

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

HIGH COURT LAND DIVISION CIVIL SUIT NO. 0380 OF 2021

NAMUKASA MARY GRACE:.....:PLAINTIFF

VERSUS

NAKYEYUNE MUKASA GERALD & ANOR:.....:DEFENDANTS

BEFORE:HON. MR. JUSTICE TADEO ASIIMWE

JUDGEMENT

The Plaintiff sued the Defendants for a declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit land, a declaration that the defendants whether by themselves or their servants or agents or otherwise have no claims to the suit property and are accordingly, trespassers on the same, a declaration that the defendants are not entitled to remain on the suit property, a permanent injunction restraining the defendants, their family members, servants, workmen and or agents from further interference, disruption of activities,

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further entry, access, cultivation, construction upon the suit land described as Busiro Block 493 plot 42, land at Mbuya, General damages for trespass, vacant possession and costs.

The facts of the case are that the Plaintiff is a registered proprietor of the suit land comprised in Busiro Block 493 plot 42, having got the same from her father a one Yowasi Lubowa Ssebba in 1989 and processed a land title over it in 1992. That she has been in physical possession of the land with her employees and workers undertaking poultry and other farming activity thereon. That in July 2019 the defendants laid a claim to the suit land having occupied it as the family of Ssekitende whereas not. That the defendant's entered on to the plaintiff's said land in the last week of 2019 and planted banana stems, dragged the plaintiff's attorneys to police on spurious criminal charges for trespass hence this suit.

On the other hand, the Defendants denied the plaintiff's case and contended that Zakaliya Ssekitende Mukasa bought the suit kibanja now situate at Katwe cell, Kajjansi town council Wakiso district from Kezironi Kayondo. That at the time the land owner was Samu Lugudde Kanyike katula and his land agent was Bulasio Lwanga. That from then zakaliya Ssekitende Mukasa and his family members have been occupying and utilizing the said kibanja with in its known boundaries as their family land and duly paid busulu for it. That in 1981, Sam Lugudde Kanyike Katula transferred the land comprised in Busiro Block 493 plot 24 to Yowasi Lubowa Sebba who got registered on 8.11.81 under Instrument No.

KLA100681. That On 7.2 .92 Yowasi Lubowa Sseba subdivided the land in to Busiro block 493 plot 42 and 43 and transferred plot 42 to the plaintiff which included Ssekitende's suit kibanja. That in 2016 Kibbuka James Keeya as son and agent of Yowasi Lubowa Sseba presided over a meeting regarding a dispute over the suit kibanja. He confirmed that it was the property of Zakariya Ssekitende Ssalongo. That following the resolution of the meeting, Kibuuka James keeya acknowledged Zakariya Ssekitende Mukasa as the owner of the suit kibanja and its boundaries, also accepted payment of busuulu as Annual rent for the kibanja

At scheduling, the following issues were agreed for determination by this Court;

1. Whether the Defendants are trespassers to the suit land.
2. Whether the plaintiff is entitled to any remedies sought.

At the hearing the plaintiff was represented by Counsel Andrew Mena Grace while the defendant was represented by Kawanga John.

Both counsel filed written submissions which I shall consider in this Judgement.

THE LAW

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all



is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

In Miller V Minister of Pensions [1947]2 ALL E R 372 Lord Denning stated:

“That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not.”

It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

In a bid to proof their case, the plaintiffs led evidence of four witness and closed while the defendants called five witnesses.

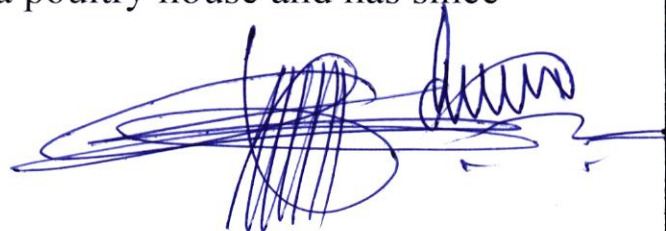
PW1 Sali Joseph Mtamale testified in his witness statement stated that he is aged 57 years and a resident of mpundwe village,nakawuka ward, Kajjansi town council and that he saw the plaintiff as a young girl and only saw the defendant at the time of dispute. That he knew both zakariya ssekitende and yowasi Lubowa. That ssekitende a kibanja on sebba's land. that although the defendant had a kibanja on sebba's land, he never lived on it as his sister Nansubuga stayed on it until she died. That the plaintiffs

claim is for the whole of the area stretching through the plaintiffs land up to the witness's land. That he is aware of the boundaries of ssekitendede where his sister used to stay. That the land the said Nasubuga occupied did not stretch up to from the road to the witnesses kibanja. That he was present when the plaintiff erected her poultry house on the land and that she erected the structure without any dispute or interference from anybody including Nasubuga who was using utilizing the suit land at the time.

On the other hand, DW1, he finally stated that he was around when the defendants brought a surveyor and showed him the whole land without proof of ownership, he confirmed that indeed the suit land belongs to the plaintiff.

In cross examination, he confirmed that although was not present when sekitinde brought his land, he is aware of the transactions. He confirmed that he was aware of the Busululu payments by the defendant and Zakaria.

PW2 James Kibuuka keeyaa testified that he is a lawful attorney of the plaintiff who is his biological sister who stays in the US. That the plaintiff became a registered owner of land comprised in Busiro block 493 plot 42, land at Mbuya and became a registered owner in 1992. That he is also the care take of his father's estate which includes PLOT 43 where a one Ssekitende has a kibanja. That plot 42 has no kibanja interest and that the plaintiff through him has exclusively owned the same without disputes. That in 1989, the plaintiff built on the land a poultry house and has since

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that time, cultivated, grazed cattle and done poultry farming on the land and her workers reside on the same land. that in 2019 the defendants laid flimsy claims on the plaintiff's land and pulled down the suit fence, elected another fence, made demarcations, created plots offered the said plots for sale and forcefully graded and cultivated the land under the protection of armed persons.

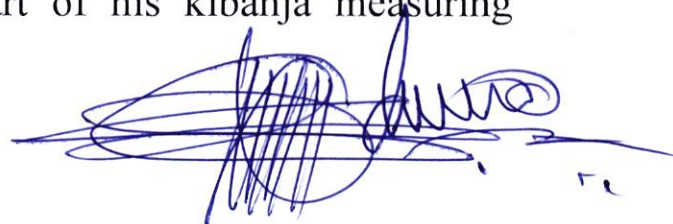
In- cross examination he stated that that Yowasi Sseba Lubowa bought land which was subdivide in plots 42 and 43. That the 1st defendants husband Zakaliya Sekitende had a kibanja om plot 43 from Sam Lugudde in 1981. That all bibanja interests are on plot 43 and not 42 and that his father never challenged sekitendes unregistered interest on plot 43. That Ssekitinde's kibanja is separated by the road on the right side. That he received Bulusu from Ssebba for plot 43. That he resolved a dispute between Tereza Nansuga and it ended in favour of the defendants

Pw3 BUULE TOM. Testified that he was employed by the plaintiff as her farm manager and has been the farm manager since 2012. That the farm of the plaintiff is on block 493 plot 42 land at Mbuya. That he saw the defendants when they had a dispute with the children of Nansubuga Tereza over the ownership of the kibanja on the land of Yowasi Lubowa Sseba. That it was resolved in favour of Zakaria Mukasa Ssekitende. That the defendants' land is the one that was initially occupied by Teresa

Nansubuga. That in 2019 the defendants entered upon the plaintiff's land and planted banana stems, cut down the fence, pulled down the gate of the farm, chased away workers and drove away the farm animals from the land which they later poisoned as per the pictures attached.

PW4 Kanyerezi Tom testified in this court and stated that he is a resident of Lusoke Village, Bulwani Parish Ssisa Subcounty, Kajjansi Town Council, Busiro County, Wakiso District and Builder. That he was the chairperson LC11 from 1988 to 2020. That the plaintiff and her attorney James Keeya are known to him as children of Ssebba who owned the suit land that he bought in 1980, and was buried of the same with his father and grandfather when they died. That He had however never seen the defendants or Zakariya Mukasa Ssekitende for the 60 years he was neighbour to the suit land. that he was the one who built the poultry house on the suit land as he was asked by Sseba to do so. That there was also a banana plantation that belonged to Sseba's wife a one Kasalina Nabuule Sseba and used to cultivate the area below the banana plantation. That a one Tereza Nansubugaa was also living on a kibanja above the suit land and no complaints ever arouse between the two. That he was surprised to the defendants come to the area, declared themselves owners, fixed their own boundaries and beat up the workers of the plaintiff.

On the other hand, DW1 Ssekitende Mukasa Zachary testified that that the 1st defendant is his wife while the 2nd defendant is his son. That in 1969 Kezironi Kayongo sold to him part of his kibanja measuring



approximately 18.30 acres belonging to Samu lugude kanyike katula. That he paid busulu for it until payment of the same was abolished in 1975. That he built on the kibanja and started utilizing the same with crops. That he was posted to far schools with his wife since they were teachers and he left his sister Teresa Nsubuga in occupation of the same. That the boundaries of the suit kibanja stretch from Nakawuka/Kasanje road down to the drainage of river of Nakawuka. That in the east they shared a boundary with kibanja of kasalina Nankya, presently Kibuuka James Keeya who uses it as his farm. That he raised his entire family on the suit land. That in 1981 Sam Luggude sold block 493 plot 24 to Yowasi Lubowa Ssebba who became the new land lord. That his care taker Kibuuka James Keeya started grazing animals which would stray on the suit land and inconvenience his sister Teresa Nansubuga. That the said Kibuuka James keeya claimed to be the care take of his father's land and used to accept payments and handle disputes relating to the land. That in 2016 he sorted a dispute with his family members regarding the suit land.

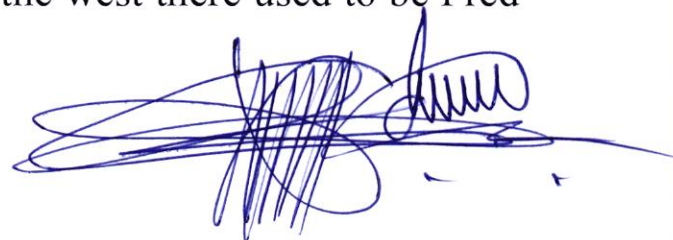
In cross examination, he confirmed that he stays with both defendants and that they stayed on the village for 83 years and that he bought land/kibanja twice in 1969 and 1973. That they only made an agreement in 1973 and that DE3 doesn't mention the exact place of the land bought, no size of land bought, no boundaries of the land and no neighbours mentioned. That there is no indication in the agreement that the balance was paid. He confirmed that he was not residing on the suit land and had left his sister

a one Nansubuga in his kibanja. That he built a house on the suit land in 1969 and it collapsed. That the size of his kibanja is 18.3 acres as per the surveyor

In reexamination he testified that the size of the kibanja he bought is 4 acres.

DW2 Ssebajwe Henry testified that he is a surveyor and he was instructed by the defendants to survey their kibanja and establish the extent to which it extends in to the plaintiff's tittle which he did and submitted his reports. In cross examination he confirmed that there was no order requesting for boundary opening but did boundary opening for plot 42 block 493 on the instructions of 2nd defendant who paid his fees. That it's the 2nd defendant who showed him the suit land. that the size of the defendants kibanja is 2.53 as identified by the 2nd defendant and that plot 42 block 493 partially falls within the kibanja in issue by 0.78 acres (78 decimals). He lastly confirmed to court that there is no documentary evidence to establish the 2nd defendant's kibanja but oral information.

DW3 Kiyaga William testified in this court and stated that in 1969 Ssekitende Mukasa Zakaria bought the suit kibanja from Kayongo kezironi and it is presently situate at Katwe cell Nakawuka ward, Kajjansi town council, Wakiso district, along Nakawuka Kasenje road, Buwaya. That in the east of this kibanja was Nakya kasalina's kibanja, presently being occupied by Mr. Kibuuka James, in the west there used to be Fred



Ssekisaka's kibanja presently occupied by his own widow Nakato Harriet. That all the kibanjas on the land stretch from the road up to the river below. That at the time when ssekitende bought his kibanja, the land owner was Lugudde Samwiri katula and his land agent who used to collect the busulu was the late Bulasiyo Lwanga. That in 1981, Samwiri lugudde katula sold the land to the late Sebba Yowasi and that it was alleged that Sseba gave to his daughter the plaintiff one acre of land but has never seen her in the village. That since 1969 Ssekitende and the members of his family have been occupying and utilizing the suit kibanja.

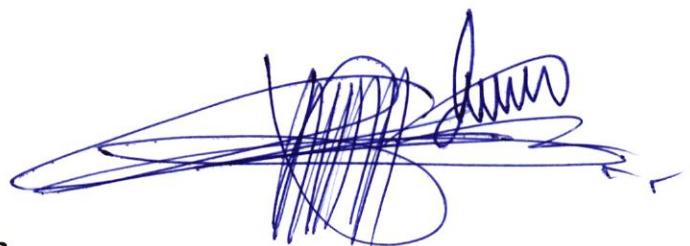
In cross examination, he stated that he has lived in Katwe village since 1970 but was not present when the said Ssekitende bought the suit kibanja but was told by Ssekitende who showed him the boundaries in 2019. He confirmed that he equally does not know the size of Ssekitende's land but was the chairman LC1 since 2021.

DW4, Nakyeyune Mukasa Gerald, the 1st defendant testified in this court and stated that her husband a one Ssekitende bought the sui land from Kayongo kezironi That at the time when ssekitende bought his kibanja, the land owner was Lugudde Samwiri Katula and his land agent who used to collect the busulu was the late Bulasiyo Lwanga. That luggude later sold the suit land to Sebba who subdivided it and gave plot 42 to the plaintiff. That their kibajja sits on both titles.

In cross examination, in cross examination, she stated that her kibanja falls within two tittles, one for Ssebba Yoweri Lubowa and another for his daughter Namukasa grace. That the kibanja measure 2.5 acres. That boundaries mentioned in her evidence are not mentioned in the purchase agreement. That the information about the boundaries is from her husband.

That there is a temporary structure made of bricks built by sebba, the plaintiffs father in 1990. That it was meant to be a school but turned in to a poultry house. That there were no disputes on the suit land until 2019. That the boundaries were marked with use of palm trees and empami inn the west, east. In the north the is a main road and river in the south.

DW5, Francis Kiryoyi Xavier also testified in this court and confirmed that the kibanja in issue was acquired by his father Zakaria and that he got information about the boundaries from his father, a one Nansubuga Tereza and neighbours. He confirmed that he is not residing on the suit property but the suit property has 4 houses in total. He confirmed that he was presented when Sseba gave the plaintiff land as a gift in 1992. That the plaintiff has no structure on the suit land. that the poultry house and a small school belong to Ssebba who illegally put them on the suit land and was orally stopped.



RESSOLUTION

Before I delve in to the main issues raised for resolution I wish to deal with preliminary issues raised by counsel for the defendants in his submission.

1. That the suit is barred by limitation.
2. The power of attorney is not signed in latin character.
3. That Namukasa Mary grace and Or Namukasa grace keeya are not the names of the same person.

To begin with, it is not professionally proper for the defendant to raise preliminary objections on matters of the law in their final submissions when they did not raise them during trial to enable the plaintiff to respond to the adequately. It feels like an afterthought intended to disrupt court. I shall however proceed to deal with the objections raised one by one.

On the issue of limitation, **Section 5 of The Limitation Act**, provides that;

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.

However, this case is founded on both recovery of land and trespass.

With the tort of trespass to land, the courts treat the unlawful possession as a continuing trespass for which an action lays for each day that passes (see *Konskier v. Goodman Ltd* [1928] 1 KB

Be that as it may, this cases would not be considered as stale under the limitation act.

Besides even if this case was purely founded on recovery of land, “the right of action is deemed to have accrued on the date of the dispossession.” A cause of action accrues when the act of adverse possession occurs according to section 6 of the same Act, In *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.

In this cases from the evidence on record, the dispute begun in 2019. Ideally this suit was not filled after 12 years and therefore not barred by limitation. This preliminary objection lacks merit and is accordingly over ruled.

On the issue of a power of attorney not being signed in Latin character, I am aware of the legal requirement of the powers of attorney to be signed in Latin character. I have noted that the power of attorney was signed although not in Latin character. the essence of power of Attorney in such circumstances is to ensure that the donee has locus/authority to bring such an action on behalf of another. The defendant led no such evidence on

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trial to prove that indeed the plaintiff had no authority /locus to bring such an action before court on behalf of another. Giving regard to the form in which the power of attorney was signed as a determination of this case would utterly be paying attention to a mere technicality to the prejudice of the plaintiff. Accordingly, this preliminary objection is over ruled.

On the issue that Namukasa Mary Grace and Or Namukasa Grace keeya are not the names of the same person, it goes back to the burden of proof. He who alleges must prove. However, the defendants who raised /alleged to this fact, raised it at the least of opportunities to afford themselves a chance to prove the same and later alone denied the plaintiff a chance to prove that fact otherwise. Therefore, this preliminary objection is over ruled.

I shall therefore proceed to deal with the issues as framed.

ISSUE 1; Whether the Defendants are trespassers to the suit land.

In this case, the plaintiff's claim is that the defendants trespassed on her land which was given to her by her father a one Yowasi Seeba. on the other hand, the defendants claim ownership of the same as kibanja holders whose land belongs in two tittles, on belonging to the late Sseba and another belonging to the plaintiff.

in the case of **Justine E.M.N. Lutaaya vs Starling Civil Engineering Co. SCCA No.11 of 2002**, *trespass to land is premised upon interference with the possession of land. I must to mention that one's physical presence*

on the land or use or de facto control of it does not amount to possession sufficient to bring an action of trespass as one is required to have had an interest in the subject land.

In the case of ***John Katarikawe versus William Katwiremu [1977] HCB 210 at 214***, it was observed by Byamugisha J., (as she then was) that *interests in land, in particular, include registered and unregistered interests.*

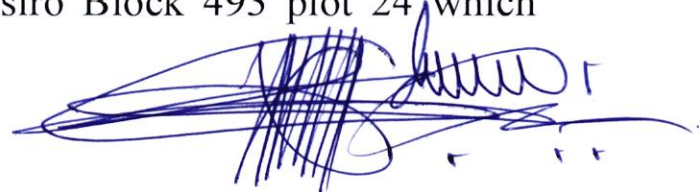
In the instant case, whereas the Plaintiff's claim in the suit land is based on a registered interest, that of the Defendant is based on an unregistered interest.

Byamugisha J., further observed in the case of ***Ojwang versus Wilson Bagonza CACA No.25 of 2002***, *further observed that for one to claim an interest in land, he or she must show that he or she acquired an interest or title from someone who previously had an interest or title thereon.*

Whereas the Defendant does not dispute that the Plaintiffs are the registered interest in the suit land, the Plaintiff deny that the Defendants has a Kibanja interest thereon.

In my view since both parties claim an interest in the suit land, it is important to determine the interest of each party in the suit land before we can determine the issue of trespass.

From the evidence on record it is consistently clear that the suit land was part and parcel of the larger part of Busiro Block 493 plot 24 which



initially belonged to Samu Lugudde Kanyike Katula. That on the said land, the 2nd defendant's father zakaliya Ssekitende Mukasa bought a kibanja from a one Kayongo as per DE3.

It is also clear that in 1981, Sam Lugudde Kanyike Katula transferred the land comprised in Busiro Block 493 plot 24 to Yowasi Lubowa Sebba who got registered on 8/11/1981 under Instru. No. KLA100681. On 7.2.92 Yowasi Lubowa Sseba subdivided the land in to Busiro block 493 plot 42 and 43 and transferred plot 42 to the plaintiff as per PEX1. It was confirmed by DW5 in cross examination that he was present when the plaintiff was given plot 42 above. It is therefore not in contention that indeed the plaintiff is the registered proprietor of the suit land.

However, what is in contention is whether the 2nd defendant's fathers had kibanja which extends to the plaintiff's land. The onus is on the defendant on the balance of probability to prove that indeed their father's kibanja extends to the plaintiff's land.

To begin with, it's necessary for court first to establish the kibanja that the defendant's father purchased from a one Kayongo. Evidence on record shows that the defendant's father purchased a kibaja on plot 24(before sub division) as per DE3. However, the same has no size, no boundaries and no neighbours mentioned. The defendant's and their witnesses confirmed this in their evidence. From the record, DEX1 is evidence that the defendant's father was paying busulu to the earlier

landlord Sam Lugudde Kanyike Katula and later to Yowasi Sebba estates when block 24 was sold to him. the said DEX1 Equally does not show the description of the kibanja the defendant's father was paying Busulu for. The 2nd defendant, DW5 confirmed that he was there when the plaintiff was given land in 1992 by his father and indeed the plaintiff was registered on title in 1992.

There is no evidence on record to show that the defendants or the said Ssekitende paid Busulu to the plaintiff as one of her landlords. Dw1 and the 1st defendant testified that they did not know that the plaintiff was given land by his father. However, the 2nd defendant confirmed that he was present when land was given to the plaintiff. Besides even if it were true that indeed the said Ssekitende did not know that the plaintiff was his land, that would defeat his interest on the plaintiff's land.

Further from the evidence on record it is clear that the defendants and the said Ssekitende never stayed on the suit land permanently but rather left the late Teresa Nansubuga, Ssekitende's sister in occupation of their kibanja. There is no evidence on record that since 1992 when the plaintiff was registered on title, there was ever a dispute over the suit land between the plaintiff and the said Teresa Nansubuga. Instead it was Ssekitendes's evidence that in 2016 the plaintiff's attorneys, Kibuuka James, keeya settled issues pertaining the suit kibanja between the said Teresa and the defendants which he found in favour of the defendant's.

Clearly from the evidence on record, 2016 when a dispute was settled between a one Teresa and the defendants a poultry house belonging to the plaintiff was already existing on the suit land. Although the defendants claimed that the poultry house and a structure which was built to be a school belonged to Sseba and that he had illegally erected them in 1989 under protest, the said structures were found on the suit land quite old but still standing. Besides If they were illegal structure, why dint the defendants break them down. Further, there is no evidence on record that the said illegal structures were reported to the authorities.

At locus, court observed bushy land, a few banana plantations, brick and motor house with open doors and windows, 3 rooms with blackboards. Another house with no blackboards but with very old iron sheets. The 2nd defendant was recalled and he could not show court exactly the boundaries of his father's kibanja. The living fence showed by him as a demarcation was quite young, short and not a reflection of 1970s. The plaintiffs' attorney managed to identify a poultry house, a three roomed house with blackboards built by the plaintiff's father and another with very old iron sheets.

Considering evidence as a whole, the defendant's evidence of having a Kibanja interest on the suit land was vehemently disputed by the Plaintiff's evidence.

Be that as it may, I shall proceed to deal with the issue of trespass.

It was the plaintiff's evidence that the defendants came upon the land, cut down the plaintiff's trees, forcefully cultivated there on, planted a barbed wire fence, banana stems and instigated violent acts on the said land. This evidence was not rebutted by the defendants but instead they admitted cultivating the suit land and fencing it claiming that they owned a kibanja on it. The defendants on their admission were found guilty of trespass.

The defendants are indeed trespassers in the suit property.

ISSUE 2. Whether the plaintiff is entitled to any remedies

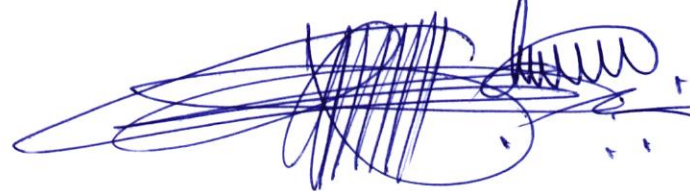
The Plaintiff sought for the following remedies,

- 1. A declaration that the plaintiff is entitled to an exclusive and unimpeded right of possession and occupation of all that piece of land situated at mbuya and known as Busiro block 493 plot 42 (suit property)**

I have already found that the plaintiff is the right full owner of the suit property and as a result entitled to an exclusive right of possession and occupation of the suit land, I so declare.

- 2. A declaration that the defendants and their servants or agents have no claim on the suit property and are accordingly trespassers**

I have already found that the defendants are trespassers on the suit property and I so declare.



3. A declaration that the defendants and their agents or servants are not entitled to remain on the suit property

4. Vacant possession

Remedies 3 and 5 are similar in effect and therefore shall deal with them together

I have already found that the defendants are trespassers on the suit property and therefore not entitled to stay on the suit property and therefore an order for vacant possession is hereby issued.

5. An injunction restraining the defendants, her agents or servants from interfering with the suit property.

General damages

Damages for trespass are *per se*. In assessment of general damages, Courts are mainly guided by the value of the subject matter, the economic inconvenience that the innocent party may have been put through and the nature and extent of the breach suffered. In *Charles Acire versus Myaana Engola* HCCS No. 143 of 1993 it was also held that;

“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 if she or he had not suffered the wrong.”

It is also trite law that in exercising the discretion to grant general damages, Court should not punish the Defendant for the breach but, rather

put the Plaintiff in the position he or she was prior the breach complained of. See **Boschcon Civil & Electrical Construction Co., (U) Ltd versus Salini Construttiri Spa HCCS No. 151 of 2008**. Taking account of the inconvenience suffered by the Plaintiff as a result of the Defendant's acts, I am inclined to award Ug shs. 20,000,000/- only (Twenty million shillings) as general damages to the Plaintiffs at the rate of ten percent from the date of judgment till full payment.


COSTS

Costs follow the event. The plaintiff having succeeded, she is entitled to costs. Therefore the Plaintiff is granted costs of this case.

In the result, the plaintiffs case succeeds with the following orders; -

1. A declaration that the plaintiff is the rightful owner of the suit property.
2. A declaration that the defendants and their agents have no interest in the suit property.
3. A declaration that the plaintiff is entitled to quiet and exclusive possession of the suit land.
4. A permanent injunction is hereby issued restraining the defendant, her agents or and their servants from interfering, staying or cultivating on the suit land.
5. The defendants, their agents and or their servants are here by ordered to cease any activity on the suit property.

6. 20 (Twenty million Ugandan shillings) is awarded to the plaintiff as general damages.
7. Interest of 10% per annum on general damages is awarded from the date of Judgement.
8. Costs of the suit



TADEO ASIIMWE

JUDGE

15/O1/2024