THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0024 OF 2013

ADRABO STANLEY ……. PLAINTIFF

VERSUS

MADIRA JIMMY ……. DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendant for general damages for trespass to land, mesne profits, an order of vacant possession, a permanent injunction, and costs. The plaintiff's claim is that he is the registered proprietor of approximately 520 hectares of land comprised in LRV 1320 Folio 1, at Lozoki village, Arivu Parish, Vurra sub-county in Arua District. The plaintiff acquired the said land on 2nd April, 2004 by way of purchase from *The Non Performing Assets Recovery Trust* (NPART), the previous registered proprietor having defaulted on a mortgage to the now defunct Uganda Commercial Bank (UCB). Without the plaintiff's permission and without any claim of right, the defendant during the year 2005 entered onto the land, established thereon a livestock farm and has since then been grazing his livestock on the land. The defendant as well embarked on cutting down the plaintiff's trees he found on the land for purposes of burning charcoal. The defendant has since then refuse to vacate the land despite the plaintiff's demands, hence this suit.

In his written statement of defence, the defendant denied the accusations made against him by the plaintiff. The defendant contended that the land he occupies lies outside that claimed by the plaintiff and that he acquired it lawfully by way of purchase from its previous customary owners during the year 2003. In the alternative, he contended that the plaintiff has never been in physical possession of the land in disputer and that if indeed the plaintiff did acquire title to the land, then he obtained it subject to the defendant's customary interest therein, since the defendant has been in physical possession thereof since the year 2003. The defendant further counterclaimed against

the plaintiff seeking a declaration that the defendant is in rightful possession of the land, a permanent injunction and an ward of general damages for the harassment he has suffered at the hands of the plaintiff, which has denied him quiet enjoyment of his land.

In his testimony, the plaintiff stated that having seen the land in dispute advertised by NPART for sale during 2002, he contacted the Auctioneers entrusted with the power of sale. He decided to buy the lender after being assured by the Auctioneers that there were no occupants on the land. He and his advocate inspected the land and confirmed there were no occupants. On 13th June, 2003, his bid of shs. 30,000,000/= was accepted by NPART. He paid that purchase price in instalments which he completed in January, 2004 and in April, 2004 the title was transferred into his name. On 27th April, 2007, he together with a surveyor and the Auctioneer went to the land for the latter to hand it over to him. In an exercise that took them two days, the surveyor located some of the mark-stones but most of them had been uprooted. On 30th April, 2007 at his formal introduction to the residents by the Auctioneer, the plaintiff met a hostile reception. He has not been able to use the land at all due to threats of violence from the residents. The defendant has occupied about 50 acres of the land, has put up temporary structures and carries on agricultural activities on the land. As a result, he has lost income of shs. 100,000,000/= per annum. The plaintiff did not call any witnesses and closed his case.

In his defence, the defendant testified that he bought the land in dispute in 2003 and paid the purchase price in two instalments. Before he purchased it, he had inspected it on 26th October, 2003 and found only the seller and his family in occupation. Inquiries he made of the L.C.1 Chairman confirmed that the seller was the customary owner of the land. He took possession of the land and used it to rear his cattle and grow crops. He paid the last instalment of the purchase price on 10th June, 2004 and that is when the agreement of purchase was executed. In 2007, there was an unsuccessful attempt to evict him from the land. In June 2013, he received a notice of intention to sue from the plaintiff's advocates requiring him to vacate the land. The land he bought is located at Anyali village lies outside the boundaries of the land claimed by the plaintiff, a person he has never seen on the village, which lies in Lozoki village.

D.W.2 Mr. Asea Matia testified that he knows the defendant as his neighbour since sometime during 2004 after he had purchased and took over possession of the land in dispute. He was the L.C.1 Chairman at the time the defendant bought the land in dispute. He was one of the witnesses at the signing of the agreement of sale. D.W.3 Mr. Okua Abraham, the defendant's cousin, testified that he was involved in the transaction by which the defendant bought the land in dispute. Together with the defendant, they inspected the land before contracting to purchase it. There was no occupant but there were a few cattle belonging to the seller, grazing on the land. He signed as a witness to the agreement of sale on 10th June, 2004. The defendant then closed his defence.

The court visited the *locus in quo* on 19th December, 2016, inspected the key features mentioned by the witnesses in their testimony, prepared a sketch map and recorded its observations. Having seen only two mark-stones whose correlation the witnesses could not explain satisfactorily, the court directed that the District Staff Surveyor undertakes a re-opening of the boundaries of the land comprised in LRV 1320 Folio 1, in the presence of surveyors engaged by each of the litigants and furnish court with a report of his findings, more particularly as to whether the land occupied by the defendant lies within the boundaries of the land comprised in the title deed. In a letter addressed to court dated 16th March, 2017, the Acting District Staff Surveyor responded by indicating that the exercise could not be undertaken by reason of the fact that the records in his custody indicated that when the file containing the field survey report in respect of that land was submitted for approval to the Entebbe Lands and Survey Office on 14th January, 1986, it was queried and returned to Arua with instructions that the surveyor undertakes the survey afresh, because one side of the plot had not been surveyed. There was no indication that this instruction was ever implemented. In the circumstances, he indicated he could not undertake a boundary re-opening since there is no official record of an approved survey of that plot.

Consequently, the plaintiff engaged the services of a firm of surveyors by the name M/s "Wemo Consultant Planners and surveyors," who submitted to court a report dated 15th September, 2017. According to that report, the land occupied by the defendant lies within that registered to the plaintiff. However the author of this report was never produced for cross-examination, and the report does not disclose the date on which the boundary re-opening was done.

On the other hand, the defendant engaged the services of a firm of surveyors of their own, M/s "Integrated Surveys and Mapping Consultants," who produced and tender in court their report dated 21st August, 2017. By the consent of both counsel, the firm's Director, Mr. Waseni George testified as D.W.3 and stated that he is a land surveyor by profession, a civil servant working as a Principal Staff surveyor with the Ministry of works and Transport and also practices privately as the Director of Integrated Surveys and mapping Consultants.

He holds a Masters Degree in Geo-informatics obtained from ITC Netherlands in 1999. He also holds a bachelor's degree in Land Surveying from Makerere University obtained in 1997 and a Diploma in Land Survey obtained in 1990 from the Survey Training School in Entebbe. He received instructions from the defendant to re-open boundaries of the land in dispute. The defendant provided him with a copy of the land title. He then set upon the determination of the boundary of the land comprised in the title. This would enable him to know whether the defendant's land is within the boundary of the title or not.

Upon examination of the title deed, he took interest in the deed plan. The deed plan captures the plot number and provides information about the file which caused the survey (instruction to survey number) and finally provides the reference of the map sheets where the surveyed land falls. He was lucky to find the instruction to survey number FO 227. He began following the route of the survey. When he went to the office of the Commissioner Surveys and mapping, he discovered that a survey was undertaken around that area but when the file JRJ (Job record jacket) was received but the Commissioner, he bounced it because an error was discovered in the survey (RTF- Return to the field). The file was sent back to Arua, back to the surveyor. The nature of the error was that the map of the land was that only one side of the land appeared to have been surveyed and the rest of the land was left open. It had not been surveyed. The file was never re-submitted back to the Commissioner. As things stand now there is no survey information regarding that particular land in the survey reports.

He stated further that if the boundary is marked by a river, there should be lines with distances and if the actual survey of that area is not done because of the nature of the river, the lines will remain drawn in red. In this case there are no lines along the river and approval of the deed plan

therefore is questionable. He went on further to testify that in the deed plan referred to in the title, a map reference No. 4 and No. 9 of the area was cited. He happened to obtain those maps and looked at them. There was nothing which resembled or correlated to the land referenced in the title, on the map sheets. The plot was not indicated on the cadastral map yet in the title it is referred. The plot exists only in the title and nowhere else in the cadastral drawings. He displayed to a copy of map No. 4. He stated that had the title originated from the official map it would be reflected there. Since it was not on that map, he resorted to another method. He went to the ground to obtain information there and come back to the maps and the records.

He sent a survey team with specific instructions to go on ground and let Madira take them around what he claimed to be his land together with the neighbours and take measurements. They took 26 corners and recorded their coordinates. From those he tried to plot them at the Arua Land Office but the maps had been taken to Entebbe. He went to Entebbe, plotted the coordinates and got the results. What he got is that actually Mr. Madira's land which is approximately 50 acres falls within a surveyed plot which according to the record he found, belongs to "Kyara Wood fuel Cooperative Society" and that land measure 310 Hectares. Mr. Madira's land is part of those 310 Hectares. It is north of River Ora. It is edged in red on the cadastral map. Once land is subjected to the survey process, independent checks will reveal that the new survey was done on an existing plot. In case of overlap, it will be rejected. It is not possible for two titles to exist on the same piece of land. It is possible that the rejection of the survey was because of this problem, and could be the reason why the surveyor never submitted another report after the survey was queried. He informed Mr. Madira about his findings and prepared a report dated 21st August, 2017 reflecting those findings.

Under cross-examination by counsel for the plaintiff, he stated that the plot number of Kyara Cooperative Society is not indicated on the map he saw. There were eight surveyed plots in the neighbourhood out of which six have numbers. Why the two of them do not have numbers, requires the cartographer to explain. He did not obtain certified copies of the cadastral drawing sheet No. 19/4/4 which is attached to his report. Although the names of the filed team members he sent out to open the boundaries do not appear in the report and neither did they append their signatures to the report, his signature suffices as their supervisor.

In a joint memorandum of scheduling, the parties agreed on the following issues;

1. Whether the defendant is a trespasser onto the suit land.
2. What remedies are available to the parties?

In his final submissions, counsel for the plaintiff, Mr. Abbas Bukenya argued with regard to the first issue that Exhibit P. Ex. 1 is a certificate of title and it shows that the plaintiff is the owner and proprietor of the land. One of the key elements of trespass is ownership, the defendant did not have permission of the plaintiff and lastly that damage or loss was done. Although the plaintiff has never been in physical possession, he is relying on constructive possession. He cited section 59 of *The Registration of Titles Act*, arguing that a certificate of title is conclusive proof of ownership. He furthere cited *Kirigege Livestock Farm v. Reila Ranching Cooperative Society, H.C. Civil Appeal No. 6 of 1992* where it was held that a registered proprietor does not have to be in physical possession to sue in trespass. He also cited *Maya Mixed Farm Lt. v. Theuri [1973] EA 114*. He concluded that the first element had been proved therefore.

As regards the unlawful entry, he relied on the plaintiff's testimony that the defendant has a house thereon and cultivates the land. At the *locus in quo* visit, the court noted that it had not crossed the river and was thus still in Arua District. This was confirmed by the Chairperson of the area. The court was able to see all the features constituting trespass inclusive of the house of the defendant. None of the defendants' activities was located on the other side of the river. They are confined within the land the plaintiff owns. In the pleadings, paragraphs 9 and 12 of the written statement of defence, the defendant alleges that he cannot be evicted without due compensation. All this irresistibly points to the fact that the acts of the defendant are on the disputed land comprised in exhibit P.Ex.1. This is an implied admission that the disputed land to the extent of 50 acres, falls under Exhibit P.Ex.1. and that it is located in Lozoki village.

In his submission, section 16 and 19 of *The Evidence Act* concerns admissions and under section 28 of *The Evidence Act*, these admissions create an *estoppel* without any further proof required under section 28 and 57 of *The Evidence Act*. In *Haji Asumani Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Apeal No. 7 of 1995* it was held that there can be no better evidence against a party than an admission by such a party. In as much as the defendant has a counterclaim, in view

of the said admissions, a court of justice cannot give judgment in favour of the defendant contrary to evidence that disproves his claim. That was held in John *Naggenda v. The Editor of Monitor Publications and another, S. C. Civil Appeal No. 5 of 1994*.

He continued by arguing that the testimony given by D.W.4. ought not to be relied on to disentitle the plaintiff of his proprietary ownership in favour of the defendant for the following reasons; title is conclusive evidence at to ownership. The witness having put all his findings in the report, he is barred under the provisions of sections 90 - 93 *The Evidence Act* from using oral evidence to vary or add to what is not contained therein. He also ran short of having a formal confirmation or evidence that the cadastral map he was relying on to demonstrate that the defendant's land is outside that of the plaintiff did not have any feature by way of a stamp or signature originating from the department of mapping and surveys in Entebbe, which two features would have helped to take judicial notice of the document, nor was the cadastral map certified in any way leave alone that the witness himself concedes that he never went to the ground, let alone was any evidence led to show that any of the members of the team of surveyors he sent onto the ground were named in the report. None of them sanctioned the report. The report lacks authenticity.

As regards the extent of trespass by the defendant, he relied on the testimony of the plaintiff to the effect that it extends to fifty acres. The 50 acres mentioned by the plaintiff coincide with the 50 acres mentioned by D.W.4. On the issue of remedies, the plaintiff testified that if he was to rent out the 50 acres it would earn him 100,000,000 /= per annum. He prayed that the court awards the plaintiff mesne profits from 2004 when he discovered the trespass after he had obtained registration. Whereas the defendant concedes to have come to the suit land in 2003 after purchase of the same, Asio Matrio D.W.2 said the defendant only came to the land in 2004 and as guided by the scheduling notes, the defendant's brief facts in para 3, the defendant was only handed over the suit land in 2004 after accomplishing full payment. This explains why the mesne profits should be calculated as from 2004.

Exhibit D. Ex. 2 the sale agreement in favour of the defendant is dated 10th June, 2004. It is the same day that the final payment was done. All that read together with the scheduling notes

indicates that not even an equitable interest passed to the defendant until June 2004. Exhibit P. Ex. 1 shows that the respondent got registered on 2nd April, 2004 before the alleged interest in the suit land could pass to the defendant. This is notwithstanding that there was already a running lease for 49 years from 1983. Going by the dates, it is evident that the defendant is a trespasser. This is further evident in the summary of evidence attached to the defendant's defence by which he was seeking alternative compensation.

The defendant in his defence and counterclaim does not deny that the plaintiff did acted bonafidely when he got registered. If there were any irregularities by the previous proprietors, they cannot be visited to the plaintiff and do not constitute fraud which would justify a cancellation of title. On the contrary the plaintiff is saved from those irregularities if any by the provisions of section 59 of *The Registration of Titles Act*. D.W.4 said that in respect of natural boundaries a red pen is used. To that effect he agreed to that position but when referred to exhibit P. Ex. 1 The original title has red markings along the river bank. But there are no corresponding distances. What we have in the title deed is an estimate of the total acreage. D.W.4 when asked whether the properties of the defendant are beyond the river or not he said that they do not cross the river. According to the testimony of the plaintiff and what was seen at the locus these activities do not cross the river. On basis of all the above, he prayed that since there is no fraud imputed, the reliefs be granted as prayed.

In response, counsel for the defendant, Mr. Jimmy Madira (the defendant's namesake) submitted in respect of the first issue that the plaintiff has premised his claim on the certificate of title, which has not been proved. Indeed a certificate of title is conclusive evidence but the certificate before court is not the one envisaged under that law. Section 59 *Registration of Titles Act* envisages a title that specifies the dimensions of the land to which it relates. The defence has shown that the acreage of the land is not definite, the dimensions are not known and what is contained in the deed plan is an estimate of the land. Estimates cannot constitute land for actual land registration. The boundaries must be closed. They relied on a natural feature which is a river and it does not specify the various points. The river does not have a specific permanent course. The boundaries were left open and this confirms the finding that the survey was incomplete and

cannot be used for a title. The plaintiff is relying on a document that is un-reliable as a certificate of title.

It has been held before that trespass is enforcement of possessory rights than proprietary rights. The plaintiff and the defendants have proved that the plaintiff was never in possession. He has never acquired vacant possession. He acquitted the land before making a physical inspection of the land. Had he done so he would have found people in possession. The suit land lies outside that of the purported title. The defendant is not on the suit land. He has never been in possession and therefore he is not entitled to the remedies sought. On the other hand the defendant has established his equitable claim. He paid valuable consideration and has been in possession of the same land and it is the plaintiff who has denied him quiet enjoyment by threatening to evict him. The counterclaim is for a declaration of ownership, an injunction against the plaintiff's threats of eviction and damages for the inconvenience. Physical possession had been given to the defendant earlier that the plaintiff's acquisition. The defendant has never enjoyed quiet enjoyment of the land. Counsel concluded by stating that the plaintiff has not proved his claim to the required standard and his suit should be dismissed with costs.

This being a civil suit, the burden of proof lies with the plaintiff. To decide in his favour, the court has to be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that the more probable conclusion is that for which the plaintiff contends, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*). The burden of proof is on the plaintiff to prove on the balance of probabilities that he has a better claim to the land than the one made by the defendant.

First issue: Whether the defendant is a trespasser onto the suit land.

Trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). It is an action for enforcement of possessory rights where if remedies are to be awarded, the plaintiff must

prove a possessory interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry upon it. It is an invasion affecting an interest in the exclusive possession of property. The cause of action for trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful interference. Therefore an action for trespass may technically be maintained only by one whose right to possession has been violated. The gist of a suit for trespass to land is violation of possession, not a challenge to title. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised in the sense that the defendant should not have had any right to enter onto plaintiff's land. In order to succeed, the plaintiff must prove that; he or she was in possession at the time of the defendant's entry; there was an unlawful or unauthorized entry by the defendant; and the entry occasioned damage to the plaintiff.

Although characterised as an action for trespass to land, the suit before court in these proceedings is in the character of an action for recovery of land, since in his own admission, the plaintiff has never been in physical possession of the land in dispute. He seeks to enforce ownership rights as opposed to possessory rights. A suit for recovery of land is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership of the land. An out-of-possession owner of land may on the basis of constructive possession, even with no physical contact with the land, may recover for an injury to the land by a trespasser which damages the ownership interest.

Trespass when pleaded as part of a suit for recovery of land, requires the plaintiff to prove either actual physical possession or constructive possession, usually through holding legal title. There must have been either an actual possession by the plaintiff at the time when the trespass was committed, either by himself or by his authorised representative, or a constructive possession with the lands unoccupied and no adverse possession. In essence, an action for recovery of land is founded on trespass involving a wrongful dispossession. It is the mode by which conflicting claims to title, as well as possession, are adjudicated. Any person wrongfully dispossessed of

land could sue for the specific restitution of that land in an action of ejectment. An action for the recovery of land is the modern equivalent of the old action of ejectment (see *Bramwell v. Bramwell, [1942] 1 K.B. 370*). It is action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title.

Being a suit for recovery of land, it was critical for the plaintiff to prove the validity of his title since actions for recovery of land are premised on proof of a better title than that of the person from whom the land is sought to be recovered. Ownership comprises of a number of rights, and among these rights one of the most significant right is possession of property. Possession is *prima facie* evidence of ownership and the law always protects the right to possession. If someone is in possession and is sued for recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them (see see *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*). Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. Consequently, the plaintiff must succeed by the strength of his or her own title and not by the weakness of the defendant's.

In his submissions, counsel for the plaintiff relied heavily on section 59 of *The registration of Titles Act* to advance the argument that since the plaintiff is the registered owner of the land in dispute (se exhibit P. Ex.1), then he has conclusively proved his title. Counsel for the defendant differs and submits that exhibit P. Ex.1 is not the type of title envisaged by section 59 of the RTA and for that reason it cannot provide conclusive proof of the plaintiff's ownership of the land in dispute. This controversy strikes at the very heart of the Torrens system.

Historically, confirming ownership of land required one to check the documents transferring title to the land, for several prior transactions. This was known as the Deed System. Under that system, even though a person appeared to be the owner of land, the purchaser was not entitled to rely on the registry and had to confirm that the person selling the property was the rightful owner of the property. In the Torrens System, a purchaser does not need to search back through each

previous transfer. Instead, the purchaser can rely on whatever name shows on the Land Title at the Land Registry. If the title deed shows a person as the owner, the purchaser can by virtue of section 59 of *The registration of Titles Act* buy the property from that owner without worrying about how that person became the owner. Under the Torrens System, security of title is based on the four principles of; (i) indefeasibility (cannot be impeached), (ii) registration (title is by registration), (iii) the curtain principle (abolition of notice or exhaustive inquiry), and (iv) assurance (compensation upon detrimental reliance). Its key feature is that it captures all interests in a property, including transfers, mortgages, leases, easements, covenants, and other rights in a single Certificate of Title which, once registered with the Commissioner of Land Registration, it is guaranteed correct by the State. In other words, the register is conclusive evidence of ownership. Thus, there is no need to search behind or beyond the Certificate of Title to ensure proven ownership of the land.

Under the principle of indefeasibility, a title that is indefeasible cannot be defeated, revoked, or made void. The technical meaning of indefeasibility is indestructibility or inability to be made invalid. The person who is registered as proprietor has a right to the land described in the title, good against the world. There are a limited number of exceptions to this principle of indefeasibility and these are listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*; which essentially relate to fraud or illegality committed in procuring the registration. The concept of indefeasibility is, however, not defined in the Act. An explanation of the concept can be found in *Frazer v. Walker [1967] AC 569* as: the expression is a convenient description of "the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.

The essential idea of the Torrens System is to individualise property in land by determining and specifying its physical and juridical components. *The Registration of titles Act* creates a *Legal cadastre* (a parcel-based description of interests or rights in real property supported by titles or deeds, and registration). Although "Cadastre" is defined in *Webster's Third New International Dictionary* as "an official register of the quantity, value, and ownership of real estate used in apportioning taxes," and in plain English, a cadastre is an official register showing details of

ownership, boundaries, and value of real property in a district, made for taxation purposes (see *Collins English Dictionary* 1979), in Uganda, the concept of a cadastre is hardly used for purposes of taxation but is rather applied as a legal or juridical cadastre designed to; define property rights, describe the extent (spatial, sometimes temporal) of property rights, support land transfer, provide evidence of ownership (e.g., using land as collateral), provide a basis for land administration and management. The Cadastre answers the needs of the fundamental registration concerning demarcation and establishment of rights in land.

The juridical cadastre is conceived as a system for recording and retrieving information concerning the tenure interests in the land that, as with the fiscal cadastre, requires the identification of the people holding an interest in the land and the location of those interests. However, the juridical cadastre requires a more rigorous delineation of these interests in order to provide for the secure transfer of title to the land. The Juridical cadastre then is a record of interests in land, encompassing both the nature and extent of these interests. An interest or property right in land may be narrowly construed as a legal right capable of ownership or more broadly interpreted as any uniquely recognized relationship among people with regard to use of the land. The cadastral system is a combination of people, technical resources, structure, and organized procedures that results in; - the official recording of data pertaining to the initial delimitation of cadastral parcels and their subsequent mutation; the official recording of data pertaining to all recognized tenure interests in these parcels; the official recording of other parcel-relatable data; and the subsequent storage, retrieval, dissemination, and use of these data.

An understanding of the nature and extent of interests in land requires a spatial setting. The relative complexity of rights and interests in land also requires accuracy in the measurement and representation of the spatial extent of rights and interests and in the institutions associated with measurement and representation of land. Therefore a basic component of the juridical cadastre are the cadastral drawings delimiting the physical boundaries of land ownership. The cadastral survey system governs the creation and mutation of parcel boundaries. The resultant cadastral system is concerned with information and data about human division of the land into parcels for purposes of ownership and use. The cadastral system, as a geographic-information system that

employs the proprietary land unit (the cadastral parcel) as the basic reference unit for gathering, storing, and disseminating information, has three basic components. These are as follows:

a) The cadastral parcel, defined as a continuous area of land within which unique, homogeneous interests are recognized. It is defined three dimensionally in recognition of subjacent and superjacent interests and in time.
b) The cadastral record, the source of graphical and/or alphanumeric information concerning both the nature of the interests and the extent of those interests.
c) The parcel index, the system for relating parcels and records

To achieve this, the system maintains both micro-level and macro-level spatial records of surveyed parcels of land. At the macro level are Large-scale base maps which locate the major physical features of the landscape usually at scales of from 1:500 to 1:25,000. At the micro level is the cadastral overlay and the deed plan which provide a pictorial representation of parcel boundaries. The cadastral parcel then constitutes an unambiguously defined unit of land within which unique property interests are recognised. The cadastral boundaries are lines connecting points that have unique identities and records, through which they may be located on the ground. Accurate placement of these points on the cadastral drawing improves the accuracy of the definition of the boundary, which must be documented on the deed plan. The purpose of accurate plotting is simply to make the deed plan more useful in locating the land on the parcel of land to which it relates, on the ground. Land subdivision requires surveying, and associated field work, mapping, and recordation must follow prescribed standards and so do the resultant descriptions. Parcel records are associated with individuals and legal entities claiming an interest to a parcel of land. As a result, the juridical cadastre is a routine file of parcel-related data designed to meet special purposes with efficiency and timeliness, especially valuation and title.

The delineations of property boundaries by field surveys must be approved by a public office. Any parcel-identifier system can only work if one agency has the sole authority for assigning identifiers. This preferably should be that agency responsible for land registration(for example section 152 of *The Registration of Titles Act* requires depositing with the registrar, a plan of registered land that has been sub-divided for the purpose of selling it in allotments). The role of

the public office is to enforce standards for cadastral surveys formulated with respect to identifiers for all boundary points, monumentation (materials, dimension, reference points), information required on monuments (surveyor's name, monument number, dates), investigation of survey errors and their correction, monitoring of surveyors' work performance, verifying the topographic works done in the field, check the spatial accuracy of location data, ascertainment of data required in the record of each boundary segment (identities of end points and identities of parcels bounded), plans or plats of survey (seals, detail, cartography, approvals, materials), field books, and so on. Ties of property boundary surveys to the geodetic coordinate system (concerned with very high precision measurement of the earth's surface for the determination of geographic meridians of latitude and longitude) being essential in modern times, it is not unusual for property corners to be required to be located with typical accuracies, for example of 1–2 ft in rural areas or 0.1 ft in urban areas. The recording of survey plans is important for conveyance or subdivision. Indexes are created and maintained that facilitate future access to all the documents used to locate and describe property corners and monuments shown on the deed plans, i.e., that the documentation is keyed to parcel identifiers, point identifiers, or some other references that appear on the deed plan. A valid title deed should therefore on the face of it be shown to have been based on a reliable survey.

The physical determination of a parcel of land results in the recognition of its precise situation, of its exact limits, of its real dimensional appearance. The legal determination is obtained by reference to the principles in *The Registration of Titles Act* as reflected on every title of property so constituted, permitting to know quickly thus and easily, at all time, its origins, history and legal situation. Section 59 of *The Registration of Titles Act* is intended to make chains of title easier to research. The title deed is a reflection of both title and boundary that is used in determining the physical and juridical components of the land to which it relates. Apart from defining ownership, a land title therefore should provide a definitive description of a specific parcel of land, including a description of its location and boundaries.

The legal surveying component of the cadastral survey system generally entails a two-phase operation of (a) gathering, interpreting, and weighting pertinent information and (b) spatially referencing the information. Accuracy specifications are necessary for both of these phases.

Survey methods have over time evolved from the use of pacing, Gunter's chains, measuring wheels, circumferenter, Kater's compass where approximation sufficed to steel bands, invar tapes, and later to Electronic Distance Measurement (EDM) equipment, and subsequently Global Positioning System (GPS) devices, each in turn being capable of improved efficiency and greater accuracies of measurement than preceding forms. Although cadastral survey standards have for the most part been based upon the capabilities of existing technology and existing maps have been modified in response to technological change, including cadastral maps digitalisation, it was not demonstrated to me that curvilinear lines have been used before or adopted as acceptable modes of delineating parcels of land. In our system, boundaries are commonly described by points or corners and straight lines in between. There is only one exception; with regard to the ambulatory lines of "natural" boundaries formed by lakes, rivers, etc. which are permitted by sections 154 and 155 of *The Registration of Titles Act*.

From the cartographic perspective, indefeasibility under the Torrens system is a relative concept. It refers to the fact that if a title is examined or attacked at a given point of time, it cannot be defeated or annulled. It does not mean that the title can never be defeated, exceptions do apply. Registration does not cure the defects in a title deed but acts merely as a root of title. It is commonly thought that once a title is recorded on the register, not only is the title created by the act of registration, but upon registration *The Registration of titles Act* will guarantee the validity of that title and confer upon it an immunity from any attack. While it seems to be universally acknowledged that indefeasibility will result from the registration of title, the title should be definite and complete in its physical and juridical components. Whereas the juridical component is satisfied by a description of the tenure (the mode of holding or occupying the land) and the holder, registerable interests in land being parcel-oriented, the deed plan is essential or critical for spatial representation of the physical extent of the proprietary interest it represents.

The deed plan is a representation, on a smaller scale, of ordnance survey maps or drawings in the parcel indexing records kept by the Land Registry, that illustrate the spatial extent on the ground, of the title so created. It represents the spatial limits of the estate or interest by delimiting the land which is the subject of the juridical proprietary interest. In other words, the physical limits of the proprietary rights encompassed in the title, thus defining the physical limits on the ground,

of the land constituting the subject-matter of the proprietary rights. Since a cadastral map displays how boundaries subdivide land into units of ownership, proprietary rights under the Torrens system cannot exist outside or independent of well defined parcels of land, in spatial terms. In a situation where the status of measurements of preceding times is undermined by alternative forms of evidence produced by modern technology of "what the land boundary was intended to be, and where it was intended to be located," measurements and mathematics do not always provide the correct answers to the precise boundaries of the parcel of land in question.

Whereas precision would be desirable, it is of the utmost importance to understand that deed plans do not show the exact (or the precise) line or position of the boundaries of the land in the title but show their general position, within an acceptable margin of error. A deed plan may be subject to distortions in scale and measurements scaled from the deed plan may not match the exact measurements between the same points on the ground, hence the provision for rectification under sections 156 and 157 of *The Registration of Titles Act*. This may explain why the State guarantee of ownership does not extend to the boundaries of the land shown in a title being correct (see section 180 of *The Registration of Titles Act*). Moreover section 154 and 155 of *The Registration of Titles Act* allows for description of land in a certificate of title to be done by way of abuttals, including features such as lakes, rivers and creeks, "both in the body of the certificate and in the plan thereon, or in the plan only." Thus marked boundaries are *prima facie* evidence of the legal extent of ownership of land and may be marked by natural boundaries such as rivers and creeks. Ambulatory boundaries cannot be marked on the ground and are not fixed in one place but can change position over time through slow and imperceptible accretion or erosion of the described feature. If the description of a boundary is ambiguous or otherwise uncertain or is in conflict with the occupations, courts may settle the position of the disputed boundary.

The title deed presented by the plaintiff, exhibit P. Ex. 1, satisfies both the juridical and spatial components of title in that it defines the tenure as leasehold, specifies the duration as 49 years and identifies the plaintiff as registered owner. On the spatial aspect, although the deed plan enclosed therein is delineated on one side not by straight lines, but by a red ambulatory line along the course of River Oraa, this according to sections 154 and 155 of *The Registration of Titles Act,* is acceptable as a proper description of land in the certificate of title. It should also be

noted that there is a presumption at common law that where land is described as being bounded by a non-tidal river or stream, ownership extends to the middle line of the water (the *ad medium filum acquae* rule), unless there is a clearly defined intent to the contrary (see *Holmes v. Bellingham, (1859) 144 ER 843; Halsbury's Laws, 4th ed., 2004 Reissue, Vol 21 (Highways, Streets and Bridges) at paras. 217 – 218; Central London Railway v. City of London Land Tax Commissioners [1911] 1 Ch 467* and *St. Edmundsbury v. Clark (No. 2) [1973] 1 WLR 1572*). Hence, although the lines are not specifically delineated on the deed plan, they are ascertainable by evidence.

Consequently, for as long as the physical boundaries of the parcel of land can be ascertained on the ground by natural boundaries (e.g. rivers, cliffs), monumented lines (boundaries marked by survey or other defining marks, natural or artificial), old occupations, long undisputed Abuttals (a described “bound" of the property e.g. a natural or artificial feature such as a street or road), statements of length, bearing or direction (metres, feet or other measurements in a described direction), inaccuracies in the deed plan will be inconsequential and may not invalidate the title. If the description of a boundary in a deed plan is imprecise or is in conflict with the actual physical occupation, courts may settle the position of the disputed boundary using any two or more of the above boundary features in the determination of a true boundary position, giving such weight to either of them as the circumstances of the case may warrant. Courts have consistently ruled in favour of long, acquiescent and undisturbed occupation dating to the time of survey as the most convincing evidence of a boundary between properties.

In the instant case, D.W.4 testified that "if the boundary is marked by a river, there should be lines with distances and if the actual survey of that area is not done because of the nature of the river, the lines will remain drawn in red. In this case there are no lines along the river and the approval therefore is questionable." His attempt to refute the validity of the deed plan advances a reason that is inconsistent with the provisions of sections 154 and 155 of *The Registration of Titles Act.* He testified that since the red line delimiting the boundary of the land along River Oraa is ambulatory, the survey was never completed. To the contrary, the deed plan in exhibit P. Ex.1 is dully approved by a one Mr. Latuke for the Commissioner of Lands and Surveys on 12th October, 1983, whose authority to do so has not been disproved. Moreover, section 90 of *The*

Evidence Act, when any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of that document, which purports to be in the handwriting of any particular person, is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. The argument presented by D.W.4 therefore cannot of itself form the basis of invalidating the plaintiff's title.

The *ad medium filum acquae* presumption in respect of ambulatory lines may be rebutted, but it is not rebutted (i) by the land being described as containing an area which can be satisfied without including half the river bed; (ii) by the land being described as bounded by the river bed; (iii) by the land being referred to as coloured on a plan, whereon the half of the river bed is not coloured; (iv) by the grantor being owner of the land on both sides of the road or river; or (v) because subsequent events not contemplated at the time of the grant show it to have been very disadvantageous to the grantor to have parted with the half of the road or river bed, but which if contemplated would probably have induced him to reserve it (see *Giles v. County Building Constructors (Hertford) Ltd (1971) 22 P&CR 978 at 981 – 982*). In any event, the dispute between the plaintiff and the defendant is not related to the location of the boundary along this river, hence any ambiguity, uncertainty or imprecision occasioned by the ambulatory nature of that line has nothing to do with the defendant's disputed occupancy.

D.W.4 further refuted the validity of the plaintiff's title on basis of an opinion he formed after examining records at the office of surveys and mapping and Entebbe and the Land Registry in Arua. Whereas sections 75 and 76 of *The Evidence Act* authorise court to receive and rely on certified copies of public documents in proof of the contents of the public documents or parts of the public documents of which they purport to be copies, the ones attached to the report furnished by this witness, exhibit D. Ex. 3, are uncertified. The authenticity and admissibility of those documents was not proved. In *Sarkar's Law of Evidence*, 17th Edition, 2010 at p. 1258, it is noted that "the infirmity of expert evidence consists in this that it is mostly matters of opinion and is based on facts detailed by others, or assumed facts..... An expert is fallible like all other witnesses and the real value of his evidence lies in the logical inferences which he draws from

what he has himself observed, not from what he merely surmises or has been told by others." An expert's evidence therefore must always be received with caution.

In forming his opinion, D.W.4 relied on records and information he did not compile himself but which was complied by others. When authenticity of the source cannot be guaranteed, any purported conclusions would be inconclusive. Whereas an expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion, provided (i) it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion, and (ii) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness (see, *Hambsch v. New York City Tr. Auth., 63 N.Y.2d 723, 480 N.Y.S.2d 195, 469 N.E.2d 516* and *Wagman v. Bradshaw, 292 AD2d 84, 85, 739 N.Y.S.2d 421*), in the instant case in absence of certified copies, the court has not been availed an opportunity to independently verify the accuracy of these sources. Therefore, while an expert witness' testimony of reliance upon out-of-court material to form an opinion may be received in evidence, provided there is proof of reliability of that source, testimony as to the express contents of the out-of-court material is inadmissible.

It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability (see *Wagman v. Bradshaw, 292 AD2d 84, 85, 739 N.Y.S.2d 421*). Accordingly, the drawing purported to have been obtained from the Entebbe Survey and Mapping Department attached to exhibit D. Ex. 3, was not shown to be sufficiently reliable to permit D.W.4 to rely upon it as an out-of-court material “of a kind accepted in the profession as reliable in forming a professional opinion.”

Plainly, it is wrong to permit an expert witness to offer testimony interpreting surveys and mapping records compiled by others, without the production and receipt in evidence of the original records thereof or properly authenticated certified copies. The danger and unfairness of permitting an expert to testify as to the contents of inadmissible out-of-court material is that the testimony is immune to contradiction. Without receipt in evidence of the original or certified copies of those records, the plaintiff against whom the expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the records, through his own expert witness. The best evidence rule is intended to eliminate or reduce the spectre of deceit or perjury, potential inaccuracies attendant to human recall, or errors in crafting or recording a writing.

When an expert witness relies on a source of information whose validity has not been proved before court, it is unsafe for the court to rely on the conclusions drawn by the expert. I find the opinion formed by D.W.4. to the effect that the survey of this land was rejected and was never completed thereafter, is testimony as to the express contents of the out-of-court material, hence inadmissible and it is inconsistent with the deed plan presented in the title deed. Inasmuch as such out-of-court material is inadmissible, logic dictates that testimony as to its contents is also barred from admission into evidence. Opinion evidence is only an inference drawn from data, in this case of a secondary type. Such opinion cannot get precedence over direct eye-witness testimony or physical evidence before court unless the inconsistency between the two is so great as to falsify the oral or physical evidence, which it has not in the instant case.

Expert evidence is opinion evidence and it cannot take the place of substantive evidence. Expert opinion, based on unreliable secondary evidence, is nothing more than conjecture. In the circumstances, that aspect of the survey report (exhibit D.Ex.3) produced by D.W.4, is rejected. I therefore find that the plaintiff has proved on the balance of probabilities that he is the registered proprietor of land comprised in LRV 1320 Folio 1, at Lozoki village, Arivu Parish, Vurra sub-county in Arua District and that its validity has not been impeached by the defendant. That being so, the plaintiff is in constructive possession of the land to which it relates and has the capacity to sue for recovery of the land from any one in wrongful possession.

While the plaintiff claims the defendant unlawfully occupies part of his land, the defendant refutes this and contends that the land he occupies lies outside the boundaries of the land claimed by the plaintiff as comprised in his tile. Determination of the actual location of the defendant's occupation required the opening of the boundaries of the plaintiff's land. The actual location of any boundary is subject to the evidence of an on-ground assessment of the facts pertaining to the matter, and is best undertaken by a Registered (or Licensed) Surveyor. Surveying is the science of the accurate determination of the relative positions of points above, on, or below the earth's surface for the planning and efficient administration of the land, the sea and any structures thereon. While topographic surveying, involves the mapping of the earth's surface by aerial, photogrammetric or ground surveys, or a combination of these methods, land (or cadastral) surveying, deals with the determination of land boundaries for legal purposes and land ownership. Determination of the actual boundaries of any parcel of land ordinarily harnesses aspects of both types of survey. It is for this reason that court directed the District Staff surveyor to undertake this exercise, which he declined to do.

In lieu thereof, the plaintiff presented a survey report indicating that the land occupied by the defendant, measuring approximately 50 acres, lies within the boundaries of the plaintiff's leasehold title. This report cannot be relied upon since it's author was never called to testify and be subjected to cross-examination. On his part, the defendant produced a survey report though D.W.4 which indicates that the land occupied by the defendant is part of 310 hectares designated to Kyara Wood Fuel Cooperative Society and not the 520 hectares comprised in LRV 1320 Folio 1 belonging to the plaintiff. However, during his examination in chief, he explained further that once land is subjected to the survey process, independent checks will reveal that the new survey was done on an existing plot, in case of overlap and it will be rejected. Because it is not possible for two titles to exist on the same piece of land, it is possible that the rejection of the survey was because of this problem (of overlapping).

The testimony of D.W.4 therefore alluded to his discovery of an overlap between the 310 hectares designated to Kyara Wood Fuel Cooperative Society and the 520 hectares comprised in LRV 1320 Folio 1. He opined that this could have been the reason why the initial survey of the latter was rejected, which opinion the court has previously rejected for the reasons advanced

before. Although unreliable to support his opinion of the unproved rejection of the survey, this finding of overlap however suffices to establish the fact that the land occupied by the defendant is indeed within the boundaries of LRV 1320 Folio 1. This is corroborated by the observation of court made at the locus since the land occupied by the defendant is on that side of Oraa River that lays within Arua District. On that basis, I find that the plaintiff has proved on the balance of probabilities that the land occupied by the defendant forms part of that constituted in LRV 1320 Folio 1.

Whether or not the defendant's occupation constitutes a trespass depends on whether at the time the defendant entered into occupancy, the plaintiff had acquired title to the land. Exhibit P. Ex. 1 shows that the plaintiff became registered proprietor of the land on 2nd January, 2004. Whereas in his testimony the defendant claimed to have entered into occupation of the land sometime in October, 2003, his agreement of purchase, exhibit D. Ex. 2 is dated 10th June, 2004. D.W.3 Okua Abraham, a witness to that agreement, testified that the defendant entered into occupation of the land in June, 2004, some time after execution of that agreement. In his own written statement of defence at paragraph 5, the defendant stated that it is after he paid the last instalment on 10th June, 2004 that the land was handed over to him. In light of all the evidence, I am inclined to believe and find as a matter of fact that the defendant entered into possession of the land in dispute some time after 10th June, 2004, five months after the plaintiff had acquired title to the land. There is no evidence that he sought the consent or obtained authorisation of the defendant or had other lawful cause to do so.

To justify his entry thereon, the defendant claimed to have purchased the land from its customary owners at the time. The plaintiff refutes this and states that at the time he purchased the land, it was vacant. It is only three years later, on or about 27th April, 2007, when he together with a surveyor and the Auctioneer went to the land for the latter to hand it over to him, that he was prevented by people who had encroached on the land within the last three years or so following his purchase of the land. The persons from whom the defendant purchased the land therefore were not customary owners of the land. Even if they were, section 35 of *The Land Act* required them to give the first option of purchase to the plaintiff as the registered owner of the land. There is no evidence that this was done.

Section 35 of *The Land Act* creates a statutory right of pre-emption vested in the registered owner of land. It is a right, also called a "first option to buy," to acquire an existing or newly coming into existence interest in land before it can be offered to any other person or entity. A first option may also mean a right of first refusal. The offer contemplated by the provision must be an offer which names a price (see *Smith v. Morgan [1971] 1 WLR 803* and *Manchester Ship Canal Co. v. Manchester Racecourse Co. [1901] 2 Ch 37*). The obligation on the vendor, should he or she wish to sell, is an obligation to make an offer to the purchaser at the price and at no more than the price at which he or she is, as a matter of fact, willing to sell. If that offer is accepted by the registered proprietor, then there will be a purchase at a figure which has been agreed upon. If the offer is rejected, then *cadit quaestio* and is referred to the mediator. The seller must, of course, act bona fide in defining the price to be included in the offer. The basis of the right of the first refusal must be the current offer to sell of the seller or offer to purchase of any prospective buyer. It is only after the grantee fails to exercise its right of first priority under the same terms and within the period contemplated, could the owner validly offer to sell the property to a third person, again, under the same terms as offered to the grantee (see the Court of Appeals of Philippines decision in *Parañaque Kings Enterprises, Inc. v. Court of Appeals, G.R. No. 111538, February 26, 1997, 268 SCRA 727*).

In the instant case, even if it had been proved that the persons from whom the defendant purchased the land were its customary owners, the proof of which he has not furnished to this court, it was mandatory that before entering into a contract to sell the land an incompatible with the plaintiff's pre-emptive right, such as that which they entered into with the defendant (exhibit D.Ex.2), they had to offer to sell the land to the plaintiff first at a specified price, which they did not do. This pre-emptive right is a statutorily imposed restraint on alienation. An agreement of sale executed in favour of a third party who by virtue of section 35 of *The Land Act* cannot be deemed a purchaser in good faith, and which is in violation of the statutory right of first refusal, is invalid. Annulment of the agreement of sale is the proper remedy for a sale in contravention of this pre-emptive right. Consequently, exhibit D.Ex.2, being in contravention of a mandatory statutory restraint on alienation, is void and incapable of vesting any interests in the land unto the defendant.

In conclusion, the plaintiff has proved on the balance of probabilities that by virtue of being the registered proprietor of land comprised in LRV 1320 Folio 1, at Lozoki village, Arivu Parish, Vurra sub-county in Arua District from 2nd January, 2004 to-date, he was in constructive possession of the land at the time of the defendant's entry; there was an unlawful or unauthorized entry by the defendant onto that land which occurred during or around June 2004 and the defendant has remained in occupation of approximately 50 acres thereof; and the entry occasioned damage to the plaintiff since he has been denied access and has been unable to put that part of his land to use since then. The first issue is therefore answered in the affirmative. The defendant is a trespasser on the plaintiff's land.

Second issue: <u>What remedies are available to the parties?</u>.

The defendant presented a counterclaim by which he sought a declaration that the defendant is in rightful possession of the land, a permanent injunction and an ward of general damages for the harassment he has suffered at the hands of the plaintiff, which has denied him quiet enjoyment of his land. Having found in resolving the first issue that the defendant is a trespasser on the land, he is not entitled to any of the reliefs claimed din the counterclaim. Consequently, the counterclaims is dismissed with costs to the plaintiff.

On the other hand, the plaintiff sought a declaration that the defendant is a trespasser on the land. Following the findings made in resolving the first issue, it is accordingly declared. He sought an order of vacant possession and since it has been found that the defendant has no basis for retaining possession of the land, that order too is granted. To prevent further acts of trespass by the defendant on this, a permanent injunction hereby issues against him, his servants and persons claiming under him restraining him from continued acts of trespass onto the plaintiff's land.

Regarding the plaintiff's claim for mesne profits, 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 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 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 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 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 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 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 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 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 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 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] 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 possession.

Examples of the application of some of the above principles may be found in cases such as *Jegon v. Vivian, (1871) LR 6 Ch App 742,* a case involving unauthorised mining of land. There it was held that although the value of his land may not have been diminished by the trespass, the plaintiff was entitled to recover damages equivalent to what he would have received if he had been paid for a wayleave. The financial position of the plaintiff should not be different, according to the accident of whether it intercepted the minerals, or discovered their loss only after they had been sold by the defendant. While on the other hand, in *Ramzan v. Brookwide Ltd, [2011] 2 All ER 38*, the plaintiff owned a flying freehold room butting into the defendant's property. While the plaintiff's property was unoccupied, the defendant broke through into the room, blocked off the door to the plaintiff's property, and included the room in the flat it then let. The case was transferred to the High court to consider issues of principle on the award of damages, including exemplary damages. The Court decided to award mesne profits, representing the actual loss to the plaintiff, on the basis of applying an annual percentage of 4.5% to the agreed capital value of the expropriated property.

In *Horsford v. Bird, [2006] UKPC 3 (Privy Council Appeal No 43 of 2004*), the respondent built a boundary wall and fence which encroached to a considerable extent on the appellant's land, and the expropriated land became part of the respondent's garden. In awarding mesne profits to the appellant, the Privy Council opined that the appellant was entitled to recover damages representing not only the value of the undeveloped land but also the value of the expropriated land to the respondent. The Privy Council concluded that an award limited to the bare value of the expropriated land does not represent due compensation to the appellant. Lord Scott opined that mesne profits should be assessed on a yearly basis as a percentage of the capital value of the piece of land in question. In His Lordship's opinion, an annual rate of 7.5 per cent of the capital value would represent reasonable mesne profits.

One broad principle governing liability for mesne profits that emerges from available authority is that the court may be guided by profits which the person in wrongful possession of property

actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but should not include profits due to improvements made by the person in wrongful possession. 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. 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.

Determination of the quantum of mesne profits on the basis of rental value of the property, despite being a correct test and a relevant factor, it is not decisive of the matter. While assessing the quantum, factors such as location of the property, comparative value of the property, condition of property in question, profits that are actually gained or might have been gained from the reasonable use such property are generally taken into consideration by the courts. The key criteria for the calculation of mesne profits is not what the owner loses by the deprivation of possession but profits should be calculated on the basis of what the person in wrongful possession namely, the defendant had actually received or might with ordinary diligence have received therefrom. In *Waters and ors v. Welsh Development Agency, [2004] 1 WLR 1304*, the method adopted was the “open market value" approach where compensation was assessed by reference to the price a willing seller might reasonably expect to obtain from a willing buyer and consideration given to the enhanced value of the land because of its location or attraction to a particular buyer or class of buyers or its value to an adjoining landowner.

In the instant case, the area in dispute as seen at the *locus in quo* visit has large expanse of undeveloped land. The court was not furnished with evidence of current values and market trends within the locality, regarding land under this type of user. It is not possible to determine the demand to purchase land in the area so as to take advantage of the rental income that is

envisaged. I bear in mind too that there is no evidence that the plaintiff had intentions of developing it. He led no evidence as to what precisely he would have done with the fifty acres or so occupied by the defendant, if the defendant had not been in occupation. The evidence merely suggests that he was inclined to develop the property. The court was only furnished with the pre-trespass value of the undeveloped land and therefore will use that as the basis of determination of its capital value and apply to it an annual rate of thirty per cent as representing reasonable mesne profits accruing to the plaintiff.

It was the plaintiff's evidence that he bought the entire 520 acres at Shs. 30,000,000/= The land occupied by the defendant being 50 acres, it represents 10.4% of the total acreage and hence a pro rata value of shs. 3,120,000/= as at 13th June, 2003 when his bid was accepted. According to the defendant, he paid shs. 2,000,000/= on 10th June, 2004 for the land. On basis of these figures, i determine for purposes of this assessment, the capital value of the land encroached upon to have been shs. 3,000,000/= at the time of the trespass. To-date, the defendant has been in unlawful occupation for thirteen years and six months. At the annual rate of 30% of the capital value of the land, the plaintiff therefore is entitled to the rounded off sum of shs. 12,250,000/= as mesne profits.

Concerning the claim for general damages, damages for trespass to land are intended to compensate the claimant for being kept out of his land on whatever basis they are assessed. As regards the claim for general damages, trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. *Halsbury’sLaws of England*, 4th edition, vol. 45, at para 1403, explains five different levels of damages in an action of trespass to land, thus;

1. If the plaintiff proves the trespass he is entitled to recover *nominal damages*, even if he has not suffered any actual loss.
2. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

3. Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.
4. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
5. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

In *Halsbury's Laws of England*, 4th Ed., Vol. 45 (2), (London: Butterworth's, 1999, at paragraph 526), the law on damages for trespass to land is addressed thus:

> "526. Damages. In a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use....Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

The defendant's conduct is thus key to the amount of the damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was willful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well.

From his plaint and testimony in court, the basis for the plaintiff's claim for general damages, in addition to mesne profits, is premised on the loss of use and enjoyment of his land. The reality is that the plaintiff's rights were invaded and he has been deprived of the use and enjoyment of his property. Nevertheless, I am not satisfied that this is a case which warrants an additional award of damages for loss of use and enjoyment. I am of the opinion that recognition of the infraction of the plaintiff's legal rights or loss of use and enjoyment is reflected and subsumed in the amount awarded as mesne profits. He has not proved any actual damage as would entitled him to receive such an amount other than loss of use and enjoyment. The Court is unable to agree

with the plaintiff's contention that he is entitled to an additional substantial amount for loss of use and enjoyment separate and apart from the amount awarded for trespass in the form of mesne profits. To award general damages, in addition to mesne profits for the same factors would, in my view amount to double benefit and or unjust enrichment. In the premises, the claim for general damages for loss of use and enjoyment is disallowed.

In the final result, Judgment is entered for the plaintiff against the defendant in the following terms;-

a) shs. 12,250,000/= as mesne profits.
b) An order of vacant possession.
c) A permanent injunction restraining the defendant, his servants, agents and persons claiming under him from further acts of trespass on the plaintiff's land comprised in LRV 1320 Folio 1, at Lozoki village, Arivu Parish, Vurra sub-county in Arua District.
d) interest on the sum in (a) above at the rate of 8% from the date of this judgment until payment in full.
e) The costs of the suit.

Dated at Arua this 21st day of December, 2017.

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Stephen Mubiru
Judge
22st December, 2017