

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0002 OF 2015**  
**(Appeal from the judgment and decree of Koboko Magistrate Grade One Court**  
**in Civil Suit No. 0002 of 2012)**

<b>1. BAIGA ROBERTS</b>	<b>}</b>		
<b>2. DATA</b>	<b>}</b>	.....	<b>APPELLANTS</b>
		<b>VERSUS</b>	
<b>KOBOKO TOWN COUNCIL</b>		.....	<b>RESPONDENT</b>

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

This is an appeal from the decision of the Grade One Magistrate of Koboko, in Civil Suit No. 2 of 2012 given on 29<sup>th</sup> January 2015, by which judgment was entered in favour of the Respondent (plaintiff in the court below) against the appellants (defendants in the court below) for; recovery of land, general damages for trespass to land of shs. 1,000,000/=, costs and interest.

In the court below, the respondent sued both appellants for trespass to land comprised in what is known as “Boma Grounds” within Koboko Town Council. The respondent claimed that the appellants were trespassers on approximately half an acre on the lower side of the slightly over eight acres of land constituting the Boma Grounds. Briefly, the respondent’s case was that they owned that land which had since the colonial times been designated a boma ground and subsequently gazetted as such. That the appellants occupied that part of the grounds during the late 1980s or early 1990s as part of returning exiles, in the aftermath of the 1979–80 war. The respondent allowed them to occupy that part of the land on a temporary basis. They were as well allowed to put up temporary structures.

During or around the year 2012, the respondent being desirous of developing that area, engaged a government valuer to assess the value of developments of all occupants, inclusive of the appellants, who had settled on the land in the circumstances explained above. All other occupants received compensation and vacated the land. The appellants rejected the compensation

and refused to vacate the land, hence the suit against them seeking a declaration that the land belongs to the respondent and an order of vacant possession.

In their defence, the appellants denied being trespassers on the land. They instead claimed to be in lawful occupation as members of the Nyangiliya Clan, the ancestral customary owners of land in that area, and by virtue of the fact that they had lived on it together with their mother, Mary Apayi, since the late 1980s and subsequently inherited it from her upon her demise in 2008. They counterclaimed for a declaration that they are lawful owners of the land and in lawful occupation as well as an injunction to stop the respondent from evicting them.

In its judgment, the trial court found that the respondent had failed to prove its claim of being the registered proprietor of the disputed land, since it did not produce the title deed, but had proved ownership on account of the ability of its witnesses to show court the boundaries of the boma ground, during proceedings at the *locus in quo*, and on account of the fact that the rest of the occupants had accepted compensation and vacated the land. The trial court dismissed the appellants' defence and counterclaim by reason of their failure to prove customary ownership of the disputed land since they had no proof of permission by the then prescribed authorities to occupy public land by customary tenure, and at the *locus in quo*, had failed to account for occupancy by other persons who had vacated, what appeared to the court, to be land communally held. The appellants were found to be in unlawful occupation of the land. The court entered judgment for the respondent.

Being dissatisfied with that decision, the appellants appealed on the following grounds, namely; -

1. The learned trial magistrate erred both in law and fact when he failed to properly evaluate the evidence on record and hence arrived at a wrong decision.
2. The learned trial magistrate erred both in law and fact when he held that the suit land belongs to the plaintiff without proof of ownership of the same by the plaintiff.
3. The learned trial magistrate erred both in law and fact when he held that the defendants are trespassers on the suit land.

4. The learned trial magistrate erred both in law and fact he (sic) awarded the plaintiff general damages in the sum of shs. 1,000,000/= (Uganda shillings one million) without any legal basis.
5. The learned trial magistrate erred both in law and fact when he did not make any finding or judgment on the counterclaim.

At the hearing of the appeal, the appellants were represented by Mr. Ronald Semugera while the respondent was represented by Mr. Ben Ikilai. In arguing the appeal, both counsel presented grounds one and two together, and grounds three and four separately. Counsel for the appellants abandoned ground five. The appellants seek orders setting aside the judgment of the court below and an award of costs, both of the appeal and of the trial.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the court below to a fresh scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others vs Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

The court will therefore, in the course of this judgment, re-appraise the evidence on record. With regard to grounds one and two, counsel for the appellants argued that the court having found that the respondent had failed to prove its claim of being the registered proprietor of the land in dispute, its ultimate finding that the land belonged to the respondent was not supported by the evidence on record. He argued that the respondent failed to prove any other form of ownership under the four tenures recognized by the law and therefore the suit should have been dismissed.

In response, counsel for the respondent argued that the trial magistrate properly appraised the evidence adduced and came to the right conclusion. He argued that although the respondent

failed to prove its claim of being the registered proprietor of the land in dispute, evidence adduced at the locus satisfied court of the respondent's ownership since the witnesses were able to show court the boundaries of the land as well as the fact that other occupants had vacated the land upon receiving compensation from the respondent, for their developments on the land.

In reply, counsel for the appellants argued that having failed to adduce evidence of ownership in court, the respondent could not prove such ownership by the visit to the locus since such visits are made for purposes of clarifying and verifying evidence given in Court. Secondly, that the other occupants had left the land upon receiving compensation did not prove the respondent's ownership of the land.

In considering these two grounds, this court takes cognizance of paragraph four of the amended plaint which stated the respondent's claim in the following terms;

4. The Plaintiff brings this suit against the defendants jointly and severally for trespass to land comprised in and commonly known as Boma Grounds, Koboko Town Council measuring approximately 0.22 hectares or 0.559 acres (hereinafter referred to as the suit land), a declaration that the suit land belongs to the plaintiff, an order of vacant possession, an order of permanent injunction restraining the defendants, their agents, servants and or employees and anybody claiming or deriving authority through him from interfering with the plaintiff's quiet enjoyment of the suit property, general damages and costs of the suit with interest thereon.

From the above statement of claim, though not as distinctly stated, this court discerns a two-pronged action of trespass to land; in one limb, is the action for recovery of land in dispute (evidenced by the claim for a declaration that the suit land belongs to the plaintiff and an order of vacant possession) and in the second limb is the action for the tort of trespass as a wrongful entry onto the land in dispute (evidenced by the claim for a permanent injunction guaranteeing quiet enjoyment of the suit property). Whereas an action for recovery of land is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership of the land, an action of trespass to land as a claim in tort is perceived as a wrong against possession, not ownership, of the land. In the latter case only the person who has exclusive possession or an

immediate right to possession of the land in question can sue. Grounds one and two bring into focus the first limb of the respondent's claim while ground three addresses the second limb.

To succeed in its claim of trespass as a basis for recovery of the land in dispute, the respondent had to prove ownership under one of the four tenure systems provided for by article 237 of the *Constitution of the Republic of Uganda, 1995* and section 2 of the *Land Act, cap 227*, viz.; - (a) customary; (b) freehold;(c) mailo; and (d) leasehold.

The latter three tenures usually require the production of a certificate of title as proof of ownership. Indeed the respondent in paragraph 5 (a) of the plaint claimed to be the "registered proprietor of the suit land". This was supported by the testimony of, PW1 while under cross-examination at page 33 of the record, line three, where he stated; "The suit land is registered in the name of the plaintiff." However, the respondent did not adduce any title deed in evidence. During his final submissions to the court below, learned counsel for the respondent did not address this gap in his client's evidence. On his part, counsel for the appellants at page 87 lines 1 and 2 during his final submissions contended; "Accordingly for the plaintiff to prove ownership of the suit land as claimed in the plaint, had (sic) to produce a certificate of title registered in its names. No certificate of title was ever produced in court to prove ownership by the plaintiff. The plaintiff on this alone has failed to prove its claimed ownership of the land." The trial magistrate agreed and in his judgment at page 97 lines 5 – 6 of the record decided; "In the absence of a certificate of title, I find, notwithstanding any other documents adduced, the plaintiff has failed to prove that it is the registered proprietor of the suit land."

At the hearing of the appeal, counsel for the respondent conceded to the propriety of this finding. This court too finds that based on the pleadings and evidence before it, the trial court came to the correct conclusion as regards this aspect of the respondent's claim.

The trial court however went ahead to consider whether the evidence adduced by the respondent proved any other form of ownership by the plaintiff of the suit land. This was challenged by counsel for the appellants both during his submissions before the trial court and on appeal. In its judgment (from page 99 – 100 of the record of appeal), the trial court evaluated evidence

adduced during its visit to the *locus in quo*, which evidence was substantially limited to the various witnesses indicating the boundaries of each party's claim over the disputed area, as follows;

The plaintiff having failed to prove that it is the registered owner of the suit land, it must prove any other form of ownership....At the visit of the *locus in quo*, Plaintiff's witnesses showed the court the extent of its land...the defendant in turn showed court the extent of his land, the boundaries.....

The trial court's decision to engage in this analysis is flawed for two reasons; Firstly, it constituted a departure from the respondent's pleadings. The respondent's claim was premised on its being the registered proprietor of the land in dispute. Introduction into evidence or advertent to evidence in proof of any other form of ownership would require a prior amendment of the respondent's pleadings, which was not done in this case.

In his final submissions to the court, learned counsel for the appellants cited *Interfreight Forwarders (U) Limited v East African Development Bank; S.C. Civil Appeal No.33 Of 1992* (unreported), which the trial court does not seem to have considered, yet it would have offered useful guidance and indeed was binding authority on the court.

In the cited precedent, the respondent's claim against the appellant was for the price of a new motor car that had been damaged beyond repair in a road accident while being transported from Mombasa to Kampala. In the plaint, the respondent had premised its claim on negligence to which the appellant's defence was inevitable accident. The trial court had found the appellant negligent. In an alternative finding, the learned trial Principal Judge found that if the appellant did not negligently cause the accident, then it was strictly liable as a common carrier. On appeal to the Supreme Court, the learned trial Judge was criticized with regard to the alternative finding;

.... because it does not appear to have been the Plaintiff's case as stated in the plaint that the Defendant was a "common carrier". Paragraphs 3 & 4 of the plaint which have a bearing on the issue did not indicate that the contract was made with the Defendant as "a common carrier."

Citing Order 6 Rule 1 of the *Civil Procedure Rules*, the Supreme Court opined;

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

The Supreme Court then concluded;

...if the Plaintiff did not plead that the Defendant was a common carrier, I think that he cannot be permitted to depart from what clearly appears to have been his case as stated in the plaint and claim that there was evidence proving that the Defendant was a common carrier. As already found above, no evidence in fact, supported that contention.

Similarly in the appeal before this court, since the respondent did not plead proprietorship other than by registration, the trial court should not have permitted the respondent to depart from what clearly appears to have been its case as stated in the plaint and instead claim that there was evidence proving that it owned the land in dispute other than by registration.

This court is mindful that the decision cited was delivered before promulgation of the *Constitution of 1995*, which in article 126 (2) enjoins courts to administer "substantive justice without undue regard to technicalities." However, this court is inclined to follow the decision of the Supreme Court in the case of *UTEX Industrial Ltd vs. Attorney General SCCA. No 52 of 1995* to the effect that "the article was never intended to do away with the rules of procedure," but rather is a reflection of the saying that rules of procedure are handmaidens of justice. They are to be applied with due regard to the circumstances of each case.

In the instant case, the trial court ought to have considered the intricacy of claims relating to land where parties and the court in a single action, usually have to deal with and unravel various tenure systems and multiple consistent or competing, and sometimes conflicting interests in the same piece of land. Disputes over land therefore present a heightened need for the parties, by their pleadings, to define and deliver their claim with clarity and precision the real matters in controversy between them upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It would occasion injustice to the opposing party to permit a litigant to present an amorphous claim of an interest in land which keeps on metamorphosing, hydra-like, as the suit goes on. It occasions hardship to the opposing side to prepare for and meet the case and evidence of such a litigant. The circumstances of this case therefore required a strict adherence to the rules regulating the content of pleadings. In failing to strictly apply those rules, the finding of the trial court ended up being entirely different from the claim that was presented to it. This was as a result of permitting the respondent to significantly depart from its pleadings.

Secondly, the finding that the plaintiff proved ownership of the land is wrong in law. The trial court did not pronounce itself with precision regarding the form of ownership the respondent proved, i.e. whether of a legal or equitable nature. The respondent having failed to prove ownership by registration, the trial court appears to have proceeded to consider ownership under the only tenure system left open to the respondent, viz; customary tenure. This was an exercise in futility since the definition of customary tenure in section 3 (1) of the *Land Act, cap 227* does not envisage public bodies / statutory institutions owning land under customary tenure, but rather individuals (persons), households (family), communities (communal ownership) and traditional institutions. For those reasons, this court finds that the trial court erred in law and in fact when it found that the respondent had proved ownership of the land in dispute. Grounds one and two of the appeal therefore succeed.

Regarding ground three of the appeal, counsel for the appellants argued that the respondent having failed to prove ownership of the land, there was no basis upon which the appellants could have been found to be trespassers on the land. With due respect, this submission is oblivious of the second prong of the respondent's claim at the trial, i.e. the tort of trespass to land.



Trespass to land as a tort is constituted by unauthorised interference with a person's possession of land. From this perspective, trespass is unjustified entry onto land in another's possession, i.e. entering onto the land without permission, or refusing to leave when permission has been withdrawn. This tort developed to protect a person's possession of land, and therefore only a person who has exclusive possession or an immediate right to possession of land may sue. It is a wrong against possession, not ownership, of the land. For purposes of this tort, possession refers to occupation or physical control of the land such that use of the land without physical control is not sufficient, nor is ownership of the land without possession. Thus, a landlord of leased premises does not have exclusive possession, nor does a lodger or a licensee. In considering this ground, this court is therefore required to determine whether the trial court was presented with material proving that the respondent was in occupation or physical control (exclusive possession) of the land in dispute to justify an action in trespass.

The combined effect of paragraphs 5 (b) and (c) of the plaint (excluding the reference to being the registered proprietor thereof, which has already been considered under grounds one and two), is that the respondent's claim was premised on the contention that it had physical control of the land by virtue of which it permitted the appellants temporary occupancy, which appellants subsequently refused to vacate the land when the respondent revoked the permission. The respondent therefore contended that the appellants became trespassers on the land by refusing to leave when permission was withdrawn.

The land in dispute was in the respondent's evidence described as forming part of the "Boma ground." The Boma ground was described by PW1 at page 32 of the record of appeal, lines 10 and 11 as an "open space for the good of everybody in the Town Council." PW2 at page 39 of the record of appeal, lines 18 and 19 described it as "civic land which is meant for public use. Civic land is land opened for public use and the land in dispute is located with (sic) civic land" and at page 41 lines 1 to 3 "the cadastral plan shows clear boundaries which is (sic) bordered by roads as open space which is regarded (sic) to as a civic land for the purposes of public functions. According to DW2 while under cross-examination at page 51 of the record of appeal line 2, "It was made for recreational purposes." I therefore construe the characterization of the

land in dispute as being in the form of a public park, garden or recreation ground within Koboko Town Council.

According to Part 3 of the Second Schedule to the *Local Governments Act, cap 243* (Functions and services of the Government and local governments), a local government council (which includes urban councils like the respondent) is within its area of jurisdiction, empowered to;

2. Establish, maintain or control public parks, garden and recreation grounds on any land vested in the council and in connection with or for the purposes of that Public Park, garden or recreation ground to—
  - (a) establish, erect, maintain and control aquariums, aviaries, piers, pavilions, cafes, restaurants, refreshment rooms and other buildings or erections that the council may deem necessary;
  - (b) reserve any portion of the public park, garden or recreation ground for any particular game or recreation or for any other specific purposes, exclude the public from those portions and provide for their renting and hiring to the public, clubs or other organisations; and
  - (c) provide or permit any other person to provide any apparatus, equipment or other amenity.

Control over such public places within urban areas is further provided for by *The Physical Planning Act, 8 of 2010* (which commenced in April 2011) under sections 11 and 12 created urban physical planning committees, specified their functions and under item 2 of the fifth schedule, requires them in their development plans to make;

provision of special areas .....for public and private open spaces, and prohibiting the carrying on of any trade or manufacture, or the erection of any building, in a particular part of the area, otherwise than in accordance with the plan.

In light of the above provisions, an Urban Council (such as the respondent) is empowered to maintain or control public parks, gardens and recreation grounds “on any land vested in the council” and in that connection is given exclusive control over such land or premises constituting public parks, gardens and recreation grounds within its area of jurisdiction. In the tort of trespass to land, it is not material whether physical control or apparent dominion be acquired with or without a good title, or, if without a good title, whether innocently under colour of a supposed title, or with wrongful knowledge and intent. A possessor may be a mere wrongdoer yet as against all third parties not claiming under the true owner, is fully protected by the law.

The question then for purposes of this ground of appeal is not whether the Boma Ground, is situate on land vested in the respondent (because that is a question of ownership) but rather whether the trial court was presented with evidence to prove that it is land, with all buildings, structures, works, appliances and servitudes, rights, powers and privileges connected therewith, used for the purposes of recreation, games, sports or amusements or as a public playground, garden, or open space, to which the public has access, whether on payment or not, but managed, or otherwise under the control of the respondent, as a public park (which is a question of possession). In any case, the common law tradition regards ownership as a relative concept as opposed to an absolute one. This simply means that possession is a good title to a thing, enforceable against anyone who cannot show a better title.

Apart from PW1 and PW2 who provided court with a description of the land, PW3 stated at page 41 of the record of appeal that his uncle showed him the boundary of the Boma Ground in 1973 and cautioned him not to cross it. That in the year 2000 he settled on this land with the consent of the Town Council. On his part, PW4 at page 45 of the record of appeal, stated that as way back as the 1940s, he had known the land in dispute as “government land.” At the *locus in quo*, the record of appeal indicates at page 60 that PW2 showed court a number of features established on the Boma Ground by the respondent or with the respondent’s permission, including; NPA buildings on a part allocated by the respondent, a community borehole, remains of a demolished public toilet, kiosks on another part allocated to developers to forestall further encroachment, a fence on one side, trees planted on another side and open space for “public celebrations.” The sum total of this evidence is that the Boma ground is a public space managed by the respondent.

Whether a person has ownership is a question of law but whether a person has possession is a question that could be answered as a matter of fact, without reference to law at all. A person may exercise dominion or control over property not in his or her physical possession. A person who exercises dominion or control over property not in his or her physical possession is said to have that property in his or her “constructive possession.” The evidence before the court indicated a manifest intent on the part of the respondent, of sole and exclusive dominion, not merely to exclude the world at large from interfering with the Boma Ground, but to do so on the respondent’s own account and in its own name. For that reason, the court is satisfied that there

was credible evidence presented to the trial court, sufficient to support the finding that the respondent managed, or otherwise had under its physical control (and therefore exclusive constructive possession), the land constituting the Boma Ground.

Once possession by the respondent was proved, the presence of the appellants on the land against the will of the respondent then constituted a *prima facie* invasion of the land. In that case it was for the appellants to justify their presence on the land. They did this by pleading in their written statement of defence that the land in dispute belonged to the Nyangiliya Clan, which they inherited from their mother (who apparently was a member of that clan) and that it neighboured but lay outside the Boma Ground (see paragraphs 5 - 8 of the amended written statement of defence and paragraphs 1 – 4 of the counterclaim). On its part, the respondent contended that the appellants occupied part of the land constituting the Boma Ground but not adjacent to it as claimed and that they were licensees on it whose license had been revoked during the year 2012.

On its part, the respondent evidence was that the appellants were mere licensees on the land (PW3 at page 41 lines 10–12) who were allowed to put up temporary structures. Upon reviewing the evidence adduced by either party, this court makes the following observations; firstly, the first appellant did not testify in his defence. The second appellant testified as DW4 and at page 56 lines 4–6 stated that “We were all brought later for compensation mine was supposed to me (sic) Ug. Shs. 700,000/= but I refused to sign because the land belongs to Nyangiliya clan” (emphasis) added. The second appellant did not claim occupancy in his own right but possibly as a member of the Nyangiliya clan.

Secondly, the appellants’ contention that the land they occupied lay outside the Boma Ground was disproved at the *locus in quo* when the respondents’ witnesses were able to demonstrate that it indeed lay within the perimeter of the Boma Ground. The appellants’ claim of customary inheritance fell apart when in their testimony, DW4 stated at page 54 that he did not know how the appellants mother obtained the land, while DW1 at page 48 and DW3 at page 52 of the record of appeal, stated that the land given to the appellants’ mother by the then chief, lay outside the Boma Ground. These witnesses were either uncertain about the location of the land given to the appellants’ mother, were referring to a different piece of land or were out rightly

untruthful. Their testimony in court was inconsistent with what the court observed at the *locus in quo*. The trial court was therefore justified in disbelieving their account of the appellants' occupancy.

On the other hand, the respondents' witnesses PW3 and PW4, at pages 41 – 45 of the record of appeal gave a detailed account of the circumstances in which the appellants came onto the disputed land. Settlement on the hitherto open public space started after 1983, upon the return of the local population from exile. PW3 was the first to settle on the Boma Ground with the permission of the respondent (see lines 12 – 15 at page 41). It is him who around 1990 gave part of this land to the second appellant to put up his house (see lines 20 – 21 at the same page). Around the same time, it is PW3's deceased brother who gave the first appellant's mother part of the same land to construct her house (see lines 5 – 14 at page 42). The witness stood by this testimony even under cross-examination and does not seem to have been shaken (see lines 10 – 18 at page 43). Neither was PW4's testimony discredited by cross-examination. Both witnesses had known the appellants since childhood. In fact the second appellant is an in-law of PW3. There was nothing to suggest why either witness would be motivated to tell lies about any of the appellants and the circumstances in which they came to occupy the land. The trial court was therefore justified to believe the respondent's evidence as opposed to that of the appellants.

This court is required in the circumstance of this case to consider whether the appellants' occupancy under the licence created any justification for their continued stay even after it was terminated in the year 2012, considering that they had temporary structures on the land.

Under English common law, if the owner of land requests another or indeed allows another to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity. For example in *Inwards and Others v. Baker* [1965]1 All E.R. 446, a son built a bungalow for living in on his father's estate with the consent and permission of the father. After living there for many years, the executrix of his father tried to eject him in the county court. An order of ejectment was given. But in the Court of Appeal it was refused on ground that the equity arising from expenditure on land does not fail, "merely on the

ground that the interest to be secured has not been expressly indicated. . . . The court must look at the circumstances in each case to decide in what way the equity can be satisfied.”

In the case before this court, there is no evidence on record to suggest that in permitting the appellants to settle on the land, the respondent created or encouraged expectation that the appellants will be able to remain on the land. The evidence of PW3 at page 42 indicates that when requested to leave, all occupants left apart from the appellants yet they all occupied the land under similar circumstances. This begs the question why it is only the appellants who harboured such an expectation. I have not found any evidence to suggest that in allowing the appellants to occupy and put up temporary structures on the land, there was an intention for the appellants to live and occupy those structures permanently without limitation in point of time, as long as they wished. Any equity arising out of the expenditure of money on the temporary structures was met by the respondent’s willingness and offer to compensate. The trial court’s finding that the appellants became trespassers on the disputed land upon the respondent’s termination of their occupancy and offer of compensation for their developments thereon, is therefore well founded since their occupancy did not create an equity such as to entitle them to stay. Their rejection of the compensation and continued occupation manifested a deliberate intention to interfere with the respondent’s right of possession. This ground of appeal must fail.

The last ground of appeal challenges the award of a sum of Shs. 1,000,000/= as general damages to the respondent. Learned counsel for the appellant argued that since the respondent had not proved ownership of the land the appellants could not have been trespassers and therefore the award of general damages was unwarranted. In response learned counsel for the respondent argued that since the appellants had remained in occupation of the land for a period of over four years following the revocation of their license, the award of that sum in damages was justified.

This ground of appeal too must fail. Firstly in light of the decision on ground three of this appeal, the premise upon which it was presented is erroneous. Secondly, it is trite law that an appellate court cannot alter damages awarded by the lower court, simply because it would have awarded a different amount if it had tried the case at first instance. An appellate court may lawfully interfere in the assessment of damages only in one of the following circumstances; first it may

intervene where the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained. (See *Henry H. Ilanga v M. Manyoka* [1961] EA 705 at p.713). This court has not been furnished with any of those reasons that would justify setting aside of the award.

In conclusion this appeal succeeds on grounds 1 and 2, fails on grounds 3 and 4, while ground 5 of the memorandum of appeal stands withdrawn. However, since the appeal has not succeeded on grounds challenging the right of the respondent to curtail the appellants' continued occupation of the land in dispute, the appellants' success is minimal or merely technical. The overall effect is that the decision of the court below is upheld on grounds other than those that supported it.

For purposes of awarding costs, the level of success of an appeal must be taken into account, but; the extent or level of success of an appeal is not measured according to the relief obtained *per se*. The decision on the grounds of appeal in issue is a relevant consideration... It seems to me therefore, that if the factor of "partial success" can be "good reason" for awarding to a successful party only a fraction of the costs, then, subject to the court's discretion, it can, in appropriate circumstances, be good reason for not awarding any costs to the successful party. A good example is where the success is minimal or technical. (Per Mulenga, JSC. in *Impressa Infortunato federici v Irene Nabwire* (Suing through her next friend Dr. Julius Wabwire); S.C.CA No. 3 of 2000 (unreported).

Therefore, because this appeal has only succeeded in part, considering that the appellant's success is minimal or only technical, but was occasioned by the respondent's failure to adduce evidence of proprietorship, the respondent shall be entitled to only one half of the costs of the appeal and the full costs in the trial court. Otherwise the appeal is hereby dismissed. I so order.

Dated at Arua this 14<sup>th</sup> day of July 2016.

Stephen Mubiru  
Judge