of events which followed, it is also not in dispute that the original grant was issued to Yonasani Nsubuga. Subsequently, one Sebanakita a grandson to Nseribetya had obtained letters of administration as per ***AC No. 0080 of 2003.*** His names were entered on the title on 3rd January, 2006.

A certificate of title for the suit land was tendered in by the plaintiffs as ***PExh 7,*** bearing the names of Yonasani Nseribetya who was the original registered proprietor, entered onto the title on 7th October, 1935. His successor in title was the late James Ssebanakitta.

The plaintiffs also presented to court letters of administration granted to Nsangi Rhoda, Solomon Sebanakitta and Jonathan Kagenda all children of the late Sebanakitta, issued by court on 24th September, 2010, vide *AC No. 939 of 2009.* ***(PExh 5).***

PExh 6 is the search certificate for the suit land indicating the name of Ssebanakita James as the administrator of the estate of Yokana Nseribetya. It also indicates that three caveats had been successively lodged on the same title. The first caveat was lodged by the defendant himself on 24th April, 1997.

The second one was lodged some ten years later by Ssebanakita James himself. It was lodged on 25th September, 2007, while the third caveat was in the names of Nkanga Lamech (1st plaintiff), Namulindwa Robinah and Namukoka Musa (3rd

plaintiff), lodged on 23rd August, 2012, claiming as sons/daughter, and beneficiaries of the estate of Yonasani Nseribetya.

In support of the plaintiffs' claims, the 3rd plaintiff, Musa Namukoka, the 3rd plaintiff aged 83 years, testified as ***Pw1***. He claimed that the suit land belonged to them as family and that he was one of the sons of the deceased as the original owner; and that most of his siblings had since passed on.

In ***Pw1's*** evidence, he named other beneficiaries of the estate, amongst whom were Robinah Namulindwa, Israel Ssekubwa (both deceased) Lameck Nkanga Nseribetya and Christine Nakamatte.

James Sebanakitta the son and heir to the late Mulindwa Nseribetya who had been son and also heir to Yonasani Nseribetya in 2005 had filed a suit in the Chief Magistrate's Court at Luwero: ***Civil Suit No. 0009/2005: James Ssebanakitta vs Yonasani Nsubuga.***

In that case the late James Ssebanakita testifying as ***Pw1*** informed court that Yonasani Nsubuga had fraudulently secured letters of administration and that when Ssebanakita went to Bukalasa land office to ascertain the estate, he found that Nsubuga had transferred the land of the deceased, which however could not be verified by this court.

In that suit he accordingly sought among others, an order for the cancellation of the grant to Nsubuga.

Court in granting the prayer for revocation relied on a will admitted in that court as ***P.1*** and letters of administration which had been issued to in ***AC No. 32/96*** on 11th July, 1996 to Nsubuga.

The decree ***(PExh 4)*** as endorsed by court on 19th December, 2005 which was clear and unambiguous reads:

1. *The letters of administration granted to Yokana Nsubuga in Administration Cause No. 32 of 1996 on 11th July, 1996 are hereby revoked. (emphasis mine).*

2. *The plaintiff be given vacant possession of the land at Kyakamuli measuring 374 acres comprised in Bulemeezi vol. 719/10 and transferred into his names.*

3. *A permanent injunction doth issue to restrain Yokana or his agents, servants, successors or whatever from interfering with quite (sic!) ownership and possession of the same land or any other land of late Yonasani Nseribetya which Yokana Nsubuga could have dealt with. (emphasis mine)*

4. *The defendant pays to the plaintiff the costs of this suit.*

Notably, among the witnesses in that suit were: Robinah Namulindwa ***(Pw2)***, a daughter to the deceased, ***Pw3***, Isreal Sekubwa, ***Pw4,*** Lameka Nkanga the 1st plaintiff in this suit. All the witnesses, listed as children of the deceased including one Nathan Namukoka denied knowledge of Nsubuga.

The defendant relying on his evidence and that of two other witnesses in *paragraph 18* of his witness statement however claimed that the decree was not enforceable against him.

He referred to a sale agreement between him and the said Yonasani Nsubuga, which was the basis of his claim. The agreement dated 23rd May, 1996, was tendered in court as ***DExh 1(a).***

As per the handwritten sale agreement dated 23rd May, 1996, Nsubuga had sold to the defendant the land located in ***Mitala Kyakamuli Bulemeezi Block 598, plot 1 measuring 374 acres or 151.0 hectares,*** at a price of ***Ugx 4,000,000/=. Ugx 200,000/=*** had been paid in cash leaving a balance of ***Ugx 3,800,000/=.***

None of the witnesses however presented by the defendant had been signatory to the agreement.

It is now settled law that a grant of letters of administration remains valid until revoked even where it is later established that the grant had been obtained through fraud, for as long as it remains in operation, it is taken to represent the estate of the deceased. ***(Anecho Haruna Musa vs Twalibu Noah & 2 others HCCS No. 0009 of 2008, cited by this court in Nurdin Katende vs Yunus Kabugo & 4 others. HCCS No. 364 of 2012).***

In this instant case, and based on the facts as highlighted, the defendant purchased the land on 23rd May, 1996 from Nsubuga who obtained the grant on 11th July, 1996. At the time he sold the land to him, Nsubuga had not even obtained the purported grant.

As a signatory to the sale transaction and a key witness in this suit Nsubuga was not produced in this court as a witness to support the defendant's claim of a valid acquisition and ownership of the suit land.

It is not in doubt therefore that the cause of action accrued in 1996; and that between and 2005 about nine years later, a suit had been filed by the registered owner of the suit land. In the judgment of court, the grant of letters to Nsubuga was revoked and the estate property recovered from the illegal occupants.

After the judgment in 2005, the defendant no longer therefore had any protectable interest in the suit land. This is further supported by the fact that within the period of 1996 to 2021 several letters of administration were successively secured and caveats lodged between 1997 and 2012 over the same estate, even before the filing of this instant suit. He never took the trouble to validate his stay on that land.

I could not agree more with the statement in *paragraph 6* of the reply to the WSD that the defendant's occupation was always protested by the late James Ssebanakitta who filed a suit in 2005 in Luwero Court and his family.

In those circumstances as highlighted and in response to ***issues No. 1 and 2***, the assertion by the defendant that the suit was limited by statute and that the plaintiffs had no cause of action against would hold no merit.

Issue No. 3: Whether the plaintiffs have interest in the suit land.

Section 110 of the Evidence Act, stipulates that when the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner.

In the submissions it was argued by the defence counsel that in his evidence ***Pw1*** Musa Namukoka *alias* Nasani Namukoka, (2nd plaintiff) admitted that he did not even know where the suit land was located; failed to present any documents in evidence or as proof that he was a son/beneficiary of the late Nseribetya and that he could not have been prevented from using the land whose location he had no knowledge of.

Pw1 presented a distribution scheme/list dated 20th August, 1957 for the estate of Eriasafu Mulindwa, heir to Yonasani Nseribetya who died on 28th June, 1957. ***(Ref. PExh 1).***

Yonasani Nseribetya had left 9 children, five of whom were boys. ***Pw1,*** at 16 years at the time was listed as one of them, together with the 1st plaintiff Lamecka Nkanga, at 10 years, then. Also named therein was the heir, Eriasafu Mulindwa who was at the time only 36 years.

A total of 17 beneficiaries under the estate were listed and indeed amongst them were the plaintiffs in this suit, together with others who had testified during the trial in the lower court.

In that scheme, the 1st plaintiff obtained 50 acres, the 2nd plaintiff, ***Pw1*** obtained 100 acres out of the suit land. It is clear that the beneficiaries never took possession of the respective shares at the time.

Nsubuga took advantage of the situation and sold the entire 374 acres to the defendant, even before the finding was made by court that he had fraudulently obtained the letters of administration.

Pw2, Nakulima Enid Sofia, aged only 49 years a daughter to Lameka Nkanga, the 1st plaintiff and niece therefore to the ***Pw1,*** informed this court that whatever she knew about this land was from her father. Her evidence was therefore treated by this court as hearsay evidence. On account of his advance age and based on the documentary proof which the defendants did not successfully challenge, this court found no reason to doubt the truthfulness of ***Pw1*** as a sole witness for the plaintiffs.

From the judgment of the lower court he had testified as Nasani Namukoka ***(Pw5)***. James Ssebanakitta who filed the suit testified as ***Pw1***. As noted earlier court ruled in his favour upon which the land was duly recovered in his names as the administrator of the estate of his late grandfather.

The trial court which made its position clear on the ownership of this suit land ordered the occupants on that land to vacate it. The decision remained unchallenged by the defendant.

Yet he made no attempt to vacate the land as ordered by court. A judgment of the court whether null or void regular or irregular, and for as long as it remains undischarged, must be obeyed (***Hon. Sitenda Sebalu vs Secretary General of the East African Community Ref No. 8 / 2012.). see also; Hadkinson vs Hadkinson [1952] all E. R; Attorney General vs Kiruhura District Local Government & 2 others HCMA No. 35 of 2012).***

It is also a maxim of law recognized and established that no man shall take advantage of his own wrong. ***See: Nabro Properties Ltd vs. Sky Structures Ltd & 2 others [2002] 2 KLR at page 299***.

Following the valid orders of court, the defendant therefore remained on the suit land only as a tenant in sufferance and could not lawfully claim any valid interest thereon, equitable or otherwise.

In the scheme of things, the case of ***Israel Kabwa vsMartin Banoba Musinga SCCA No. 52 of 1995*** recognizes the beneficiaries' right to protect and preserve the estate from waste.

In response to ***issue No. 3*** therefore, the said judgment was in *rem*, binding onto the defendant and every other person who occupied or utilized that land. It was proof that the plaintiffs had interest in the suit land.

Issue No. 4 Whether the defendant's occupation of the suit land is lawful

The particulars of fraud as pleaded by the plaintiffs were:

1) *Acquiring the suit land from Yokana Nsubuga whom he knew or ought to have known had no interest in the land;*
2) *The defendant knew or ought to have known that the letters of administration were fraudulently obtained by Yokana Nsubuga and were revoked by court.*
3) *The defendant has on several occasions threatened to cause harm to the plaintiffs if they did not desist from claiming ownership of the land.*
4) *The defendant did not furnish any consideration for the suit land.*

The defendant in his reply however denied any fraud on his part in the purchase and entry, claiming that no trespass had been committed by him or any of family members. His was that he was a bona fide purchaser for value without notice of any fraud.

A *bona fide* purchaser for valuable consideration of land derives protection under ***section 181 of the RTA***. The term is defined in ***Black's Law Dictionary 8th Edition at page 1271*** to mean:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."

Whether or not there was fraud and whether or not a party was a *bonafide* purchaser for value without notice the question that a court would poise is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. ***(David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985)***.

A person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

Thus in ***Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995),*** such failure to make reasonable inquiries or ignorance or negligence was held to form particulars of the offence of fraud.

In the present case, the plaintiffs in their reply to the defence, *paragraph 4* thereof, argued that the defendant never inquired from them about the land or the late Ssebanakitta for fear of knowing the truth.

That he lodged caveat when he knew or ought to have known that he had no caveatable interest and failed to secure the prior consent of the beneficiaries under the estate, claims which the defendant however denied.

According to him, he and Nsubuga went to the lands office at Bukalasa and was shown the title registered in the names of Nsubuga as administrator of the estate; that he took effective possession of the land in 1996; made payments and lodged

caveat and utilized the land. There was no such evidence however to prove that a certificate of title had been issued in Nsubuga's names.

In the case of ***FJ K Zaabwe vs. Orient Bank & 5 O'rs SCCA No. 4 of 2006***ion of "fraud" is defined as *an intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.... A false representation of a matter of fact, whether by words or by conduct...*

It is trite that where an allegation of such gravity as fraud is made, the person who seeks reliance on it must not only specifically plead but also strictly prove it, the burden being heavier than on a balance of probabilities generally applied in civil matters. ***(Kampala Bottlers Ltd. Vs Damaniaco (U) Ltd (supra)).***

It must also be proved to a standard higher than any in ordinary civil suit. That being the case, the plaintiff had the undischarged orders of court as proof that there was fraud committed by Nsubuga in securing the grant into his names, which justified the revocation of the said grant. He had constructive knowledge of that fact.

The title that was presented to court was not in the names of Nsubuga as the defendant wanted court to believe, or the defendant as his successor in title. It was in the names of the estate.

Needless to add, a registered proprietor is protected from ejection from certificate save for fraud ***(section 176 (c)*** and generally by virtue of ***section 59*** of the ***RTA*** the title is conclusive evidence of ownership, save in instances where fraud has been committed.

All the defendant had was a sale agreement, with no witnesses to support its authenticity and as admitted by him, even failed to complete the payment of the outstanding balance.

During cross examination he failed to present a copy of the certificate of title; letters of administration from Nsubuga, a survey report for the suit land; or any proof of how Nsubuga had acquired the land in the first place.

No search certificate was presented to court as evidence of his search prior to the purchase. Indeed, it is clear that no survey was ever carried out to establish the proper boundaries of the suit land.

DExh 2 statement of search shows that the search was carried out on 23rd September, 2020. The findings were that the land was registered in the names of Nseribetya, the administrator of the estate of Yokana Nseribetya *AC No. 0080 of 2003,* registered on the 3rd January, 2006 under *Inst. No. BUK60108.*

Clearly the only search on this land was made several decades after the purchase had been made and after a decision of court had already been passed in favour of the registered owner.

The defendant had not been entirely honest in his assertion that prior inquiries and searches were made to verify the authenticity of Nsubuga's interest as administrator and owner of the entire portion of land.

Indeed, if proper inquiries had been made by him, he would have discovered that Nsubuga never owned/acquired the property; and had no valid letters of administration over the estate.

After lodging a caveat in 1997, he sat back. Yet the primary objective of the caveat is merely to give the caveator temporary protection. A caveator must not sit back for eternity without taking positive steps to handle the controversy, so as to determine the rights of the parties affected by its existence. (***Hunter Investments Ltd vs Lwanyaga & Anor MC No. 081 of 2016).***

In the case of ***Sentongo Produce vs Vs Coffee Farmers Ltd & Rose Nakafuma Muyiisa HCMC 690/99***, it was held that for a caveat to be valid, the caveator or must have a protectable interest legal or equitable to be protected by the caveat.

The defendant in this case could not have under those circumstances acquired any protectable interest in that land.

Prior consent of the registered proprietor of the suit land and the beneficiaries of both estates and consultations of the neighbours and the local area leaders ought to have been secured.

Court in the recent decision of ***Jenifer Nsubuga vs Michael Mukundane and Anor CACA NO. 208 of 2018*** made it clear that though not in statute law consultations with the leadership of the area where the land is located is very key in establishing that due diligence was carried out.

None of the LCs in fact appeared in court came to testify. Instead the defendant presented two witnesses**, *Dw2 and Dw3***, to prove that he was an adverse possessor of the suit land.

Could the defendant claim ownership as an adverse possessor under those circumstances?

The defendant relying on the evidence of Christopher Kagonyera, ***Dw2*** a resident of Kaguyo LC 1, Katugo Parish, Ngoma sub county aged 76 years claimed that he was an adverse possessor.

Dw2 claimed to share boundaries with the defendant had no knowledge of the block or plot number of the land in dispute. He claimed to have heard about, but knew nothing about the Nsubuga whom the defendant claimed to have sold the suit land to him.

Although he claimed that the title was in the defendant's names, no such title was presented to court. In reexamination he admitted that he relied on the defendant's claim that the land had been registered in his names, whereas it was not.

It struck this court as odd therefore that given the time he had spent on the land as the defendant's neighbour, he hardly knew anything about this land which covered a huge area of more than half a square mile.

Similar observations were made by this court in respect of the evidence supplied by Mugerwa Fred who testified as ***Dw3,*** a resident since 1972 of the neighbouring Kilangazi village within same parish. The two witnesses did not add much value to the defendant's defence.

In the Supreme court decision earlier cited ***(Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu: SCCA 15 of 2019***), the concept of adverse possession was carefully discussed.

The court provided preconditions that must be satisfied before court can consider one to be an adverse possessor in Uganda. These were:

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

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

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

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

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

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

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

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

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

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

The said provision and principles did not in the view of court apply to the defendant, in light of the fact that there was an existing judgment which had already determined the rights of the estate over this land. The owners had made all efforts to eject him. That is why he could not bother to proceed under ***section 78 of the RTA*** as cited.

As noted earlier, a cause of action is said to be disclosed if three essential elements are pleaded: existence of the plaintiff's right; violation of that right, and the defendant's liability for that violation. (Refer also to: ***Auto Garage vs Motokov (No. 3) [1971] E. A. 514,*** at 519 D.

The plaintiffs' had a right under the estate of the deceased; that right was violated and that violation was attributable to the defendant's illegal entry, continued stay on the land despite the undischarged court order.

In response to ***issue No. 4*** therefore, the defendant was a mere trespasser on the suit land. He could not also claim the disputed land as an adverse possessor.

Issue No 5: Remedies:.

The plaintiffs sought for prayers that the defendant's occupation of the suit land comprised in ***Mitala Kyakamuli Bulemeezi Block 598, plot 1 measuring 374 acres or 151.0 hectares (suit land)*** is unlawful and prayed for a declaration that they were the rightful owners of the suit land; a permanent injunction; vacant possession, mesne profits; general damages and costs of the suit.

Mesne profits:

In ***section 2(m) of the CPA*** these are defined as profits payable by a person in wrongful possession of the property, actually received or might with ordinary diligence have received from the property, together with interest on those profits.

The key criteria for calculation of *mesne* profits is not what the owner loses by the deprivation of possession, but profits calculated on the basis of what person in wrongful possession had actually received or might with ordinary diligence have received therefrom.

Courts in that respect often adopt the open market value approach. ***(See: Vivo Energy U LTD vs Shire Petroleum Co. Ltd & 2 others. (Civil Suit No. 0008/2016).***

The powers and amount to be paid would lie in the discretion of court and I am mindful of the fact the discretion should be exercised judiciously. I accordingly grant a sum of ***Ugx 150,000,000/=*** as *mesne* damages is payable to the estate of Nseribetya as a fair award.

General damages:

General damages consist of items of normal loss which a party is not required to specify in his pleading to permit proof. These damages are presumed by law to arise naturally in the normal course of things.

Court may award them where it cannot measure the way in which they are assessed, except the opinion and judgment of a reasonable person. ***(See Ronald Kasibante vs SHELL (U) LTD [2008] HCB, at 163).***

These may accrue as a consequence due to loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in, had she not suffered the wrong.

Thus as stated in ***Robert Caussens v Attorney General SCCA No.8 of 1999*** it was pointed out clearly that the object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered.

In the assessment of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and extent of the breach. ***(Uganda Commercial Bank V Kigozi [2002]) 1 EA 305.***

The plaintiff may not prove that he/she suffered general damages, it is enough if he/she shows that the defendant owed him duty of care which he/she breached. ***(See: Kalemera & Others vs UNILIVER (U) LTD & Anor [2008] HCB 134 at 136).***

In applying its discretion which has been left to court, I would accordingly grant ***Ugx 50,000,000/=*** as general damages, to atone for the inconvenience and suffering occasioned by the unlawful occupation of the suit land by the defendant.

Accordingly, the orders /declarations are made in the terms below:

1. ***The suit property belongs to the estate of Nseribetya of which the plaintiffs are some of the beneficiaries;***

2. ***The defendant's occupation of the suit land comprised in Mitala Kyakamuli Bulemeezi Block 598, plot 1 measuring 374 acres or 151.0 hectares (suit land) is unlawful;***

3. ***A permanent injunction issues against the defendant, his agents and successors restraining them from occupying and utilizing the land;***

4. ***The defendant is directed to vacate the land within a period of three months after delivery of this judgment;***

5. ***A sum of Ugx 150,000,000/= is awarded to the mesne profits to the estate of the late Nseribetya.***

6. ***General damages of Ugx 50,000,000/ awarded to the plaintiffs.***

7. ***Interest of 12% awarded in respect to orders 5 and 6 above;***

8. ***Costs of the suit to the plaintiffs.***

Alexandra Nkonge Rugadya

Judge

20th October, 2023.

Delivered on 23/10/2023

J