

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 105 OF 2006

SARAH NAKITO

(Administrator of the Estate of

the late Erinesiti Kaweesa) =====PLAINTIFF

-VERSUS-

1.NAKIWALA SAFINA

2.BUYONGO KIM

3. NAMBATYA MASTULAA

(Administrators of the estate of

the late Ahmed Sembatya) =====DEFENDANTS

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI

JUDGMENT

Introduction:

[1] The Plaintiff filed this suit against the Defendants seeking for, a declaration that land comprised in Kyadondo Block 215 Plot 939 land at Kulambiro (herein after referred to as the 'suit land') belongs to her as her beneficial share from the estate of the late Erinesiti Kaweesa; a declaration that the Defendants are trespassers on the suit land; an order to evict the Defendants from the suit land; a permanent injunction against the Defendants, their agents or any person claiming from them or on their behalf, restraining them from occupying, utilizing, selling, dealing with, claiming interest, transferring or in whatever manner interfering with the Plaintiff's interest in the suit land; general, punitive and exemplary damages; mesne profit; interests; and costs of the suit.

Background:

[2] From the pleadings of the parties and the documents adduced in court, which documents were not contested by both parties, it is common ground that the suit land originally formed part of the land of Yokana Gabiri, comprised in Mailo Register Volume 305 Folio 13, land at Kulambiro in Kyadondo, which land originated from Final Certificate Number 16964. The name of Yokana Gabiri was entered on the Mailo Register on the 20th November 1924 and he was issued with a Certificate of Title. The land of Yokana Gabiri was measuring 637.40 acres or thereabout.

[3] On the 25th April 1941, Yokana Gabiri transferred 6 acres of his land to Erenesiti Kawesa. The name of Erenesiti Kawesa was accordingly entered on the Mailo Register under Instrument Number 51541 and he was issued with a Certificate of Title for land comprised in Mailo Register Volume 828 Folio 6. The area of the land was stated in Erenesiti Kawesa's Certificate of Title as 6 acres, being part of land comprised in Final Certificate Number 16964 registered in Mailo Register Volume 305 Folio 13.

[4] The transaction of transfer of the 6 acres from Yokana Babiri to Erenesiti Kawesa was reflected on the encumbrance page of Yokana Babiri's Certificate of Title. The area constituting the 6 acres was marked on the deed plan of Yokana Gabiri as "X".

[5] On the 2nd March, 1952 Erenesiti Kawesa sold 0.71 acres out of his 6 acres to Alima Nakiwala at a consideration of 70 shillings. On the 4th July, 1952, Erenesiti Kawesa signed a transfer form in favor of Alima Nakiwala for the 0.71 acres. On the 26th October, 1954, Erenesiti Kawesa died. The transfer form in favor of Alima Nakiwala for the 0.071 acres was lodged in the land's registry on the 28th November 1955 under Instrument Number KLA 2326.

[6] On the same date (28th November 1955) when the transfer form in favor of Alima Nakiwala for the 0.071 acres was lodged in the land's registry, the name of Erenesiti Kawesa was cancelled as the owner of the land comprised in Mailo Register Volume

828 Folio 6 by instrument Number 2326, instead, the owners were stated to be Erenesiti Kawesa as having 5.29 acres and Alima Nakiwala as having 0.71 acres.

[7] On the 10th June 1969, Mailo Register Volume 828 Folio 6, was brought to the new register (the Block and Plot register). It was described as Kyadondo Block 215 Plot 109. Two different Registrars of title issued 2 blue page Certificates of Titles for Kyadondo Block 215 Plot 109. One in the name of Alima Nakiwala, the area was indicated to be 0.71 acres and another in the name of Erenesiti Kawesa, the area was indicated to be 5.29 acres. The blue page Certificate of Title in the name of Alima Nakiwala was stated to have been issued on the 28th November 1955 under Instrument Number KLA 2326, which is the same date and Instrument Number registering the transfer of the 0.71 acres from Erenesiti Kawesa to Alima Nakiwala. The blue page Certificate of Title in the name of Erenesiti Kawesa was on the other hand issued on the 19th June 1967 under Instrument Number Mailo Register Volume 829 Folio 6.

[8] On the 9th March 2001, Sarah Nakito (Plaintiff) and Nalwanga Susan who are granddaughters of Erenesiti Kawesa were issued with a Certificate of Succession to the estate of the late Erenesiti Kawesa by the Administrator General. The land they were inheriting was mentioned as, Kyadondo Block 215 Plot 109, at Kulambiro, in Kyadondo, measuring 5.29 acres.

[9] On the 15th March 2003, vide High Court Administration Cause No. 871 of 2002, Nakito Sarah (plaintiff), Kawesa Sam and Kawesa Ernest were granted Letters of Administration to administer the estate of the late Erenesiti Kawesa.

[10] On the 15th February 2006 the name of Erenesiti Kawesa was cancelled from the blue page certificate of title and the names of Nakito Sarah (Plaintiff), Kawesa Sam and Kawesa Ernest who are administrators of the estate of the late Erenesiti Kawesa were entered on the blue page certificate of title as the proprietors.

[11] Vide Instrument No. KLA 290172, the area of the land on the blue page Certificate of Title in the name of Nakito Sarah (plaintiff), Kawesa Sam and Kawesa Ernest, that is Kyadondo Block 215 Plot 109, was amended to 6.153 acres.

[12] The area schedule shows that plot 109, with an area of 6.153, was subdivided into plot 939 and plot 940. Plot 940 was subdivided into several other plots.

[13] On the 15th February 2006, the Registrar of Titles, under Instrument No. KLA290172, issued a Certificate of Title for Block 215 Plot 939 (the suit land) in the name of Nakito Sarah, Kawesa Sam and Kawesa Ernest as administrators of the estate of the late Erenesiti Kawesa.

[14] On the 11th July 2019, the Commissioner Land Registration issued a Special Certificate of Title for the suit land. In the Special Certificate of Title, the area of the land was stated to be 0.3200 hectares. The deed print of the suit land issued on 17th June 2019 indicates that the size of the land is 0.288 hectares.

The Plaintiff's case:

[15] The Plaintiff pleaded that after Erenesiti Kawesa sold 0.71 acres of his land comprised in Mailo Register Volume 828 Folio 6 to Alima Namakula, he (Erenesiti Kawesa) signed transfer form and mutation form and handed over to Alima Namakula. Alima Namakula surveyed off her 0.71 acres, created plot 33, registered it in her names leaving the residue of Erenesiti Kawesa's land as plot 109 measuring approximately 5.29 acres. Upon the death of Erenesiti Kawesa, the Plaintiff and her co-administrators of the estate of the late Erenesiti Kawesa transferred the land comprised in Kyadondo Block 215 Plot 109 into their names and subdivided it into plots 939, 940, 1621 and 1619. She was given the suit land as her beneficial share of the estate.

[16] According to the Plaintiff, around 2003, the late Ahmed Sembatya, alleging to be the administrator of the estate of Alima Nakiwala trespassed and /or entered on the suit land claiming that the late Alima Nakiwala had purchased it. The Plaintiff instituted this

suit against Ahmed Sembatya, unfortunately Ahmed Sembatya died before the suit could be heard and determined. After the death of Ahmed Sebatya, his children, including the Defendants continued to trespass on the suit land and thereby frustrating and impeding her right to quite possession of the suit land.

[17] The Plaintiff contended that the Defendants' unauthorized entry and continued use of part of the suit land amounts to trespass, has caused her great inconvenience, financial loss, mental anguish and psychological torture for which she holds the Defendants jointly and severally liable and she seeks for, general damages; punitive damages; and mesne profit.

The Defendants' case:

[18] The Defendants pleaded that they are the lawful owners of the suit land having inherited it from their father Ahmed Sembatya who was the administrator of the estate of the late Alima Namakula. According to the Defendants, Alima Namakula purchased the suit land from the late Erenesiti Kawesa who later bequeathed it to their father.

[19] The Defendant pleaded that Ahmed Sembatya independently owned plot 33 which was neither subdivided from the late Erenesiti Kawesa's estate nor a residue of plot 109. According to the Defendants, the suit land was created from plot 109 and it is the very portion which was purchased from the late Erenesiti Kawesa by the late Alima Namakula. They further pleaded that they have been in possession of the suit land without any disturbance from anyone. They denied that they are trespassers on the suit land. They denied that the Plaintiff suffered any inconvenience, financial loss, mental anguish and psychological torture.

Issues:

[20] At the hearing, the following issues were agreed upon for the determination of the court;

- i. Whether the suit land belongs to the estate of the late Erenesiti Kawesa.

- (a) Whether the land the late Alima Nakiwala bought from the late Erenesiti Kawesa is the suit land.
 - (b) Whether land comprised in Kyadondo Block 215 Plot 33 was curved out of land comprised in Mailo Register Volume 828 Folio 6.
- ii. Whether the Defendants are trespassers on the suit land.
 - iii. What remedies are available to the parties.

Witnesses and documents presented:

[21] The Plaintiff testified as PW1. She did not call any other witness. She adduced 15 documents which were admitted in evidence and marked as EP1 -EP15. The 1st Defendant testified as DW2. The Defendants called 3 witnesses. DW1 was Mr. Norman Bamwenda, a surveyor who opened the boundaries for plots Block 215 plots 33,109 and 939 and made a report to that effect. DW2 was Safina Nakiwala (1st Defendant) DW3 was Mr. Emmanuel Bamwite, a Senior Registrar of Titles working at the office of the Commissioner Land Registration. DW4 was Mr. Jasper Kakooza, a Senior Staff Surveyor working with the Ministry of Lands, Housing and Urban Development. The Defendants adduced 16 documents which were admitted in evidence and marked as ED1-ED16.

Legal representation and submissions:

[22] At the hearing, the Plaintiff was represented by Mr. George Muhangi of M/S Kafeero & Co. Advocates. The Defendants were represented by Ms Rehema Nantongo of Kazungu Kakooza Alinaitwe & Co Advocates. Both counsel filed written submissions. I have considered the submission of counsel in the determination of the issues before the court.

Consideration and determination of the court:

Issue 1: Whether the suit land belongs to the estate of the late Erenesiti Kawesa.

- (a) Whether the land the late Alima Nakiwala bought from the late Erenesiti Kawesa is the suit land.

(b) Whether land comprised in Kyadondo Block 215 Plot 33 was curved out of land comprised in Mailo Register Volume 828 Folio 6.

[23] It is common ground that the suit land is registered in the name of Nakito Sarah, Kawesa Sam and Kawesa Ernest as administrators of the estate of the late Erenesiti Kawesa. The same was registered in their name on the 15th February 2006, under Instrument No. KLA290172.

[24] Counsel for the Plaintiff submitted that a Certificate of Title is conclusive evidence and proof of ownership unless there is evidence to the contrary. According to counsel, under the concept of indefeasibility, the registered proprietor is immune from attack by adverse claims to the land or interest in respect of which he is registered. For that proposition of the law, counsel cited the case of *Allan Fredrick Frazer versus Douglas Hamilton Walker and another (1967) AC 569.*

[25] Counsel for the Defendants on the other hand submitted that the Plaintiff does not enjoy any indefeasibility of the title since there are adverse claims by the defendants of 0.71 acres from the estate of the late Erenesiti Kawesa as a result of purchase by Alima Nakiwala. According to counsel for the Defendants, the registration was in error. Counsel made reference to the evidence of Mr. Emmanuel Bamwite (DW3) who testified that the registration of the suit land into the name of the administrators of the estate of the late Erenesiti Kawesa was in error because the portion of the land which became plot 109 was meant to belong to the estate of the late Alima Nakiwala since the Plaintiffs had already got their land, that is plot 940 out of Block 215 plot 109 measuring 5.29 acres. Therefore, the residue of plot 109, that is plot 939, was for the estate of the late Alima Nakiwala.

[26] Counsel for the Defendant further submitted that the registration of the suit land into the names of the administrators of the estate of the late Erenesiti Kawesa was tainted with a lot of fraud and illegalities. Counsel submitted that the administrators of the estate of the late Erenesiti Kawesa went ahead to process the Certificate of Title for

the suit land fully aware of Alima Nakiwala's interest. Counsel referred to the evidence of the Safina Nakiwala (DW2) who testified that the administrators of the estate of the late Erenesiti Kawesa were fraudulent since they went ahead to obtain the Special Certificate of Title when the matter was in court and when the suit land was caveated by her father Ahmed Sembatya. Safina Nakiwala (DW2) went on to testify that the Certificate of Title for the suit land was obtained on the 15th February 2006 when the matter was already in court. Counsel relied on section 77 of Registration of Titles Act, Cap 230 of the laws of Uganda and the case of Makula International Ltd versus His Eminence Cardinal Nsubuga and 7 others 1982 HCB 11. Counsel prayed that the Certificate of Title for the suit land in the name of the administrators of the late Erenesiti Kawesa be recalled and cancelled by court.

[27] I have carefully considered the submissions of both counsel concerning the legal effect of the Certificate of Title for the suit land being in the name of the administrators of the estate of the late Erenesiti Kawesa and whether the same can be recalled and cancelled. Under the Torrens system of land registration, which was first pioneered in South Australia in 1858 by Sir Roberts Torrens and was introduced in Uganda in 1908 by the Registration of Land Titles Ordinance, 1908 and has been applied since then, a Certificate of Title once issued cannot be impeached (called into question its integrity or validity) or defeasible (annulled or made void). Once issued, the Certificate of Title becomes conclusive evidence that the person named in the Certificate of Title is the proprietor of the land. Put differently, as was indeed stated by Barwick C.J in Breskvar versus Wall (1971) 126 CLR 276 at 385;

"It is not a system of registration but a system of title by registration."

[28] The principle of indefeasibility of title, which is the foundation of the Torrens system of title by registration, overlooks any informality or irregularity in the registration process, but only considers the registration itself as conclusive evidence of ownership of the land. The principle of indefeasibility of title is recognized in several sections of the Registration of Titles Act, Cap 230. Section 59 thus provides that;

“59. Certificate to be conclusive evidence of title

No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.

“Underlined for emphasis.

[29] However, indefeasibility is not an absolute concept. It has a number of exceptions.

Under Section 77 of the **Registration of Titles Act, Cap 230**;

“Any certificate of title, entry, removal of incumbrances or cancelation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud.”

[30] Additionally, under Section 176 (c) of the Registration of Titles Act, where any person is deprived of land by a registered proprietor by fraud, the person who has been deprived of the land can maintain an action for ejectment or other actions for recovery of the land. Section 176 (c) of the **Registration of Titles Act, Cap 230** thus provides that;

“176. Registered proprietor protected against ejectment except in certain cases
No action of ejectment or other action for recovery of any land shall lie or be maintained against the person registered as proprietor under this Act, except in any of the following cases –

(a) the case of a mortgagee as against a mortgagor in default;

(b) the case of a lessor as against a lessee in default;

(c) the case of a person deprived of land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;

(d) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of the other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide for value;

(e) the case of a registered proprietor claiming under a certificate of title prior in date of registration under this Act in any case in which two or more certificates of title may be registered under this Act in respect of the same land, and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in that document as the grantee, owner, proprietor or lessee of the land described in it, any rule of law or equity to the contrary notwithstanding.” Unlined for emphasis.

[31] However, for a party to rely on fraud to impeach the Certificate of Title of a registered proprietor, it is a mandatory requirement that particulars of fraud must be pleaded and proved. Failure to plead particulars of fraud is a fundamental defect in pleadings which cannot be cured by evidence or otherwise. In **Tifu Lukwago versus Samwiri Mudde Kizza and Another S.C.C.A No. 13 of 1998**, Mulenga J.S.C held that;

“It is correct that when a claim is based on fraud, then it must be specifically so stated in the pleadings, setting out particulars of the alleged fraud; and that

those particulars must be strictly proved. However what is required in pleadings is to disclose clearly, facts which, if proved strictly, would constitute fraud.”

[32] In the instant case, the Plaintiff clearly pleaded, in the amended plaint filed in court on the 11th October 2019, that the Certificate of Title of the suit land is in the names of the administrators of the estate of the late Erenesiti Kawesa and actually attached to the plaint a copy of a search report dated 10th July 2010 (EP13) which clearly indicates that the proprietors of the suit land are the administrators of the estate of the late Erenesiti Kawesa. The Defendants, in their amended written statement of defense, which was filed in court on the 25th October 2019, did not plead that the Certificate of Title was obtained by fraud. The Defendants did not also file any counterclaim seeking to impeach the certificate of title in the name of the administrators of the estate of the late Erenesiti Kawesa on account of fraud. The Defendants cannot, therefore, by way of evidence, be permitted to introduce new allegations of fraud and make new prayers that the Certificate of Title in the name of the administrators of the estate of the late Erenesiti Kawesa, should be recalled and cancelled by court when the same did not form part of their pleaded case. In *Interfreight Forwarders (U) Ltd versus East African Development Bank, S.C.C.A No. 33 of 1992*, Oder J.S.C. held that;

“The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial. See Bullen & Leake and Jacob’s Precedents of pleading 12th Edition, page 3. Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by

him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."

[33] Had the Defendant pleaded fraud and prayed that the Certificate of Title for the suit land be cancelled on account of fraud, the Plaintiff would have had the opportunity to respond to that allegation and the court would have framed an issue on fraud so that evidence could be adduced for and against the allegation of fraud. The Defendants having failed or opted not to plead fraud; they cannot be permitted during hearing to present evidence that is not in consonance with their pleaded case. Therefore, the evidence of Safina Nakiwala (DW2), alleging that the administrators of the estate of the late Erenesiti Kawesa were fraudulent in obtaining registration or obtaining the special Certificate of Title, when the same was not pleaded, amounts to a departure from the Defendants' pleadings. It is hereby rejected.

[34] Similarly, the evidence by Mr. Emmanuel Bamwite (DW3) that the registration of the suit land in the name of the administrators of the estate of the late Erenesiti Kawesa was in error is also a departure from the pleadings of the Defendants. According to Mr. Emmanuel Bamwite (DW3), the suit land was supposed to be the interest of Alima Nakiwala and yet it was registered in the name of the administrators of the estate of the late Erenesiti Kawesa, which in his view was an error. He further stated that certificate of title for the suit land was issued in error because the acreage on the certificate of title is different from the acreage on the deed print. The Defendants, neither plead that there was error in the registration of the suit land into the name of the administrators of the estate of the late Erenesiti Kawesa nor did they pray that the certificate of title should be recalled and cancelled by court for having been issued in error. The evidence of Mr. Emmanuel Bamwite (DW3), in that regard, is a departure from the Defendants' pleadings. It is accordingly rejected.

[35] On the submissions of counsel for the Defendants that the registration of the Certificate of Title for the suit land in the name of the administrators of the estate of the

late Erenesiti Kawesa was illegal, counsel did not point out the illegality (breach of any law) committed by the administrators of the estate of the late Erenesiti Kawesa to warrant the court to apply the principles in *Makula International Ltd* (supra). In my view, allegations of errors in registration of a Certificate of Title or allegations of fraud are not matters of illegalities that the court can deal with without being pleaded and proved.

[36] In the end, the defendants having not impeached the Certificate of Title for the suit land, which is in the name of the administrators of the estate of the late Erenesiti Kawesa is, the Certificate of Title for the suit land is therefore conclusive evidence that the suit land belongs to the estate of the late Erenesiti Kawesa. The administrators are holding the suit land in trust for the estate.

[37] Having found that the Certificate of Title for the suit land was not impeached and therefore the Certificate of Title for the suit land is conclusive evidence that the land belongs to the estate of the late Erenesiti Kawesa, I do not find the need to determine whether the land the late Alima Nakiwala bought from the late Erenesiti Kawesa is the suit land or whether land comprised in Kyadondo Block 215 Plot 33 was curved out of land comprised in Mailo Register Volume 828 Folio 6, in a bid to establish the true ownership of the suit land. The evidence adduced by the parties concerning the exact portion of land which was sold to the late Alima Nakiwala would only be relevant if the defendants had challenged the Certificate of Title in the name of the administrators of Erenesiti Kawesa, which they did not do. In the absence of any challenge to the Certificate of Title for the suit land, it would be an exercise in futility and against the spirit of law in section 59 of the *Registration of Titles Act, Cap 230* to investigate whether the portion which was sold by Erenesiti Kawesa to Alima Nakiwala is the very portion which became the suit land. Issue 1 is therefore resolved in the positive.

Issue 2: Whether the defendants are trespassers on the suit land.

[38] Counsel for the Plaintiff submitted that the Defendants are trespassers on the suit land. According to counsel for the Plaintiff, the Plaintiff is the registered proprietor of

the suit land. Since 2006 when the Certificate of Title was obtained, Ahmed Sembatya and the Defendants have trespassed on and cultivated the suit land without the permission of the Plaintiff thereby denying the Plaintiff to take actual possession of the suit land. According to counsel for the Plaintiff, no matter for how long the real owner is out of actual possession and use of the suit land, her title and constructive possession remains.

[39] Counsel for the Defendants on the other hand submitted that the Defendants are not trespassers on the suit land since they are lawful owners of the suit land deriving their interest from grandmother Alima Nakiwala who purchased the suit land. According to counsel for the Defendants, the Defendants and their family have been in possession of the suit land since time immemorial and the same was confirmed by the Plaintiff in her evidence. Counsel for the Defendant further submitted that the Plaintiff has never been in possession of the suit land but only tried to take possession of the suit land in 2006 but failed.

[40] The law on trespass is fairly settled. In *Justine E.M.N Lutaya vs Sterling Civil Engineering Company Ltd Civil Appeal No. 11 of 2002*, at page 6, Mulenga, J.S.C held that;

“Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person’s lawful possession of that land. Needless to say, 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. ”

[41] In *Sheik Muhammed Lubowa versus Kitara Enterprises Ltd, Court of Appeal Civil Appeal No. 4 of 198*, at page 4, Manyindo V-P held that;

“...it seems clear to me that in order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land indeed belonged to him, that the respondent had entered upon that land and that that entry was

unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land.”

[42] A person holding a Certificate of Title to land has legal possession of land and therefore can institute a suit against a trespasser for eviction. In the case of **Moya Drift Farm Ltd versus Theuri (1973) E.A 114**, in which the trial court had dismissed a suit by the registered proprietor of land on the ground that at the time of the unlawful entry complained of, the proprietor was not in possession. On appeal, counsel for the proprietor argued that while the decision may have been in conformity with the English law, it was inconsistent with s.23 of the Registration of Titles Act of Kenya. Spry, V.P. at page 115 held that:

“I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as ‘the absolute and indefeasible owner’ of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor on registration and, unless there is any other person lawfully in possession such as a tenant, I think that title carries with it legal possession.”

[43] In **Justine E.M.N Lutaya** (supra) Mulenga J.S.C., cited with approval the case of **Moya Drift Farm Ltd** and held that:

“...in absence of any other person having lawful possession, the legal possession is vested in the holder of a certificate of title to the land. In the event of trespass, the cause of action accrues to that person, as against the trespasser.”

[44] From the evidence of the Plaintiff and that of the defendants, it is common ground that the Defendants are in physical possession of the suit. I have already found in issue 1 that the suit land belongs to the estate of the late Erenesiti Kawesa. The Certificate of Title is in the name of Nakito Sarah (Plaintiff), Kawesa Sam and Kawesa Ernest who are administrators of the estate of the late Erenesiti Kawesa. In law, they are in legal possession of the land. The Defendants are on the suit land without their permission. The claim of the Defendants that they are lawfully on the suit land by a virtue of a

purchase by Alima Nakiwala could only have been established by them impeaching the Certificate of Title of the suit land which they did not do. I therefore find that the Defendants are trespassers on the suit land.

Issue 3: What remedies are available to the parties.

[45] The Plaintiff prayed that, the suit land be declared to belong to her; a declaration that the Defendants are trespassers on the suit land; an order to evict the Defendants from the suit land; and a permanent injunction be issued against the Defendants, their agents or any person claiming from them or on their behalf, restraining them from occupying, utilizing, selling, dealing with, claiming interest, transferring or in whatever manner interfering with the Plaintiff's interest in the suit land. The Plaintiff also prayed for general, punitive and exemplary damages; mesne profit; interests; and costs of the suit.

General damages:

[46] General damages are losses that are non-pecuniary in nature and are not capable of precise calculation. It is therefore subject to estimation only. They include pain and suffering, physical inconvenience and mental distress. The award of general damages is at the discretion of court, and is always as the law will presume to be the natural consequence of the defendant's act or omission (See **James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993**). The objective of awarding damages is 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 in had he or she not suffered the wrong (See **Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992**). In assessing the quantum of damages, courts are mainly guided, *inter alia*, by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach (See **Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305**). It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's actions.

[47] In the instant case, the plaintiff testified that the defendants interfered and or frustrated her right to quite and peaceful enjoyment of the suit land. The value of the suit land was stated to be beyond UGX 50 million. I find that this is a fit and proper case to award general damages of UGX 20 Million.

Punitive/exemplary damages:

[48] In **Fedrick J.K Zaabwe versus Orient Bank Ltd & 5 others**,supra Katureebe, JSC relied on the decision of SPRY, V.P. in **Obongo -Vs- Kisumu Council [1971] EA 91** and gave guidance on the purpose of exemplary damages. He held that;

“...exemplary damages are completely outside the field of compensation and, although the benefit goes to the person who was wronged, their object is entirely punitive.”

The learned JSC further guided on the circumstances under which exemplary damages can awarded;

“first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant’s conduct is to be taken into account. It will be seen that the House took the firm view that exemplary damages are penal, not consolatory as had sometimes been suggested.”

[49] The same principle was adopted in **Uganda Revenue Authority vs. Wanume David Kitamirike CACA No.43 of 2010** where Kasule, JA held that exemplary or punitive damages are an exception to the rule that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendant’s egregious, highhanded, malicious, vindictive, oppressive and/or

malicious conduct. They focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff.

[50] Applying the above principles to the instant case, there was no evidence adduced by the plaintiff to warrant the award of punitive/exemplary damages. The Plaintiff did not adduce any evidence that the Defendant's conduct was calculated to procure for them some benefit, not necessarily financial, at the expense of the Plaintiff or that the actions of the Defendants were egregious, highhanded, malicious, vindictive and oppressive. I therefore decline to award any punitive/exemplary damages.

Mense profit:

[51] Section 2(m) of the Civil Procedure Act (Cap.71) defines *mesne profits* as;

'... those profits which the person in wrongful possession of the property actually received or might, with ordinary diligence have received from it, together with the interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession'.

[52] In **Adrabo Stanley versus Madira Jimmy HCCS No. 0024 of 2013** Mubiru J held that;

"It is settled principle of law that in case of mesne profits the burden of proof rests on the plaintiff. The onus of proving what profits the defendant might have received with the ordinary diligence lies on the plaintiff. The plaintiff may also adduce evidence to prove that the defendant was not diligent and might have obtained greater profits by proper diligence."

[53] The learned Judge further held that;

"Determination of the quantum of mesne profits is left at the discretion of the court and being in the nature of damages, the Courts have not laid down any invariable rules governing award and assessment of mesne profits in every case. There is no uniform criteria for the assessment of mesne profits. The quantum depends upon the facts and surrounding circumstances of each case. The Court

may mould awards and assessment of mesne profits according to the justice of the case."

[54] In the instant case, the plaintiff did not adduce any evidence of profits the Defendant might have received from the use of the suit land. I there therefore decline to award any mense profits.

Costs of the suit:

[54] Section 27(2) of the Civil Procedure Act provides that the award of costs is in the discretion of court and costs of any action shall follow the event unless for good reasons court directs otherwise. In **Francis Butagira vs. Deborah Mukasa SCCA No.6 of 1989**, it was further held that a successful party should not be deprived of costs except for good reasons. In the instant case, the plaintiff suit has succeeded. There is no reason why I should not award her the costs of the suit.

Orders:

[55] In the end, having determined this matter in favor of the plaintiff, I thus make the following orders;

- i. It is hereby declared that that the suit land belongs to the estate of the late Erenesiti Kawesa.
- ii. It is hereby declared that the Defendants are trespassers on the suit land.
- iii. An order is hereby issued to evict the Defendants from the suit land.
- iv. A permanent injunction is hereby issued to restrain the Defendants, their agents or any person claiming from them or on their behalf, from occupying, utilizing, selling, dealing with, claiming interest, transferring or in whatever manner interfering with the suit land.
- v. The Defendants are hereby ordered to pay to the plaintiff general damages of UGX 20 Million.

- vi. The general damages mentioned in (v) above shall attract interest of 15% per annum from the date of the judgement till payment in full.
- vii. The Defendants to pay the plaintiff the costs of the suit.

I so order.

Dated and delivered by email this 7th June 2023.



.....
Phillip Odoki

Judge.

