

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0073 OF 2004

1. **OMITO LUKA** }
2. **PAUL RUBANGA KERUMBE**}
3. **ORWINYA B. GEORGE** } **PLAINTIFFS**
4. **PROSPER KERCAN** }
5. **KAKURA KANUTU** }
6. **ONGIERA MARKO** }

VERSUS

THE ATTORNEY GENERAL **DEFENDANT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiffs, on their own behalf and on behalf of sixty one others jointly and severally sued the defendant for trespass to land, an award of general, special and exemplary damages, and costs. The plaintiffs' case was that they are all owners of diverse parcels of land under customary tenure situated at Akuru Bridge and Owaro Okwiyo villages in Nebbi District. During or around the month of November 2002, a contingent of officers and men of The Uganda Peoples Defence Forces, without the consent of the plaintiffs, but in the course of their employment and duty as personnel of the army, encroached upon and occupied a large portion of their land on the two villages thereby displacing them and their respective families. In addition, the plaintiffs' crops were destroyed and their communal grazing lands taken over. The plaintiffs contend that the soldiers' actions were wanton, oppressive and unlawful and that the defendant is liable. In its written statement of defence, the defendant denied liability and opted to put the plaintiffs to strict proof of all their allegations.

At the scheduling conference, the following issues were agreed upon;

1. Whether the plaintiffs own the land in dispute.
2. Whether soldiers of the UPDF trespassed on the suit land.

3. Whether the UPDF occupied the suit land in the course of their employment for which the Attorney General is vicariously liable.
4. Whether the plaintiffs sustained loss or damages as a result.
5. What are the remedies available to the plaintiffs?

P.W.1 Mr. Paul Rubanga testified that during November 2002, a contingent of soldiers of the UPDF and their equipment scared the plaintiffs off their grazing land and homes situated within the two villages. They destroyed their crop of sim sim, cassava, cotton, millet, sorghum and other crops. They occupied an area estimated at three square kilometres. The residents sought the intervention of the RDC but he did not offer an effective solution until the soldiers began their phased evacuations starting in 2006, with the last contingent leaving in 2009. Upon the residents' return to the villages, they engaged the services of an agricultural officer who helped them compute the extent of their losses.

P.W.2 Mr. Omito Luka testified that during the year 2002, a contingent of soldiers of the UPDF surrounded the entire village during the night and the following morning the residents vacated the village out of fear. The soldiers destroyed his crops on approximately thirteen acres of land. He re-occupied his land in 2008 after the UPDF had left. A few of the residents stayed behind and conducted business and trade with the soldiers. The plaintiff closed its case and the defendant did not call any evidence.

In his final submissions, counsel for the plaintiffs Mr. Donge Opar argued that customary ownership of land is proved by use of the land through growing of seasonal crops, grazing of animals etc. P.W.1 and P.W.2 testified that they lived together with other people in the two villages. They grew crops like cassava sweet potatoes, maize, planting of trees and grazing animals in the area in question. At the time of the trespass in 2002 they were in possession, grew crops, had huts on the land, etc. When they were displaced by the defendant, they eventually returned to the area without anyone resisting. The evidence shows they are the customary owners of the suit land. The UPDF in November 2002 entered onto the land without their consent or authority. They complained to the local authorities but there was no help given to them. Trespass to land is an unauthorised entry onto the land and the witnesses P.W.1 ns P.W2 have proved that the entry was unauthorised by them. They also add that the UPDF soldiers destroyed their

property including crops and huts. The entry therefore amounted to trespass and there is no controverting evidence on these two issues. The occupation was for 7 years from November 2002 to towards the end 2009.

He submitted further that according to the two witnesses, the soldiers were in army uniform and were also armed with their guns. On arrival they started digging their trenches, cutting down trees, destroying their crops, and they were forced to leave the place, they lost use temporarily of the grazing land for their animals and also some of their houses were destroyed. They listed the property destroyed in exhibit P.E. 2 which was uncontroverted. The matter was reported to the Local authorities in the area who could not do anything about it. The only inference is that they were in the course and scope of their duties. In the result, the plaintiffs are entitled to compensation for the loss of their property stated to be shs. 882,680,700/= for all the plaintiffs and destruction of their property, which was uncontroverted and should be awarded as special damages. They were inconvenienced by the loss and deprivation of the use of their land for seven years. Some of their children failed to go to school. They also stayed away from their land for seven years and they suffered mental torture. They should be awarded general damages in the sum of shs. 10,000,000/= per person. These acts were wanton, unconstitutional and very oppressive. The plaintiffs were deprived of their foodstuffs, their animals had no grazing ground and generally their rights were trampled upon. He prayed that they be awarded exemplary damages of shs. 5,000,000/= each. He also prayed for the costs of the suit.

In reply, the learned State Attorney Mr. Balala submitted that it is not in dispute that the UPDF occupied land measuring approximately 2.5 square kilometres. The soldiers were coming from an operation in Congo back to Uganda and they occupied a piece of land part of which was being occupied by citizens of Uganda but the citizens have not been clearly verified as to their identity. It is probable that part of the land could have been owned by the plaintiffs. It is probable that part of it was unoccupied. He therefore submitted that whereas the plaintiffs could have occupied part of it, it is also probable that the land could have been vacant. The evidence does not prove the extent of trespass.

On the fourth issue, PW2 said on arrival of the UPDF soldiers he left the land but took away all his livestock. There is no evidence that any of the plaintiffs was required to leave their livestock behind. The period of stay was not proved in actual terms. PW2 states they left in 2006 but one batch left in 2009. The duration is not established. The UPDF left the land after some time. The huts / houses of the plaintiffs were not destroyed because the witnesses did not prove any destruction to their huts. P.E.2 was unilaterally made by a person who is not a professional in valuation. He prayed that it be disregarded as a reflection of the actual damage and loss. The UPDF occupied the land upon their return from Congo where they were executing their Constitutional Mandate. He finally prayed that if the court is inclined to allow the suit, let a professional valuer to be appointed to establish the extent of damage.

This being an action for trespass to land, the tort 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 (see *Salmond and Heuston on the Law of Torts*, 19th edition (London: Sweet & Maxwell, (1987) 46). It is a possessory action 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. Such possession should be actual and this requires the plaintiffs to demonstrate their exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised. The defendant should not have had any right to enter into plaintiff's land. In order to succeed, the plaintiff must prove that; he or she was in possession at the time of trespass; there was an unlawful or unauthorised entry by the defendant; and the entry occasioned damage to the plaintiffs.

To decide in favour of the plaintiffs, the court has to be satisfied that the plaintiffs have furnished evidence whose level of probity is not just of equal degree of probability with that adduced by the defendants, such that the choice between their version and that of the defendant would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the defendant, might hold that the more probable conclusion was that for which the plaintiffs contend. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials (see *Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd [1982] HCB 130*).

1. Whether the plaintiffs own the land in dispute.

Whereas an action for recovery of land is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership of the land, an action of trespass to land as a claim in tort is perceived as a wrong against possession, not ownership, of the land. In the latter case only the person who has exclusive possession or an immediate right to possession of the land in question can sue. This issue is accordingly amended to address possession rather than ownership.

Factual possession signifies an appropriate degree of exclusive physical control (see *Powell v. McFarlane (1977) 38 P&CR 452*). The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so. Although an action in trespass to land does not require proof of ownership of the land in question and the right to possess is sufficient, evidence of user of unregistered land may be sufficient to establish customary ownership of such land. In *Marko Matovu and two others v. Mohammed Sseviiri and two others, S.C. Civil Appeal No. 7 of 1978* where it was decided that;

There is no definition of customary tenure perhaps because it is so well understood by the people. Where a person has a kibanja, it is generally accepted that he thereby established customary tenure on public land. But not all people live on a kibanja. In many areas people grow seasonal crops on the land they occupy and in other places some use the land for grazing cattle only. Yet all these people also enjoy customary rights over land they use.

Just as customary ownership of land may and indeed will be presumed from evidence of actual possession of a house, field, garden, farm or messuage on the land, actual possession may be established by evidence of a similar nature showing sufficient control demonstrating both an intention to control and an intention to exclude others. In the instant case, it was the evidence of both witnesses for the plaintiffs that they occupied an area within the two villages estimated at three square kilometres on which they had grazing land, had constructed homes and grew crops

such as sim sim, cassava, cotton, millet, sorghum and so on. This evidence was not weakened by cross-examination and the defendant did not adduce any to controvert it. This issue therefore is decided in the affirmative.

2. Whether soldiers of the UPDF trespassed on the suit land.

Trespass to land occurs when a person directly enters upon another's land without permission or other lawful cause and remains upon the land, places or projects any object upon the land and thereby interferes, or portends to interfere, with another person's lawful possession of that land (see *Justine E.M.N. Lutaaya v. Stirling Civil Engineering Company, S.C. Civil Appeal No. 11 of 2002*). In the instant case, it was the evidence of both witnesses for the plaintiffs that some time during November 2002, a contingent of soldiers of the Uganda Peoples' Defence Forces entered onto their respective land holdings, dug trenches thereon, cut down trees, destroyed their crops, and they were forced to leave the place, thereby losing use temporarily of the grazing land for their animals and also some of their houses were destroyed. This evidence was not weakened by cross-examination and the defendant did not adduce any to controvert it.

At common law, taking or destroying property in the course of fighting the enemy did not give rise to any claim for compensation whether that was done by the armed forces of the Crown or by individuals taking arms to defend their country or by the enemy. Common law recognises the executive prerogative to do all those things in an emergency which are necessary for the conduct of war, in those cases of necessity, for the public defence, where the Executive has power to act without statutory authority. The idea in such situations is that it is equitable that burdens borne for the good of the nation should be distributed over the whole nation. There is no right to compensation in a case belonging to that category of urgency, in which the law arms the government and citizen alike with the right of intervening, which sets public safety above private right. For example in *In re A Petition of Right* (1915 case cited in *Burmah Oil Company (Burma Trading) Limited v. Lord Advocate, [1965] AC 75*) during the first world war, the military authorities took possession of land for Shoreham Aerodrome. The owners were dissatisfied with the compensation offered and sought a declaration that they were entitled to proper compensation. The Crown pleaded that the land had been taken by the royal prerogative or,

alternatively, under *The Defence of the Realm Act, 1914*. It was held that no compensation was legally due under either.

What had never been clarified was the question whether compensation was payable when property was taken deliberately for defence purposes, such as training of troops, manufacture of munitions, obtaining the wide variety of supplies necessary to maintain the forces on active service, and economic warfare and various purposes essential to the conduct of the war but not immediately concerned with the maintenance of the fighting services. The opportunity arose in *Burmah Oil Company (Burma Trading) Limited v. Lord Advocate*, [1965] AC 75, [1965] 2 All ER 348, [1964] 2 WLR 1231 where the General Officer Commanding during the war of 1939 to 1945 ordered the appellants oil installations near Rangoon to be destroyed. The Japanese were advancing and the Government wished to deny them the resources. It was done on the day before the Japanese occupied Rangoon. The question was, whether compensation was payable for this destruction. The Government were exercising a prerogative power which required them to pay compensation. Being wary of looking at older authorities through modern spectacles while at the same time careful not to ignore the many changes in constitutional law and theory that had taken place, their Lordships distinguished this situation from one where property was damaged or destroyed during the course of battle: Lord Reid stated;

This case therefore turns, in my view, on the extent of the exception of what has been called battle damage. Such damage must include both accidental and deliberate damage done in the course of fighting operations. It cannot matter whether the damage was unintentional or done by our artillery or aircraft to dislodge the enemy or by the enemy to dislodge our troops. And the same must apply to destruction of a building or a bridge before the enemy actually capture it. Moreover, it would be absurd if the right to compensation for such a building or bridge depended on how near the enemy were when it was destroyed. But I would think that Vattel is right in contrasting acts done deliberately (*librement et par precaution*) with damage caused by inevitable necessity (*par une necessite inevitable*). His examples show that he means something dictated by the disposition of the opposing forces. It may become necessary during the war to have new airfields or training grounds and the necessity may be inevitable, but that kind of thing would not come within the exception as stated by any of the commentators, inevitably necessary because there is really no choice: for example, there may be only one factory in the country or one site available for a particular purpose.

The House then discussed the use of the Royal prerogative stating: “the prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute.” The House also considered the right to self help in an emergency. Lord Upjohn said “No doubt in earlier times the individual had some.....rights of self-help or destruction in immediate emergency, whether caused by enemy action or by fire, and the legal answer was that he could not in such circumstances be sued for trespass on or destruction of his neighbour’s property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour’s house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade.” Lord Reid said “it would be very strange if the law prevented or discouraged necessary preparations until a time when it would probably be too late for them to be effective’. Lord Pearce observed: ‘the prerogative power in the emergency of war must be one power, whether the peril is merely threatening or has reached the ultimate stage of crisis. Bulwarks are as necessary for the public safety when they are constructed in good time against a foreseen invasion as when they are hastily improvised after the enemy has landed. The Crown must have power to act before the ultimate crisis arises.”

When property is not taken or destroyed by the military in the course of fighting the enemy but deliberately for defence purposes essential to the maintenance of the forces, not immediately concerned with the conduct of war, such taking or destruction assumes the form of a compulsory acquisition in respect of which Article 26 (2) (b) (i) of *The Constitution of the Republic of Uganda, 1995* guarantees prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property. The same principle is to be found in modern common law such as was illustrated in *Attorney General v. De Keyser’s Royal Hotel Ltd [1920] AC 508; [1920] All ER 80, (1920) 36 TLR 600, (1920) 122 LT 691*, where the Crown took possession of a London hotel for use as headquarters of the Royal Flying Corps. The hotel had been requisitioned during the war for defence purposes. The owner claimed compensation seeking a declaration that they were entitled to rent. The Attorney General argued that the liability to pay compensation had been displaced by statute giving the Crown the necessary powers. The owners succeeded on the ground that the Crown had acted under the Defence of the Realm Acts and that compensation was due in respect of the use of statutory powers. The court

explained that there is an established general principle, of high constitutional importance, that there is no common law power to take or confiscate property without compensation. The powers of the Judicial Committee of the Privy Council are now governed by the Acts of 1833 and 1844 which must be recognised as superseding the royal prerogative. In the exercise of the War Prerogative, the Crown's power to requisition property had been limited by Defence Act 1842 so as to require compensation to be paid to the subject. Lord Parmoor said:

The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments. The result is that, whereas at one time the Royal Prerogative gave legal sanction to a large majority of the executive functions of the Government, it is now restricted within comparatively narrow limits. The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion.

The court emphasised that the constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the executive Prerogative but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. Lord Dunedin discussed when the prerogative is overtaken by statute: "it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?"

In as much as the Executive is bound by the Constitution which by its provisions happens to deal with something which before its promulgation could be done by way of executive prerogative, and specially empowers the Executive to do the same thing, but subject to new conditions imposed, by those provisions the prerogative is curtailed. This executive prerogative to take for defence purposes property essential for the maintenance of the fighting services, not immediately concerned with the conduct of war, is now accompanied by an obligation to make compensation to those whose property is taken. In such circumstances, compensation ought always to be made,

because what is taken for the general good should be paid for by the general community. Hence it would seem to follow as a matter of general principle that when in the exercise of the executive prerogative a citizen is deprived of his or her property by the executive in some emergency for the benefit of the state, the citizen is entitled to be compensated therefor.

According to *Crown of Leon (Owners) v. Admiralty Commissioners [1921] 1 KB 595*, in order to invoke the executive prerogative, “there must be a national emergency, an urgent necessity for taking extreme steps for the protection of the Realm.” In the instant case, there is no evidence to suggest that the plaintiffs’ land was occupied out of necessity as such necessity would in general require proof of an actual and immediate necessity arising in face of the enemy and in circumstances where the rule *Salus populi suprema lex* (the safety of the people is the supreme object of the law) was clearly applicable, for example such as would justify declaration of a state of war under Article 124 or a state of emergency under Article 110 of *The Constitution of the Republic of Uganda, 1995*.

In absence of evidence of a state of necessity or in the alternative prompt payment of fair and adequate compensation prior to the taking of possession of the plaintiffs’ land, I find that activities of the Uganda Peoples’ Defence Forces, including the digging of trenches, cutting down of trees, destruction of crops, occupation of grazing land and destruction of houses which occurred some time during November 2002, without the consent of the plaintiffs, constituted acts of trespass on the plaintiffs’ land. Assuming, as it is insinuated by counsel for the defendant, that there was a public necessity to take possession of the plaintiffs’ land for administrative purposes in connection with national defence, this necessity in the circumstance of this case cannot be argued as an answer to a claim in trespass. This issue is answered in the affirmative.

3. Whether the UPDF occupied the suit land in the course of their employment for which the Attorney General is vicariously liable.

According to the *East African Cases on the Law of Tort* by E. Veitch (1972 Edition) at page 78, an employer is in general liable for the acts of his employees or agents while in the course of the employers business or within the scope of employment. This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer

is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own.

The security situation that existed at the time along the border between the Democratic Republic of Congo and Uganda is reflected in the defence presented by Uganda in the *Case Concerning Armed Activities on the Territory of the Congo*, judgment of 19th December 2005, delivered by the International Court of Justice. In that defence, Uganda stated that she sent two UPDF battalions into eastern Congo, followed by a third one in April 1998, at the invitation of the Congolese President. On 27th April 1998 the Protocol on Security along the Common Border was signed by the two Governments in order to reaffirm the invitation of the DRC to Uganda to deploy its troops in eastern Congo as well as to commit the armed forces of both countries to jointly combat the anti-Ugandan insurgents in Congolese territory and secure the border region. On 8th April 2000 and 6th December 2000, Uganda signed troop disengagement agreements known as the Kampala plan and the Harare plan. Uganda pointed out that, although no immediate or unilateral withdrawal was called for, it began withdrawing five battalions from the DRC on 22nd June 2000. On 20th February 2001, Uganda announced that it would withdraw two more battalions from the DRC. On 6th September 2002 Uganda and the DRC concluded a peace agreement in Luanda (*Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Co-operation and Normalisation of Relations between the two Countries*). Under its terms Uganda agreed to withdraw from the DRC all Ugandan troops, except for those expressly authorized by the DRC to remain on the slopes of Mt. Ruwenzori. Uganda claims that, in fulfilment of its obligations under the Luanda Agreement, it completed the withdrawal of all of its troops from the DRC in June 2003. Uganda asserted that since that time, not a single Ugandan soldier was deployed inside the Congo. She confined actions to her own side of the Congo-Uganda border, by reinforcing its military positions along the frontier.

According to section 56 (1) (j) of *The Evidence Act*, courts may take judicial notice of the commencement, continuance and termination of hostilities between the Government and any other State or body of persons. The troop movement reflected in the defence presented by Uganda in the I.C.J *Case Concerning Armed Activities on the Territory of the Congo*, cited above is consistent with the testimony of P.W.1 who stated that the UPDF Contingent which occupied their land was returning from the Democratic Republic of Congo. The court of Appeal for Eastern Africa in *Muwonge v. Attorney General of Uganda [1967] E A 17* decided that:

An act may be done in the course of a servant's employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable.

A suit for trespass to land may be maintained whether the defendant committed the entry unwittingly or wilfully and wantonly (see *Atlantic Coal Co. v. Maryland Coal Co. (1884)*, 62 Md. 135 at 143; *Gore v. Jarrett (1949)*, 192 Md. at 516, 64 A.2d at 551 and *Barton Coal Co. v. Cox (1873)*, 39 Md. 24 at 29-30). Trespass may be committed even when a trespasser makes a mistake regarding the title or boundaries of his land and undertakes activities on an adjoining neighbour's property thinking he or she is on his or her own property. In the instant case, the testimony of both witnesses for the plaintiffs' is uncontroverted to the effect that the soldiers who occupied their land belonged to the Uganda Peoples' Defence Forces. They were in army uniform and were carrying arms. I have not found any evidence to suggest that the UPDF soldiers were on a frolic of their own. According to section 3 (1) (a) of *The Government Proceedings Act*, Government is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject in respect of torts committed by its servants or agents, where such conduct would have given rise to a cause of action in tort against that servant or agent or his or her or estate. On basis of the evidence availed to court, I find that the plaintiffs have proved on the balance of probabilities that the UPDF occupied the suit land in the course of their employment for which the Attorney General is vicariously liable.

4. What are the remedies available to the plaintiffs?

By their plaint, the plaintiffs sought the following reliefs; compensation for trespass, general damages, exemplary damages, special damages, and costs of the suit. As regards special damages, not only must they be specifically pleaded but must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990 – 1994) E.A. 219*). The plaintiffs pleaded the particulars of special damages by way of annexure “B” to the plaint referred to in paragraph 6 of the plaint. It is a list of names of the plaintiffs and their respective claimed quantified losses resulting from the trespass complained of.

The origin of that list was explained by P.W.1 during his testimony. He said that: “we valued the property we lost. Our total valuation of this loss was 882,680,700/= (eight hundred eighty two million, six hundred eighty thousand seven hundred).... we came to this valuation with the help of [an] agricultural officer who was not among us. He is a government worker for the sub-county..... we got these figures from the office of the agricultural officer called Peter. I do not know his other name. He is alive but in another sub-county.” This valuation dated 11th August 2004 was received in evidence as exhibit P.E.2.

I have examined the exhibit. It is devoid of any explanation as to how the various amounts due to each of the plaintiffs were established. The list is signed, not by the agricultural officer to whom it is partly attributed but instead by P.W.1 as the “Chairman Claimants”. Compilation of the valuation is partially attributed to “an expert” opinion of a person whose qualifications and expertise are unknown. In *Ugachick Poultry Breeders Ltd v. Tadjinkara T/a S.T Enterprises Ltd, Court of Appeal Civil Appeal No. 2 of 1997*, it was held that the court is not bound to accept the opinion of an expert if it found good reason for not doing so. I find myself unable in the circumstances to accept as an accurate representation of the plaintiff’s loss, sums of money quantified in those circumstances.

I am further persuaded by the decision in *Kamugira v. National Housing and Construction Company H. C. Civil Suit No. 127 of 2008*, where it was held that simply attaching a valuation report to pleadings does not amount to strictly proving the claims, but only amounts to

“specifically pleading” the special damages. In the instant case, the expert who advised P.W.1 regarding the quantum was not called to give evidence on the report and to be tested on the report’s veracity through cross-examination. As a result, the skill and competence of the Agricultural Officer was never tested, the method used in the valuation was never explained, and the nature of items valued or basis of the values attached to them was never revealed.

It is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to it being assailed as inherently incredible or possibly untrue (see *James Sawoabiri and another v. Uganda, S. C. Criminal Appeal No. 5 of 1990* and *Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008* and *Annet Zimbiha v. Attorney General H. C. Civil Suit No. 01 of 2009*). Although the defendant in the instant suit did not challenge the admissibility of this valuation and did not cross-examine P.W.1 on it, I find the evidence to be inherently incredible or possibly untrue in so far as there is no indication as to when the actual valuation was done and whether it was still possible at the time to determine the acreage of crops each of the plaintiffs had, the crop varieties grown by each of the plaintiffs, the productivity of each of their parcels of land or information relating to other material loss suffered by any of the plaintiffs. I am unable to tell the specific items, the quantities and value of material loss suffered by each of the plaintiffs listed. For that reason it is not possible for me to determine whether the figures present a fair estimate of the loss or not. As Sherlock Holmes reminded Dr Watson; “when you have eliminated the impossible, whatever remains, however improbable, must be the truth,” however in this case, I have not been provided with any material by which to eliminate the impossible so as to remain with the truth, however improbable it may be. In the result the plaintiffs have not proved their claim for special damages on a balance of probabilities and this part of their claim is rejected.

With regard to the claim for exemplary damages, also referred to as punitive damages, this represents a sum of money of a penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are deterrent in nature and aimed at curbing the repeat of the offending act. They are given entirely without reference to any proved actual loss suffered by the plaintiff (see *WSO Davies v. Mohanlal Karamshi Shah [1957] 1 EA 352*). If the trespass is

accompanied by aggravating circumstances, the plaintiff may be awarded exemplary damages. Exemplary damages should only be awarded in two categories of cases, apart from cases in which exemplary damages are expressly authorised by statute. The two categories are; - cases in which the wrong complained of was an oppressive, arbitrary or unconstitutional action by a servant of the government, or cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation made to the defendant (see *Kanji Naran Patel v. Noor Essa and another* [1965] 1 EA 484). The aggravating factors were neither pleaded nor proved in the instant case. The evidence of the two plaintiffs who testified as witnesses does not show that the defendant engaged in any oppressive or arbitrary acts. The defendant never forced any of the plaintiffs off their land. They instead chose to leave on their own volition, each plaintiff at such a time as he or she found himself or herself uneasy living in close proximity of the soldiers. I find that the trespass, although unconstitutional for lack of prior compensation, was not accompanied by circumstances of aggravation. The claim for exemplary damages is thus rejected.

Lastly, with regard to the claim for general damages, 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. The award of general damages is in the discretion of court in respect of what law presumes to be the natural and probable consequence of the defendant's act or omission (see *James Fredrick Nsubuga v. Attorney General, H.C. Civil Suit No. 13 of 1993* and *Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003*).

In an action of trespass if proved by the plaintiff, he or she is entitled to recover damages even though he or she has not suffered actual loss. If the trespass has caused the plaintiff actual damage, the plaintiff is entitled to receive such an amount as will compensate him or her for his or her loss. 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 should reasonably be paid for that use (mesne profits) (see *Halsbury's Laws of England* 3rd Edition, Vol.38 para.1222). The defendant's conduct is thus key to the amount of the damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was wilful, 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 (see *Halsbury's Laws of England*, 4th edition, vol. 45, at para 1403).

General damages are awarded as recompense. The position was accurately put by Earl Jowitt in *British Transport Commission v. Gourley* [1956] AC. 185, 197, thus: "the broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been if he had not sustained the injuries." Needless to say "injury" and "loss" are used interchangeably in cases of tort.

In this case, by reason of the defendant's agents' activities on the two villages, the plaintiffs were wrongfully deprived of the use of their land. I am therefore prepared to accept the general proposition that, where an individual is deprived of use his or her property under the lawful authority of the state for the public good, the loss to the individual must be made good at the public expense. I find the defendant's conduct in the instant case to be in the in-between area: more than accidental or inadvertent but less than arbitrary.

I have considered award of general damages in such cases as *Osuna Otwani v. Benard Satsi and eleven others*, H.C. Civil Suit No. 4 of 1992, a judgment delivered on 16th August 1993, where the court awarded shs. 90,000/= against each of the defendants for the inconvenience the plaintiff suffered at the hands of the defendants who during 1989 had trespassed onto his about 210 acres of land whose real economic value was unknown. In *Christopher Narimanya v. Abdul Kasule and two others*, H.C. Civil Suit No.159 of 1993, a judgment delivered on 2nd March 1994, the court awarded shs. 900,000/= against the defendants who were found to have been trespassing on the plaintiff's land for a period of about one and a half years starting from August, 1992 during which time he could not develop his land and put it to full use. In *Bushenyi- Ishaka Town Council v. Mafred Muhumuza and two others*, H.C. Civil Appeal No. 68 of 2011, a judgment delivered on 27th August 2013, the court upheld an award of shs. 45,000,000/= as general

damages for trespass to land whereby the appellant wrongly took over their late father's land without paying them any compensation. In *Placid Weli v. Hippo Tours and Travel Ltd and two others*, H.C. Civil Suit No. 939 of 1996, a judgment delivered on 18th October 2013, the court awarded shs. 100,000,000/= to a plaintiff whose land had been fraudulently sub-divided into three plots instead of two as had been agreed thus trespassing onto the plaintiff's land and blocking access thereto from December 1989. Finally in *Dr. Henry Kamanyiro Kakembo v. Roko Construction Limited*, C.A. Civil Appeal No. 05 of 2005, a judgment delivered on 4th April 2014, the Court of Appeal upheld an award of shs. 5,000,000/= to an appellant as a consequence of the unauthorized excavation of murram from his land, a pit had been created on the said land measuring approximately 0.40 hectares or just about one acre. The appellant had confronted the respondent about their activities and demanded that the respondent restores the land. The respondent agreed to do so and in fact made effort to fill up the pit created by the excavation of murram. The appellant being dissatisfied with the manner in which the pit had been refilled and filed a suit claiming for Shs. 45,000,000/= and being dissatisfied with the award, had filed the appeal.

In comparison to two of the authorities cited above where substantial damages were awarded, the trespass in this case did not involve an inordinately long or permanent deprivation of land as it is said to have spanned a period running from November 2002 to sometime in 2009, a period of seven years. Within that period, the plaintiffs left and returned at diverse times, some longer or shorter than others. The specifics were not provided to court thereby making it impossible to arrive at individualised figures that will put each plaintiff in the same position as he or she would have been if the trespass had not occurred. In the circumstances the court is constrained to award an average sum, slightly above what it considers to be nominal, to ensure that no injustice is occasioned to either party. Each plaintiff is awarded shs. 6,000,000/= in general damages, with interest thereon at court rate until payment in full. The plaintiffs are as well awarded the costs of the suit.

Dated at Arua this 15th day of June 2017.

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Stephen Mubiru
Judge
15th June 2017