THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0008 OF 2017

SULEIMAN ADRISI ……..……..……..……..…..…… PLAINTIFF

VERSUS

1. **RASHIDA ABDUL KARIM HALANI }**
2. **MOHAMMED ALLIBHAI } ……..…… DEFENDANTS**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendants jointly and severally seeking a declaration that he is the rightful proprietor of land comprised in L.R.Y H.Q.T 488 Folio 25 measuring approximately 0.0450 Hectares at plot 2 New Lane Arua Municipality, a permanent injunction restraining the defendants from further acts of trespass on that land, general damages for trespass to land, and the costs of the suit. His claim is that before expulsion of persons of Indian extraction by the Idi Amin Regime in 1972, the property in dispute was owned by the first defendant. When the property was expropriated, the property was taken over by the Departed Asians Custodian Board. During the war of 1979, the building thereon was completely destroyed up to ground level. Following the end of that war, several persons and entities, including the plaintiff, applied for allocation of that plot and the plaintiff emerged the successful applicant and on 14th June 1988 the Departed Asians Custodian Board granted him permission to re-develop the plot. During the year 2001, he reconstructed the building at the cost of shs. 56,920,300/= and obtained an occupation permit in July, 1993 and began paying monthly rent to the Board.

On 20th July, 2011 the plaintiff applied to Arua District Land Board for a lease over the plot and he was granted a lease offer for an initial five year term. He was surprised when the second defendant on 4th October, 2016 wrote a letter to his tenants stopping them from paying rent to the plaintiff and directing them to pay rent to him on behalf of the first defendant. The second defendant went further to seek revocation of the plaintiff's lease offer and his certificate of title

which the Arua District Land Board continued to do without giving him an opportunity to be heard. He contends that the revocation was fraudulent in that the second defendant colluded with the District Land Board to revoke his lease offer and cancel his certificate of title. In the alternative, he claims compensation for his developments on the land in the event that it is re-claimed by the first defendant.

In their joint written statement of defence, the defendants refute the plaintiff's claim and contends that following a legislative revocation of all dealings with that plot as former expropriated property, it reverted to the first defendant by virtue of a repossession certificate dated 13th August, 1999. Consequently, the purported offer of a lease over the same plot by the District Land Board.

P.W.1 Suleiman Adrisi, testified that the defendants trespassed on his land in September, 2016 when they told his tenants not to pay rent to him. The premises are located at New Lane Plot No. 2 in Arua Municipality. He acquired that plot when he applied for it from the Departed Asians Custodian Board. during 1988. He first applied to the Custodian Board and then to the Municipal Council and the names of the successful applicants were displayed at the Municipal Council offices and there were four of them. He applied by writing a letter to the Custodian Board (exhibit P. Ex.1). The plot was vacant since the house that had existed thereon had been destroyed during the 1979 war. He went to Arua Municipal Council where his building plan was drawn and then he started re-construction. It cost him shs. 56,920,000/= He sold 270 heads of cattle from his farm in Terego to raise the money. His farm in Terego had not been affected by the war and that is where he took refuge.

He began building on the land in 1988 and completed after three years, that is around 1994. After that he was given an occupation permit after the Municipal Council had inspected the building (document P. ID. 1). He was then given a letter by the Custodian Board after completing the building in 1993 (exhibit P. Ex. 2). He started dealing with the Custodian Board. He let the building out to tenants. It is a single storied commercial building with seven rooms all used as shops. He in turn paid rent to the custodian Board but could not remember the year he started paying rent to the custodian Board but was paying around shs. 125,000/= per month to the

lawyers of the Custodian Board who were collecting the rent (exhibit P. Ex. 3). He stopped paying rent when the Municipal Council gave him documents which included a title and a permit showing he had completed constructing the building and it was his. The permit bears his name and that of the Municipal Council (exhibit P. Ex. 4). The value of the building is in the region of shs. 700 - 800 million shillings and he has a valuation report where it is indicated as shs. 560,000,000/= (exhibit P. Ex.5). At the time he constructed the building he did not know who the owner of the plot was. No one approached him to claim ownership. He only knew that the land belonged to the Municipal Council. He even made an application to them. There is an Indian called Alibhai who came to him in September 2016. He came with a letter he gave to tenants asking the tenants to pay rent to him because the land is Alibhai's. He picked his documents and ran to his lawyer who then filed this suit. The defendants have trespassed on his land and the Indian said he cannot settle the matter. He wants the house declared his. If the Indian wants the land, he should pay the value of the building which is over shs. 500,000,000/= and costs.

Under cross-examination he stated that at the time he applied for the plot it was vacant. Even the Town Clerk wrote on the document. By 8th June 1998 when he applied for the plot (exhibit P. Ex.1). there was only debris of a collapsed building on the plot. They were four applicants for the same plot including Shoe Makers, Ahmed Ongolobo and Sulaiman Addrissi. He was the successful one out of the other three. There was a damaged building but with a strong foundation. The foundation had been damaged on one side by fire. He received bills of quantities from the Custodian Board and was permitted to put up a new structure, not simply to repair the building (exhibit D. Ex.1). He acquired the land from the Municipal Council and he was then advised to apply to the Custodian Board again for the land. It belonged to Custodian Board at the time. He obtained a bills of quantities for the construction (exhibit D. Ex.2). He engaged engineer Atonyo who is now deceased. He submitted the report of his expenses to the Custodian Board. He was paying rent to the Custodian Board. He did not keep the receipts for the expenditure he made in construction. His dealings after that were with the Municipal Authority not the Custodian Board. He could not remember when he began the re-construction. It took him about three years to complete the construction. He had almost completed the building by 1992. (Exhibit P. Ex.3) in 1993 is when he began paying rent to the Custodian Board. He did not anticipate that there would be a dispute where these receipts would be required. By that letter he

was required to begin paying rent immediately but until 1995 he had not paid rent to the Custodian Board. It was his house and so he was collecting rent.

The tenants were paying shs. 50,000/= per month each at the time. They were seven tenants and he kept on increasing the rent over the years. The total rent he paid to the Custodian Boars is shs. 26,000.000/= He was paying about 100,000 - 120,000/= per month. When the Municipal Council gave him a letter, that is when he stopped paying rent to the Custodian Board. He could not remember whether he paid rent to the Custodian Board beyond 1999. He may have began collecting rent in1993 but has no record of the rent he has collected since 1999. The property was his so he would collect rent and spend it. Before the order for payment of rent into court, some tenants were paying shs. 300,000/= and others shs.600,000/=. There are eight tenants. The valuation report indicates that he collects shs. 5,200,000/= per month. It is only the building without the land that was valued. He did not know whether they valued the building and the land. He has collected rent in excess of shs. 56 million since 1999. He has never demanded for compensation from the first defendant. In 1996, he did not meet the first defendant over compensation. He has not deposited the money in court because he has a loan in the bank.

P.W.2 Okwonga Oyake Justin, testified that before his retirement, he worked with Arua Municipal Council as a Revenue Collector from 1978 to 1992. He was in charge of custodian Board Property in the entire West Nile from 1995 to 2003, working with Sam Rwingwegi and Company Advocates who were the agents of the Custodian Board. They were instructed by the custodian Board to collect rent on its behalf. The building had been destroyed in 1980 by the wars and the plot was allocated to the plaintiff. He built a house on the plot but since he built the house they never collected any rent from him. The government came with a policy of returning property to the Indians. Those who repossessed paid the sitting tenants for the renovations done. Plot 2 was repossessed in 1999. The sitting tenant, the plaintiff has not been compensated. It is a single storied commercial building. When the first defendant came in, Suleiman produced the cost of building which was shs. 56,000,000/= but the first defendant could not refund the money. She went back to Canada in 1988.

Under cross-examination he testified that the Custodian Board never received any rent from the plaintiff. If he claimed he paid shs. 26,000,000/= that was a lie. It is only sitting tenants who were required to submit costs of improvements. (Exhibit P. Ex. 3) shows that they demanded for rent from him but he did not pay. At the time they wrote the letter, the property belonged to the Custodian Board and that is why they were writing. He did not submit the costs of his renovation to Custodian Board. The custodian Board would have compensated him had he submitted. He was collecting rent from the premises at the time. He met Rashid in the presence of the plaintiff and the meeting was in his office at Arua transport Road. It is the plaintiff who asked for compensation but he could not remember whether the first defendant demanded for proof. It is the amount and not the proof that was in dispute. He did not know whether the plaintiff took any steps to recover the costs he was demanding. The compensation due to him was the refund of his money like it was done to other tenants. The money to be refunded was the cost of building the house. It was now co-managed with the Municipal authorities. Together they did the allocation of the property to the plaintiff. He did not know whether the lease had expired.

P.W.3 Andiga A. K. Jabir, a neighbour to the plot in dispute, testified that Plot 2 New Lane belongs to the plaintiff after it was allocated to him on 8th June 1988. He was allowed to rebuild it after the wars of 1979 - 1981 had destroyed it to foundation level. He developed it from foundation level up to completion and he obtained an occupation permit but he did not know how much the plainrtff spent on construction of the building. I did not know whether he presented a demand for compensation. That was the close of the plaintiff's case.

D.W.1 Muhammad Alibhai, a property manager under the name Alderbridge Real Estate and Management Limited based in Kampala, testified that they repossessed the property now in dispute on behalf of their client, Rashida Abdul Karim, the first defendant. The property is at Arua Plot 2 New Lane. He had powers of attorney from her executed on 7th May, 1999 (exhibit D. Ex.3). He was subsequently issued with a certificate of repossession from government, number 3246 dated 13th October, 1999 for plot 2 New Lane Arua (exhibit D. Ex. 4). When he obtained the certificate he took possession of the property briefly. It was for a few months when some of the tenants began to pay rent. The plaintiff was one of the tenants. He had a claim of interest in the property. He had done some alleged reconstruction of the property then he

hijacked all the tenants. He has been collecting rent on the property ever since. The first defendant has a title deed to the land issued on 22nd September, 2016 because the previous title had expired (exhibit D. Ex.5). The defendant had proceeded to obtain title over the same land. At the time he did that, the first defendant had already re-possessed the property. The lease over this property in favour of Rashida was still running. He challenged the title the plaintiff had obtained. He complained to the Registrar of Titles and to the District Land Board in Arua. The Arua District Land Board wrote a letter saying the plaintiff's title had been issued in error and the Registrar of Titles in Kampala invited him and the plaintiff in Kampala. The plaintiff did not turn up. The Land Office wrote a letter cancelling his title (exhibits D. Ex.6 and 7 respectively). There is a Board minute No. 9 and No. 10 of 11th November, 2016 and is a revocation of a lease offer to the defendant on plot 2 New Lane (exhibit D. Ex.8).

He scrutinised the list of expenses claimed by the plaintiff as expenditure on improvements. (exhibit D. Ex.2). They are not opposed to paying him but some of the expenses do not seem correct. The first defendant had come in 1998 and said the building was in the same exact condition as she had built it in 1972. Rashida had showed him a photograph of the property in 1999. In the plaintiff's presentation, there were expenses of things that was never done e.g. 20% contingency, transport of shs. 6,000,000/= He had no supporting documents. The document was prepared by the Ministry of Housing. The plaintiff never produced any document to prove expenditure. He has been collecting for the last 20 years and he has paid himself off. The defendants never authorised him to collect rent on their behalf. He has never accounted for any of the rent he collected. He has never taken any action against the second defendant since 1989 when the property was repossessed. The defendants have a counterclaim of shs. 409,000,000/= Sometime during 2016 they secured physical possession of the property and the tenants showed him receipts of the rent they were paying to the plaintiff which is 5,200,000/= per month. On that basis he compiled a tabulation which represents estimates of the rent over the years. The total as at April, 2017 is 509,000,000/= without interest. Since repossession they invited the plaintiff to meet them from 1996. He responded to some of their correspondences. This is a letter from 1999. It is dated 10th March, 1999. It is from my management company. He prayed that the court assists them to collect mesne profit and interest. He would be comfortable with the principal sum after offsetting his 56 million. They can offset 56 compensation and add 144,000,000/= ex-gratia

to make a total offset shs. 200,000,000/= leaving a balance of shs. 388,000,000/= Apart from the amount counterclaimed, they would like to have physical possession of the property, a permanent injunction to enable them enjoy it quietly, interest and costs. General damages are to compensate for the deprivation of use because the owners are in their old age.

Under cross-examination he testified that he approached the plaintiff immediately after they obtained repossession. He notified the plaintiff in the 1990s and not in 2016. He never worked with the custodian board before. By 2016 he had the powers of attorney. He received the first one in 1992 - 1992 specifically for repossession and the second one was in 1988-89 with wider powers including the power to sue. That was the close of the defence case.

At the commencement of the trial, the parties and their counsel agreed on the following issues for the determination of court;

1. Who between the plaintiff and the first defendant is the rightful and lawful owner of the suit land.
2. Who of the parties as between the plaintiff and the defendants is a trespasser on the suit land?
3. Whether any of the parties acquired a certificate of title to the suit land illegally and / or fraudulently.
4. What remedies are available to the parties?

In his written final submissions, counsel for the plaintiff Mr. Donge Opar contended that from the facts of the case, the building on plot was completely destroyed in the war of 1979 and the plaintiff re-constructed it from foundation level. He is therefore entitled to compensation at the current market value of the building. The valuation report (exhibit P. Ex. 5) placed the current market value of the building at shs. 550,000,000/= The defendants' counterclaim is misconceived as they could not have earned rent from a non-existent building. Although the plot belongs to the first defendant, the building belongs to the plaintiff. Allowing an off-set would be endorsing unjust enrichment by the defendants.

In his written final submissions, counsel for the plaintiff Mr. Ambrose Tebyasa contended that when the plaintiff obtained authorisation to occupy the plot from the Departed Asians Custodian Board and the Municipal Council, the permissions granted constituted him a licensee or periodical tenant and not an owner of the land. This property was vested in the Departed Asians Custodian Board upon expulsion of the former Asian owner, the first defendant. The plaintiff was under an obligation to pay rent to that Board even though he did not do so in fact. Upon repossession of the property by the first defendant, the plaintiff was only entitled to compensation for any improvements he may have made on it. The plaintiff instead purported to acquire a certificate of title over the land while the extension of lease granted to the first defendant upon repossession of the land was still running (exhibit D. Ex.5). The plaintiff's title was therefore correctly cancelled for having been issued in error. Not having been authorised by the first defendant to occupy the premises or collect rent on her behalf, the plaintiff is a trespasser on the land. In any event, his claim for compensation is stale, being barred by limitation. Consequently, the suit ought to be dismissed and judgment entered for the defendants against the plaintiff on the counterclaim.

The first and third issues raised by the parties are inter-related and I find it convenient to address the two concurrently.

First issue: Who between the plaintiff and the first defendant is the rightful and lawful owner of the suit land?

Third issue: Whether any of the parties acquired a certificate of title to the suit land illegally and / or fraudulently.

The genesis to the dispute in this suit can be traced back to *The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree*, of 9th August 1972 by which entry permits and certificates of residence that had been issued to any person of Asian origin, descent or extraction who was a subject or citizen of The United Kingdom of Great Britain and Northern Ireland, the Republic of India, The Republic of Pakistan and the Republic of Bangladesh, were revoked. They were given 90 days to leave the country. This was followed by *The Declaration of Assets (Non-Citizen Asian) Decree* of by which the departing Asians were prohibited from

transferring or undertaking any further transactions of a proprietary nature in any real property they had in Uganda. They were instead required to declare that property to the Minister who was to appoint agents to manage the property until its transfer to a Uganda Citizen. The property so declared was then expropriated by *The Properties and Businesses (Acquisition) Decree*, 1973 and vested in the Government of Uganda.

Under *The Assets of Departed Asians Decree,* 27 of 1973; as amended by Decree No. 12 of 1975, Decree No. 3 of 1977, and finally by Act 9 of 1982, all assets declared by a departing Asian, including those left behind by Asians who failed to prove their citizenship at the time and in the manner specified by the Government, without any further authority vested in the Government. Under that law, the Departed Asians' Property Custodian Board was established; (a) to take over and manage all assets transferred to it by virtue of section 13 of *The Assets of Departed Asians Decree, 1973*; (b) discharge all the liabilities transferred to it by the Act; (c) in relation to any assets, collect all debts or other monies due to the departed Asian; and (d) to sell or otherwise deal with such assets in the same way as the departed Asian may have done.

By August, 1972 the first defendant was the proprietor of land comprised in L.R.V 766 Folio 20 Plot 2 New Lane, Arua being a 47 year lease running from 1st March, 1969 (exhibit D. Ex.11). Upon her expulsion from Uganda and expropriation of that property, it vested in the Government of Uganda. Although by virtue of section 6 (1) (d) of *The Assets of Departed Asians Decree,* Cap 83 the Departed Asians' Property Custodian Board had the power to sell the property, the plaintiff din not adduce any evidence of a transaction of sale between him and that Board. He was therefore a tenant on the property. In any event, even if he were a purchaser from the Departed Asians' Property Custodian Board prior to February, 1983 section 2 (2) (a) of *The Expropriated Properties Act* Cap 87, (whose commencement date was 21st February, 1983) nullified all purchases, transfers and grants of, or any dealings of whatever kind in, such property.

The plaintiff claimed to have been allocated the plot by the Departed Asians' Property Custodian Board in response to his application of 8th June, 1988 (exhibit P. Ex.1). By that date, section 2 (1) (c) of *The Expropriated Properties Act* Cap 87 had reverted all properties which were vested in

the Government and transferred to the Departed Asians Property Custodian Board under the Assets of Departed Asians Act, or acquired by the Government under *The Properties and Businesses (Acquisition) Decree*, *1973*, or in any other way appropriated or taken over by the military regime, except property which had been affected by the provisions of the repealed *National Trust Decree, 1971*, in the Government, to be managed by the Ministry responsible for finance. By virtue of section 2 (4) of that Act, the powers of the Departed Asians Property Custodian Board were then limited to the management of such properties. The Board did not have powers of sale. By exhibit P. Ex.2 dated 23rd July, 1992 the Board explicitly notified the plaintiff that

> we are glad to hear from you that you have completed the reconstruction of the said plot but we are requesting you to start paying rent immediately as you have finished the work. Then you submit your claim of interest to the verification committee for the consideration (sic) at the final disposal of the property. You are therefore advised to start your payments of rent very soon and submit your claim of interest in the property to the Verification Committee without any further delay.

It is clear from that communication that the plaintiff was permitted to re-develop the property and occupy it as a periodical tenant paying monthly rent to the Departed Asians Property Custodian Board, while waiting compensation for the cost of its re-development to be considered at the time of final disposal of the property. The occupation permits issued by Arua Municipal council (the one dated 8th April 1992 (P.ID.1) and that dated 8th October, 2007 (exhibit P. Ex.4) did not create propitiatory rights in the property. The plaintiff therefore did not acquire any proprietary interest in the land. He continued occupying it and sub-letting it to other tenants from whom he was collecting rent, and continued to do so until 13th August, 1999 when the first defendant was issued a certificate authorising her repossession of the property (exhibit D. Ex.4). It would appear that throughout that period, the plaintiff never paid any rent to the Departed Asians Property Custodian Board (see the demand notice, exhibit P. Ex.3 dated 29th December, 1995).

Be that as it may, the certificate authorising the first defendant's repossession was issued under the provisions of section 6 (1) of *The Expropriated Properties Act* Cap 87. The effect of the certificate was to divest proprietorship of that property from government and to revert it to the first defendant. Under section 6 (1) (a) thereof, it provided sufficient authority for the chief

registrar of titles to transfer the title to the former owner hence the issuance of L.R.V HQT 950 Folio 24 Plot 2 New Lane, Arua being a 5 year lease running from 16th June, 2016 (exhibit D. Ex.5). The duplicate certificate of title was issued to the first defendant on 23rd September, 2016 she having been registered as proprietor thereof on 22nd September, 2016. By the time that new lease title was issued, the previous 47 year lease title comprised in L.R.V 766 Folio 20 (exhibit D. Ex.11) had expired on 1st March, 2016. Thos therefore was grant of a 5 year initial term renewal running from 16th June, 2016, to be extended to 49 years upon the first defendant complying with the building covenant. The renewed lease was executed on 16th June, 2016.

By the time the Arua District Land Board granted the plaintiff a lease offer over the same property on 21st February, 2013 the property was already vested in the first defendant by virtue of the repossession certificate issued on 13th August, 1999. The subsequent issuance of leasehold title L.R.V. HQT 488 Folio 25 on 13th July, 2015 (presented as part of exhibit P. Ex.5) for 49 years with effect from 23rd August, 2012 over the same land created a concurrent title deed over the same property. In leasing the land to the plaintiff, Arua District Land Board failed in its duty to ensure that the land was available for leasing. Land is available for leasing by a District Land Board to an applicant when it is either; (i) vacant and there are no conflicting claims to it, (ii) or is occupied by the applicant and there are no adverse claims to that occupation, (iii) or where the applicant is not in occupation but has a superior equitable claim to that of the occupant, (iv) or where the applicant is not in occupation but the occupant has no objection to the application. In view of the fact that the Minister of Finance had in accordance with section 6 (1) of *The Expropriated Properties Act* Cap 87 had on 13th August, 1999 issued a certificate authorising the first defendant's repossession, the land was no longer available for leasing by the District Land Board. The grant of a lease to the plaintiff was therefore made in error.

It is trite that by virtue of section 59 of *The Registration of Titles Act*, a certificate of title is conclusive proof of ownership (see *Kampala Bottlers v. Damanico (U) Ltd, S. C. Civil Appeal No. 22 of 1992* and *H. R. Patel v. B.K. Patel [1992 - 1993] HCB 137*). It can only be impeached on grounds of illegality or fraud, attributable to the transferee (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others, S.C. Civil Appeal No. 4 of 2006 and Kampala Bottlers Ltd v Damanico (U) Ltd., S.C. Civil Appeal No. 22of 1992)*. The plaintiff sought to secure a

cancellation of the first defendant's title by pleading that she acquired it fraudulently and dishonestly because it was issued without notice, inspection, and recommendation by the Area Land Committee. Considering the legislated procedure for acquisition of a title deed on repossession, those cannot be valid grounds for impeachment of the first defendant's title. L.R.V 766 Folio 20 (exhibit D. Ex.11) to which the first defendant became registered proprietor on 21st August, 1970 by 13th August, 1999 still had 17 years to run. There was no need for the first defendant to register the certificate of repossession with the Chief Registrar of Titles so as to cause its transfer into her names as former owner in accordance with section 6 (1) (a) of *The Expropriated Properties Act* Cap 87, since it had never been registered in any other person's name since 21st August, 1970. There had not been any intermediate transaction that required reversal. She remained the registered proprietor before and after expropriation.

Where disputants claim a similar estate or interest, under the same tenure in the same parcel of land, there is a validity and not a priority dispute over the legal estate in such land. A priority dispute is essentially an argument which arises where two or more persons hold property interests of a different type in a piece of land which are inconsistent, making it necessary to determine who has the superior right to the land. On the other hand, it is not possible to confer two identical legal estates to separate persons, except co-owners, in the same property. Technically, therefore, priority disputes between legal estate holders do not exist, since there in law exists only one title. Any subsequent title raises not a priority but rather a validity dispute. In the instant case, although the first defendant's title deed was issued on 23rd September, 2016 and that of the plaintiff had been issued over a year before that, on 13th July, 2015, the validity of either title cannot be based on the principle of "first in time" which principle is more appropriately applicable to priority and not validity disputes.

At common law in relation to legal estates**,** ownership of an estate is absolute. Only one fee simple estate may exist against any single piece of land. It is not possible for two estates, both vesting the same title and possession, to exist in the same parcel of land. Upon the execution of a first deed of conveyance, the legal estate in the specified parcel of land will pass from the owner to the transferee. This means that the owner has nothing to pass over to any subsequent transferee, and even if the deed of conveyance to the second transferee is valid, it is impossible

to convey a legal estate in land when the owner no longer holds one. The *nemo dat* principle applies to prevent any priority dispute between two identical legal estates from arising, because a grantor who has already transferred his or her legal estate to a grantee cannot execute a subsequent grant of that estate; the grantee cannot give away what he or she does not possess (see *Mwebesa and three others v. Shumuk Springs Development Limited and three others, H.C. Civil Suit No. 126 of 2009*). The inevitable consequence of this is that, once created, a legal interest will prevail against any purported creation of a subsequent legal interest, to the extent of any inconsistency.

In the instant case, title to the land in dispute had by virtue of action taken by the Minister of Finance under section 6 (1) of *The Expropriated Properties Act* Cap 87, been divested from government and reverted to the first defendant as from 13th August, 1999. Although under article 286 of *The Constitution of the Republic of Uganda, 1995* statutory leases to urban authorities were revoked and the District Land Boards became lessors of what was formerly public land, this was not land falling within the description of article 241 (1) (a) and section 59 (1) (a) of *The Land Act*, of land in respect of which there was no owner. The land in dispute, although controlled and managed by Arua District Land Board as lessor, was transmitted to it from the former lessor, the Controlling authority, by operation of law and this being a novation by operation of law, Arua District Land Board was bound by the terms and conditions contained in L.R.V 766 Folio 20 (exhibit D. Ex.11) which by then was left with twenty one (21) years to its expiry date of 1st March, 2016. The implication is that by 13th July, 2015 when the plaintiff was issued a title deed to this land, there was already a running lease in favour of the first defendant due to expire in a the next eight months. In the circumstances, Arua District Land Board was prevented by the *nemo dat* principle from granting a similar estate in the same land to any other person because its predecessor in title, as lessor, had as grantor already transferred its legal estate to a the first defendant as grantee and could not execute a subsequent grant of that estate to another person before the land had reverted to it at the expiry of the 47 year lease still running as from 1st March, 1969 (exhibit D. Ex.11).

The grant to the plaintiff having been illegal, it was proper therefore for Arua District Land Board to take corrective measures when by its minute 10 of 11th November, 2016 (exhibit D.

Ex.8) took a decision to revoke the plaintiff's title, resulting in communication of that decision by the Chief Administrative Officer Arua to The Commissioner Land Registration on 28th November, 2016 (exhibit D. Ex.7) and culminating in an administrative decision of The Commissioner Land Registration on 20th January, 2017 (exhibit D. Ex.6), cancelling the plaintiff's parallel title comprised in L.R.V. HQT 488 Folio 25 on 13th July, 2015 (presented as part of exhibit P. Ex.5) purported to run for 49 years with effect from 23rd August, 2012 over the same land.

In conclusion therefore, as between the plaintiff and the first defendant, the first defendant is the rightful and lawful owner of the suit land. There not being evidence of dishonest conduct on his part that meets the standard of proof of fraud, the plaintiff acquired his certificate of title to the suit land illegally rather than fraudulently and consequently the first defendant is declared the rightful proprietor of Plot 2 New Lane Arua Municipality.

Second issue: Who of the parties as between the plaintiff and the defendants is a trespasser on the suit land.

The property having reverted to the former owner by virtue of the certificate of repossession dated 13th August, 1999 the plaintiff requires the first defendant's authorisation to remain on the land. It was the testimony of D.W.2 the second defendant that upon securing repossession of the premises, he duly notified him of this fact. Under section 10 (1) of *The Expropriated Properties Act* Cap 87, persons legitimately occupying property affected by the Act were to continue to so occupy the property until the property was returned to the former owner under the Act. Thereafter, section 10 (2) of the Act prescribed that legitimate tenants were entitled to not less than ninety days notice to vacate property they occupied where that property was returned to a former owner in accordance with the Act. Correspondences to that effect dating as far back as 14th January, 2000 were tendered in evidence (exhibits D. Ex.9 A-D).

Trespass to land may occur when a person without permission of the landlord, remains upon the land, where the entry was initially lawful (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). The plaintiff therefore became a trespasser on

the land as from 14th January, 2000 and has since then been in unlawful possession of the land and therefore a trespasser.

Fourth issue: What remedies are available to the parties?

The moment someone proves a better title against the person who was in prior possession, he or she is entitled to compensation against the unlawful possessor of property. Mesne profits are one such mode of compensation that can be claimed against a person in unlawful possession. It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property.

However, under section 12 (2) of *The Expropriated Properties Act*, Cap 87 where property is returned to a former owner, the former owner is liable to pay for the value of any improvements in the property to the person or body that effected the improvement. The plaintiff claimed improvements worth shs. 56,920,300/= while the first defendant counterclaimed shs. 409,000,000/= Apart from adducing evidence of a bills of quantities, the plaintiff did not adduce cogent evidence of actual expenditure. He claimed that he had to re-construct the building from foundation level. By analogy of section 12 (4) of the Act, that compensation may be arrived by ascertainment of the value of improvements less the income derived or which ought to have been derived from the property or business from the date of the repossession.

The sum due as compensation became recoverable as from the date of repossession, 13th August, 1999. Under section 3 (1) (d) of *The Limitation Act*, an action to recover any sum recoverable by virtue of any enactment, cannot be brought after the expiration of six years from the date on which the cause of action arose. The plaintiff's cause of action became stale after 13th August, 2005. He has filed it eleven years out of time yet he did not plead any disability. A litigant puts himself or herself within the limitation period by showing the grounds upon which he or she could claim exemption, failure of which the suit is time-barred, the court cannot grant the remedy or relief sought and must reject the claim (see *Iga v. Makerere University [1972] EA 65).*

This disability must be pleaded as required by Order 18 rule 13 of *The Civil Procedure Rules*, which was not done in the instant case. It is trite law that a plaint that does not plead such disability where the cause of action is barred by limitation, is bad in law.

On the other hand, mesne profits are in a way payment by the trespasser in respect of the benefit he or she has gained out of the trespass. They are in general awarded because the trespasser has made improper use of an asset of the plaintiff. In economic terms, there has been a transfer of value for which the wrongdoer must account (see *Devenish Nutrition Ltd v. Sanofi-Aventis Sa (France) and others, [2009] Ch 390, 2009] 3 WLR 198, [2009] 3 All ER 27*). The key criteria for the calculation of mesne profits is not what the owner loses by the deprivation of possession but profits should be calculated on the basis of what the person in wrongful possession namely, the defendant had actually received or might with ordinary diligence have received there from.

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

The court may be guided by profits which the person in wrongful possession of property actually received or might with ordinary diligence have received there from, together with interest on such profits, but should not include profits due to improvements made by the person in wrongful possession. Despite the lack of proof of actual expenditure, and the fact that the plaintiff's claim was stale, the second defendant by way of compromise made a concession of shs.56,920,300/= and an additional ex-gratia concession of 144,000,000/= thereby offsetting a total of shs. 200,000,000/= as compensation for the plaintiff's improvements on the property. This left a sum of leaving shs. 388,000,000/= as mesne profits due from the plaintiff to the first defendant. Having considered the breakdown explaining how these figures were arrived at, I find that they

are not exaggerated and are a fair representation of income the first defendant would have obtained from that property over the last nineteen years but for the plaintiff's trespass. That sum is awarded to the first defendant as mesne profits.

Concerning the claim for general damages, from its plaint and testimony of its witness in court, the basis for the plaintiff's claim for general damages, in addition to mesne profits, is premised on the loss of use and enjoyment of its land. The reality is that the plaintiff's rights were invaded and was deprived of the use and enjoyment of its property. Nevertheless, I am not satisfied that this is a case which warrants an additional award of damages for loss of use and enjoyment. I am of the opinion that recognition of the infraction of the plaintiff's legal rights or loss of use and enjoyment is reflected and subsumed in the amount awarded as mesne profits. The plaintiff has not proved any actual damage as would entitled it to receive such an amount other than loss of use and enjoyment. To award general damages, in addition to mesne profits for the same factors would, in my view amount to double benefit and or unjust enrichment. In the premises, the claim for general damages for loss of use and enjoyment is disallowed.

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

a) A declaration that the first defendant is the rightful owner of land comprised in Plot 2 New Lane Arua Municipality.
b) An order of vacant possession of the premises. The plaintiff is to hand over the premises to the first defendant's agent, the second defendant, on or before but in any event not later than 30th April, 2018 failure of which execution will ensue.
c) 388,000,000/= as mesne profits payable to the first defendant for the plaintiff's trespass thereon from 14th January, 2000 to-date.
d) Interest on the award in (b) above at the rate of 8% per annum from the date of judgment until payment in full.
e) The costs of the suit and of the counterclaim.

Dated at Arua this 9th day of April, 2018

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Stephen Mubiru
Judge,
9th April, 2018.