THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

LAND DIVISION

CIVIL SUIT NO. 539 OF 2014

ADAM BENEDICT HARVEY.....PLAINTIFF

VERSUS

1. **EMMANUEL MAKUMBI**
2. **MARTIN BIRUNGI**
3. **JOSEPH SERWADDA.....DEFENDANTS**

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT:

Introduction:

The plaintiff filed this suit against the defendants claiming they are trespassers on the property comprised in ***Block 273 plot 8078, volume 4504 folio 24 LRV 4483/14,*** land at Mutungo Kitiko (suit property) measuring approximately 0.481 hectares acquired from *Inter Afrique Engineering & General Equipment Ltd.*

He sought a declaration that he was the rightful owner thereof; a permanent injunction, restraining the defendants and their agents from trespassing on the suit land; general damages and costs of the suit.

The defendants filed a defence and counterclaim under which they refuted the plaintiff's claim of trespass. They contended that the original plot number out of which the suit land was created was originally ***plot No. 2092.*** It belonged then to Zeverio Kasawuli who had used the *kibanja* for cultivation and grazing cows since 1970, having acquired it from Nalongo Bunzibiridde.

That they had bought the equitable interest in the suit land from Zeverio Kasawuli on 7th February, 2003 following which they had taken possession. The defendants claimed therefore that they had acquired equitable interest in the suit *kibanja* comprised in ***plot No. 8078:*** the land sold to the plaintiff, which had been created out of the residue, ***plot No. 4528, at Kitiko Mutungo.***

In 2006, they discovered that one Prince Alexander Simbwa, a Director of *Inter Afrique Engineering and General Equipment Ltd* had made an application and was issued with a lease by the Buganda Land Board (BLB).

The initial term of 5 years which had expired in 2011 was granted with the full knowledge of the defendants' equitable interest and in total disregard therefore of that interest and that upon such discovery the defendants had lodged complaints with BLB.

In the counterclaim they therefore sought a declaration that they were *bonafide* claimants under section ***29 of the Land Act, Cap.227***; a declaration that *M/s Inter Afrique Engineering and General Equipment Ltd* obtained registration of its title to defeat their equitable interest and that the plaintiff/counter defendant was not a *bonafide* purchaser for value. They also therefore sought relief in special damages of ***Ugx 45,000,000/=;*** general damages and costs of the suit.

Agreed facts:

1. ***The plaintiff is the registered proprietor of the suit land as a holder of the leasehold interest for 15 years, effective 1st January, 2006.***

2. ***The leasing authority is the Kabaka of Buganda acting through the BLB.***

3. ***The predecessors in title to the suit land are Inter Afrique Engineering & General Equipment Ltd and Zeverio Kasawuli.***

4. ***Zeverio Kasawuli's lease run from 1992 to 1997.***

Issues:

1. ***Whether the defendants had an equitable interest in the suit property prior to the acquisition by the plaintiff.***

2. ***Who was in possession of the suit land prior to acquisition of the same by Inter Afrique Engineering & General Equipment Ltd and later the plaintiff.***

3. ***Whether the defendants are trespassers on the suit land.***

4. ***Whether the registration of Inter Afrique Engineering & General Equipment Ltd and the plaintiff titles is fraudulent.***

5. ***What remedies are parties entitled.***

I will deal with the first three issues jointly.

1. ***Whether the defendants had an equitable interest in the suit property prior to its acquisition by the plaintiff.***

2. ***Who was in possession of the suit land prior to acquisition of the same by Inter Afrique Engineering & General Equipment Ltd and later by the plaintiff.***

And

3. ***Whether the defendants are trespassers on the suit land.***

Analysis of the law:

By virtue of ***section 101 (1) of Evidence Act, Cap. 6,*** whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist.***(George William Kakoma v Attorney General [2010] HCB 1 at page 78).***

The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. ***(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.***

The plaintiff's contention in this suit was that he bought a lease interest comprised in ***plot No. 8078 Kyadondo Block 273, Mutungo Kitiko*** measuring approximately 0.481 hectares from *M/s Inter Afrique Engineering and General Equipment Ltd* a company owned by Prince David Alexander Simbwa, being the lessee thereof, with Buganda Land Board as the lessor.

A total sum of ***Ugx 200,000,000/=*** was paid on 8th March, 2014 and consequently on 30th July, 2014 he became the registered on the title as the proprietor, after obtaining transfer consent from the lessor.

The plaintiff claimed that the defendants had committed trespass on his land when on 20th August, 2014, they maliciously damaged the buildings materials brought by one Jjuko Kwagalana whom he had contracted to have them ferried to the suit land, and upon which he had reported the case to Kajjansi Police Station.

He claimed that such actions in trespass frustrated his efforts of putting up an office for *M/s Whave Ltd,* a nonprofit social company dealing in provision of safe water along with Ministry of Water and Environment and other Agencies.

Trespass was defined as an unauthorized entry upon land that interferes with another person's lawful possession. Where it is evident that trespass is continuous, the right to sue will accrue during and after the trespass has ended. (***Justin Lutaya v Stirling Civil Engineering Company, Supreme Court Civil Appeal No. 11 of 2002, the Supreme Court).***

He who alleges must prove. The plaintiff in this case had the burden not only to prove that the defendants had had no equitable interest as claimed on the suit land but also that he had lawfully acquired the lease; and that the defendants had accordingly committed trespass on that land.

The defendants on their part however claimed that they executed the purchase agreement with one Zeverio Kasawuli in respect of the *kibanja* at a consideration of ***Ugx 4,500,000/=*** which he had occupied since 1964, using it for grazing cattle and for stone quarrying. Kasawuli had in 1992 been issued with an initial lease over the land which expired in 1997. The land measuring about 5 acres had been subdivided into smaller plots.

The defendants had subsequently entered into an arrangement with the stone excavators on that land and subsequently commenced the process of obtaining a lease on the property only to find out later that despite their complaints to BLB, the lease was granted to a company owned by Prince Alexander Ssimbwa.

The defendants who claimed that they acquired an equitable interest from a person who had been in occupation of the property for over 30 years denied therefore that they were trespassers on that land.

Analysis of the evidence:

Sub-issue No. 1: Whether or not the sale agreement of 2003 between the defendants and Zeverio Kasawuli was valid:

In dealing with the first three issues, the first central question to be addressed by court is whether in the first place the 2003 transaction between the defendants and Zeverio Kasawuli had been valid.

The plaintiff, Mr. Adam Harvey, on his part testified as ***Pw1*** and relied on a number of documents to prove his claim of ownership. He denied the claim that the defendants had any valid claim on that land.

Pw3, Jjuko Kwagalana Stephen told court that he had been contracted by the plaintiff in September 2014, to construct temporary structure on the suit land and it was his evidence that the defendants had destroyed the building materials which he had ferried on that land.

Pw4, Dr. Emmanuel Mbogga resident since 2005, testified that at the time the plaintiff purchased the land there had been no actual development on that land by the defendants until the time when a structure was put up by the defendants in 2014, but was later demolished by the plaintiff.

The defendants however pleaded in their counterclaim that they purchased the suit land from Mr. Zeverio Kasawuli on 7th February, 2003 as per sale agreement, ***DExh 1.*** That the late Kasawuli had been in occupation and use of that land since 1964 and even after the expiry of the lease in 1997, implying therefore that he had remained a *kibanja* owner after his lease expired in 1997.

Upon careful perusal of the agreement between the defendants and Kasawuli ***DExh 1*** this court noted that the total consideration that had to be paid by the defendants to Kasawuli in respect of that land was a sum of ***Ugx 4,500,000/=,*** out of which only ***Ugx 1,500,000/=*** had been paid, leaving an outstanding balance of ***Ugx 3,000.000/=.***

The said balance had to be paid on 30th March, 2003. It is not clear from the defendants' evidence whether or not the transaction was completed before or after the time they claimed to have taken possession.

Secondly, as again noted by this court, there was uncertainty surrounding the size of the *kibanja* purported to have been purchased by the defendants. The suggestion by them seemed to be that the *kibanja* that was bought by them in 2003 (as per the sale agreement, ***DExh 1),*** was the same and therefore equivalent in size with that in the certificate of title, ***DExh 2***, land comprised in ***plot 2092*** that had initially been leased to Kasawuli, from 1992 to 1997.

DExh 2 however indicated a total area of *3.355* hectares (approximately 8.29 acres, much more than the 4.5 or so acres they claimed to have bought, (as per evidence of ***Dw2).*** The purchase agreement ***DExh 1,*** and the sketch annexed to it were however silent on the actual size, measurements of the *kibanja* sold to the defendants.

In the JSM, they claimed to have bought 5 acres which they had subdivided into several plots. Given all these discrepancies, this court found it difficult to reconcile the information and description of the land comprised in ***DExh 1*** with that under ***DExh 2.***

Furthermore, it is not disputed that in 1992 Zeverio Kasawuli had applied and was granted an initial lease over the suit land which expired in 1997. It was the defence counsel's assertion that the fact that the lease had expired in 1997 did not extinguish Kasawuli's *kibanja* interest which the defendants took on in 2003 when they bought it from him, an argument which the plaintiff's side did subscribe to.

Dw1, Opio Janan who was a caretaker of the neighbouring land belonging to *Akright* told court that he started staying in the area in 2003. He claimed that he had not been aware that the land in dispute belonged to Prince Alexander Simbwa.

According to him it originally belonged to Kasawuli, who was known to him prior his demise. At the *locus* visit, he showed the boundaries and the *kibanja* that he had sold to one Mukalazi, a neighbor and informed court that he had informed the plaintiff that the land belonged to the 1st defendant, which claim the plaintiff however denied.

Dw1 however admitted that he was not present when the land which he said had a stone quarry, was sold by Kasawuli to the defendants. He was not a witness to the agreement, thus making his evidence regarding that transaction mere hearsay.

It was his claim however that by the time the plaintiff came onto the land, it had already been graded by one of the defendants, Makumbi Emmanuel ***(Dw2). Dw2*** told court that the total land bought from Kasawuli which was about 4.5 acres, part of which was leased to the plaintiff had been graded around 2008-2009.

It is clear from ***PExh 4*** that indeed if such grading took place around that time, it was during the subsistence of the initial 5 year lease term granted to Prince Ssimbwa on 1st January, 2006 over ***plot 4528,*** which lease expired in 2011 and was renewed within the same year. ***(PExh 5.).*** The defendants therefore graded land which had already been allocated to someone else.

Dw3, Mr. Martin Barungi testified that they had taken immediate possession of the *kibanja* after purchasing it in 2003. It was also the defence evidence that Kasawuli who prior to the sale transaction between him and the defendants had equitable interest, upon expiry of the lease, continued having interest in the land and later on filed an application for extension of lease in in 2005 and later on in 2009. I could not however find any cogent evidence to prove those claims, as I shall endeavor to elaborate later.

Dw2 while acknowledging the fact that they never made any application to BLB for a lease in their names told court that they had objected to BLB's decision to grant the lease to Prince Ssimbwa, but no action was taken by BLB.

Dw4, Mr. Moses Ndawula, aged 37 years, Secretary of the village since 2019 admitted that neither him nor his father who at the time had been the LC Chairperson endorsed the sale agreement, ***DExh1,*** and indeed no LC had witnessed the agreement.

Dw4 neither therefore witnessed the transaction nor did he know the person who had been the witness to the agreement. She was not called in as a witness and one cannot rule out the possibility that she was neither a leader nor a resident in that area.

The endorsement by the LCs and neighbours could not have been the condition precedent to a valid transaction. Indeed this court takes judicial notice of the fact that prior to 2000s, land sale transactions were more or less based on trust.

It was not until the collapse of the system of the trust-based transactions that the involvement of neighbors and LC became so crucial. It is now an accepted practice, recognized by courts as an act of due diligence.

The fact is also therefore acknowledged that lands are not vegetables that are bought from unknown sellers. These are valuable properties and it is incumbent upon buyers to make thorough investigations; not only of the land but of sellers.***(Katende vs Vithalidas & Co. Ltd. CACA No. 84 of 2003).*** But those principles equally applied to the defendants as they did to the plaintiff.

This court considers even more serious the fact that among the key conditions for extension of Kasawuli's lease was the requirement to develop the land to the satisfaction of the lessor, on or before 31st July, 1997.***(clause 2(c)***).

Secondly, in ***clause 2(d)***, the land was to be used for mixed farming. Thirdly, under ***clause (2) (f)*** of the lease agreement, Kasawuli as the lessee at the material time *could not sublet or part with possession or suffer anyone to use or confer an anyone an equitable interest without written consent of the lessor.*

It appears that none of the above clauses had been complied with. The defendants knew that BLB was the agent of the lessor, and could have if they had taken the trouble have found out the status of the lease as at 2003 and the previous owner's failure to comply with the terms of the lease, when they set out to purchase the land from him. That ought to have put them on sufficient notice of the prior and superior interest of the registered owner, to whom the suit land had already reverted prior to their 2003 transaction.

After the lease expiry in 1997, it was not however until around 2005-6 that Kasawuli, having failed to comply with the terms and conditions of that lease, chose to apply for extension- as the defendants wanted court to believe.

In the event that he did, this was some nine (9) or so years after the expiry of the initial lease. It was around the same year that BLB had decided to issue the lease to another party, Prince Alexander Ssimbwa. The defendants themselves had not formally registered their purported interest in the suit land to BLB by that time.

Kasawuli's application for extension of the lease was not presented to court. What the defendants relied on was some correspondence, ***DExh 7***, as their proof that the application had been made by Kasawuli in 2005 to BLB and subsequently in 2009.

I have had occasion to peruse the said document, ***(DExh7)***, an internal memo from the Head Land Management to the CEO, BLB, dated 21st September, 2012. It was an attempt to give a brief background to the *kibanja*, said to have been a part of the original ***plot 2092.***

It is worth noting that the explanation had been given after Prince Ssimbwa had already been granted the initial lease for ***plot 4528*** and its extension. Thereafter upon request by Prince Simbwa, ***plot 8098*** had been curved out and sold to the plaintiff.

The background explanation given in that memo was that Mr. Kasawuli had applied for and was granted an extension of the lease of the said plot to a full term. However that the BLB had cancelled the extension on grounds that the land was cultural site and that Kasawuli had defaulted on payment of ground rent.

Furthermore, that the application was made in 2005 through MMAKS, Kasawuli's lawyers. This was around the same time Prince Alexander Simbwa had applied and soon thereafter granted the residue***: plot 4528.***

Further as per ***DExh 7***, that in 2009, the same Kasawuli sought a fresh lease for the same land but it was later cancelled. That evidence was not availed by BLB in whose custody it ought to have been.

Without any reason offered, BLB was neither a party nor invited as a witness to guide court in substantiating a number of those assertions. It is also worth noting that Kasawuli never took the trouble to challenge any of the said offending decisions of BLB. The only possible reason I can think of is that he himself had ceased to hold interest in that land as early as 1997.

The contents of the said correspondence could however not be readily verified as the document itself was not signed; its author was not known and defendants had nothing to prove how or under what circumstances they had received the memo since it was not addressed to any of them.

It is not known how the late Kasawuli had secured the *kibanja* prior to the lease, given the fact that the defendants in their evidence never availed to court any *busuulu* payments from him; never adduced evidence of prior purchase/acquisition of the *kibanja* by him from the previous owner, to substantiate their claim. No legal representative from his estate was called in to testify, verify, confirm or prove when and how such prior interest could have been acquired.

The defendants' claim therefore that Kasawuli had been a sitting tenant before he was issued with the lease in 1992 and that he remained a sitting tenant after 1997 following its expiry was not supported by any cogent or substantial proof.

Dw4, as noted earlier, testified as a local leader, also a son of deceased former chairperson of the area, but neither him nor his father before him had been a witness to the transaction between Kasawuli and the defendants. Neither him nor ***Dw1*** who had lived on the land since 2003 had any substantial background knowledge of the history of the land to help in guiding this court. theirs could be dismissed therefore as hearsay evidence.

As summarised through the communication from BLB, dated 6th April, 2005 ***(DExh 5)*** relied on by the defendants, excerpts of which I cite below:

> *The purchasers bought a kibanja on the kabaka's land and ...never processed the lease on the said land. Until they have processed the lease and shown their intentions regarding the utilization of the said land, they have no right to bar the Nvujjo collectors from carrying out their duties.*
>
> *In the premises the said agreement was illegal and therefore the miners and the Nvujjo collectors should proceed with their activities. The perpetrators may be sued for causing financial loss to the kingdom which would have been collected during the period in which the miners were not working.*

This was clear evidence that the defendants were not recognized or known to BLB in 2005 except only as *perpetrators, with no rights* as no lease had been processed by them or their agents over that part of the land.

A careful perusal of that document (when reproduced in full) reveals another thing which to this court is worth noting. The BLB noted at that point that the *kibanja* purchasers were the ***M/s Credit Rating Ltd***, since the letter was copied to them as "purchasers'. One would have expected instead the names of the defendants to appear on that list.

It goes without saying therefore that for the defendants to have been recognized as representing the said company in any such transaction they had to present express authority by way of a special resolution or as directors or shareholders, with express authority to transact and commit that company in any such transaction.

Court is therefore left wondering whether or not the defendants entered into the sale agreement with Zeveria Kasawuli in 2003, and graded the land as individuals, joint owners or as representatives of the said company.

As a matter of fact, the cluster of certificates of titles ***(DExh3)*** for the adjoining ***plots 6991 -7001*** were registered in the names of the defendants as joint owners but not in the individuals' or company names of ***M/s Credit Rating Ltd.*** Those discrepancies could only have been ably explained by the defendants themselves, but were not.

Thus as correctly pointed out by learned counsel for the plaintiff, a lessee cannot purport to transfer an interest if the lease itself has since ceased to exist. The former lessee upon such expiry therefore becomes only a tenant at will in relation to that land.

Even if Kasawuli had stayed in physical possession as the defendants seemed to suggest, without such statutory authority or consent from the lessor there would still be no interest to pass on, as the lease upon expiry automatically reverted to the lessor.

To facilitate its renewal or obtain fresh mandate, consent of the lessor could not therefore be dispensed with. The first option to purchase such interest in the *kibanja* in the event that it existed, ought to have been availed not to the defendants, but to the kingdom of Buganda through BLB as the undisputed lessor of the suit land.

This principle is backed up by ***section 34 of the Act.*** Given the circumstances under which the transaction was executed, the defendants cannot therefore deny that the BLB had been strangers to the 2003 transaction between them and Kasawuli.

For while ***section 38 of the Land Act,*** entitles the tenant in occupation to acquire a lease or sublease on land, the process commences with an application to the registered owner, who may cause the interest to be granted, upon such terms and conditions as may be agreed upon. The lessor also enjoys a right to reject the lessee's application if such conditions are not fulfilled.

Under ***section 34 (1),*** the tenant in occupation also has a right among others, to assign and create third party rights in respect of the tenancy by virtue of ***sub section (3)*** thereof; but prior to any such undertaking he/she must submit an application for consent to the transaction.

In equal measure, under ***section 35(2),*** the lessor/owner of the land who wishes to sell the reversionary interest in the land is required to give the first option of buying that interest to the tenant by occupancy.

Section 34 (9) is clear and unambiguous. It makes void and ineffective any transaction purporting to pass interest in land if it is undertaken without such consent. The provision for consent with all due respect could not therefore be dispensed with or be selectively applied to suit the interests of one party as against the other.

Even if therefore one was to consider Kasawuli as a tenant in occupation from whom the defendants had derived their interest, BLB the lessor had an existing and superior title as the registered owner and ought to have been consulted or given the first option to purchase the land from Kasawuli in 2003.

Since the 2003 transaction was devoid of such consent it was therefore invalid and the argument therefore that Kasawuli had an equitable interest or that the expiry of his lease ***(DExh 2)*** did not extinguish his equitable interest in the suit land becomes academic.

In ***Bishopgates Motor Finance vs. Transport Brakes Ltd [1949] 1 KB 332, at page 336-7*** court ruled that in the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give better title than he himself possesses.

That legal principle was emphasized by the Supreme Court in ***Halling Manzoor vs. Serwan Singh Baram, SCCA No.9 of 2001*** that a person cannot pass title that he does not have. Kasawuli therefore in those circumstances had no title to pass on to the defendants since the agreement between him and the defendants was not recognizable in law.

Sub-issue No. (2): Whether the defendants were entitled to protection accorded to customary tenants under section 29 of the Land Act.

A tort of trespass to land is committed, not against the land, but against the person who is in actual possession of the land. (See: ***Justine E. M Lutaaya vs Stirling Civil Engineering Company Ltd. Civil Appeal No. 11 of 2002).*** Such possession may be physical or constructive.

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

In ***George Kasedde Mukasa v. Emmanuel Wabende & Others, Civil Suit No. 459/1998*** trespass to land was held to be committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another.

It was the plaintiff's claim in the present case that the malicious damage to the building materials on the suit land was an act of trespass by the defendants. The defendants did not make any attempt to deny that they had demolished the structure. In their arguments they however maintained that Kasawuli had been a customary owner of that suit land which he had acquired even before Prince Simbwa.

Customary tenure is defined in ***section 1(l) of the Land Act*** as *"a system of land tenure regulated by the customary rules which are limited in their operation to a particular class of persons which are defined in* ***Section 3".***

That the *kibanja* had been utilized by the late Kasawuli for farming/grazing cows for many years since 1970s; and that Kasawuli had also allowed the youth to excavate the land. It was the learned defence counsel's submission that this had not been challenged.

The implication therefore from their submission was that the late Kasawuli had been a customary tenant on that land and derived protection of that interest by virtue of ***section 29 of the Land Act, Cap. 227,*** which interest he had passed onto the defendants.

The court in ***Kampala District Land Board & George Mutale vs. Venansio Babweyala & Ors (SCCA 2/07),*** held that a customary tenancy must be proved. Such proof would entail for example long occupation, recognition of the owner of the reversion or landlord (and vice versa) and payment of ground and in some instances payment of a type of land tax or rent. It may be established by cultivation of seasonal crops or grazing cattle. ***(Marko Matovu vs Mohammed Sseviri and Anor Civil Appeal No. 7 of 788).***

As already noted, BLB did not recognize the defendants as lessees or actual owners of the *kibanja* as they appeared to suggest. Also noted is the fact that such tenure could not be held on urban land under ***section 24 (1) (a) of the Public Land Act 1969 and section 5 (1) of the Land Reform Decree, 1975.***

The Land Reform Decree 1975, which was the law in force by the time Kasawuli is said to have been in occupation, declared all land in Uganda to be public land to be administered by the Uganda Land Commission in accordance with the ***Public Lands Act 1969,*** subject to such modifications as may be necessary to bring that Act into conformity with the decree.

The system of occupying public land under customary tenure was to continue, but only at sufferance and any such land could be granted by the Uganda Land Commission to any person including the holder of the tenure only in accordance with the decree.

Section 5 of the decree specifically restricted occupying land by customary tenure, and under the ***Land Reform Regulations 1976*** any person wishing to obtain permission to occupy public land by customary tenure had to apply to the sub-county chief in charge of the area where the land was situate, and such application had to be approved by the sub-county Land Committee.

This position of the law was considered in the case of ***Kampala District Land Board & George Mitala Vs Venansio Bamweyana & Others, S.C.C. Civ. Appeal No. 2 of 2007 & High Court Land Division Civil Appeal No. 52 of 2010 Musisi Gabriel Vs Edeo Limited and George Ragui Kamoi.***

In High Court Land Division ***Appeal No. 52 of 2010 High Court: Musisi Gabriel Vs Edeo Ltd & George Ragui Kamoi*** court held that since the restriction on acquisition of customary tenure the ***Public Land Act, 1969*** seemed to have continued as the law governing all types of public land, including customary tenure subject to the provision of the decree.

Kasawuli could not have legally acquired any customary tenure on the suit land prior to the enactment of the ***Land Act, 1998*** and hence could not pass on what he did not have to the defendants. I find the above authority relevant and therefore persuasive in this instant case.

The Supreme Court in ***Kampala District Land Board & Anor vs Venasio Babweyaka & 3 others (supra)*** cited by counsel for the defendants however made the observation that since the ***1998 Land Act*** was silent on the said prohibition, this could be seen as a general tendency in that Act to thereafter enfranchise occupants with usufructs rights to enable them secure other interests in the land by either obtaining a certificate of occupation or a leasehold.

In any case, in the present case before me, there was no substantial evidence that the land could have been held under customary tenure; or used for the purposes of mixed farming as dictated by the terms of the expired lease, to prove any such holding. From the survey report dated 15th June, 2013 relied on by the defendants, *the land was bare open grass land and lies on a stressed rocky terrain.* ***(Ref: DExh 11).***

It is also trite that what is customary in a particular place depends on the use to which the land is put and in that regard, court took judicial notice of the fact that excavation of stones was not traditionally acknowledged as customary practice of utilization of land in Buganda.

That meant therefore that the possibility of utilizing the land for grazing/mixed farming by Kasawuli or his successors in title for that matter and on such terrain was so remote as in any case, activities for farming could not co-exist with those for excavation.

The conclusion is therefore inevitable that at no point had the suit land ever been used for the purposes of mixed farming as the defendants wished court to believe, so as to place Kasawuli as a customary owner within the protective ambit of ***section 29 of the Land Act***.

The said section defines a lawful occupant to include *a person occupying land by virtue of the repealed Busuulu and Envujjo law of 1928; a person who entered the land with the consent of the registered owner; and include a purchaser; or a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.*

Under ***subsection (2) of the same Act,*** *a bonafide occupant* is defined to include a person who before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for 12 years or more. I could not agree more for without proof, Kasawuli did not fall within any of those categories.

Section 29 (5) which provides that any person who has purchased or otherwise acquired the interest of the person qualified to be a *bonafide* occupant is also taken to be a *bonafide* occupant for the purposes of the Act is consequently inapplicable to the defendants in this case.

They did not enter upon the land with the consent of the registered owner; Kasawuli did not meet the criteria of a *bonafide* or customary occupant; and besides they had no proof of *busuulu or other* payments to show such existence.

By the defendants' own admission Kasawuli, the original owner had allowed the squatters to use the land for excavation, a form of contradiction to the assertion that the former owner had used it for grazing animals/farming.

Not only therefore was there no proof of utilization of land for the purpose for which it had been intended but there was also no proof that BLB had registered its approval of the defendants' existence and ownership on that land.

The correspondences between BLB and defendants were not with due respect, to be perceived as validation of the illegal occupation and/or use of that land by the defendants or predecessor on that land.

In the absence of *busuulu* receipts or substantial proof of long customary use, occupation and possession the defendants and their predecessor had no possessory rights and therefore neither legal nor equitable interest in the suit land.

A *kibanja* being a perpetual interest indeed, it would be absurd for the defendants to raise the argument that Kasawuli had a *kibanja* before his lease in 1992; and between1992 to 1997 held a leasehold interest and upon termination of his lease in 1997, his *kibanja* had resurrected.

The defendants therefore also failed to show that Kasawuli had a tenancy on the land and it was not disclosed or compensated for by the registered owner at the time of acquiring a leasehold certificate of title.

Counsel for the defendants in submission, cited the case of ***Kampala District Land Board & Anor vs Venasio Babweyaka & 3 others SCCA No. 2 of 2007,*** where the respondents had purchased the land in 1998 from persons who had occupied and utilized the land since 1970 and therefore deemed to be *bonafide* occupants, for purposes of ***section 29(5) of the Land Act.***.

Court also referred to an earlier decision in ***Kampala District Land Board and Chemical Distributors vs National Housing and Construction, Civil Appeal No. 2 of 2004***, where it was observed that the respondent had been in occupation or possession of the suit land for more than 12 years at the time of coming into force of the 1995 Constitution.

The respondent had not only occupied the land but also utilized it without any challenge from KCC. Court thus declared that the respondent was entitled to enjoy its occupancy in accordance with ***article 237 (8) of the Constitution and section 31 (1) of the Land Act***, if the suit land was registered land.

That since the respondents were lawful *bonafide* occupants their interest in the suit land could not be granted or transferred to a third party without affording them the protection provided in the ***Land Act.***

It followed therefore that while the land occupied by a *bonafide* occupant could be leased to someone else, the first option had to be given to the *bona fide* occupant which had not been done in that case.

The court in that case therefore came to the conclusion that the rules of natural justice had not been followed and the respondents were not given a fair hearing before they were deprived of their interest.

In the present case, the facts were slightly different since the issue of consent was applicable on three fronts: first point of reference was the failure by the defendants and Kasawuli to involve the registered owner/lessor in the 2003 transaction, which had the effect of invalidating the transaction.

On the second front, BLB would have been under obligation and indeed the rules of natural justice would have so demanded, that the consent of Kasawuli be secured before transferring the lease to Prince Simbwa. However, Kasawuli's lease had already reverted to the lessor in 1997 thus making him at that point a tenant at will.

In the third scenario, Prince Simbwa had to secure the consent from BLB as the lessor, (just as the defendants had done when it came to the sale of the adjacent plots to third parties), before any subdivision and/or transfer of the land could be made to the plaintiff. Simbwa had complied with that requirement. *(Refer to correspondences between him and BLB:* ***PExh4 –PExh 9)***.

In those circumstances, neither BLB nor Prince Ssimbwa therefore had any legal obligation towards Kasawuli who was a tenant at sufferance or to the defendants who purported to take over the *kibanja* from him, having done so without the consent of the registered owner.

The defendants therefore failed to prove that they or their predecessor had been an equitable owner of that land, and therefore entitled to protection under ***section 29 of the Land Act.*** For all in all, the late Kasawuli as already established could not have been a sitting tenant but a tenant at sufferance.

It is also therefore trite that the right to sell unregistered land is vested only in the person who had valid title to that land. He or she who has no title cannot pass on what was not in existence. ***(Erina Lam Oto Ongom vs Opoka and Anor [2020] UGHC 185).***

Thus when a lease or a definite term has been terminated by effluxion of time the lessee or tenant has no longer any legal right on the property and becomes a trespasser. It also follows therefore that the lessor or controlling authority must not thereafter seek to enforce its rights to possession for it is automatic. The question of notice to such tenant therefore becomes superfluous. (***Dr. Adeoderanta Kekitinwa & 3 others vs Edward Maudo Wakida CACA No. 3 of 1997***)

I could not agree more therefore that Kasawuli had been required to develop the land and not to use it or suffer it to be used for purposes other than mixed farming. Stone excavation was therefore a violation of ***clause 2 (d)*** of the lease agreement.

The land therefore became available for leasing as far back as 1998 and the defendants just like anybody else were entitled to apply for a lease, but they never did. The defendants not only therefore failed to prove that they were *bonafide* customary owners, but also failed to satisfy court that after the expiry of the lease Kasawuli had remained with any interest to pass on to the defendants.

That therefore addresses ***issues 1,2,3.***

Issue No. 4: Whether the registration of Inter Afrique Engineering & General Equipment Ltd and the plaintiff titles is fraudulent.

Section 64 (1) of the RTA provides that a registered interest can only be impeached where there is fraud.

It is well established law that a cause of action in fraud, as alluded to by the defendants, must be specifically pleaded, particulars thereof provided and the claim proved at a balance of probabilities higher than in any other ordinary suit. ***(See Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC).***

A party faced with pleadings founded in fraud would then know the specific elements of fraud that it needs to rebut or disprove in its defence. ***See: Fam International Ltd & Another vs. Mohamed Hamird El-Fatih Civil Appeal No. 16 of 1993 (SC).***

Fraud that vitiates a land title of a registered proprietor must be attributable to the transferee. However fraud of a transferor not known to the transferee cannot vitiate the title. ***See: Wambuzi C.J, Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 2012.***

In the present case, the defendants raised particulars of fraud in their counterclaim that the plaintiff obtained registration, well knowing that the defendants/counterclaimants had interest in the suit property; ignored calls from them that the suit property did not belong to *Inter Afrique Engineering & General*

Equipment Ltd.; and ignoring notice from the LC officials that the property belonged to the defendants/counterclaimants. They sought recovery of a portion of land sold to the plaintiff in 2014.

The plaintiff presented ***PExh 1 and PExh 2*** as proof that he had bought suit land from *M/s Inter Afrique Engineering and General Equipment; a* sale agreement was executed on 8th March, 2014; lease issued on 23rd July, 2014; and plaintiff got registered onto the title on 30th July, 2014, facts which were not in dispute.

It was the 1st counter claimant/defendant, Emmanuel Makumbi's testimony that following the purchase of the *kibanja* they surveyed the land and plotted it, only to discover in 2006 that one Alexander Simbwa, the Director of M/s *Inter Afrique Engineering & General Equipment Ltd* had made an application for a lease over the suit land.

Among the agreed facts was that the plaintiff is the registered proprietor of the suit land as a holder of a leasehold interest which existed for 15 years, effective 1st January, 2006.

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

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

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

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

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

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

It is an acknowledged fact that the lease for the entire ***plot 4528*** was issued in 2006 to the plaintiff's predecessor in title. This was the year when Kasawuli was purported to have been dispossessed of the land.

By their own admission, the defendants as counter claimants got to learn about the grant of the lease in 2006, implying that the cause of action first accrued to them as early as 2006. That is when they discovered the purported fraud.

They however filed the counterclaim in 2019, 13 years after the right of action had accrued; and only after the main suit was filed against them. Kasawuli or his legal representative did not file any action to challenge Prince Simbwa or BLB.

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

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time.

Limitation is therefore not intended to extinguish claims. ***See Dhanesvar V. Mehta v. Manilal M Shah [1965] EA 321; Rawal v. Rawal [1990] KLR 275, and Iga v. Makerere University [1972] EA 65.***

In the premises, the plaintiff's action against the defendants succeeds, while the counterclaim is dismissed with costs.

Issue No. 4: Remedies:

General damages:

General damages are awarded at court's discretion. Those that the law presumes to arise from direct, natural or probable consequences of the act complained of by the victim. These follow the ordinary course or relate to all other terms of damages whether pecuniary or none pecuniary, future loss as well as damages for paid loss and suffering. ***See; Uganda Commercial Bank Vs Deo Kigozi [2002] EA 293.***

Black's Law Dictionary 9th Edn at page 445 defines *damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the direct probable consequence of the act complained of.* ***(Ref: Storms versus Hutchison (1905) AC 515.***

In the case of ***Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35*** it was held that the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering.

The claim in this case was that the defendants caused damage to the plaintiff's property (building materials; interrupted the enjoyment of his quiet possession; and all plans to develop the land had stalled on account of the defendants' actions.

In the premises and circumstances as highlighted, the plaintiff is therefore entitled to a discretionary award of general damages for the inconveniences caused by the delay; and for the losses incurred through the defendants.

Accordingly:

1. ***The plaintiff, Adam Harvey acquired a good title and is the rightful owner of plot 8098, block 273, land at Kitiko Mutungo.***

2. ***A sum of Ugx 50,000,000/= is awarded as general damages to the plaintiff, with interest at a rate of 10% per annum, payable from the date of delivering this judgment, till payment is made in full.***

3. ***A permanent injunction issues, restraining the defendants and their agents from trespassing on the suit land.***

4. ***Costs of the suit awarded to the plaintiff.***

Alexandra Nkonge Rugadya

Judge

11th January, 2022

Delivered by email

18/1/2022