IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 029 of 2019

In the matter between

1.OJOK CHARLES

2.AKELLO DELLIS

3.LUWAMOI JULIUS PETER

4.LABEJA THOMAS PETER **APPELLANTS**

And

1.OCAN JERIFANSIO

2.ODUR NOKRACH ANDREW

3.OPIO CHARLES **RESPONDENTS**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Land Law *— Licenses and tenancies — The law is that where under the arrangement in question the occupier was granted a right to exclusive possession of the land, then a lease (if it is for a fixed term) or tenancy (if not a periodical one) arises, and not a mere licence — Actual occupation requires some degree of permanence and continuity. However, the degree of physical presence required will depend on the nature of the land. —Temporary use of land will be associated with activities and material placed on the land that might be easily removed and relocated, while permanent use will be associated with activities and material placed on the land that might be deliberately designed to require great difficulty in removing after installation — Actual occupation requires some degree of permanence and continuity. However, the degree of physical presence required will depend on the nature of the land. A person claiming actual occupation may successfully show such occupation, even if it is intermittent, so long as they are able to point to some physical evidence or "symbol" of their continued*

residence at the property, as well as evidence of their intention to return to the property —Trespass — Trespass in all its forms is actionable per se, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellants jointly and severally sued the respondents jointly and severally for the recovery of approximately 100 acres of land situated at Lapyem village, Lanyiri-nyiri Parish, Lira Palwo sub-county, in Agago District, a declaration that they are the rightful customary owners of the land, general and special damages for trespass to land, a permanent injunction and the costs of the suit.

[2] Their claim was that during or around 1982, a one Ogera Francis Okwor gave the land in dispute as a gift *inter vivos* to their late father Obonyo James who occupied and utilised the land until his death in the year 2014. Before his death in 1989 Ogera Francis Okwor gave the rest of his land to the appellants' father, Obonyo James. Together with their father the appellants occupied the land until the year 2002 when insurgency forced them to vacate it. They returned to farm the land in the year 2007 while residing at Lira Palwo. The appellants inherited the land following the death of their said father. It is during the year 2015 when the respondents began trespassing onto the land. The 3rd respondent constructed two huts on the land. The respondent have since then refused to vacate the land, hence the suit.

[3] In their joint written statement of defence, the respondents refuted the appellants' claim and contended that during or around the year 1958 three persons; a one Ogera Francis Okwor and Fatuma Lumoria acquired the land now in dispute, as

vacant unclaimed land then. Henceforth the land was occupied by their respective families and descendants, including the respondents. During or around the year 1989, the 1st respondent allowed a one Anek Juliana temporary occupancy of the land. When she eventually vacated the land in 1998, her husband Obonyo remained on the land. He too eventually left in the year 2000 but during the year 2011 Anek Juliana returned to occupy three acres of that land. She was during the year 2015 followed by the rest of the appellants who have since then refused to vacate the land. They therefore counterclaimed recovery of the three acres, a declaration that they are the rightful customary owners of the land, general and special damages for trespass to land, a permanent injunction and the costs of the counterclaim.

The appellant's evidence in the court below:

[4] P.W.1 Ojok Charles, the 1st appellant, testified that the respondents are his maternal uncles. He inherited the land in dispute from his late father Obonyo James in the year 2014 who in turn acquired it in 1982 from Ogera Francis Okwor, the appellant's grandfather, before the latter's death in 1989. The appellant was born and lived on that land until their displacement to Palwo Satellite IDP Camp in 2002. From there they continued growing crops on the land until his father's death in the year 2014. It is during the year 2015 that the dispute began but attempts to have it mediated by the elders failed. His father planted mango and orange trees on the Southern part of the land where the boundary is marked by Cashew nut and Tamarind trees. The respondents have since denied the appellants access to the land. The 2nd respondent, Odur Nokrach Andrew, is a neighbour occupying 15 acres of land.

[5] P.W.2, Akello Delis, the 2nd appellant, testified that the land in dispute belonged to his late father, Obonyo James and his late mother Anek Juliana. Obonyo James acquired the land from Ogera Francis Okwor during the year 1982. The dispute began following the death of Anek Juliana in 2013 and Obonyo James in

2014. It is then that the 1st respondent, Ocan Jerifansio, denied them access to the land. The 1st appellant P.W.1 Ojok Charles occupies the Western part of the land. The 1st respondent, Ocan Jerifansio has encroached onto the land from the Northern direction and has established gardens and to huts on the land. The 2nd respondent Odur Nokrach Andrew occupies about one acre of the land. Her father planted mango trees, Cashew nut and Tamarind trees, there is a shrine and graves of two deceased siblings of hers who died in their childhood, and were buried on the land during the year 1995. Ogera Francis Okwor is her maternal grandfather. Her mother, Anek Juliana, was the biological daughter of Ogera Francis Okwor. The 1st respondent's biological father was a brother to Ogera Francis Okwor. When Anek Juliana deserted the marital home on the land, her husband remained behind looking after the children and was only displaced by the insurgency. He continued tilling the land even when he was in the IDP Camp.

[6] P.W.3 Labeja Thomas Peter, the 4th appellant, testified that his late brother Obonyo James was given the land in dispute by Ogera Francis Okwor during 1982. He vacated the land in the year 2002 due to insurgency and lived in an IDP Camp until the year 2007. Throughout that time, Obonyo James and his children continued using the land until the year 2013 when the dispute began when the 1st respondent, Ocan Jerifansio, trespassed onto the land, followed by the rest of the respondents. Obonyo James had planted about six mango trees and a tamarind tree on the land. The 2nd respondent Odur Nokrach Andrew occupies about ten acres of the land. The common boundary between the appellants' and the respondents land is a *Kworo* tree and an anthill. P.W.4 Luwamoi Julius Peter, the 3rd appellant, testified that he is an immediate neighbour to the land in dispute. The land in dispute belonged to the late Obonyo James but the respondents have since encroached onto it. There is a well and shrine on the land courtesy of the late Obonyo James. The 2nd respondent Odur Nokrach Andrew occupies about 15 acres of the land. He has known the boundaries of the land since 1979.

The encroachment began in 2008 while Obonyo James was bed ridden, and intensified following his death in 2014.

[7] P.W.5 Okello James testified that he is an immediate neighbour to the land in dispute. The land in dispute had since 1982 belonged to the late Obonyo James but the respondents had following his death in the year 2014, encroached onto it. They have prevented the appellants from accessing the land. Obonyo James planted mango trees, Cashew nut and Tamarind trees, and had a shrine on the land in dispute. The land now belongs to the 1st and 2nd appellants. The 2nd respondent Odur Nokrach Andrew occupies about 15 acres of the land. The 3rd respondent had occupied the land for the last four years, having occupied the land following the death of Obonyo James. P.W.6 Otim John Azikus testified that Obonyo James was his brother. Obonyo James acquired the land in dispute in 1982 from Ogera Francis Okwor who was not survived by any child. Obonyo James occupied the land until his death in the year 2014. It is after his death that the respondents began encroaching upon it. Obonyo James planted mango trees, Cashew nut and Tamarind trees, and had a homestead (*Wang Obonyo*) on the land in dispute. One of the boundaries is a footpath leading to Omot. 2nd respondent Odur Nokrach Andrew crossed that boundary and now occupies about 15 acres of the land in dispute.

[8] P.W.7 Okwana Tiberio testified that he is a neighbour to the East of the land in dispute. Obonyo James acquired the land in dispute in 1982 from Ogera Francis Okwor. He occupied the land from then until his death during the year 2014. Obonyo James planted mango trees, Cashew nut and Tamarind trees, and had a homestead and shrine on the land in dispute. The 1st respondent's father had land to the North of that which Ogera Francis Okwor gave to Obonyo James. The common boundary was marked by a *Pwo Kworo* tree, a Shea nut tree and an anthill.

The respondents' evidence in the court below:

[9] In his defence as D.W.1 Ocan Jerifansio, the 1st respondent, testified that he acquired the approximately 80 acres of land in dispute as a gift *inter vivos* from his late paternal uncle, Ogera Francisco Okwor in 1988. He utilises only two to three acres of it only as farmland and does not live on the land. In 1982, Ogera Francisco Okwor permitted a one Mateyo Lamot to occupy about four acres of the land temporarily and when he eventually vacated it during the year 1989, Ogera Francisco Okwor permitted his sister Anek Juliana to occupy it together with her husband Obonyo James until the year 1998 when both of them left and lived elsewhere until his death in 2014. The 1st and 2nd appellants were born on the land and lived with their parents until their eventual migration in 1998. Ogera Francisco Okwor had no child by the time of his death in 1999. The appellants vacated the land during the period of insurgency and he thereafter stopped them from using it. The 2nd respondent Odur Nokrach Andrew's land is separated from the land in dispute by a footpath.

[10] D.W.2 Odur Nokrach Andrew, the 2nd respondent, testified that the land in dispute originally belonged to Ogera Francis Okwor. When he died in 1988, his brother's son, D.W.1 Ocan Jerifansio, the 1st respondent, took over the land. The appellants' parents Anek Juliana and her husband Obonyo James lived on the land in dispute from 1989 until the year 1998 when she deserted him. Obonyo James remained on the land together with the appellants until they were displaced by the insurgency in the year 2002. They never returned to the land. It is the 1st respondent who from time to time permits him to grow crops on different parts of the land. The 3rd respondent too does the same. The 1st respondent has a garden of about two acres on the land. The dispute over the land began following the death of Obonyo James. D.W.2 uses part of the land in dispute as grazing land.

[11] D.W.3 Opio Charles, the 3rd respondent, son of the 2nd respondent, testified that the land in dispute belongs to the 1st respondent and it is him who from time to tome has since the year 2009 permitted him to grow crops on the land. Multiple persons request for temporary permission to grow crops on the land. D.W.2 Odur Nokrach Andrew, the 2nd respondent is one of the persons the 1st respondent has given such permission. The appellants too used to request the 1st respondent permission to cultivate about four acres annually of the land. Before his death, Obonyo James had lived with his children and wife on the land but were displaced by insurgency. The 1st respondent lives about 10 kilometres away from the land in dispute but comes to cultivate it. A court injunction passed in the year 2018 stopped all activities on the land.

[12] D.W.4 Okello Justine, testified that the land in dispute belongs to the 1st and 2nd respondents, and to Ogera Francis Okwor before them. The later was a brother to the 1st respondent's father, Okidi Celsio. The appellants and their parents lived on the land before until his death in the year 2014. Following his death, the appellants continued using the land. The 2nd and 3rd respondents too live on the land. The 2nd appellant has no other land save the one now in dispute. The 1st respondent allowed him to grow crops in two gardens that belonged to the late Obonyo James. D.W.5 Okwera Joseph, testified that the 1st respondent allowed him to grow crops on the land in dispute, stating that it was his land which previously belonged to his feather, Okidi Celsio. The 1st respondent does not live on the land but only uses it for cultivation of crops. The 2nd and 3rd respondents too had gardens on the land. D.W.4 Okello Justine too was permitted by the 1st respondent to establish a garden on the land. Obonyo James and his family too lived on the land and had gardens on it.

Proceedings at the *locus in quo*:

[13] The court then visited the *locus in quo* on 3rd August, 2018 where P.W.3 Labeja Thomas Peter, the 4th appellant showed the court the land in dispute which he

stated measures approximately 100 acres. He showed the court the location of the former homestead of Obonyo James as the place where the court convened. The 3rd respondent has a house on the Western side of the land in dispute. He showed the various parts of the land given by the 1st respondent to the rest of the respondents and multiple other persons for cultivation since the year 2013. D.W.1 Ocan Jerifansio, the 1st respondent, too stated that indeed that was the land in dispute which he stated measures approximately 80 acres. His biological father Okidi Celsio and mother Anying Safira never lived on the land. It is his late paternal uncle Ogera Francis Okwor and his wife Neko Labere Atit who lived on the land. Since the year 1980, the 1st respondent had been cultivating the land. It is during the year 2015 that he sued the 3rd and 4th appellants for establishing gardens on the land without his permission. His suit was consolidated with the appellants' suit. At times he permits various persons to cultivate parts of the land in dispute. Obonyo James and his family lived on the land. The dispute over the land began following the death of Obonyo James. A sketch map was drawn indicating the mango trees and tamarind trees planted by Obonyo James. The court estimated the land in dispute to be approximately 100 acres.

Judgment of the court below:

[14] In his judgment delivered on 29th March, 2019, the trial Magistrate found that it was common ground that the land in dispute originally belonged to the late Ogera Francis Okwor who died in 1982. Before his death, he gave the entire land to Obonyo James who also died in the year 2014. The 1st respondent Ocan Jerifansio served as caretaker of both Ogera Francis Okwor and Obonyo James during their old age. The appellants claim to have inherited the land from their late father Obonyo James. There was no evidence to show that before his death, Ogera Francis Okwor surrendered the entire 100 acres of land to Obonyo James. Evidence at the *locus in quo* showed that the 1st respondent had since the year 1980 cultivated approximately 80 acres of the land in dispute. The appellants had nothing to show that they had ever lived on or used the land. Obonyo James was

a mere licensee on the land. The 1st respondent proved on the balance of probabilities that the land belongs to him, having acquired it from his paternal uncle. The respondents therefore are not trespassers on the land. The 2nd and 3rd respondents were wrongly sued since they have no interest in the land. The suit was accordingly dismissed with costs to the respondents.

The grounds of appeal:

[15] The appellants were dissatisfied with that decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate, consider and weigh the evidence of the appellants vis-a-vis that of the respondents thereby reaching a wrong conclusion by holding that the 1st respondent is the owner of the suit land whereas not, hence misdirecting himself and occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact by ignoring the appellant's relevant evidence as presented in court thereby reaching a wrong decision / judgment that the suit land belongs to the 1st respondent.
3. The learned trial Magistrate erred in law and fact when failed to conduct the visit to the *locus in quo* and the entire trial process properly by failing to address himself to the relevant laws and / or misapplying the laws thereby reaching a wrong decision / judgment.

Duties of the first appellate court:

[16] Despite having been given sufficient time to file their written submissions, none of the parties did. Nevertheless, it is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three others v. Eric Tiberaga, S.C. C A No. 17 of 2000*; *[2004] KALR 236*). 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[17] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[18] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

All grounds of appeal considered concurrently.

[19] For convenience, all grounds of appeal will be considered concurrently. The 1st and 2nd appellants' claimed the land by inheritance from their late father Obonyo James who during or around 1982, acquired it as a gift *inter vivos* from Ogera Francis Okwor. They occupied and utilised the land until his death in the year 2014. It is only during the year 2002 when insurgency forced them to vacate it but they returned to farm the land in the year 2007 while residing at Lira Palwo.

In contrast, the 1st respondents claimed it is as a gift *inter vivos* from his late paternal uncle, Ogera Francisco Okwor given to him during the year 1988. During the year 1989, Ogera Francisco Okwor permitted his sister Anek Juliana to occupy it together with her husband Obonyo James until the year 1998 when both of them left and lived elsewhere until his death in 2014. The 1st and 2nd appellants were born on the land and lived with their parents until their eventual migration in 1998.

[20] Common to both versions is the fact that the 1st respondent has never lived on that land. To the contrary, the appellants' mother Anek Juliana and her husband Obonyo James lived on that land and it is from there that they gave birth to the 1st and 2nd appellants. The only contested facts are; the duration of their stay and whether or not it was a gift *inter vivos* to them or mere temporary occupancy.

[21] As regards the duration of Anek Juliana and her husband Obonyo James' occupancy of the land in dispute, P.W.1 Ojok Charles stated that Obonyo James acquired the land in 1982 and lived on that land with his family until their displacement to Palwo Satellite IDP Camp in 2002. From there they continued growing crops on the land until his father's death in the year 2014; P.W.2, Akello Delis stated that Obonyo James acquired the land during the year 1982. The dispute began following the death of Anek Juliana in 2013 and Obonyo James in 2014; P.W.3 Labeja Thomas Peter stated that Obonyo James was given the land in dispute during 1982. He vacated the land in the year 2002 due to insurgency and lived in an IDP Camp until the year 2007. Throughout that time, Obonyo James and his children continued using the land until the year 2013 when the dispute began; P.W.5 Okello James stated that the late Obonyo James had since 1982 owned the land in dispute but the respondents had encroached onto it following his death in the year 2014; P.W.6 Otim John Azikus stated that Obonyo James acquired the land in dispute in 1982 and occupied it until his death in the year 2014; lastly P.W.7 Okwana Tiberio stated that Obonyo James acquired the

land in dispute in 1982 and occupied it from then until his death during the year 2014.

[22] On the other hand, D.W.1 Ocan Jerifansio stated that it is during the year 1989, that Anek Juliana was permitted to occupy it together with her husband Obonyo James until the year 1998 when both of them left and lived elsewhere until his death in 2014; D.W.2 Odur Nokrach Andrew stated that the appellants' parents Anek Juliana and her husband Obonyo James lived on the land in dispute from 1989 until the year 1998 when she deserted him. Obonyo James remained on the land together with the appellants until they were displaced by the insurgency in the year 2002. They never returned to the land; D.W.3 Opio Charles stated that before his death, Obonyo James had lived with his children and wife on the land but were displaced by insurgency; D.W.4 Okello Justine stated that the appellants and their parents lived on the land before until his death in the year 2014. Following his death, the appellants continued using the land.

[23] Having considered the two versions, I find that the appellants' version is consistent and not discredited by cross-examination. On the other hand, the respondent's version is contradictory. Contrary to the 1st respondent's version of Obonyo James having vacated the land during the year 1998, D.W.2 Odur Nokrach Andrew, D.W.3 Opio Charles and D.W.4 Okello Justine stated that Obonyo James remained on the land together with the appellants until they were displaced by the insurgency in the year 2002. This corroborates the appellants' version. I find as a fact that Obonyo James was in possession of the land in dispute together with the appellants from 1982 until his death in the year 2014.

[24] As regards the character of that occupancy, P.W.1 Ojok Charles stated his father planted mango and orange trees on the Southern part of the land where the boundary is marked by Cashew nut and Tamarind trees; P.W.2, Akello Delis stated her father planted mango trees, Cashew nut and Tamarind trees, there is a shrine and graves of two deceased siblings of hers who died in their childhood,

and were buried on the land during the year 1995; P.W.3 Labeja Thomas Peter stated that Obonyo James had planted about six mango trees and a tamarind tree on the land; P.W.4 Luwamoi Julius Peter stated that there is a well and shrine on the land courtesy of the late Obonyo James; P.W.5 Okello JamesObonyo James planted mango trees, Cashew nut and Tamarind trees, and had a shrine on the land in dispute; P.W.6 Otim John Azikus stated that Obonyo James planted mango trees, Cashew nut and Tamarind trees, and had a homestead (*Wang Obonyo*) on the land in dispute; lastly P.W.7 Okwana Tiberio stated that Obonyo James planted mango trees, Cashew nut and Tamarind trees, and had a homestead and shrine on the land in dispute.

[25] On the other hand, D.W.1 Ocan Jerifansio stated that he utilises only two to three acres of the land in dispute only as farmland and does not live on the land; D.W.2 Odur Nokrach Andrew, D.W.3 Opio Charles, D.W.4 Okello Justine and D.W.5 Okwera Joseph all stated that it is the 1st respondent who from time to time permits them to grow crops on different parts of the land.

[26] A license is an agreement where the landowner gives permission to another party to use the property for a specific, limited purpose. Usually the right is (i) non-exclusive, (ii) for a short term or non-consecutive use, (iii) non-transferrable and (iv) freely revocable. Under a license, land is occupied but not necessarily possessed. A license allows occupation but does not give the occupier exclusive possession nor legal title. A licence may be created orally, may be express or implied by conduct of the parties or from the circumstances (see *R (on the application of Beresford) v. Sunderland City Council [2004] 1 All ER 160*).

[27] The law is that where under the arrangement in question the occupier was granted a right to exclusive possession of the land, then a lease (if it is for a fixed term) or tenancy (if not a periodical one) arises, and not a mere licence (see *Street v. Mountford [1985] AC 809* and *Bruton v. London and Quadrant Housing Trust [1999] 3 All ER 481*). Temporary use of land will be associated with

activities and material placed on the land that might be easily removed and relocated, while permanent use will be associated with activities and material placed on the land that might be deliberately designed to require great difficulty in removing after installation. In addition, activities associated with temporary use are more likely to be of the type that require more frequent inspection or adjustment in comparison to those associated with permanent use. A gift *inter vivios* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift.

[28] Actual occupation requires some degree of permanence and continuity. However, the degree of physical presence required will depend on the nature of the land. A person claiming actual occupation may successfully show such occupation, even if it is intermittent, so long as they are able to point to some physical evidence or "symbol" of their continued residence at the property, as well as evidence of their intention to return to the property (see *Lloyds Bank v. Rosset [1989] Ch 350; Epps v. Esso Petroleum [1973] 1 WLR 1071*; *Chhokar v. Chhokar [1984] F.L.R. 313* and *Kling v. Keston Properties Ltd (1985) P. & C.R. 212*). What is required is some evidence of previous occupation and an intent to return to the property; physical evidence in or around the property would be required to satisfy this requirement. Occupation by a representative may be sufficient (see *Abbey National Building Society v. Cann [1991] 1 AC 56*; *Lloyds Bank v. Rosset [1989] Ch 350* and *Strand Securities v. Caswell [1965] Ch 958*).

[29] Having considered the two versions, I find that the presence of the various trees testified to by the appellants and verified at the visit to the *locus in quo,* corroborated their claim to exclusive possession. There was no evidence to show that the 1st respondent ever enjoyed exclusive possession of the land. During that period of time, the 1st respondent never engaged in any conduct assertive of title to the land, such as determination of the nature of user of the land, the range

of crops that could or could not be grown on the land, forcing the appellants to share parts of it with him or other persons, etc. There is no evidence of conduct by the 1st respondent or his servants exercising unrestricted access to and use of the land during all the time the appellants had enjoyed occupation. There is no evidence to show that the 1st respondent retained nor exercised powers of supervision and control of the appellants' activities on the land. He therefore did not adduce evidence to prove that the appellants were mere licensees on the land. Based on the duration of the occupancy and the mature of activities on the land undertaken by the late Obonyo Charles, the circumstances of this case negative any intention to create a mere licence or periodical tenancy.

[30] Trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.

[31] *Halsbury’sLaws of England*, 4th edition, vol. 45, at para 1403, explains five different levels of damages in an action of trespass to land, thus; (a) If the plaintiff proves the trespass he is entitled to recover *nominal damages*, even if he has not suffered any actual loss; (b) if the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss; (c) where the defendant has made use of the plaintiff’s land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use; (d) where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded; and (e) if the trespass is

accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

[32] In *Halsbury's Laws of England*, 4th Ed., Vol. 45 (2), (London: Butterworth's, 1999, at paragraph 526), the law on damages for trespass to land is addressed thus: "a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use....Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

[33] The defendant's conduct is thus key to the amount of damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was willful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well. In the instant case, the trespass began in the year 2013 and has continued for the last seven years. Considering that this was wilful trespass, I will award general damages of shs. 2,000,000/= per annum which translates into shs. 14,000,000/= for the last seven years, to be paid by each of the respondents to the appellants jointly.

<u>Order:</u>

[34] In the final result, the appeal succeeds on all grounds and is accordingly allowed. The judgment of the court below is set aside. Instead the counterclaim is dismissed and judgment is entered for the appellants against the respondents jointly and severally in the following terms;

a) The appellants are declared the rightful customary owners of the land in dispute.
b) The common boundary between the appellants' and the respondents, land is the *Kworo* tree and the anthill.
c) An order of vacant possession of that land.
d) A permanent injunction hereby issues restraining the respondents, their agents, employees and persons claiming under them, from further acts of trespass onto the appellants' land across that common boundary.
e) General damages of shs. 14,000,000/= to be paid by each of the respondents.
f) Interest on the above sum at the rate of 8% per annum, from the date of this judgment until payment in full.
g) The costs here and below.

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru…………..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Donge and Co. Advocates.

For the respondent : M/s Odongo and Co. Advocates.