

**THE REBULIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 459 OF 1998**

GEOGRGE KASEDDE MUKASA :::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

1. EMANUEL WAMBEDDE }
2. EFULAIMU SSEVUME }
3. MOSES MUGATTANSI }
4. SIRAJE SEMWOGERERE }
5. EMMANUEL KASULE } DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE MOSES MUKIIBI

JUDGMENT

The plaintiff's action against the defendants jointly and severally is for general damages for trespass, Mesne profits, eviction and recovery of possession of land and a permanent injunction restraining the defendants from further trespass on the plaintiff's land comprised in Kibuga Block 11 Plot 325 situate at Ndeeba.

The plaintiff's case is as follows:-

He is the registered proprietor of land comprised in kibuga Block 11 Plot 325 measuring 0.56 Acres situate at Nsike Ndeeba. In 1990, or about that time, the defendants, their servants, employees or agents trespassed on the said land by erecting illegal structures thereon. The plaintiff protested against the defendants' illegal presence on his land but in vain. As a result of the defendants' occupation of the said land the plaintiff has been unable to derive benefit from it since he could neither use it nor rent it out, and he has, consequently, suffered loss and damage.

The plaintiff prayed for Judgment to be entered against the defendants for:

- a) Eviction of themselves, their servants, workmen and employees from the land and removal of their illegal structures.
- b) A permanent injunction restraining them from trespassing on his land.

- c) General damages for trespass.
- d) Costs of the suit.
- e) Mesne profits.
- f) Any other or alternative relief.

The defendants filed a joint Written Statement of Defence. They averred that each of them occupies a separate plot of land acquired under different circumstances. The defendants averred jointly and severally that each of them lawfully acquired his piece of land well before 1990, and that none of them is a trespasser. The defendants averred that at all material time the land in dispute has been occupied by various Bibanja owners. They contended that the plaintiff could not have suffered the damage alleged or at all. The defendants prayed jointly and severally that the suit be dismissed with costs.

At the commencement of the hearing three issues were framed and agreed, namely:

- 1) Whether the defendants are lawful or bonafide occupants of the suit land.
- 2) If not, whether the defendants are trespassers on the suit land.
- 3) What remedies are available to the parties, if any?

This suit was filed in this court on 5/5/1998. The written statement of Defence was filed on 11/6/1998. No further pleadings were filed after that. The Land Act (No. 16 of 1998) [Now Cap. 227 in Vol. 9 Laws of Uganda 2000] was not yet enacted. The date of commencement for the Land Act, 1998 was 2nd July, 1998.

In the instant case there are several defendants occupying separate plots (customary holdings/Bibanja). They averred that each one acquired his Plot under different circumstances. It is therefore necessary to state the different modes of acquiring a customary holding, and the law applicable thereto at the material time.

The BUSUULU AND ENVUJJO LAW, 1928 provided in Section 8 as follows:

“8. (1) Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner except –

- a) the wife or child of the holder of a Kibanja; or
- b) a person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof.

2) Nothing in this law shall give to the holder of a Kibanja the right to transfer or sub let his Kibanja to any other person”.

This law remained in force until 1975 when the Land Reform Decree (No.3 of 1975) abolished it. Under the Busuulu and Envujjo Law, 1928 a customary tenant had no powers to transfer his Kibanja except in circumstances as provided in subsection (1) (a) and (b) of section 8. No person could acquire a lawful Kibanja holding over Mailo land without the consent of the mailo owner.

See: MULUTA JOSEPH V. KATAMA SYLVANO S.C. Civil Appeal No. 11 of 1999.

In that case the Supreme Court observed that an agreement purporting to sell and transfer a Kibanja holding was not sufficient proof of acquisition of a lawful Kibanja holding in the absence of proof of the essential fact that would have constituted creation of the Kibanja holding, namely consent of the mailo owner.

After the enactment of the Land Reform Decree, 1975 (whose date of publication was 1st June, 1975) the system of the Kibanja holding was governed by that Decree and the Land Reform Regulations, 1976 (S. 1 No. 26 of 1976).

Subsection (3) of Section 3 of the Land Reform Decree, 1975 provided as follows:

“ (3) . Without prejudice to the generality of subsections (1) and (2) of this section, tenancies on land held immediately before the commencement of this Decree,

(a) as mailo land subject to the Busulu and Envujjo Law; or _____

(b) _____

May continue after such commencement subject to the following,

- (i) The conversion of any such tenancy into a customary tenure on public land, but without the payment of Busuulu, envujo or the customary rent required by the laws referred to under paragraph (b) of this subsection;

- (ii) The development needs of the lessee on conversion with respect to the land.
- (iii) Such conditions as the commission may, having regard to the zoning scheme affecting the land, impose; and
- (iv) The payment of compensation, where the tenancy is terminating at the instance of, or to satisfy the said development needs of, the lessee on conversion.....”.

Subsection (4) of the section 3 provided as follows:

“(4). The following laws shall cease to have effect in any part of Uganda, namely,

- (a) the Busuulu and Envujo Law; “.

Under Section 16 (Interpretation) of the Land Reform Decree, 1975 the word “Prescribed” was stated to mean “Prescribed by regulations made under this Decree”. Regulation 8 (1) of the Land Reform Regulations, 1976 Provided:

“8. (1) Every person who, immediately before or on the commencement of the Decree, was in occupation of land by customary tenure, by virtue either of the Public Lands Act or the Decree, shall, within 24 months from such commencement apply to the sub county Land Committee through the sub county chief in charge of the areas where the land is situated for the purpose of being registered in respect of such occupation.”

In my view a person who, on the commencement of the Decree, was in occupation of land by customary tenure, by virtue of the Decree, was a Kibanja holder whose tenancy, previously held on mailo land under the Busulu and Envujo Law, had been converted into a customary tenure on public land.

Such person had to apply to the Sub county Land Committee in charge of the area where the former mailo land was situated to be registered as owner of a particular Kibanja holding.

Under section 16 of the Land Reform Decree, 1975 the word “Commission” was defined to mean and include any prescribed authority in relation to subleases, temporary occupation licences and customary tenures.

So, in my view, the prescribed authority in relation to persons who were in occupation of land by tenancies which had been converted into customary tenures was the sub county Land Committee.

In the case of persons who sought new customary occupation Regulations 1 and 3 of the Land Reform Regulations, 1976 would apply. These Regulations provided as follows:

“1. (1) Any person wishing to obtain permission to occupy Public Land by customary tenure shall apply to the sub county Chief in charge of the area where the land is situated”.

“3. (1) An applicant under regulation I shall be registered as the customary occupant of land by the sub county Land Committee if the land he has applied for is land which may be so occupied and no objection has been lodged against his application_____”.

Regulation 14 provided:

“In the performance of their functions under these Regulations, the Sub County Land Committees and the County Land Committees shall be deemed to be acting on behalf of the commission_____”.

So, in my view, in the case of persons who sought new customary occupation on Public Land the prescribed authority for purposes of Subsection (1) of section 5 of the Land Reform Decree, 1975 was the Sub County Land Committee.

In the case of TIFU LUKWAGO Vs. SAMWIRI MUDDE KIZZA and Another, S.C. Civil Appeal No. 13 of 1996 (unreported) MULENGA, J. S. C. said:

“The Land Reform Decree, 1975 converted mailo land into public land, and the mailo land owner into a lessee on conversion. It preserved Kibanja holding as a customary tenure on public land without any apparent liability or obligation, on the part of the Kibanja holder, to the lessee on conversion. _____ it had been under the Busulu and Envujo Law, and in particular S. 8 therefore, that the requirement for the mailo land owner’s consent was provided for. The customary practice of introduction and giving a kanzu was for the purpose of soliciting such consent. The position after the Decree therefore was that while the customary tenure was continued, the customary rights and obligations previously appertaining to that tenure were not preserved_____”.

Subsection (1) of section 4 of the Land Reform Decree, 1975 provided:

“4. (1). A holder of any customary tenure on any public land may, after notice of not less than three months to the prescribed authority or of any lesser period as the said authority may

approve, transfer such tenure by sale or gift inter vivos or otherwise, subject to the condition that such transfer shall not vest any title in the land to the transferee except the improvements or developments carried out on the land.”

Subsection (2) of section 4 provided:

“(2). Any agreement or transfer by the holder of a customary tenure purporting to transfer a customary tenure as if it were actual title to land shall be void and of no effect and, in addition, the person purporting to effect such transfer shall be guilty of an offence_____”.

In the case of PAUL KISEKKA SAKU V. SEVENTH DAY ADVENTS CHURCH ASSOCIATION OF UGANDA, S.C. CIVIL Appeal No. 8 of 1993 (unreported) the Supreme Court held that in the case of transfer of an existing customary holding the relevant provision was S.4 (1) of the Decree which provided that a holder of a customary tenure could transfer it after three months’ notice to the prescribed authority.

Section 5 of the Land Reform Decree, 1975 provided for fresh acquisition of customary tenures.

Subsection (1) of Section 5 provided as follows:

“5. (1). With effect from the commencement of this Decree, no person may occupy public land by customary tenure except with the permission in writing of the prescribed authority which permission shall not be unreasonably withheld.”.

Subsection (2) of section 5 provided as follows:

“(2). Any agreement or transfer purporting to create a customary tenure of land contrary to subsection (1) of this section shall be void and of no effect and, in addition, the person purporting to effect such transfer shall be guilty of an offence_____”.

Section 6 of the Decree provided for un lawful occupation of land.

Subsection (1) of section 6 provided:

“ 6. (1). It shall be an offence under this Decree to occupy land unlawfully”.

Subsection (2) of the same section provided:-

“(2). A person shall be guilty of occupying land unlawfully if, having no grant of title to that land, he occupies that land after the commencement of this Decree, otherwise than as provided in section 5 of this Decree”.

Now I wish to deal with the first issue which is:

Whether the defendants are lawful or bona fide occupants of the suit land.

I must say that the use of the expressions “lawful occupant” or “bona fide occupant” leads to a temptation to consider this case in light of the provisions of the Land Act [now cap. 227]. Yet, as I stated earlier in this Judgment, pleadings in this suit were closed before the Land Act was enacted. So, in my view the issue which directly arises from the pleadings is:

Whether each one of the defendants acquired his plot (Kibanja holding) law fully.

The Plaintiff (PW1) testified as follows:

He is the registered proprietor of land comprised in Kibuga Block 11 Plot 325 situated at Ndeeba Industrial Area.

[He produced a Duplicate Certificate of Title for the land which was duly inspected by court and returned to him]. He was registered as proprietor of the land in 1971. He inherited the land from his late father Hamu Mukasa (deceased). He sued the defendants because they had started putting up illegal structures on his land. He realized this in 1990. In 1990 he reported the defendants to the Local Council 1 Chairman of the area. The case was handled by LC1, LC2 and LC3 committees. The defendants were told to vacate the land by all the three levels of LCs but they refused to do so. One Erina Nora Nakayiza was the one selling plots to the defendants. Another so called landlord who sold plots to the defendants was called Kanala. None of the defendants was paying rent to the witness. None of them ever approached the witness to regularize his stay on the land. He was introduced to the defendants by the LC1 Chairman as the registered Proprietor of the land. He has taken industrialists to view the land but they declined to take it. He has lost rent for all the years the defendants have occupied the land. The area is adjacent to the Kasese railway line and he intended to lease the land to industrialists. The area is ear-marked for industrial development. The defendants should be evicted and their illegal structures removed.

The witness reiterated his prayers contained in the plaint.

During cross examination the witness testified as follows:

Since 1965 when he returned from UK he had been ordinarily resident in Uganda. The estate of Hamu Mukasa (deceased) was administered by the Administrator General. The witness was given a big piece of land in the area which he subdivided into plots. The land was vacant in 1971 when he sub divided it. He did not see Erina Nora Nakayiza on the land in 1971. There was an influx of people encroaching on the land around 1990. He does not want any illegal tenant there. The area is gazetted as an industrial area.

When this court visited the locus in quo the witness testified as follows:

His boundary along Mutesa 11 Avenue starts from B.K. Industries perimeter wall. The plot extends along Mutesa 11 Avenue for about 70.4 feet, ending where a palm tree was cut down, the location of a mark stone. From that point to the rear of the plot, near Abasinga bakery, the length is 69.5 feet. The boundary line runs in front of a house belonging to the brother of Efulayimu Ssevume, along the garage. The said house is situated outside the plot indispute. The boundary line cuts across a wooden video Hall near Mutesa 11 Avenue. From Abasinga bakery the boundary is in a straight line measuring about 49.7 feet ending at the perimeter wall of B.K. Industries. The boundary also runs along the perimeter wall for B.K. Industries for about 21.3 feet ending at Muteesa 11 Avenue. The area of the plot is 0.56 acres. The witness did not authorize any body to build on his plot (325).

The second defendant [Efulaimu Ssevume] testified as DW1 as follows:

He acquired a Kibanja situated at Kabowa in 1985. He had a brother called Damasco Nsereko who owned a Kibanja in the area. Damasco Nsereko left his home. The witness remained a caretaker of Nsereko's Kibanja. Damasco Nsereko had constructed a house on the Kibanja. There were crops on the Kibanja such as bananas, sugar canes, Pawpaws and Jackfruit trees. The witness started looking after Nsereko's kibanja in 1975.

In response to cross-examination he testified as follows:

He put up his own house at Kabowa in 1991. His brother died in 1995. At that time the witness was still looking after the Kibanja. He never applied for letters of Administration to the estate of his late brother. He holds the Kibanja in trust for the deceased's children.

The second defendant gave evidence at the locus in quo as follows:

He constructed his first house in 1980. It is the house next to Mutesa 11 road. At that time the owner of the land was Kanala.

The witness clarified that he has one house on the land. It has five rooms and is used for commercial purposes. It is the house with a frontage at Mutesa 11 road.

At the locus in quo I recorded my observations. I observed that the structure belonging to Efulaimu Ssevume, the second defendant, was situated on land comprised within the boundaries which were pointed out to court by the plaintiff.

Learned Counsel Mr. Mbogo, for the plaintiff, posed this question:

Given that the defendant (D2) got the Kibanja in 1985 or sometime thereafter has he proved that he acquired it lawfully and in accordance with the Land Reform Decree, 1975?

Learned Counsel reiterated the Law applicable to customary tenancies on former mailo land as stated in the Land Reform Decree, 1975.

Learned Counsel for the defendants Mr. Muyonjo made an assertion in his submissions as follows:

“Subsequently his late brother also gave him a portion of the Kibanja where he built”.

Learned Counsel Mr. Mbogo also stated as a fact that the defendant (D2) acquired a customary tenancy on public land from his brother on land where the plaintiff was the lessee on conversion.

With due respect to both learned counsel I must state that such a position is not supported by the evidence on record. There is no evidence on record to show that the second defendant acquired any portion of his brother’s Kibanja either by sale or as a gift inter vivos. The second defendant neither produced nor alluded to any writing made by his brother as evidence of a sale or a gift. According to subsection (1) of S.4 of the Land Reform Decree, 1975 a transfer of a customary tenure on public land by sale or gift inter vivos could only vest title to the transferee in the

improvements or developments carried out on the land. There is no evidence on record of what improvements or developments the late Damasco Nsereko (the brother) transferred to the second defendant. It is possible that during the absence of the late Damasco Nsereko the second defendant appropriated to himself a vacant portion of the former's Kibanja. So in this particular case the question of giving notice to the prescribed authority does not arise.

I found the second defendant evasive in answering questions during cross examination. He also changed his story relating to the year when he built his house on the land. At first he stated that he built the house in 1991, but later he said that he did so in 1980. He did not impress me as a truthful witness. I did not believe his story. In the circumstances I find that the second defendant failed to prove that he acquired any plot or Kibanja holding lawfully. I, therefore hold that the second defendant occupied and constructed a building on the land illegally.

The 3rd defendant, MUSA MUGATTANSI (DW3) testified as follows:-

He settled at Kabowa in 1977. He is a Kibanja holder. His father called Elias Semakula gave him the Kibanja. There were crops on the kibanja like banana plants, Yams Avocado trees and sugarcanes. When he was given the Kibanja he cultivated it and planted more banana plants, sugar canes and yams. He constructed a house on the Kibanja in 1993.

The house is occupied by him and some tenants. His father introduced him to one Mwebe who was the Chairman of the village. His father told him the name of the landlord as Kanala. He took him to meet Kanala at Ndeeba.

In response to cross examination he testified as follows:-

He never checked in land office to know on whose land his Kibanja is situated. He knew his landlord as Kanala. He did not know if the land on which his Kibanja is situated belongs to plaintiff. He would only vacate the land upon being compensated for his developments. He has four houses on the land. He has sugarcanes, banana plants, avocado trees and yams.

At the locus in quo the 3rd defendant (DW3) testified as follows:-

He has four structures on the land. They were built with clay bricks. He has crops on the land such as Yams, cassava, sweet bananas, avocado and Paw paws.

He started occupying the land in 1977. He started construction in 1981. Between 1977-1981 he used the area for repairing vehicles. He also cultivated food crops in the area. When he commenced construction neither the plaintiff nor any other person stopped him. He constructed his last building in 1993. He has no approved building plans for his structures. He does not pay any rent for his Kibanja. His buildings are found within the area which court inspected.

At the locus in quo I observed that the houses belonging to Musa Mugattansi (DW3) are situated on the land comprised within the boundaries which the plaintiff showed to court. I also observed that the area occupied by the 3rd defendant (DW3) had some crops like cassava, sugar canes, sweet bananas, yams and avocado trees.

Learned Counsel Mr. Mbogo conceded that Elias Semakula, the father of the 3rd defendant, was a Kibanja Owner and not a mailo owner. Counsel submitted that the 3rd defendant was a Kibanja owner and not a mailo owner. Counsel submitted that the 3rd defendant acquired the Kibanja in the 1977, and at that time the law applicable was the Land Reform Decree, 1975. He submitted that there was no evidence that he complied with that law when he was acquiring the Kibanja holding. Counsel concluded that the 3rd defendant's acquisition of the said Kibanja holding was unlawful.

It appears to me that the 3rd defendant (DW3) acquired on transfer by gift inter vivos an existing customary holding. It is not very clear for how long Elias Semakula, the father of the 3rd defendant, held the Kibanja before he gave it to the 3rd defendant. However, it is clear from the evidence that there were developments on the Kibanja like banana plants, yams, Avocado and Sugarcanes. I agree with learned Counsel Mr. Muyonjo that the evidence given by the 3rd defendant (DW3) was very consistent. I do believe his evidence that he acquired the Kibanja in 1977, and that it was given to him by his father. The 3rd defendant testified that he started construction in 1981 and completed his last building in 1983. This evidence remained uncontroverted. The plaintiff testified that he realized in 1990 that people had started putting up illegal structures on his land. In response to cross examination the plaintiff testified that there was an influx of people encroaching on the land around 1990. The plaintiff did not say that when he became registered proprietor in 1971 he appointed an agent to look after his land and

inform him of what was going on. In the circumstances I do believe the 3rd defendant's testimony that when he commenced construction in 1981 neither the plaintiff nor any other person stopped him. So it follows that in 1990 when the plaintiff reported the defendants to the local council 1 Chairman of the area the 3rd defendant had been in occupation of his kibanja for about 13 years, computing from 1977. It also follows that at the time this suit was filed on 5/5/98 the 3rd defendant had been in occupation of his Kibanja for about 21 years.

The 3rd defendant did not produce any evidence to show that in 1977 when his father, Elias Semakula, gave him the Kibanja in question he had previously given notice of not less than three months to the prescribed authority. However, it should be observed that Regulation 8 (1) of the Land Reform Regulations, 1976 had given persons in occupation of land by customary tenure 24 months from the commencement of the Decree to apply to the sub county Land Committee to be registered in respect of such occupation. The Decree came into force on 1st June 1975. It is possible that in 1977, when the 3rd defendant was given the Kibanja in question, even the initial 24 months' period for application for such registration had not yet expired.

In the case of TIFU LUKWAGO V. SAMWIRI MUDDE KIZZA (Supra) MULENGA J.S.C. considered the decision of the Supreme Court in PAUL KISEKKA SAKU V. SEVENTH DAY ADVENTS CHURCH ASSOCIATION OF UGANDA (Supra) and observed as follows:

“In my view failure to give notice under S. 4 (1) of the Decree is a curable irregularity, so that even if it had been proved that notice had not been given, I would not have regarded the sale a nullity.....”.

In the TIFU LUKWAGO case KAROKORA J.S.C. made the following observation:

“In any case, as it was observed by the Supreme Court in Paulo Kisekka Saku (Supra) there is a lacuna in the Decree as to who is the prescribed authority for the purpose of Section 4 (1) of the Land Reform Decree. In other words there was no prescribed authority to which the notice would be given. In my view, failure to give notice in a case of this nature, where the prescribed authority was not clearly spelt out by the law, would be an irregularity which would not vitiate the transaction in question”.

In find the observations of the two learned Justices of the Supreme Court a serious departure from the decision in the Paul Kisekka Saku case. In the latter case, in the Judgment of the court, it was observed as follows:

“It may well be that local chiefs and Land Committees were intended to be included as prescribed authorities for customary tenancies, but the law seems not to be clear. These institutions appear not to have been set up nor the Decree fully implemented”.

These observations were made by the Supreme Court in 1993. I expressed the view that the prescribed authority was the sub county Land Committee. If in 1993 the Supreme Court still doubted if such committees had been set up then I cannot say that they existed in 1977. In my view this is a better reason for adopting the observations of Justices MULENGA and KAROKORA that failure to give notice under section 4 (1) of the Land Reform Decree, 1975 was a mere irregularity which did not vitiate the transaction between the 3rd defendant (DW3) and his father Elias Semakula. For these reasons I reject the contention of learned Counsel Mr. Mbogo that the 3rd defendant’s acquisition of the Kibanja in question was unlawful by reason of default in giving notice under section 4(1) of the Land Reform Decree, 1975. I, therefore, hold that the 3rd defendant, MUSA MUGATTANSI, (DW3) acquired his Kibanja holding lawfully from his farther.

The fourth defendant, SIRAJE SIMWOGERERE (DW4) testified as follows:

He came to Kabowa in 1991. He bought a Plot in 1993 from Robbina Tereza. He executed an agreement with the seller. It was witnessed by LC1 officials. He paid Shs. 200,000/= for the Plot. [An original hand written agreement was admitted as Exhibit D.2].

At the time he bought the plot it comprised sugarcanes, yams, a mango tree and banana plants. He constructed a house on the Plot/Kibanja holding. He also permitted his two brothers: Moses Katamba and Abbas Ssemwogerere to construct houses on the land. His house is built of burnt bricks and roofed with iron sheets. He knows the Owner of the land as Kanala. He was introduced to Kanala by Robinna Tereza in 1993. He paid to Kanala a “Kanzu” of shs. 15,000/=. He did not know the plaintiff and only found him in court. He had never gone to Land Office to establish the true owner of the land. He does not recognize the plaintiff as the Land Owner. He had never paid “Busuulu” or rent to anyone. He planted sugarcanes, yams and mango trees.

At the locus in quo the 4th defendant testified as follows:

He has four structures on the land. The structures are used for residence. The four structures include two which belong to his brothers: Moses Katamba and Abbas Mukiibi.

The Kibanja which he acquired was a garden before he purchased it. He has no building plans for his structures. He had started a foundation for a new structure. He had never been restrained from carrying out further developments in his Kibanja.

I observed at the locus in quo that the houses belonging to Siraje Simwogerere, (DW4) were situated on the land comprised within the boundaries which the plaintiff showed to court. I saw a foundation for a proposed structure which the fourth defendant (DW4) claimed was his construction.

Learned Counsel Mr. Mbogo reiterated the evidence given by the fourth defendant. Thereafter, he posed this question:

“So given this evidence, can this defendant say that he is on the land lawfully?”

I found the 4th defendant a straight forward witness who gave a consistent story. He produced an agreement (Exhibit D.2) which was handwritten in Luganda language. About a quarter of the piece of paper on which the agreement had been written was torn off. The agreement was not translated into English, the language of this court. However, the 4th defendant gave clear testimony of the transaction whereby he acquired the Kibanja holding in question. I do believe his evidence on the matter. His evidence concerning the said transaction was uncontroverted. I find as a fact that the 4th defendant acquired a Kibanja holding in 1993 from one Robinna Tereza by purchase. According to subsection (1) of S.4 of the Land Reform Decree, 1975 a transfer of a customary tenure on Public land by sale or gift inter vivos could only vest title to the transferee in the improvements or developments carried out on the land. I do believe the evidence of the 4th defendant that at the time he bought the Kibanja holding it comprised sugarcanes, yams, a mango tree and banana plants that it was a garden. So, I find as a fact that there were developments on and constituting the Kibanja holding which the 4th defendant acquired.

In the TIFU LUKWAGO case (supra) MULENGA J.S.C. said:

“It had been under the Busuulu and Envujjo Law, and in particular S. 8 thereof, that the requirement for the mailo land owner’s consent was provided for. The customary practice of introduction and giving a Kanzu was for the purpose of soliciting such consent. The position after the Decree therefore was that while the customary tenure was continued, the customary rights and obligations previously appertaining to that tenure were not preserved.....”

I respectfully agree with that statement of the legal position. In my view there was no legal requirement that before the 4th defendant acquired a Kibanja he had to seek prior consent from the former mailo land owner, then a lessee on conversion. In the case of transfer of an existing customary holding in 1993 the relevant provision was S.4 (1) of the Land Reform Decree, 1975 which required that a holder of a customary tenure gives notice of not less than three months to the prescribed authority before such transfer. In the case of the 4th defendant there is no evidence on record that the said Robbina Tereza, as seller, gave the required notice. However, I have expressed the view herein before that failure to give such notice was a mere irregularity, which in this case did not vitiate the sale transaction between the fourth defendant (DW4) and the said Robbina Tereza. I, therefore hold that the 4th defendant SIRAJE SIMWOGERERE (DW4) acquired his Kibanja holding lawfully from the said Robbina Tereza.

The fifth defendant, EMMANUEL KASULE (DW2) testified as follows:-

He came to settle at Kabowa in 1991. He occupies a plot. He acquired that plot from Tereza Namutebi by purchase in 1993. He could not remember how much he paid for it. He made an agreement with Tereza Namutebi. He bought the plot using the names of Emmanuel Lubuulwa (then aged 13 years) and Nuwa Senyonjo (his brother). [A hand written Agreement dated 21/8/1993 was admitted in evidence as Exhibit D.1]

Tereza Namutebi introduced him to the local authorities. She told him that Kanala was the owner of the land. She introduced him to Kanala at his home in Ndeeba. He developed the plot by constructing thereon four blocks of houses. The first houses were occupied in 1992. Nuwa Senyonjo occupies one house. The other houses are occupied by tenants.

The fifth defendant (DW2) testified at the locus in quo as follows:

He has six structures on the land. Three of them belong to him. The other three structures belong to his brother, Noah Senyonjo. The structures are built of burnt bricks. One structure is for a shop; the others are for residence. He commenced construction in 1991. He had forgotten. It could have been in 1982. His structures have no building plans.

Tereza Namutebi (DW5) testified as follows:

She knew Emmanuel Kasule. She sold her plot to him in 1989. The plot is situated at Kabowa. She made an agreement with him. [Witness looked at Exhibit D.1]. She never sold a plot to Emmanuel Lubuulwa. She did not know him or Senyonjo. She sold the plot to Kasule at shs. 120,000/=. She signed the agreement and Kasule also signed it.

[witness was cross examined on Exhibit D.1]

The agreement dated 21/8/1993 was between her and Emmanuel Lubuulwa and Ssenyonjo, on the other part. Kasule's name was not on the agreement.

The plot had been given to her by her brother called Kaloli Lwanga. Kaloli Lwanga had made an agreement for her dated 9/5/89.

[A hand written agreement dated 9/5/1989 between Tereza Namutebi and C. Lwanga was admitted as Exhibit D.3]. Her brother had taken her to the Landlord called Kanala at Ndeeba. She had paid to Kanala "a Kanza" of shs. 6000/=. When she sold to Kasule she took him to the landlord. She did not know George Kasedde Mukasa (the plaintiff). She saw him for the first time in court. She had not paid Busuulu to anyone in respect of the plot.

Katumba Robert James (DW6) testified as follows:

He is the son of Benado Kanaala. The latter was bed ridden, crippled and mentally unstable. The witness had been appointed by his father to handle his land matters. He knew all the defendants in this case. He was present when Emmanuel Kasule (DW2) came in the company of an elderly lady, the wife of the secretary for defence, to meet Kanala. Kanala was given something. The plaintiff brought surveyors to survey the land. The witness has a home in the same area. At first it was re-opening old boundaries but, there after, the land was subdivided into plots. The witness had never sued Kasedde Mukasa (the plaintiff) to recover his father's land. Kanala never made any agreements with the defendants.

At the locus in quo I observed that the houses belonging to Emmanuel Kasule (DW2) are situated on the land comprised within the boundaries which the plaintiff showed to court.

Learned Counsel Mr. Mbogo again posed this question:

“With this evidence before us, did DW2 EMMANUEL KASULE comply with the law when the land was being transferred to him by Namutebi?”

Counsel submitted that this defendant did not discharge the burden of proof for his lawful acquisition of the Kibanja. He further submitted that this defendant did not comply with S.4 (1) and (2) of the Land Reform Decree, which renders his presence on the land unlawful.

It is clear from the evidence of the 5th defendant (DW2) that he deliberately attempted to change his story relating to the period when he commenced construction on the plot. In his evidence in chief he stated that he came to settle at Kabowa in 1991 and that he bought a plot in 1993. At the locus in quo he told court that he commenced construction in 1991. Then he changed the statement and said it could have been in 1982. As he testified at the locus in quo I found his demeanour unimpressive. I got the impression that he was trying to change his story.

The fifth defendant told court that he bought the plot using the names of Emmanuel Lubuulwa, a minor. It is not clear if he was acting as a legal guardian of the said minor. Nor is it clear if he bought the plot for the minor. On the other hand Tereza Namutebi (DW5) testified that she sold the plot to the 5th defendant in 1989.

She denied any knowledge of Emmanuel Lubuulwa or Senyonjo. She told court that she executed a Sale Agreement with the 5th defendant. When she was shown Exhibit D.1 she failed to identify the names of the 5th defendant in the said Agreement. The said Exhibit D.1 was not translated into English, the language of the court. However, it is clear from the evidence that the said Agreement did not bear the names of the 5th defendant. Emmanuel Lubuulwa and Senyonjo were not called as witnesses. The 5th defendant could not tell court how much he paid for the plot. He recalled with un certainty that it was about shs. 200, 000/=. On the other hand Tereza Namutebi (DW5) mentioned a sum of shs. 120, 000/= as the purchase price. With such

contradictions in the testimonies of the 5th defendant (DW2) and Tereza Namutebi (DW5) I cannot say that on the balance of probabilities the former has proved that he acquired a customary tenure by purchase from Tereza Namutebi. The 5th defendant did not strike me as a truthful witness. I have found it difficult to believe his story.

There is yet another aspect to the case of the 5th defendant. There is no evidence on record of the improvements or developments on the plot which Tereza Namutebi (DW5) could transfer by sale to the 5th defendant. It would appear to me that Tereza Namutebi (DW5) purported to sell a vacant plot, devoid of developments, and that the 5th defendant purported to buy (which is uncertain) a vacant/empty plot of land. In my view such a transaction clearly contravened the provisions of subsections (1) and (2) of S.4 of the Land Reform Decree, 1975. It was a transaction where Tereza Namutebi (DW5) purported to transfer a customary tenure as if it was actual title to the land. She did not say that she had any improvements or developments carried out on the land. So in my view she purported to sell a plot as if she had interest in the land itself. So on the authority of S.4 of the Land Reform Decree, 1975 I hold that any transaction between the 5th defendant and Tereza Namutebi (DW5), or between the latter and Emmanuel Lubuulwa and Nuwa Senyonjo, on the other part, concerning the said plot, was void and of no effect. I further hold that the 5th defendant, Emmanuel Kasule (DW2) occupied and constructed buildings on the land illegally.

The next issue to be considered is whether the defendants are trespassers on the suit land.

Trespass to land is committed inter alia where a person wrongfully or unlawfully sets foot upon, or takes possession of, or takes materials from, land belonging to another person. (See Para. 1205 Volume 38, Halsbury's Laws of England, 3rd Edition).

The plaintiff testified that he is the registered proprietor of the land comprised in Kibuga Block 11 plot 325 at Ndeeba. He produced a Duplicate certificate of title for the land. The said title showed that the plaintiff was registered as proprietor of the land in 1971.

In my view since a certificate of title is conclusive evidence that the person named in it as the proprietor is possessed of the estate and interest described there in, the plaintiff has proved that he is the registered proprietor of the suit land. This has been the position since 1971 when his name was entered on the certificate of title.

See: YEKOYASI MULINDWA V. ATTORNEY GENERAL (1985) H.C.B. 70 (ODOKI, J. as he then was)

At the locus in quo the plaintiff used a print for a certificate of title to find the boundary lines for his plot. In his testimony, at the locus in quo, the plaintiff clearly described the boundaries of his plot. He physically took the court round, while pointing out the boundary lines and marks. I believed his evidence concerning the boundaries of his plot. The plaintiff was able to prove that the structures put up by the defendants were situated on his plot.

My findings stated herein before were that the second defendant, Efulaimu Ssevume (DW1) and the 5th defendant, Emmanuel Kasule (DW2) occupied and constructed structures on the land illegally. Since their occupation was unlawful it constituted trespass. I, therefore, hold that Efulaimu Ssevume (DW1) and Emmanuel Kasule (DW2) are trespassers on the suit land.

The last issue for this court to consider are the remedies available to the parties, if any.

The plaintiff prayed for an order of eviction against the defendants, their servants, workmen and employees, and removal of their structures from the land.

In MULUTA JOSEPH V. KATAMA SYLVANO (supra) KANYEIHAMBA, J.S.C. said:

“The court of Appeal having held that there was no customary tenure relationship between the appellant and the respondent, by this finding alone, any structures put up by the appellant would be illegal and their demolition would be justified. Therefore, the appellant was subject to the demolition warrant”.

In the case of MC Phail V. Persons, names Unknown (1973) 3 All. E.R. 393 (CA) LORD DENNING, MR said:

“.....In a civilized society, the courts should themselves provide a remedy which is speedy and effective; and thus make self-help unnecessary. The courts of common law have

done this for centuries. The owner is entitled to go to court and obtain an order that the owner 'do recover' the land, and to issue a writ of possession immediately".

In my view Efulayimu Ssevume (DW1) and Emmanuel Kasule (DW2) are in illegal occupation of the land and the plaintiff is justified in causing demolition of the illegal structures which they constructed on the land. Once a landlord has a right to demolish illegal structures on his land he is entitled to do so without liability to compensate those affected. It, therefore, follows that both Efulaimu Ssevume (DW1) and Emmanuel Kasule (DW2) can be lawfully evicted as trespassers. In my view the plaintiff is entitled to an order of eviction and an order of permanent injunction against both defendants.

The plaintiff prayed for general damages for trespass.

In an action of trespass the plaintiff, if he proves the trespass, is entitled to recover damages, even although he has not suffered any actual loss. (See: ARMSTRONG V. SHEPPHERD and SHORT [1959] 2 Q.B. 384).

If the trespass has caused the plaintiff actual damage, the plaintiff is entitled to receive such an amount as will compensate him for his loss. The general principle is that a person injured, must, as far as possible in terms of money, be put in as good a position as if the wrong had not been committed. In tort compensatory damages are at large and are not restricted to actual pecuniary loss. The person injured must receive such sum of money as would reasonably be said to put him in as good, but neither better nor worse, a position as he was immediately before the wrong was committed.

The measure of damages for trespass to property is the loss suffered by the plaintiff and not the profit made by the defendant as a result of the trespass.

Learned Counsel for the plaintiff, Mr. Mbogo made general calculations based on the total number of structures and number of rooms on the land. Counsel suggested a sum as monthly rent for each room. Then Counsel suggested that the damages for trespass since 1990, for eleven years, at the rate of shs. 4,800, 000/= per year, should be a total sum of shs. 52, 800,000/=. I must say that the calculations made by counsel were not based on any evidence on record. I find

that counsel's calculations were over-generalised. In my view each one of the two defendants found to be trespassers occupies a particular portion on the land, and put up particular structures. No evidence was led concerning the market rental value of any portion of the land trespassed upon. In the circumstances, it is my opinion that the plaintiff is entitled to merely nominal general damages against each of the defendants. I have considered the fact that Efulaimu Ssevume built a house on the land in 1991. The house has five rooms and is used for commercial purposes. It is the house with a frontage at Muteesa 11 road. On the other hand Emmanuel Kasule (DW2) told court that he constructed on the land four blocks of houses, and the first batch were occupied in 1992. At the locus in quo he told court that he has six structures on the land, with three belonging to him, and the other three belonging to his brother, Noah Senyonjo.

I consider the sums of Shs. 1,000,000/= in respect of Efulaimu Ssevume, the second defendant, and shs. 3,000,000/= in respect of Emmanuel Kasule, the fifth defendant fair, reasonable and adequate compensation for the unlawful occupation of the plaintiff's land by each of them.

The plaintiff is entitled to the costs of this suit against Efulaimu Ssevume, the second defendant, and Emmanuel Kasule, the fifth defendant, jointly and severally.

On the contrary, Moses Mugattansi and Siraje Semwogerere, the 3rd and 4th defendants respectively, are entitled to the costs of this suit against the plaintiff.

The plaintiff prayed for mesne profits. The expression 'Mesne Profits' was defined in Section 2 of the Civil Procedure Act (formerly Cap. 65, but now Cap 71) as meaning those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from the property, together with interest on those profits, but do not include profits due to improvements made by the person in wrongful possession.

It is settled that wrongful possession of the defendant is the very essence of a claim for mesne profits.

See: PAUL KALULE V. LOSIRA NANOZI (1974) H.C.B. 202 (SAIED, J. as he then was).

The usual practice is to claim for mesne profits until possession is delivered up, the court having power to assess them down to the date when possession is actually given.

In *ELLIOTT V. BOYNTON* (1924) 1 Ch. 236 (CA) WARRINGTON, L.J. at page 250 said:

“Now damages by way of mesne profits are awarded in cases where the defendant has wrongfully withheld possession of the land from the plaintiff”.

A question arises:

At what rate are the mesne profits to be assessed?

In *CLIFTON SECURITIES, Ltd V. HUNTLEY AND OTHERS* (1948) 2 ALL. E.R. 283 at P. 284, DENNING J, raised and answered a similar question thus:

“At what rate are the mesne profits to be assessed? When the rent represents the fair value of the premises, mesne profits are assessed at the amount of the rent, but, if the real value is higher than the rent, then the mesne profits must be assessed at the higher value”.

It is settled law that Mesne profits are assessed on the basis of the value of the premises at the time. The landlord should aver in his pleading what he alleges is the annual value of the premises and must be prepared to prove it.

In the instant case there was no averment in the plaint alleging any value of the land which was trespassed upon by any of the defendants. The plaintiff did not adduce any evidence suggesting any rental value for the land in question.

Learned Counsel for the plaintiff Mr. Mbogo invited this court to award such mesne profits as are reasonable in the circumstances. Counsel suggested that Shs. 10m/= would be reasonable.

I must say that the figure suggested by counsel was not based on any evidence. It is my view that the plaintiff failed to plead in the plaint the monthly or annual rental value which could be attached to the land, nor did he adduce any evidence to prove it. So in my view, his claim for mesne profits fails.

Let me now deal with the case of the 1st defendant, EMMANUEL WAMBEDDE.

According to the record M/S Kawanga and Kasule Advocates filed a memorandum of Appearance on 29/5/1998 on behalf of Emmanuel Wambedde, the first defendant. However, a Notice of Appearance filed on the same date showed that appearance had been entered for all the defendants. ON 11/6/1998 the same lawyers filed a written statement of defence on behalf of the defendants jointly and severally. On 29/10/98 when the case came up for hearing learned counsel Mr. Mubiru Stephen confirmed as follows:

“It was intended that we enter appearance for all the five defendants. The written statement of defence is in respect of all defendants”.

On 29/10/98 when the case came up for hearing all the defendants were not in court. The issues were framed and settled. The plaintiff gave his evidence. He was cross-examined by defence counsel. Thereafter, learned counsel Mr. Mbogo closed the plaintiff’s case. Throughout the hearing which followed the 1st defendant attended court once on 13/4/2000. When the court visited the locus in quo on 20/3/2001 the 1st defendant was not present.

In relation to the 1st defendant the plaintiff testified as follows:

“He knew the names of the defendants. He did not know the people in person. He was registered proprietor of the land in 1971. He sued the defendants because they started putting up illegal structures on his land in 1990. He reported the defendants to the local council 1 Chairman of the area. Before the LC courts there was a long list of names. He could not tell who was there and who was not. None of the defendants pays him rent. He wanted the defendants to be evicted from his land and their illegal structures removed”.

In answer to cross-examination the plaintiff testified as follows:-

“He sued the owners of the structures. He did not know who was living there. He got the names from the LC1 Chairman. Emmanuel Wambedde has a structure on the land. He did not know who owned what structure. He only related the names which he obtained from the LC1 Chairman to his plot 325”.

The LC1 Chairman was not called as a witness for the plaintiff.

At the locus in quo the plaintiff testified. However, he did not point out any structure on his land owned by the 1st defendant. The structures which I saw on the plaintiff's land belonged to the other four defendants, but not the 1st defendant. In my view the plaintiff failed to adduce evidence which could prove the presence of structures belonging to the 1st defendant on plot 325. I am unable to say that on a balance of probabilities the plaintiff has established that the 1st defendant occupied his land unlawfully. I, therefore, hold that the plaintiff has failed to prove a case of trespass against the 1st defendant.

In conclusion I enter Judgment for the plaintiff against the second defendant, Efulaimu Ssevume and the 5th defendant, Emmanuel Kasule separately/severally and make the following orders:-

- (a) The second defendant, his servants, workmen and employees do vacate or be evicted from the plaintiff's land (Plot 325) at Nsiike Ndeeba, and the second defendant do remove his illegal structures/buildings or the same be demolished there from.
- (b) The 5th defendant, his servants, workmen and employees do vacate or be evicted from the plaintiff's land (plot 325) at Nsiike –Ndeeba, and the 5th defendant do remove his illegal structures/buildings or the same be demolished from that land.
- (c) The second and fifth defendants, severally, and/or their respective servants, workmen and employees are hereby permanently restrained from entering, occupying, cultivating or erecting structures/buildings on the plaintiff's land comprised in plot 325.
- (d) General damages in the amount of Shs. 1,000,000/= against the second defendant for trespass to the plaintiff's land (Plot 325).
- (e) General damages in the amount of Shs. 3,000,000/= against the fifth defendant for trespass to the plaintiff's land (Plot 325).
- (f) The second and fifth defendants pay the costs of this suit to the plaintiff in equal (50%) shares.

I do hereby dismiss the plaintiff's suit against the 3rd defendant, Moses Mugattansi, the fourth defendant, Siraje Semwogerere, and the 1st defendant, Emmanuel Wambedde. I order the

plaintiff to pay costs of this suit to the 3rd, 4th and 1st defendants, to be presented in a joint bill of costs and taxed.

MOSES MUKIIBI

JUDGE

30/4/2004.

30/4/2004 at 12.43 pm.

Mr. Charles Mbogo – Counsel for plaintiff.

Plaintiff is in court.

Defendants and their counsel are absent.

Ngobi: Court Clerk/Interpreter.

Court:- Judgment is delivered in Chambers.

MOSES MUKIIBI

JUDGE

30/4/2004.