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The Republic of Uganda
In The High Court of Uganda at Soroti
Civil Suit No. 0017 of 2021

1. Moses Nyangas Chepchulei
10 2. Labu Saidi Chepchulei } Plaintiffs

(Suing as administrators and beneficiaries of the estate of Naibei Chepchulei)

Versus

1. Nyongesa Abdu
2. Wasilwa Shaban } Defendants
15 3. Wangira Rajab
4. Ojepa Fred

Before: Hon. Justice Dr Henry Peter Adonyo

Judgment.

1. Background:

20 Moses Nyangas Chepchulei and Labu Saidi Chepchulei (The plaintiffs)
filed against Nyongesa Abdu, Wasilwa Shaban, Wangira Rajab and Ojepa
Fred, the defendants for a declaration that the defendants were
trespassers on their customary land compromised in Amagoro and Tajar
villages, Kamutur sub county, Bukedea District.

25 The plaintiffs further sought declaratory orders that the defendants'
actions of trespassing on their land amounted to land fraud yet they were
the rightful customary owners of the suit land which they inherited from
their ancestors including the late Naibei Chepchulei.



5 Other orders sought by the plaintiffs included those that all the subsisting
and subsequent transactions on the suit land by the defendants and or
their agents are *void ab-initio*, order for cancellation of any subsisting
certificates of title if any held by the defendants or any other agents
relating to entire suit land, a permanent injunction be issued restraining
10 the defendants from any further trespassers, an order of vacant
possession, exemplary damages, aggravated damages, *mesne* profits and
costs of the suit.

The facts giving rise to the plaintiffs' causes of action are that the plaintiffs
are the lawful administrators and beneficiaries of the estate of Naibei
15 Chepchulei who owned land situated in Amagoro and Tajar measuring
approximately 90 acres but which the defendants on various occasions
trespassed upon approximately 51 acres which they continued to use for
various purposes including residential occupation, cattle grazing,
cultivation and leasing to other farmers.

20 According to the plaintiffs the suit land belonged to the late Naibei
Chepchulei who has lived with his family on the suit land uninterrupted
since 1960 to date save for the period of the insurgency and cattle rustling
in the 1980's and early 1990's.

25 That in February 1980 Naibei Chepchulei was murdered by Karamojong
rustlers and was buried on the suit land with his wives and children
remaining on the suit land.

30 That on the 22.03.2012, the plaintiffs got knowledge of trespass to part of
the suit land by the defendants, who fraudulently claimed that they had
left the suit land in 1969 and had purported to have come back to recover
the same from the plaintiffs in collusion with some area LCs.

5 That the defendants took advantage of the plaintiff's absence from the suit land as a result of the insurgency and cattle rustling to conspire and grab the plaintiff's land under questionable beneficial claims.

That the 1st plaintiff on 24.05.2012 sued the defendants before the LC2 Court but unfortunately due to conflict of interest, a suspicious and
10 controversial judgment was made in favour of the defendants.

The 1st plaintiff was even denied a copy of the judgment and proceedings when he wanted to file an appeal.

The defendants were served with summons to file a defence but none of the defendants filed a written statement of defence.

15 There is an affidavit of service on record and a copy of the summons signed and fingerprinted by the defendants.

The plaintiffs then applied for a default judgement under Order 9 Rules 5 and 8 of the Civil Procedure Rules, the Deputy Registrar entered a default judgement under Order 9 rules 5 and 10 of the CPR and the matter was
20 fixed before this court for formal proof.

2. Representation:

The plaintiffs were represented M/s Musambwa & Co. Advocates. The defendants were unrepresented and never appeared in court.

3. Issues:

25 The following issues were framed for the resolution of this suit.

a. Whether the defendants are liable?

b. Whether the plaintiff is entitled to the prayers/remedies prayed for?

The issues have been adopted for the resolution of this suit accordingly.

- 5 4. Evidence on record:
 a. Witness statements:

PW1, Moses Nyangas Chepchulei told court that he and the other plaintiffs are the lawful administrators and beneficiaries of the estate of late Naibei Chepchulei. That he is the biological son of Naibei Chepchulei and that his
10 father settled on the suit land since 1960's without any interference. That in regard to the particular land portion which had been trespassed upon by the defendants, the same was for his youngest step mother called Sitati who is even still alive. PW1 told court that he was born in 1964, was raised on the suit land and knows all its boundaries and its neighbours and that
15 the defendants had never been neighbours to the suit land. That the current LC I chairpersons of Amagoro and Tajar villages, that is, Maunda Robert and Nabiye Eliud shared a boundary to the suit land.

That the 1st to 3rd defendants in the of the absence of the plaintiffs due to insecurity which arose due to Karimojong cattle rustling came from
20 Kiryandongo District and fraudulently claimed part of the family customary land and even went ahead to sell part of the suit land to the 4th defendant and other persons unknown to the plaintiffs. That the plaintiffs upon learning of the fraud and trespass upon the suit land asked the defendants to leave the suit land without any success until they decided to
25 file this matter before this court.

PW2 Labu Saidi Chepchulei testified that he was the grandson of the late Naibei Chepchulei, a beneficiary and lawful administrator of his estate. That the 1st to 3rd defendants placed fictitious beneficial claims on the suit land and that the 4th defendant with others unknown conspired to
30 fraudulently buy the suit land.

That he learnt of the trespass in 2013 when he was informed by the area residents about the actions of the defendants and their agents.

5 That the 4th defendant and others neglected to exercise due diligence before purchasing the suit land, and it came to his knowledge that the 4th defendant also refers to himself as Amuka Fred. That the 4th defendant had actual and constructive notice that the 1st to 3rd defendants had no legal basis of beneficial claim on the suit land as required by law but he
10 proceeded to transact with them. That he and his siblings have no blood relationship with the 1st to 3rd defendants and their beneficial claims to the suit land was a syndicated act of land fraud. That the defendants conspired with some area LCs to donate the suit land to the defendants which land is known publicly to be the deceased's estate and the plaintiffs are known
15 as the lawful beneficiaries. That the defendants have continued to use the suit land with impunity for grazing their own animals, establishing unlawful settlements, growing crops and hiring out the suit land to other people without lawful authority. That the acts of the defendants have occasioned financial loss to the plaintiffs while the defendants benefit
20 from the unlawful use of the land. An acre of land is leased out averagely at 200,000 Ug. Shs per which act has economically disadvantaged the beneficiaries to the tune of Ug. Shs. 102,000,000/= as mesne profits arising from unlawful possession of the suit land measuring approximately 51 acres in the period of 10 years. That for 5 decades the
25 land has been in their material possession without any land disputes before the defendants unlawfully trespassed and illegally sold it.

b. Documents exhibited:

PEX1-Letters of administration over the estate of the late Naibei Chepchulei granted to the plaintiffs on the 22nd day of November 2015 by
30 Hon. Lady Justice Naiga Jessica Ayebazibwe.

PEX2-Introductory letter by the LC I Chairperson of Taajar Village (Mukhooli Maunda Robert) to the sub county chief Kolir, wherein he

5 introduces the 1st plaintiff as the son of the late Naibei Chepchulei who was
a prominent resident of the village before he was killed by Karamojong
cattle rustlers and buried on the suit land in the said village. It introduces
the 1st plaintiff to as he was seeking to process letters of administration
into the estate of his late father Naibei Chepchulei. It is dated 11th July
10 2012.

PEx3-Another introductory letter by the LC I Tajar village dated 22nd
March 2012. It introduces the family of the late Naibei Chepchulei stated
to have been a prominent resident of the village from 1960 to 1980. That
he was killed and buried on the suit land and that his family had flee to
15 Busia to save their lives. This letter confirms that the family had come back
to resettle on their land and the residents should welcome them.

PEx4- A letter by the LC1 Tajar village confirming that Nyongesa was a
genuine resident of Tajar village and had left due the village for some time
due to the insurgency and had now returned. It is dated 26th October
20 2000.

PEx5-A letter from the LC II Kocus Parish dated 17th August 2014
addressed to the Chairman of the Land Tribunal Court of the LC II. In this
letter, the LC II writes in regard to the land of the late Naibei Chepchulei
and how he had called Wangira Rajab (3rd defendant) to go to his office
25 together with the LC I Tajar to explain why he had forcefully settled on the
late Naibei's land. The letter further explains how the LC 11 Chairperson
Kokus called the 3rd defendant to settle issues of his forceful settlement on
the land belonging to but he refused before the committee members and
marched away. He requests the chairman of the tribunal to assist the
30 complainant (1st plaintiff) in order to solve the matter before it goes to
higher authorities.

5 PEx6- A letter dated 25th July 2014 addressed to the Chief Magistrate Soroti. It is a complaint filed by the 1st plaintiff concerning the deliberate refusal by the LC II Court to forward him proceedings so that he can appeal their decision against him to the LC III Court. He further complains that even the case number was not given to him. He states that
10 the LC II Chairperson has failed to cooperate with the LC III court despite several reminders for him to forward the same.

PEx7- A letter from the Chief Magistrate Court Soroti dated 30th July 2014 addressed to the Chairperson LC II Court Kocus Parish, Kolir Sub County. This letter concerning the land dispute between Nyangas Moses and
15 Wangira Rajab is a reply to the complaint PEx6, the Chief Magistrate Baker Rwatoro directs the LC II to submit the file for perusal and advice within 7 days and on failure to do so it will be deemed that the LC II Court never handled the case at all and a fresh suit will be filed in any competent court of jurisdiction.

20 PEx8- A notice of intention to sue dated 5th June 2012 from Musambwa & Co. Advocates to the defendants and 3 others that is Musobo Dan, Kisa Rogers and Satya Robert.

PEx9- A registered statutory declaration by one Nabiye Eliud, a former area vice chairperson Tajar village and current LC1 Chairperson Amagoro
25 village, Kamutur sub county. In it he states that he is a neighbour of the deceased's estate and area born resident. He confirms that the suit land customarily and lawfully belongs to the plaintiffs whom he had lived together with for decades. He states that on the 26th of October 2000 in the absence of the beneficiaries and administrators of the estate of Naibei,
30 one Nyongesa Abdu and his son Wasilwa Shaban in the company of Wangira Rajab came and claimed Naibei's customary land as theirs whereas not. This customary land was known to them at all material times

5 to belong to the late Naibei when they grew up in the village. That the
defendants took advantage of the plaintiffs' absence in the area because of
the insecurity then to unlawfully claim and resale the plaintiff's land after
misinforming his office. He continues to renounce the LC I letter dated
26.10.2000 held by the defendants being used to vexatiously and
10 frivolously claim part of the customary land belonging to the plaintiffs.
That the defendants used the office of the LC I and LC II to unlawfully
claim the plaintiffs' land. That he personally regretted his action and he
accordingly notified the defendants to vacate the said customary land
belonging to Naibei's estate but they characteristically and continuously
15 ignored them. That he together with other residents know the boundary
marks of the late Naibei's land and the defendants are trespassers laying
fraudulent claims on the land.

PEX11- A picture of a trench dug by the defendants on the suit land in an
attempt to alienate part of the suit land.

20 c. Locus in quo proceedings:

On the 26th of September 2022, the Assistant Registrar visited the suit
land and made a report on her findings.

Only the plaintiffs, counsel for the plaintiffs and some members of the
public were present. The defendants did not enter appearance.

25 In her report she noted that the plaintiffs showed court the boundaries of
the suit land which was marked by sisal plants. There were some
settlements on the land, that is, three homesteads on the land belonging
to the Wangira family, Wangira Rajab, a former home site for Starti
Chepchulei. There were activities of cultivated maize and cotton
30 plantation by John Mwanda who is said to have purchased land from the
Wangira family and is settled on the land with his homestead to the east

5 of the land. John Mutaka and John Mwanda confirmed that their respective plots were purchased from the defendants and they were in the process of settling with the plaintiffs.

Her findings were that the sisal plants that mark the boundaries were old and were planted by the plaintiffs, the agriculture activities were done by
10 the Wangira family, John Mutaka and John Mwanda who purchased from the defendants. There was a former home site of Starti Chepchulei a grandfather of the plaintiffs. There was also a drainage trench to the south of the suit land.

5. Submissions:

15 Counsel for the plaintiff's M/s Musambwa & Co. Advocates submitted on two issues that is;

1. Whether the defendants are liable?
2. Whether the plaintiff is entitled to the prayers/remedies prayed for?

Regarding the first issue counsel submitted that the defendants failed to
20 file their defence and a defendant who fails to file a defence puts himself out of court and no longer has any *locus standi* to be heard.

Counsel relied on ***Mufumba Fredrick vs Waako Lastone, Revision Cause No. 006 of 2011*** and ***Sengendo vs Attorney General (1972) 1 EA 140.***

25 Counsel submitted that the plaintiffs' suit land is customary land which is recognised and protected by the law under Article 237 (3)(a) of the Constitution. He stated that the effect of this provision is that the suit land remained property of the late Naibei and the plaintiffs.

On fraud counsel submitted that the defendants purported to claim the
30 suit land which is known to form part of the estate of the late Naibei under

5 fraudulent and fictitious beneficial claims. That pex4 had no legal basis other than furtherance of the alleged fraud by the defendants.

Counsel referred Court to *John Kihika and Kaidoli William v Absolom Tinkamanyire CA No.0086 of 2014* where the court of appeal decreed the rightful owners of the suit land was the appellant
10 basing on the fact that the person who sold to the respondent had no right to do so. They reasoned that ***“an estate of the deceased can only be distributed by a person who has letters of administration”***

Counsel submitted that in the instant case the 1st to 3rd defendant had no legal right to sell the estate of the late Naibei and they are guilty of fraud
15 and civil trespass.

Regarding the second issue counsel submitted that where there is existence of an interlocutory judgement the question of liability of the defendant is no longer an issue and what is left is the assessment of the quantum of damages.

20 Counsel relying on various authorities prayed for exemplary damages of Ug. Shs. 90,000,000, general damages of Ug. Shs. 300,000,000, aggravated damages of Ug. Shs. 100,000,000 and Mesne profits of Ug. Shs. 127,500,000.

6. Determination:

25 As rightfully noted by counsel for the plaintiff, the defendants by failing to file their defence put themselves outside the purview of the court, for were they indeed to have a defence to the claims by the plaintiffs, then they would have filed a defence putting forward their interests and even subsequently making appearances in court. The behaviour of the
30 defendants even extended to the locus visit, the defendants despite having

5 homesteads on the suit land were not around during locus further proving their guilt.

From the evidence adduced in court including the documentary evidence and the *locus in quo* proceedings, it is clear to me that the land in dispute belonged to the late Naibei Chepchulei and his family. It is also clear that
10 the family fled the suit land during the insurgency and cattle rustling period with the 1st to 3rd defendants taking advantage of their absence to fraudulently claim the suit land as their own and further proceeding to unlawfully transact with the same by selling it to the 4th Defendant.

The plaintiffs have proved that they and their family are the rightful
15 owners of the land having inherited the same customarily from their late father and grandfather Naibei. The defendants and other persons on the suit land accordingly found to be trespassers.

7. Remedies:

The plaintiff sought for several reliefs including;

- 20 a. A declaration that the defendants are trespassers on the suit customary land compromised in Amagoro and Tajar villages, Kamutur sub county, Bukedea District.
- b. A declaration that the defendant's actions amount to land fraud, a declaration that the plaintiffs are the rightful customary owners of
25 the suit land.
- c. A declaratory order that all the subsisting and subsequent transactions on the suit land by the defendants and or their agents are void ab-initio,
- d. The court be pleased to order for cancellation of any subsisting
30 certificates of title if any held by the defendants or any other agents relating to entire suit land.

- 5 e. A permanent injunction restraining the defendants from any further trespassers,
- f. Vacant possession.
- g. Exemplary damages.
- h. Aggravated damages.
- 10 i. Mesne profits and,
- j. The costs of the suit.

This court has already, as above, found that the plaintiffs have proved that they are indeed the rightful administrators and beneficiaries of the suit land which originally belonged to the late Naibei Chepchulei, and the
15 defendants are trespassers. Accordingly, I would declare that the plaintiffs as the rightful owners of the suit land.

I would further find that the actions of the defendants in claiming the suit land as their own and subsequently selling portions of it knowing fully well that the land was not theirs amounted to fraud as they had no lawful right
20 to deal in the land and so any transactions carried out by them on the suit land were unlawful and void *ab initio*.

The plaintiffs prayed that court to cancel any subsisting certificates of title if any, however no evidence was led to the existence of any title and as such no order can be made in that regard.

25 In regards to the other prayers, I am convinced that this is a case were such should issue and I do accordingly issue a permanent injunction restraining the defendants and or their agents or any other persons claiming under them from using or dealing in the suit land.

I would also additionally, issue an order of vacant possession as against
30 the defendants and other persons occupying the land.

5 The plaintiff also prayed for exemplary/punitive damages of Ug. Shs. 90,000,000 as punishment to the defendants for the arrogance they exhibited when they refused to vacate the suit land thereby causing the plaintiffs suffering and anguish.

Lord Devlin in *Rookes v. Bernard [1964] AC 1129*, stated that in his
10 view there are only 3 categories of cases in which exemplary damages are awarded namely;

- i) Where there has been oppressive, arbitrary or unconstitutional action by the servants of the government.
- ii) Where the defendants conduct has been calculated by him to
15 make a profit which may well exceed the compensation payable.
- iii) Where some law for the time being in force authorized the award of exemplary damages.

I do not find that the acts of the defendants fall within any of the above categories though their acts would seemingly appear unjust to the
20 plaintiffs. An order of general damages would sufficiently cover their inconvenience and suffering.

Concerning the claim for general damages, damages for trespass to land are intended to compensate the plaintiffs from being kept out of the suit land for so long as well as the inconveniences they went through as shown
25 by the exhibits above in their attempts to get the defendants to leave the suit land. General damages for trespass of the suit land by the defendants is awarded to plaintiffs to the tune of UGX 100,000,000 to be paid in equal amounts by the defendants.

As for aggravated damages, this was stated in *Uganda Revenue Authority Vs Wanume David Kitamirike, Civil Appeal No. 43*
30 *of 2010 (pages 20)* as being;

5 ***“... compensatory in nature, but they are enhanced as damages because of the aggravating conduct of the defendant. They reflect the exceptional harm done to the plaintiff by reason of the defendant’s actions/omissions. Both general and aggravated damages focus on the***
10 ***conduct of the defendant in causing the injury to the plaintiff that is being compensated for.”***

I am not convinced that the circumstances herein warrant an award of such damages. I decline to do so as the conduct of the defendant do not show wanton disabuse of the plaintiffs’ rights.

15 As for mesne profits, in *Adrabo v Madira [2017] UGHCLD 102*, Stephen Mubiru, J was of the opinion that;

“...the moment someone proves a better title against the person who was in prior possession, he or she is entitled to compensation against the unlawful possessor of property. Mesne profits are one such mode of compensation that can be claimed against a person in unlawful possession. It is an established principle concerning the assessment of damages that a person who has wrongfully used another’s property without causing
20 ***the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other’s property. The law has reached this conclusion by giving to the concept of***
25 ***loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owner’s financial position after the wrongdoing***
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5 with what it would have been had the wrongdoing never
 occurred. Furthermore, in such a case it is no answer for
 the wrongdoer to show that the property owner would
 probably not have used the property himself had the
 wrongdoer not done so (see *Stoke City Council v. W and J*
10 *Wass*, [1988] 1 WLR 1406). When damages are claimed in
 respect of wrongful occupation of immovable property
 on the basis of the loss caused by the wrongful possession
 of the trespasser to the person entitled to the possession
 of the immovable property, these damages are called
15 *mesne profits*.

 In assessing *mesne profits*, the proper starting point is
 the value of the land encroached upon. The court may
 then take into account the extent to which the piece of
 land encroached upon has enhanced the amenities of the
20 defendant's own user (see *Inverugie Investments Ltd v.*
 Hackett [1995] 1 WLR 713). *Mesne profits* are in a way
 payment by the defendant in respect of the benefit he or
 she has gained out of the trespass. They are in general
 awarded because the defendant has made improper use
25 of an asset of the plaintiff. In economic terms, there has
 been a transfer of value for which the wrongdoer must
 account (see *Devenish Nutrition Ltd v. Sanofi-Aventis Sa*
 (France) and others, [2009] Ch 390, 2009] 3 WLR 198,
 [2009] 3 All ER 27). The court though should be mindful
30 that in cases of trespass of this kind there is no right to a
 share in, or account of, profits in any conventional sense.
 The only relevance of the defendant's profits is that they
 are likely to be a helpful reference point for the court

5 *when seeking to fix upon a fair price for a notional licence*
 (see Severn Trent Water Ltd v. Barnes, [2004] EWCA Civ
 570). Since mesne profits are the profits, which the
 person in unlawful possession actually earned or might
10 *have earned with the ordinary diligence, they may also*
 be awarded on the basis of market rent even if the
 plaintiff would not have let the property if vacant
 (see Swordheath Properties Ltd v. Tabet [1979] 1 WLR
 285; Whitwham v. Westminster Brymbo Coal and Coke
 Co, [1896] 2 Ch 538 and Attorney General v Blake [2001]
15 *1 AC 268). They are measured as the amount that might*
 reasonably have been demanded by the plaintiff as
 payment for the user of the land for the period of trespass.
 Mesne profits do not include profits due to improvement
 made in the property by the person in wrongful
20 *possession.”*

In the instant case, the area in dispute as seen at the *locus in quo* visit was not occupied or developed by the plaintiffs but by the defendants, their agents and persons who claimed through them. Mesne profits are one such mode of compensation that can be claimed against a person in
25 unlawful possession. However, the court was not furnished with evidence of current market value of the suit land or the value of the developments on the land.

The plaintiffs did not also furnish any evidence of the defendants leasing the land to other people and the rate at which it was being done except
30 PW2 stated that the land is averagely leased out at Ug. Shs. 200,000 per acre per year which has disadvantaged them to a tune of 102,000,000/=.

5 In submissions counsel mainly focused on the law that damages by way of mesne profits are awarded in cases where the defendant has unlawfully and wrongfully withheld possession of land from the plaintiff.

The argument of the plaintiffs is that the defendants, who have been in wrongful possession of the suit property for not less than 10 years, should
10 be made to pay mesne profits to the plaintiffs. I am not convinced that the plaintiffs have proved any amount which should be awarded as mesne profits as the figures proposed by PW2 is neither corroborated not proven though it is true that the defendants have had unlawful use of the suit land. Without any comparative figure to base such an award with, I would find
15 it difficult to award such and so none is awarded.

As for the costs of this suit, I would award the same to the plaintiffs as the successful party for they would not have incurred the costs of coming to this court were it not for the illegal action of the defendants. Accordingly, the costs of the suit are awarded to the plaintiffs in any event.

20 8. Orders:

- This suit which proceeded *ex parte* succeeds overall in the favour of the plaintiffs.
- The plaintiffs prayed that this Honourable Court cancel any subsisting certificates of title, if any. However, no evidence was led
25 to show the existence of any title and as such no such order is issued.
- The plaintiffs prayed for an order of a permanent injunction. The same is hereby issued restraining the defendants and their agents or any other persons claiming under them from using or dealing in the suit land.
- 30 - Further, an order of vacant possession is also hereby issued against the defendants and other persons occupying the land to vacate the

5 land forthwith unless they have made legally binding and satisfactory arrangements with the plaintiffs.

- No order for exemplary/ punitive damages is awarded as no reasonable ground has been proved for this court to do so.

10 - No order for mesne profit is issued as the same is not proved to the satisfaction of this court.

- An award UGX 100,000,000 as general damages for the inconvenience and suffering occasioned and unleashed upon the plaintiffs by the defendants is made and this is to be paid in equal amounts by the defendants.

15 - Interest on the general damages as awarded above is also awarded at the rate 18% per annum from the date of this judgment till payment in full.

- The costs of the suit are also awarded to the plaintiffs in any event.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

18th April 2023

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