IN THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATE'S COURT OF NWOYA AT ATIAK

CIVIL SUIT NO. 001 OF 2023

OYOO PETER ::PLAINTIFF

VERSUS

1. LUBEGA JUMA
2. NALUJJA GRACE :::DEFENDANTS

BEFORE: H/W KYEMBE KARIM ESQ MAGISTRATE G.I

JUDGMENT

Introduction:

The plaintiff brought this suit against the defendants seeking declarations of trespass, orders for general damages, *mesne* profits, vacant possession and permanent injunction.

Plaintiff's case:

It was the plaintiff's assertion that he is the proprietor of registered land comprised in Block 2 Plot 202, measuring approximately 15m X 30m, land at Lorikwo west cell, Lorikwo Ward, Elegu Town Council, Amuru District, which he acquired by way of purchase from a one, Jurua Kelementina by sale agreement dated 6th December, 2012. That at the time of purchase, the plaintiff was already renting part of the suit land from the said Jurua Kelementina while the remaining portion was being used as an auto garage by a one, Hajji, who was also renting the same from the said Jurua Kelementina; that later, the said Hajji departed from

the said premises and a certain Tumwesigye Robert came about claiming to have purchased the temporal structure thereon from the said Hajji in 2016, whereupon, he started utilizing the same; That the 2nd defendant entered into possession of part of the suitland claiming to have purchased the same from a one, Khizza Betty, who is nolonger within jurisdiction.

1st defendant's case:

The 1st defendant pleaded in defence that he originally used to work for the said Tumwesigwa Robert and later, in 2016, he, together with his brother, a one, Nsekalunho Wasswa Wmmanuel purchased a temporary structure from the said Robert Tumwesigwa at a consideration of 35,000,000/=; that in the same year, they also entered into a tenancy agreement with a one, Lagu Sabino Apiku to pay ground rent of UGX. 200,000/= per month and upon demise of the said Lagu, a one Uzimai Henry continued to collect ground rent.

2nd defendandant's case:

The 2nd defendant pleaded in defence that on the 2nd October, 2019, she purchased a temporary structure operating a bar and restaurant from a one, Khisa Betty at a consideration of 5,000,000/= and later, entered into a tenancy agreement with a one, Unzimai Henry to pay ground rent of 150,000/= per month.

Representation:

1. The plaintiff was represented by Mr. Komakech Steven from M/S Francis Owiny & Co. Advocates
2. The Defendants were represented by Mr. Etoma Joseph from M/S Uganda Law society Legal aid

The trial:

At trial, the parties proceeded by way of witness statements and the plaintiff called four(4) witnesses while the defendants also called four (4) witnesses to prove their respective cases.

Scheduling:

At scheduling, 3 issues were originally framed for court's determination.

However, under **Order 15 rule 1(5), & 5 of the CPR** this court can frame or amend issues as will enable it ably dispose of a case expediently. Thus, court added another issue to make them 4 issues, that is;

1. Who is the lawful owner of the suit land?
2. Whether the defendants are trespassers on the suit land?
3. If not trespassers, whether the defendants are entitled to fixtures or temporal structures on the suit land?
4. What remedies are available to the parties?

Submissions:

Learned counsel, Mr. Komakech submitted that the plaintiff led evidence to prove his claim by tendering a sale agreement, which was admitted as PEX 1 and evidence to show that he conducted due diligence before the purchase by way of involving the seller's family and the local council authorities, particularly, the LC1 chairperson who signed as a witness.

Learned counsel submitted further that the plaintiff also exhibited as PEX2- a certificate of title in further proof of ownership of the suit-land and that the plaintiff was in physical possession of a portion of the suit-land and also, that Pw2 who is a neighbor of the suit-land signed as a

witness, well knowing that the seller *(the said Jurua Kelementina)* was the rightful owner thereof.

Learned counsel also pointed out to this court the evidence of Pw3 who testified that he has been resident of Elegu for a long time, since, 1995 and he knew the said *Jurua Kelementina* as the rightful owner of the suit land before the sale to the plaintiff.

Learned counsel assailed the testimonies of the defendant's witnesses stating that none of the witnesses adduced any document or witness to prove the allegation of the purported temporal structures previously occupied by the said, Hajji, *(who according to uncontroverted testimony of Pw1)* was only renting from the said Jurua Kelementia, who later sold the suit land to the plaintiff. Learned counsel invited court to invoke **Section 102** and **109** of the **Evidence Act cap 8 Laws of Uganda, 2024, 7th revised edition** which places the burden of proof upon the defendants to prove their alleged interest.

In reply, learned Counsel Mr. Etoma Joseph submitted for the defendants that the plaintiff and his witnesses' evidence was marred with falsehoods, unsubstantiated allegations and contradictions. Learned counsel pointed out to this court the pleadings of the plaintiff in paragraph 2 of his plaint, whereof it was pleaded that the plaintiff came to Elegu Town council in 2011 together with his brother to carry out bar business while his witness, Pw2 testified that he first came to Bibia in 2006 and later moved to Elegu in 2012.

Learned counsel also pointed out a contradiction whereof Pw2 stated in paragraph 5 of his witness statement that he was called to come and witness the sale agreement between Pw1 and the said Jurua Kelementina

while Pw1 had earlier told court that he was living with his brother, the said Pw2, in his view, which diminished the credibility of the plaintiff's evidence.

On the issue of ownership, learned counsel submitted that the defendants were consistent in their testimonies to the effect that they are tenants of Dw3 –Unzimai Henry and as such, Dw1 and Dw2 cannot be said to be owners of the suit-land and yet, they were permitted to take possession of the portions they were occupying by the said Dw3.

To that end, learned counsel first cited for court the case **Draza Moses Vs. Abdul Salam & Anor C.s No. 0016 of 2013** for the proposition that this being a civil suit, the plaintiff is under duty to adduce evidence to a standard of proof on a balance of probabilities and the cases of **Mohan Musisi Kiwanuka SCCA No. 14 of 2002** and **A.N Biteremo Vs Damascas Munyandasituma C.A No. 15 of 1999** for the proposition that a party's departure from pleadings is good ground for rejecting the evidence and such a litigant might be taken to be a liar.

CONSIDERATION BY COURT:

ISSUE1: Who is the lawful owner of the suit land?

The plaintiff testifying as Pw1 Pw1-Oyoo Peter adduced evidence with proof of a sale agreement by which he purchased the suit land which, at the time, was not yet registered. The same was admitted as PEX 1.

The plaintiff also testified that he proceeded to bring the said land under the provisions of the **Registration of titles Act, cap 240 Laws of Uganda, 2024 revised edition** and exhibited a certificate of title which was admitted as PEX2.

I listened to the evidence elicited by the defendant's learned counsel during cross-examination. The validity of PEX1-the said sale agreement was not discounted. Neither was PEX2-the certificate of title contested or the process of acquiring the same. One would be tempted to imagine the possibility that the certificate of title was procured in a calculated attempt to defeat the unregistered interests of the defendants but the defendants did not bring any counter-claim with such specific pleading of fraud, as to give this court premise upon which to investigate that possibility.

As regards due diligence, Pw1 testified that he conducted the same and to prove it, he testified that he involved the seller's family and the local council authorities, particularly, the LC1 chairperson who signed as a witnesses.

I have perused the entire record and I have not seen any evidence of third party claims over the suit land, save for the claimed interests by the plaintiff and the defendants. This judgment therefore seeks to resolve, who of the two parties holds the better interest over the said suit land.

Pw2-Kabowa Francis and Pw3-Tabu Charles testified in support of the plaintiff and described the suit-land as measuring 15metres X 30 meters.

In ***Ocean Estates Ltd v. Pinder [1969] 2 AC 19***, it was stated that if the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them.

Therefore, where questions of who has a better title to the land like in the instant case, the court is concerned only with the relative strengths of the titles proved by the rival claimants.

It is trite that the plaintiff must succeed by the strength of his own title and not by the weakness of the defendants'.

In **Adrabo Stanley –VS- Madira Jimmy Civil suit no. 0024 of 2013,** Hon. Justice Mubiru Stephen discussed further that ownership comprises of a number of rights, and among these rights one of the most significant right is possession of property. In the instant case, the plaintiff led evidence to show that he is in physical possession of a portion of the suitland while the defendants occupy the remaining portion, each claiming a personal and distinct interest.

Section 101 Evidence Act cap 8 Laws of Uganda, 2024 revised edition places the burden of proof upon the person who asserts the contrary.

On the defendant's part, this court was left unsettled. The defendants through witnesses testified that they are owners, having purchased the same. The 1st defendant/Dw1 testified that he purcharsed the temporal structure from a one, Tumwesigwa Robert at a consideration of 35,000,000/=, while, the 2nd defendant/Dw2 testified that she purchased her temporal structure from a one, Khisa Betty at a consideration of 5,000,000/=.

But the defendants, at the same time, led evidence to show that they were renting and paying monthly ground rents, respectively, of 200,000/= to a one, Lagu Sabino Apiku and 150,000/= to a one, Unzimal Henry.

This court really wasn't satisfied as to which interest the defendants were claiming. When this court visited the *locus in quo,* indeed, it was

established that the developments on the portions being claimed by the defendants were temporary structures, one housing a bar and restaurant while the other is housing some lodging facilities.

This court was left wondering. Did the defendants purchase the temporal structures only, excluding the interest in land? This seems to be so.

But this, in itself would bring the question as to ***whether the defendants are entitled to the said temporal structures or any debris therefrom if the same were to be removed from the suit land?*** That question will be answered in resolution of **issue 3.**

Unfortunately, the defendants did not bring a counter claim and this court has no pleadings for proper guidance. However, that alone cannot handicap this court from dispensing justice. I have perused the plaint and listened to all evidence adduced by the plaintiff and he does not claim any interest in the said temporal structures situate on the suit land. Neither have I seen any evidence of 3rd party claims to the same, apart from the claims laid by the defendants. The plaintiff's claim is only in respect to the interest in the suit land.

This court is empowered under **Section 98 of the Civil Procedure Act, cap.....7th edition, Laws of Uganda, 2024** to make such orders as will meet the ends of justice.

While it is true that it is not court's place to assume facts, which, otherwise, the party seeking to rely on the same ought to have pleaded, let alone, adduced evidence in support thereof, in the course of trial, evidence arose, which, even though the defendants did not file a counter-suit, this court cannot ignore the same. I will address those pieces of evidence in due course.

In the instant case, this court was faced with two tales of how the defendants acquired their claimed interest. On one hand they say they purchased the suitland while they also testify that they were paying ground rent per month. This court is aware that ground rent, by common practice, is assessed annually, but, whatever, that be, the important fact is that the defendants admitted to payment of periodic rental fees. It is difficult to believe that they were paying rental fees for a property they already own. The test of probability tilts significantly in the favour of believing the evidence to the effect that *the defendants only purchased the temporal structures and not an interest in land.*

I say this, because, I find the plaintiff's tale of how he acquired the suit land more believable, in addition to his evidence in his Exhibits- PEX1 and PEX2 which was not discounted by the defence.

Under **Section 28 of *The Evidence Act*, cap 8, Laws of Uganda, 2024 revised edition** admissions are not conclusive proof but they create an *estoppel* against the party admitting the same. The defendants having admitted to be paying "*monthly ground rent"* or whatever that was, for the temporal structures on the suitland, they are accordingly estopped from claiming ownership of the same land.

As the defendants admit to paying *monthy ground rent* and accordingly estopped as aforesaid, the plaintiff is discharged under **Section 28 and 57 of *The Evidence Act* cap 8, Laws of Uganda, 2024 revised edition** from adducing any further proof of the capacity in which the defendants are occupying the suit land.

In **Haji Asumani Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Apeal No. 7 of 1995** it was held that there can be no better evidence against a party than an admission by such a party.

In **Kirigege Livestock Farm v. Reila Ranching Cooperative Society, H.C. Civil Appeal No. 6 of 1992** it was held that a registered proprietor does not have to be in physical possession to sue in trespass.

For those reasons, it is the finding of this court on issue 1 that the plaintiff is the rightful owner of the suitland.

Issue 2: Whether the defendants are trespassers on the suit land?

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

It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry upon it. It is an invasion affecting an interest in the exclusive possession of property. The cause of action for trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful interference. Therefore an action for trespass may technically be maintained only by one whose right to possession has been violated.

Such possession should be actual and this requires the plaintiff to demonstrate his exclusive possession and control of the land. The entry by the defendants onto the plaintiff's land must be unauthorised in the sense that the defendant should not have had any right to enter onto plaintiff's land.

In order to succeed, the plaintiff must prove that; he was in possession at the time of the defendants' entry; there was an unlawful or unauthorized entry by the defendants; and the entry occasioned damage to the plaintiff.

It has been held before that trespass is enforcement of possessory rights than proprietary rights.

Although characterized as an action for trespass to land, the suit before court in these proceedings is in the character of an action for recovery of portions of land, since in his own admission, the plaintiff has never been in physical possession of the portions of land occupied by the defendants. He seeks to enforce ownership rights as opposed to possessory rights.

A suit for recovery of land is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership of the land. An out-of-possession owner of land may on the basis of constructive possession, even with no physical contact with the land, may recover for an injury to the land by a trespasser which damages the ownership interest.

However, the testimonies of both plaintiff and the defendants' witnesses shows that the initial entry into the now disputed land was with authority of a one, Hajji *or his subsequent defacto agent, the said* Tumwesigwa Robert who had been licensed by the original owner, the said *Jurua Kelementina.*

While this court finds that the defendants do not have any ownership rights over the disputed land, it is the finding of this court that the plaintiff has never been in possession of the disputed portions of the suit land and the defendants' entry into the disputed portion of land was not wrongful as to amount to a trespass. Issue2 is accordingly resolved in the negative.

ISSUE 3: ***If not trespassers, whether the defendants are entitled to fixtures or chattels on the suit land?***

As to whether the defendants are entitled to the said temporal structures or any debris of the same, the ***quinquid platatur solo solo cedit*** doctrine as a general rule dictates that all fixtures attached to the land belong to that land, unless, evidence to the contrary is shown.

This rule is however, not absolute. It has exceptions.

A fixture is defined as an article which was once a chattel but has now become part of and permanently affixed on the land. They are usually sold as part of the land except when otherwise stated in the conveyance agreement.

To determine whether a chattel has become a fixture, several considerations come into play. For example;

a) the conduct of the claimants in as far as it can be ascertained that a certain chattel was intended to be a fixture.
b) the degree of annexation to the land.
c) the nature of the item/chattel.
d) the general circumstances of the case.

It goes without saying that each case has to be approached with due regard to the peculiar circumstances.

In **WoodFall's Law of Landlord and Tenant 24th Ed (Revised and Re-modeled) by Leonel A. Blundell, Sweet and Maxwell 1939** at page 764 it is stated that:

> *"…it is a principle of law applicable to fixtures as well as other things that individuals on entering into a contract may agree to vary the strict position in which they would otherwise legally stand towards each other, where no absurdity or general inconvenience would result from the transaction…and if the Landlord wishes to restrict his tenants' ordinary right to remove trade machinery or fixtures he must do so in plain language…"*

Thus the Canadian Court of Appeal for Ontario in its decision in the case of **Clemmer Steel Craft technologies Inc. v Bangor Metals Corp.2009 ONCA 534 (CanLII**) noted this position for it stated that;

> *"…in order for a fixture to be considered a trade fixture which belonged to a tenant then such fixture should be that which was introduced to the land and affixed thereto by the tenant and was particular to the tenant's business or trade and thus the tenant would have the right to them at common law.*

> ***Newbold, J*** *distinguished between chattels and fixtures when he concluded that a spray booth as was the chattel in issue was a trade or tenant's fixture that could be removed but under the terms which the parties had agreed upon. …"*

In the instant case, when this court visited the *locus in quo,* it indeed confirmed the temporal structures as being used by the defendants for commercial purpose, that is, bar, restaurant and lodging facilities.

However, the contractual arrangement leading to their installation was not adduced by either party, but most importantly, the plaintiff who bears the burden of proof under the said **Section 101 of the Evidence Act** to prove his case. From the appearance of his pleadings and evidence led at trial, he was not interested in retaining the said fixtures while the defendants led evidence to show that they actually purchased the same for valuable consideration.

Professor Peter Butt in his work **Land Law (5th Edition) published by Thomson Law Book Co. 2006 at P.413 para.15254** gives his insight to such situations for he states that;

> *"…the tenant has to remove his fixtures within a reasonable time after the term ends or the notice to terminate the lease expires.." To support this proposition, he also cites with approval the case of* ***Smith v City Petroleum Co. Ltd [1940] ALL ER 260*** *at* ***262.***

Another case which similarly followed this position was that of **Vopak Terminal Darwin Pty Ltd v Natural Fuels Darwin Pty Ltd (subject to Deed of Company Arrangement)[2009] FCA 742**). The facts thereto were that:

Natural Fuels Darwin Pty Ltd had built a large industrial bio diesel plant on land it had sub-leased from Vopak Terminal Darwin Pty Ltd and the plant included buildings, cooling towers, pipe work, distillation columns and underground tanks which cost more than United States Dollars Eighty Million US$80,000,000.00). Under the lease provision dealing with fixtures, it was agreed to by the parties that on or before the lease termination date, Natural Fuels Darwin Pty Ltd would at its own cost remove those fixtures and all facilities associated with the plant's installation from the premises from the property. Further it had been agreed that if Natural Fuels were not to remove its property within three months of the termination date then Vopak could remove Natural Fuel's property and dispose it at the cost and the risk of Natural Fuels or deal with those properties as if it were theirs. The lease eventually got terminated after Natural Fuels went into administration. Vopak on its part reminded Natural Fuels' administrator on the terms of the lease agreement which required the removal of the fixtures within three months of the termination of the lease. Furthermore Vopak even gave Natural Fuel's administrator an extra extension of time to sell the fixtures but no action was taken with even the extended time running out. Vopak was thus forced to apply to court for a declaration that it had the right to deal with Natural Fuel's Property as if they were its property and indeed the court held that it could deal with Natural Fuel's property as if it were its own property on the basis of the lease agreement holding that anything fixed to the land became part of the land and would remain so until it was detached from the land and that since Natural Fuels did not exercise its right to detach its fixtures and property from the land within the time provided then

those fixtures became those of the landlord as the tenant right to detach a fixture from a leased land was an exception to its obligation to deliver up to the landlord everything that has become part of the land and thus since Natural Fuels did not remove its fixtures within the time provided in the sub-lease (and as extended by agreement it ceased to be entitled to remove them and was therefore not entitled to interfere with their sale by Vopak.

In the instant case, this court has already found that the suit land belongs to the plaintiff, fortified by the provisions under **Section 59 of *The Registration of Titles Act* cap 240, Laws of Uganda, 2024 revised edition** which provides to the effect that a certificate of title is conclusive proof of ownership of land.

However, inspite the said statutory provision and the ***quinquid platatur solo solo cedit*** rule aforesaid, and inspite the fact that the defendants did not counter sue for declarations of ownership of the temporal structures, this court is nevertheless satisfied by the adduced evidence;

a) *First*, that the temporal structures on the suit land belong to the defendants. I say this, because I am satisfied with the evidence of their purchase by defendants and evidence of their current occupation and continued payment of monthly ground rent. Also, the fact that neither the plaintiff nor any known 3rd party is seeking to recover the same.

b) *Second,* in the aforesaid case of ***Ocean Estates Ltd v. Pinder [1969] 2 AC 19***, it was stated that if the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them. In the

instant case, not only is the plaintiff indesirous of claiming for the temporal structures but he also led no evidence challenging the defendant's claimed interest therein.

c) *Third,* I have perused PEX1 and there is no mention of the said temporal structures as constituting part of the agreement. It is apparent that by the time of execution of PEX1, as admitted by the plaintiff in his testimony as Pw1, the said temporal structures were already in existence and occupied by persons who later sold the same to the defendants by the 6th December, 2012 when he purchased the same from the said Jurua Kelementina. I am convinced that the plaintiff purchased his interest when the defendants or their predecessors were already in occupation and like I have already found, their occupation was not wrongful as to amount to trespass. As such, there was want of due diligence on the part of the plaintiff in this respect when he purchased the suit-land occupied by the defendants.

d) *Forth,* to grant the plaintiff the said fixtures in strict enforcement of the ***quinquid platatur solo solo cedit*** *rule* would tantamount to facilitating unjust enrichment on his part and this court generally frowns upon the same.

For those reasons, it is the finding of this court on this issue that the defendants are entitled to the fixtures on the suit land. This issue is resolved in the affirmative.

ISSUE 4: what remedies available?

The plaintiff in his plaint sough for declarations of trespass, orders for general damages, *mesne* profits, vacant possession and permanent injunction.

As the suit partially succeeds, I make the following orders and declarations.

1. A declaration doth issue that the plaintiff is the rightful owner of the suit-land.
2. The defendants are the rightful owners of the fixtures thereof constituting bar, restaurant and lodging facilities and are entitled to them.
3. Mesne profits were not proved and none is granted.
4. As the defendant's entry was not wrongful as to amount to trespass, no general damages are granted.
5. As the plaintiff purchased the suit land very well aware of the temporal structures occupied by the defendant's predecessors and the defendant's subsequent entry having been adjudged as not wrongful as to amount to trespass, and in absence of the agreement setting out the terms upon which the defendants entered upon and occupied the said temporal structures, and given that they operate on going business and are likely to suffer inconvenience in relocation, giving notice of intended change of address to customers, amongst others, this court is inclined to and hereby exercise discretion and grant the defendants 10months as reasonable time to remove their said temporal structure/fixtures.

6. During the subsistence of those 10 months, the monthly ground rents testified by the defendants as being paid, that is, 150,000/= and 200,000/= respectively, shall now be paid to the plaintiff until the 10 months mentioned in item 5 above lapse.

7. For the avoidance of doubt, the defendants do not have any protectable interest in the suit land.

8. An order for vacant possession hereby issues against the defendants severally and jointly but **SHALL ONLY** take effect upon lapse of 10 months from the date of this judgment and compliance with orders in item 6 above.

9. A permanent injunction hereby issues against the defendants from claiming any interest in the suit land.

Section 27 of the Civil Procedure Act, cap 282, **Laws of Uganda, 7th revised edition, 2024** provides that costs follow the event and the same are within the discretion of the court. I hereby decline to grant costs against the defendants as I have found their entry into the suit-land not wrongful as to amount to trespass.

I so order.

Dated at Atiak this.....18th.....day of .....September.....2024

Hw. KK

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H/W KEMBE KARIM

MAGISTRATE G.1