

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CIVIL SUIT NO. 002 OF 2017

KISORO DISTRICT LOCAL GOVERNMENT -----

5 **PLAINTIFF**

V

1. MBONIGABA BONIFACE

2. BAHUNGIREHE CYPRIAN

3. HABIMANA VALENCE

10 **4. TUSHEMERIRWE JOY**

5. NYIRANZAHAYA BENADETTE

6. MANIRUKURE ALOYSIUS

7. GARUBANDA INNOCENT

8. BYARUHANGA PETER

15 **9. TWESIME NICOLAS**

10. AGABA DENIS

11. KWIHANGANA YOHANAH

12. BYARUGABA SAVINO-----

DEFENDANTS

20 **Before: Hon. Lady Justice Olive Kazaarwe Mukwaya**

JUDGMENT

The Plaintiff sued the Defendants seeking the following orders;

1. A declaration that the Plaintiff is the customary and lawful owner of land situate at Kafuga, Nombe, Nyabicekye, Rushabarara villages, Rubuguri Parish, Kirundo Sub county in Kisoro District.
- 5 2. A permanent injunction restraining the Defendants, their agents, servants and/or employees and any one rightly acting under them from trespassing on the suit land.
3. Special Damages of UGX 300,000,000/=
4. General Damages
- 10 5. Costs of the suit.

Plaintiff's facts

Prior to the creation of Kisoro District Local Government, the land at Kafuga, Nombe, Nyabicenkye, Rushabarara villages, Rubuguri parish, Kirundo sub county in Kisoro District, measuring approximately 300 acres, was owned by Kabale District
15 Administration as the customary owner under the custody of Nyabwishenya and Kirundo Sub Counties. It was used as public land. Upon the creation of Kisoro District Local Government, Nyabwishenya and Kirundo Sub counties, were annexed to and/or made part of the newly created Kisoro District Local Government, the Plaintiff. All government lands within their jurisdiction, including the suit land, were taken over by
20 the Plaintiff which then embarked on a tree planting exercise on the suit land. Eucalyptus, Cyprus, Pine and other tree species were planted and matured into a forest commonly known as Kafuga Pocket forest which covers approximately 300 acres.

On the 23rd day of May 2016 and again on the 9th January 2017, the Defendants unlawfully and illegally entered onto the suit land and cut down and burnt the Plaintiff's
25 trees. As a result of the Defendant's actions, the Plaintiff has lost a substantial number of Eucalyptus, Cyprus, Pine and other indigenous trees and the relevant forest cover.

The Plaintiff has also been deprived of quiet possession of the suit land and suffered loss and damages for which the Defendants are liable.

Defendants' facts

The Defendants claim is that they are the customary owners of the suit land located at 5 Muko- Rwebogo surrounded by a stream of flowing water called Murungo in the two villages of Rushabarara and Nyabicenkye in Rubuguri parish, Kirundo sub-county, Kisoro district. They acquired the land by inheritance from their late fathers who settled on, occupied and cultivated it from the colonial times without challenge. It was only in 2016 and 2017 that the Defendants were arrested and prosecuted by the Plaintiff on 10 grounds that the suit land is a government forest.

The 1st, 3rd and 6th Defendants are biological brothers and sons of the late Cosma Sembeba, who acquired it by settlement during the colonial period. The 3 Defendants state that they were born on the suit land between the 1960s and 1970s.

In the late 1970s, the late Cosma Sembeba moved the family homestead to the 15 neighbouring Rutoma village and the family continued to use the suit land for cultivation, food production and tree planting until 2016 and 2017 when they were arrested by the Plaintiff. Evidence of their past utilization of the suit land is in the form of remnants of their late father's homestead, permanent crops such as tea and eucalyptus trees, which are still visible.

20 The 2nd Defendant testified that he inherited the land from his late father, Kasimba, a contemporary of Cosma Sembeba and Thomas Nduhira, who died in the 1970s.

The 5th, 7th, 8th and 9th Defendants are biological siblings. Their late father, Thomas Nduhira, was the brother of Cosma Sembeba. The 4th Defendant is their sister-in-law, widow to their deceased brother. They state that they inherited part of the suit land from 25 their deceased father who also acquired the land by settlement during colonial times. The 8th Defendant, testified that he was born on the suit land in 1958.

According to Counsel for the Defendants, the 10th, 11th and 12th Defendants were wrongfully joined to the suit by the Plaintiff. They do not have a claim on the suit land but were labourers who were arrested while working for pay. The claim to the suit land is therefore as between the Plaintiff and the 1st to 9th Defendants only.

5 Submissions by Counsel for the Plaintiff

- 10 a. Ms. Lubowa for the Plaintiff submitted that sufficient evidence had been led by the Plaintiff to prove their customary ownership of the suit land. PW1, Friday Godwin, the sub county chief of Nyabwishenya presented Exb. P.1, an inventory of the land of the then Kabale District Administration; PW2, Rukundo Manasseh corroborated his evidence. Exb. P.5, the register of land and buildings of the Plaintiff listed the suit land in Kafuga as part of its assets. The inventories were not disputed by the Defendants. Exb. 2- Exb. P.4 were applications made by the surrounding community to be granted permission by Nyabwishenya sub county to utilize and/or graze on parts of the suit land. PW5, Ndinabo James testified as
- 15 a sub parish chief of Igabiro, his responsibilities included looking after Kafuga forest-the suit land and that he participated in the eviction of encroachers from it. PW4, Sindibaza John corroborated PW5's evidence in that respect. PW4 added that his father Matayo Kamuhangire and his family, one Bulera and other individuals including Cosma Sembeba the grandfather of Mbonigaba Boniface,
- 20 the 1st Defendant, occupied part of the suit land. After their occupation was protested to by Nyabwishenya sub county, they were all forced off of the suit land in the 1970's. DW8, Zobiya Hakizimana, widow of the late Cosma testified that she and her husband left the suit land between 1978 and 1979.
- 25 b. PW3, Eldard Kanyonyi testified that Kafuga Forest and other forests; Bukingi and Kankoko are currently annexed to Bwindi Impenetrable forest and have for a long time been in existence. All three were previously under the stewardship of Nyabwishenya Sub county. He added that part of the suit land was bare land

on which trees were later planted. It was the parish chiefs of the area who contracted individuals to plant the trees. The trees were planted to add to the already existing indigenous trees on the suit land to form the presently thick forest.

- 5 c. PW10, Byamugisha Tom and PW11, Byamukama George former Acting sub county chief, Nyabwishenya, testified on the tree planting activities. PW10 was contracted to plant trees by PW11. Exb P.10, 11 and 12, are the application to plant the trees, request for payment and proof of payment respectively.
- d. The visit to the locus in quo clearly showed that some trees had been planted on
10 the suit land and there were indigenous trees as well. A vast thick forest cover of majorly indigenous trees which have existed for a long time were visible. There were traces of planted trees within the forest, this fact corroborated the testimonies of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW10 and PW11. Evidence of a long standing forest -Kafuga pocket forest.
- 15 e. PW8, Tumusiime Joseph, a surveyor relied on Exb. P.8, the cadastral map of the suit land to elaborate his findings to Court during the locus visit. It was a forest which has never been inhabited contrary to the Defendant's allegation of having occupied and cultivated the same. The surrounding features; streams of Kafuga, Murungo, Muko and Rwembogo are characteristics of a forest that has matured
20 over a period of time. The Defendants acknowledged the existence of these streams as allegedly being the marks of the boundaries of their land. There were no traces of cultivated parts or gardens seen or could have ever been on the suit land. This fact casts doubt in the testimonies of the Defendants DW1, DW2, DW3, DW4, DW5, DW6, DW7 and DW8 who alleged that they previously
25 cultivated the suit land until when they were stopped by the Plaintiff in 2017.
- f. The only activity that court found on the suit land was tree planting which the Plaintiff has proved to having done. DW1 stated his father Cosma Sembeba together with their entire family stayed on the suit land, cultivated and two of his

siblings on the suit land. DW8, the widow of Cosma Sembeba clearly stated that none of her children had been buried on the suit land and that all her children whose names she spelt out were still alive. This is contrary to her evidence in chief where she states that she buried one of her sons and her co-wife on the suit land.

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- g. DW8 added that she and her husband Cosma Sembeba occupied the suit land but that they were evicted in 1979 by a one Force (an official of the plaintiff) on allegations that the land belonged to the Government of Uganda.
 - h. The contradictions in the testimonies of the Defendants on their occupation and utilization of the suit land cannot be ignored. The contradictions cast more doubt as to whether the Defendants ever owned and utilized the suit land.
 - i. The Defendants conveniently named three hills found in Kafuga pocket forest as ‘Muko’, ‘Rwembogo’ and ‘Muryakosima’. DW1 stated that his father, the late Cosma Sembeba and his family lived and cultivated one of the hills and that their gardens were visible. Trees on the suit land were scattered. The visit of locus by Court proved that the suit land was covered in thick forest. No signs of crops or gardens mentioned by the Defendants could be seen. In addition, when court visited locus, Bizimana Stanley, the LC1 Chairperson of Nombe village and Emmanuel Rwaje the LC Chairperson Nyabicence Village both stated that they were not aware of the names of the three hills.
 - j. DW1, DW2, DW3, DW4 and DW6 testified that they owned different portions of the suit land having inherited them from their late fathers and husband respectively. When asked about the size of the land they each owned, DW1 stated that he owned approximately 37 acres, others, 6 terraces, and 20 acres and yet others could not estimate what they owned. They further stated that they cultivated their different portions growing among others maize, beans and sorghum. At the locus in quo, the demarcations were not visible, only a single unit of thick forest cover.
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- k. On trespass on the suit land by the Defendants; Counsel for the Plaintiff submitted that trespass to land consists of unauthorized interference with a person's possession of land; the unjustified entry onto land owned by another person occasioning interference with the owner's enjoyment. Halsbury's Laws of England 3rd Edition Vol. 38 defines trespass to land as; "... unauthorised entry upon land. A trespasser gives the aggrieved party the right to bring a civil law suit and collect damages as compensation for the interference and for any harm suffered." Counsel relied on the case of **Justine E.M.N Lutaaya vs. Stirling Civil Eng. Civil Appeal No. 11 of 2002**, where it was held that trespass to land occurs when a person makes an unauthorised entry upon another's land and thereby interfering with another person's lawful possession of the land. Court further held that possession does not only mean physical occupation but also includes constructive possession. A Plaintiff who brings an action in trespass is a person in possession of the land. The possession may either be in law or in fact. Counsel implored this Court to find that the Plaintiff had adduced sufficient evidence to prove ownership and actual possession of the suit land - a forest cover commonly known as Kafuga pocket forest.
- l. PW6, Nyiramanzi Henry the forest guard at Kafuga pocket forest/the suit land testified that on the 23rd day of May 2016, the Defendants together with others entered onto the suit land, cut down and burnt several trees thereon. Again on the 9th day of January 2017, the Defendants together with others, entered on to the suit land and cut down and burnt several trees. Exb. P6 shows that part of the forest cover on the suit land was cut down. DW6, Tushemerirwe Joy stated that she and the other Defendants were arrested while cutting trees on the suit land. She added that the cutting of the trees was planned and that it was collectively done. In total they cut down 300 trees. DW6 explained that the reason for the cutting of the trees was to get virgin land for cultivation and that the same was done on the 1st Defendant's portion of the suit land. Counsel submitted that the

only conclusion to be drawn from the conduct of the Defendants is that they knew that their conduct amounted to trespass. Cutting of the trees in a concealed part of the forest was deliberate. Defendants were arrested on both occasions of cutting the trees/forest on the suit land.

- 5 m. Whereas the Defendants were not convicted of trespass on both occasions of arrest, the criminal cases No. 773/2016 and No. 031/2017 did not exonerate the defendants from trespass on the suit land. The Magistrate in criminal case No. 773 of 2016 found that the prosecution had failed to prove that the Defendants had entered into forest reserve contrary to the provisions of the National Forest and Trees planting Act 2003 under which the Defendants had been charged. Criminal case No. 031/2017 on the other hand, was dismissed for want of prosecution. Counsel contended that the fact that Kafuga pocket forest is not a gazetted forest reserve does not affect its ownership. It is a forest situate on land owned by the Plaintiff. Therefore, the entry of the Defendants onto the suit land, and their admitted cutting of trees left only one conclusion. The Defendants trespassed on the suit land.

Submissions by Counsel for the Defendant

- a. Mr. Byamukama, Counsel for the Defendant submitted that under sections 101 and 102 of the Evidence Act, the Plaintiff has the burden to prove that it is the customary owner of the suit land. This is on a balance of probabilities. Counsel relied on **Nsubuga v. P. N. Kavuma (1978) HCB 307**.
- b. He added that customary tenure or ownership of land is recognized under Article 237(3) (a) of the Constitution as one of the four systems of land ownership in Uganda. It is defined in sections 1(1)(l) together with section 3 of the Land Act 1998 as a system of land tenure regulated by customary rules of a given society or community, which are limited in their operation to a particular description or class of persons. The Court in **Simea Umika & 7**

- Others v. Maber Group Farm Limited H.C.C.A No. 19 of 2016* defined customary law as “characterized by local customary rules regulating transactions in land, individual, household, communal and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any persons acquiring any part of that land in accordance with those rules”.
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- 10 c. Further, in the case of *Kampala District Land Board & Another v. Venancio Babweyaka & 3 Others (S.C.C.A No. 2 of 2007)*, the Supreme Court per Odoki, C. J held that it is trite law that in a case involving a claim of customary land ownership, the party must prove the customary law that he is relying on to make his claim. The Supreme Court cited with approval the case
- 15 of *Ernest Kinyanjui Kimani v. Mwuiru Gikanga (1965) E A 735* that “As a matter of necessity, the customary law must be accurately and definitely established”. This is also the statutory position under Section 46 read together with Section 102 of the Evidence Act.
- 20 d. The aforesaid legal requirement was repeated by the High Court in *Atunya Valiryano v. Okeny Delphino (H.C.C.A No. 51 Of 2017)* where Justice Stephen Mubiru held that under Section 3(1) of the Land Act, “a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description or class of persons to whom
- 25 customary rules apply and that he or she is a person who acquired the land in accordance with those rules”. This requirement is also stated in *Simea Umika* at page 3 *supra*.

- e. Counsel argued that customary tenure applies to individuals or persons who belong to a certain social or customary community and hold the land in accordance with its customary rules. Corporate entities and government do not fall in such a category of persons as they do not have a cultural, tribal or ethnic identity. They cannot therefore claim customary ownership of land by mere words but must prove the circumstances under which they acquired a customary interest in the land in issue from its original customary owners. Such proof is either by purchase, donation, compulsory acquisition subject to Article 26(2) of the Constitution, or perhaps on an application to the District Land Board for such land on the ground that it is not owned by any person or authority under Article 241(1) (a) of the Constitution and Section 59(1)(a) of the Land Act.
- f. In the *Simea Umika case, supra*, a limited company claimed to have acquired the suit land, which was subject to customary law, by inheritance. This was rejected by court as legally untenable on the aforesaid grounds.
- g. The ingredients to prove a claim for customary land ownership are a) existence of a custom on the basis of which ownership is **claimed** (*Kampala District Land Board case at page 16 & Simea Umika at page 7*); b) The nature and scope of such custom and its authoritative character (*Simea Umika at page 8 & Atunya Valiryano also at page 8*); and c) Evidence of acquisition of the suit land in accordance with the said customary rules (*Simea Umika at page 8 & Atunya Valiryano also at page 8*).
- h. It was thus contended that the Plaintiff, who is a local government/corporate entity under the Local Government Act, has not adduced evidence of the

customary rules under which it claims customary ownership of the suit land and the mode of its acquisition of the said land.

- 5 i. PW1 attempted to explain how the Plaintiff came into customary ownership. He presented of letters dated, the 1980s and Exb. P.1, a handwritten inventory which lists “Kafuga” as belonging to K. D.A, and Exb. P.2 - 4, which are individual applications to K.D.A to utilize the land. These letters do not state how the Plaintiff came into ownership of what is called customary land. In the 1980s when the said letters were written, all land was public land under section 1 of the Land Reform Decree, No. 3 of 1975. Under section 3, customary tenure on public land was reduced to tenancy at sufferance and such land could be allocated to third parties by government officials freely with compensation for developments only. Under the Land Reform Regulations 1976, applications for use of public land were to local government leaders / Sub County Chiefs, as was the case in Exb.P.2 - 4. These applications to use the land need to be understood in the context of the prevailing land laws at that time, which were swept aside by the 1995 Constitution. Counsel submitted that such applications do not confer nor do they prove customary ownership of the suit land by the Plaintiff.
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- 25 j. Some of the key Plaintiff witnesses were former local chiefs who had a personal interest to acquire the suit land. These include PW5, Ndinabo James, former parish chief, and PW11 Byamukama George, former Sub County Chief, who testified that they evicted the Defendants from the suit land and then applied for it as per Exb. P.2 and Exb.P.3. They had a conflict of interest and should not be believed.

- 5 k. PW2, the Assistant Chief Administrative Officer, tendered Exb.P.5, Kisoro District Local Government Register of Land & Buildings to show that “land at Kafuga” belongs to the Plaintiff. An examination of the said Register in court showed grave irregularities such as the fact that all the entries are not dated and were apparently compiled on the same day, in the same handwriting, and the Register does not state when it was prepared. It was Counsel’s contention that the register book is not an accurate and reliable historical record of land ownership by the Plaintiff as it unfolded over time. It is a mere catalogue without proof of anything. Moreover, the Register of itself, does not state the circumstances under which the Plaintiff local government acquired customary land.
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- 15 l. PW10 and PW11 attempted to prove occupation/utilization of the land; that the Plaintiff used the land to plant some trees. In its ruling, Court rejected the documents attached to their witness statements for lack of the originals. The witness statement of PW11, the former sub county allegedly in charge of the suit land, was expunged from the record. In cross-examination, both PW10 and 11 admitted that only one contract to plant trees marked Exb.P.11, was entered in the year 2004 and that only 2000 pine and eucalyptus trees were planted by the Plaintiff on the suit land. They could not state how many acres were planted. However, it was obvious to court during cross examination of the two witnesses that 2,000 trees are too few to establish effective occupation of the suit land which was put at 300 acres. The trees were planted in 2004 yet the Defendants’ claim dates back to the colonial period.
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- 25 m. PW10 and PW11’s evidence on the quantity of trees planted by the Plaintiff contradicts the accuracy of the Valuation Report tendered by PW9, Akankwasa Eunice, Environment Officer, and marked Exb. P.9. The Plaintiff

claimed that over 6,700 planted trees were destroyed with a value of UGX 300 Million/= in special damages.

- n. PW8 Tumusiime Joseph, the District Surveyor *cum* Consultant, identified
5 PID 1, a consultancy report contracted by the Plaintiff together with a private
NGO called PROBICOU in 2016. In the report, under the heading; “LEGAL
STATUS AND OWNERSHIP” of the suit land, the consultants found that
there is no record of proper legal ownership of the suit land (Kafuga forest)
by the Plaintiff. This finding is actually the main conclusion of the
10 consultancy report which, in its concluding paragraph, re-stated that Kisoro
District Local Government (the Plaintiff) does not have a customary title over
the suit land and further advised the Plaintiff to apply for ownership to the
District Land Board through area land committees.
- o. The Plaintiff’s claim to customary ownership of the suit land is contrived and
15 not supported by law or evidence of its existence or mode of acquisition.
PW8, the Kisoro District Staff Surveyor responsible for land matters, is on
record that the Plaintiff does not have customary title to the suit land.
- p. The Plaintiff claimed ownership, authority and control over the suit land as a
20 government forest. In Kisoro Crim. Case No. 151/2016, the Plaintiff arrested
the Defendants and charged them with illegal entry and trespass on the suit
land, which was described as a government forest, under section 32 of the
National Forestry & Tree Planting Act 2003. During the hearing of the case,
the Plaintiff’s witnesses were also the prosecution witnesses such as PW9
25 Akankwasa Eunice was Prosecution Witness No. 2 while PW6 Nyiramanzi
Henry was Prosecution Witness No.3. All the prosecution evidence in the
matter was heard in court. Court dismissed the case on the ground that the

suit land is not a gazetted government forest as was alleged by the Plaintiff. This position was never challenged by the Plaintiff by way of appeal.

- 5 q. In 2017, the Plaintiff re-arrested the Defendants and charged them with criminal trespass and malicious damage on the suit land under Kisoro Crim. Case No. 31/2017. The Plaintiff did not call any witnesses and the case was, after 7 months, dismissed for want of prosecution. It was at this stage that the Plaintiff changed goal posts and filed the present civil suit claiming customary ownership of the suit land.
- 10 r. The changing legal positions of the Plaintiff's about the nature of their claim to the suit land, demonstrated by the result of the criminal cases, proves that the Plaintiff is not the customary owner of the suit land. Such a claim was an afterthought by the Plaintiff after court found that, *vis-à-vis* the Defendants,
- 15 the Plaintiff does not have a valid legal claim or control over the suit land.
- s. The true nature of the Plaintiff's claim to the suit land, is that it is a forest reserve over which the Plaintiff being a local government has powers under Article 237(2) (b) of the Constitution, provided that such reserve is gazetted
- 20 under the National Forestry Act 2003. The court in Crim. Case No. 151/2016 found that this is not the case. The Plaintiff does not contest the fact that the suit land is not a legally recognized a government forest as was found by court in that case.
- 25 t. The two criminal cases also dealt with the same subject matter and parties as in the present civil suit and were in substance a determination of ownership of the suit land as between the complainant (Plaintiff) and Defendants (Accused). The issue of ownership of the suit land was therefore settled on

its merits in the two cases. The re-framing of the dispute as a customary claim by the Plaintiff is intended to defeat the outcome of the criminal cases. It offends the doctrine of *res judicata* under Section 7 of the CPA. It is an abuse of court process by the Plaintiff.

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u. The word “lawful” in “lawful/customary owner” as pleaded by the Plaintiff is actually used out of context. Under Section 29 of the Land Act 1998, “lawful” refers to “lawful occupant” of registered land. The suit land in this case is unregistered therefore that term is not applicable, save perhaps to verbally enrich the Plaintiff’s otherwise legally unsupportable claim.

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v. The Defendants have adduced evidence to prove that they are the customary owners of the suit land by inheritance from their late fathers who acquired the same by first settlement during the colonial period.

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w. The 1st, 3rd and 6th Defendants are biological brothers who were born on the suit land in the 1960s and 1970s. DW1, Mbonigaba Charles and DW4 Manirukure Aloysius testified that they inherited a portion of the suit land from their late father called Cosma Sembeba, after whom a part of the suit land is named, who acquired it by settlement during the colonial period. DW2 Byaruhanga Peter, a neighbour and co-Defendant; DW7, Rwibasira Francisco an elder and contemporary of the late Cosma Sembeba and DW8 (Zobiya Hakizimana), widow to their late father corroborated the testimonies of the three brothers. Further, PW4, Sindibaza John confirmed that the said Cosma Sembeba had built a house on the said land.

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x. DW8 Zobiya Hakizimana, 78 years old and widow of the late Cosma Sembeba, testified that she had married Cosma in 1967 and had 8 children

with him. dwelling on the suit land and that is where she lived and cultivated together with her husband and co-wife. DW3 buried one of her deceased children on the said land. In the 1970s, her husband planted tea on the said land and eucalyptus trees. During locus visit, she pointed at the eucalyptus trees that were planted by her husband. The existence of the tea is confirmed by PW6 Nyiramanzi Henry, the forest guard. DW2 Byaruhanga Peter also testified that he provided labour to plant the said tea.

y. Additional evidence of past utilization of the suit land by the family of Cosma Sembeba consists of remnants of their family homestead, permanent crops such as tea and eucalyptus trees, which are still visible. Due to limited time during the locus visit, Court did not physically enter the suit land to verify these as items of real evidence. However, it was shown the eucalyptus trees by PW8. The existence of the tea that was planted by Cosma Sembeba on the suit land is also not disputed even if court did not physically visit the same during the locus visit.

z. The 7th, 8th and 9th Defendants are biological brothers while the 5th Defendant is their sister and the 4th Defendant their sister-in-law. DW2, DW5 Garubanda Innocent and DW6 Tushemereirwe Joy, testified that they inherited part of the suit land from their late father called Thomas Nduhira, brother of Cosma Sembeba and paternal uncle to the 1st, 3rd and 6th Defendants. Thomas Nduhira acquired the land by settlement during colonial times. DW2, testified that he was born in 1958 on the suit land. DW3 Bahungyirehe Cyprian claims part of the suit land by inheritance from his late father called Kasimba, who was a contemporary of Cosma Sembeba and Nduhira and died in the 1970s.

Plaintiff Rejoinder

- a. Section 3 of the Land Act makes mention of persons owning land under customary tenure and the determinants of the same. It was the Plaintiff's submission that the term 'person' under the definition in Section 3 of the Land Act refers to persons under the law to wit both natural and artificial persons. Black's Law Dictionary, Tenth Edition at page 1324 defines a person to mean; *1. A human being also termed as a natural person. 2. The living body of a human being. 3. An entity that is recognized by law as having most of the rights and duties of a human being.* The definition of a 'person' buttresses our submission that the Plaintiff is an entity recognized under the law and as such she is a person referred to under Article 237 and section 3 of the Land Act. This is supported by Section 6 of the Local Governments Act Cap 243 (as amended) which is to the effect that local governments are a body corporate with perpetual succession.
- b. Local Governments are body corporates which qualifies them to be legal or artificial persons with legal capacity, legal protection, rights and duties just like natural persons/individuals. The rights enjoyed by both the natural and the legal person include but are not limited to ownership of land under the different land tenures stated hereinabove. The rights and protection should be equally accorded to all persons the Plaintiff inclusive. The Plaintiff's case is that she is the customary and/or lawful owner of the suit land which is commonly referred to as Kafuga pocket forest and the same is located in Kisoro District where the predominant land tenure is customary and the determinants under section 3 of the Land Act apply. Since the Plaintiff is a body corporate as shown above, she can own land under any recognized tenure more so customary land in areas where customary tenure is predominant. Holding otherwise would imply and/or mean that the Government and the Local Governments cannot and can never own land in the parts of Uganda where customary tenure is predominant.

- c. Whereas the case of **Simea Umika & 7 Others v. Maber Group Farm Limited H.C.C.A No. 19 of 2016** defines customary tenure and gives it incidents, the facts in the above mentioned case are distinct from the facts at hand. The facts in that case involved the inheritance of the suit land by one of the Respondent's directors and the distinction of the Respondent from the directors. In the instant case the land is owned by the Plaintiff as a Local Government in its own legal capacity and as a successor in title of Kabale District Administration. The decision in *Simea Umika* was based on lack of evidence of established customary rules and practices in regard to inheritance by the Respondent to support its alleged ownership. Whereas the land tenure is similar in the two cases, the cases are different in all the other facts and aspects and the decision reached has no bearing on the case at hand.
- d. In the instant case usage of the suit land by the Plaintiff is not in dispute by the community and the Defendants. The usage by the Plaintiff connotes to management envisaged under section 3 of the Land Act, ownership envisaged under Article 237 of the 1995 Constitution and referred to in *Simea Umika Versus Maber Group Farm Limited*. This goes ahead to buttress the Plaintiff's plea of customary ownership.
- e. It should also be noted that save for merely alleging ownership, the Defendants did not adduce any evidence to prove their alleged ownership and inheritance of the suit land. All that is on record is unsubstantiated claims of inheritance, usage and ownership.
- f. Court was able to see the thick forest cover comprised of vast numbers of indigenous trees and a vast number of planted trees. The number of planted trees as per PW10 and PW11's testimonies and Exhibit PE11 clearly corroborates the fact of usage by the Plaintiff.
- g. With regard to the arrest and subsequent criminal proceedings, against the Defendants, vide criminal cases Nos. 773/2016 and 031/2017, it is the Plaintiff's

submission that the decisions in the two cases did not determine ownership of the suit land. The decisions were strictly focused on criminal liability of the Defendants under the penal laws and the issues of civil liability were left unresolved hence this very case. The dispute relating to ownership of the suit land between the Plaintiff and the Defendants and the related claims of ownership remain unsettled up to date. The Defendant's plea of res judicata is misguided, misplaced and misconceived since there is no civil matter between the parties herein in respect of the suit land that has been heard and determined by any court of competent jurisdiction.

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- 10 h. The Plaintiff has never claimed to be a lawful occupant on the suit land. The land in issue is unregistered land. The word 'lawful' that the Plaintiff makes mention of in her pleadings and the declarations that she seeks in that regard literary means legal and factual recognition. Black's Law Dictionary, Tenth Edition at page 1018 defines a lawful to mean; "not contrary to law, permitted and
- 15 recognized by law". The above definition points to legality and the facts in the instant case equally address legal and factual ownership of the suit land. The usage of the word 'lawful' is not tagged to occupation of registered land and claims related thereto as the Defendants are alleging. Occupation of unregistered land such as the land in contention can also be lawful.
- 20 i. This is a matter/claim in trespass, regardless of interest in the proceedings or the subject matter, what is relevant is unauthorized entry onto the suit land by the Defendants. Once the unauthorised entry is proved just like it has been proved in the instant case, then Defendants including the 10th, 11th and 12th Defendants are liable in trespass. It is the Plaintiff's prayer that just like the other Defendants,
- 25 judgment be entered against the 10th, 11th and 12th Defendants.

Counsel for the Plaintiff reiterated her earlier submission that the Plaintiff had successfully adduced the requisite evidence to prove that she is the legal and/or

lawful owner of the suit land on which Kafuga Pocket forest is situated. The Defendant's entry on the suit land, the cutting down and burning of trees was unauthorized and interfered with the Plaintiff's possession of the suit land/forest, actions amounting to trespass.

5 On the 18th June 2020, the Court visited the locus in quo at Rubuguri parish, Kisoro District. The LC 1 Chairpersons of the neighbouring Nyabicence and Nombe villages were called as Court witnesses. DW8's evidence was also taken. A sketch map was also drawn.

Issues

- 10 **1. Whether the Plaintiff is the lawful/customary owner of the suit land and if so, whether the Defendants trespassed on the suit land?**
- 2. What remedies are available to the parties?**

RESOLUTION

- 15 **1. 1. Whether the Plaintiff is the lawful/customary owner of the suit land and if so, whether the Defendants trespassed on the suit land?**

Location of the suit land.

A complication was presented by the description of the suit land. The Plaintiff, a local government, first described the land in the plaint as; land situate at Kafuga, Nombe, Nyabicenkye, Rushabarara villages, Rubuguri parish, Kirundo sub county in Kisoro District. Later, in her final submissions to this Court, Counsel for the Plaintiff described
20 the land as situate at; Kafuga, Nombe, Nyabicenkye, Rushabarara villages, Rubuguri Parish, Nyundo sub county, Kahurire village, Nteko parish, Nyabwishenya sub county, Kisoro District. The latter description includes *Kahurire village in Nteko parish* in Nyabwishenya sub county.

According to the defendants' written statement of defence and their evidence in Court, they were the customary owners of land located at Muko- Rwembogo surrounded by a stream of flowing water called Murungo in the two villages of Rushabarara and Nyabicenkye in Rubuguri parish, Kirundo sub-county, Kisoro district. The defendants
5 reiterated several times during the trial that the land which they claim has never been known as 'Kafuga' or 'Kafuga pocket forest', but is known as 'Muryakosima', a name of one of the defendants' ancestors.

The dilemma of the suit land description was somewhat gingerly resolved by this Court's visit to the locus in quo. We travelled in a convoy to the suit land location on
10 the 18th June 2020. Along the way, Counsel for the defendants signalled for us to stop. We did so. He then indicated that the point at which we had stopped was the suit land- Kafuga. The Plaintiffs disagreed. This Court asked the parties to point out where the tree cutting complained of by the Plaintiffs had taken place and was informed that it was a distance ahead. We then drove to the second location- in the vicinity of Nombe
15 and Nyabicenkye villages in Rubuguri parish. The 1st defendant, DW1, Mboinagaba Boniface was recalled to testify. He identified the three hills as those referred to in his testimony before Court.

To get more clarity on the suit land description, Court called two fresh witnesses who were heard at the locus in quo. Court witness 1, (CW1), Bizimana Stanley testified that
20 he was the Chairman LC1 of Nombe village. He knew the three hills but had never heard their names before. He believed the three hills were located within the jurisdiction of Nombe village and Nyabicenkye villages. CW1 added that Nombe village borders Nyabicenkye village by the Rwembogo river and the Kafuga river(stream). The second Court witness, CW2, Rwaje Emmanuel, testified that he was the LC 1 Chairman for
25 Nyabicenkye village. He did not know the names of the three hills. Two out of the three hills were in Nyabicenkye. He was able to identify Murungo stream as the border mark

between Nombe and Nyabicenkye villages. Rwembogo was the ‘river’ which flowed around all three hills.

PW8, Tumusiime Joseph, the surveyor, was recalled to make clarifications on his earlier testimony in Court. Using Exb. P.6, a cadastral and land cover map of ‘Kafuga local forest’ located in Kisoro District, he indicated the spot where the tree cutting had taken place which was not visible from the point at which Court was standing. PW8 explained that the point was situated at the back of the playground and the Rwembogo and Kafuga ‘rivers’. Exb. P.6 was silent on the specific geographical location of this forest, besides naming Kisoro district as its area of location.

From the foregoing, it would appear the suit land includes the three hills located in the villages of Nombe and Nyabicenkye, Rubuguri parish, Kirundo sub county, Kisoro district and depicted on the cadastral map, Exb. P.6. The plaintiff is bound by her pleadings and therefore the description of the suit land as contained in the plaint shall be maintained by this Court. The defendants identified the suit land during the locus in quo, the only difference arising from the names assigned to the three hills by the defendants. Otherwise, the existence of the hills and their location is uncontested. I should also point out at this stage that while both the Defendants and the Plaintiff indicated that part of the suit land was located in Rushabarara village, this fact was not borne out by the locus visit. The sketch map, Exb. D.3, placed Rushabarara village outside the suit land, after ‘Muko’ stream.

This Court took note of the fact that while, Counsel for the Defendants maintained that the suit land was in a different location, his submissions were silent on the issue. I am therefore satisfied that Court visited the right location.

Ownership of the suit land

a. Plaintiff’s claim

The Plaintiff lined up 11 witnesses to establish their customary ownership of the suit land. PW1, Friday Godwin, the sub county chief of Nyabwishenya sub county, Kisoro District local government testified that the suit land, which measured approximately 300 acres, was listed as the property of the plaintiff. Exb. P.1 is a copy of an inventory dated 3rd November 1982. It makes reference to 'reserved land at Kafuga'. No acreage is indicated. Exb. P.2 and is a letter dated 1st July 1987, from the members of Nombe society of Rubuguri parish to the Parish chief of Nyabwishenya. It is an application for grazing in Kafuga II public land. According to PW1, the land was being used as public land and surrounding communities applied to be allowed to graze their animals there. Exb. P3 is an application dated 5th July 1987 by 30 members of the Kafuga II grazing society to the Co-operative Officer in charge of Kisoro sub-district. Exb. P.4 was an application by 30 persons for grazing land in Kafuga II public land. It is dated 18th June 1988 and addressed to the A.D.A Kabale in charge of Kisoro sub district through the Parish chief Nyabwishenya.

All correspondences relate to Kafuga II public land. The earliest record adduced into evidence by the plaintiff pertaining to the suit land is the inventory is dated 1982. According to PW1, after those applications were granted, the communities, societies and individuals were allowed to graze their animals on the land. It is not clear from the exhibits how much land was applied for upon which to graze the animals. And this was in the 1980s.

PW3, Eldard Kanyonyi testified that as a resident of Kahulire village, he was a neighbour to the suit land, separated from it, by the Murungo stream/river. He named five forests in the area including Kafuga. Two of the forests, Bukinga and Kankoko are currently annexed to Bwindi Impenetrable forest, while the other three are stand-alone forests. He added that Kafuga forest had bare land which was later filled with trees planted by parish chiefs and other contracted individuals. These comprised tree species such as; Cyprus, Pine and Eucalyptus. The trees grew and have always been harvested

by Kirundo sub county. PW4 testified that he has always been a member of the Management Committee of Nombe Primary school which applied to Kirundo sub county to establish a playground on part of the suit land. At the time of the locus visit, the playground was in existence. The school planted some trees which according to
5 PW4, were also cut down by the defendants.

PW11, testified that when he was sub county chief of Kirundo sub county he knew all the assets of the sub county and one was the suit land where Kafuga forest is situate. He testified that part of the suit land was bare and the rest covered by both indigenous and planted trees. A tree planting exercise was commenced to fill the bare portion of the
10 suit land in 2004. PW10 who carried out the tree planting exercise testified that he planted on approximately 3 acres of land. PW11 added that the Kirundo sub county council confirmed the tree planting exercise.

PW5, Ndinabo James, told this Court that sometime around 1973, he was posted as sub parish chief of Igabiro, Rubuguri, Nyabwishenya sub county. During that time, he
15 participated in the eviction of encroachers on the suit land and the forest including Cosmos Sembeba. The evicted persons vacated the suit land and never brought any claim over it. PW5 added that after he retired, he and others made the applications to be allowed to graze on the suit land, Exb. P. 2 & Exb. P.3, and the applications were denied. This evidence of PW5 on the response to the applications was a contradiction
20 of the testimony of PW1 who stated that the Nombe society and Kafuga II Grazing Cooperative society were allowed to graze on the suit land. It must be stated here that PW1 had no first-hand information about these applications which were made in the early 1980s. PW1 testified that he was 33 years old and posted to Nyabwishenya sub county in 2017 as Senior Assistant Secretary. PW5, on the other hand testified that he
25 was 75 years old, former sub parish chief and one of those who applied for the grazing permit. I am more inclined to believe his version of what transpired in the 1980's.

It was the duty of the Plaintiff in this suit, to prove that they enjoyed customary rights on the suit land.

Counsel for the Defendants submitted that the evidence of the Plaintiff fell short of establishing customary ownership of the suit land/forest by the Plaintiff. Customary tenure while eclectic in its identity has a distinct character that cannot be missed once it exists. It all hinges on a custom of a specific area and a particular group of persons. The onus to prove that custom lies on the party relying on it. In **Kampala District Land Board & George Mitala v Venansio Bamweyaka & Others SCCA 2/2007**, Odoki CJ held; *There is no definition of customary tenure perhaps because it is so well understood by the people.* In that case, the Court found that the respondents failed to show that they were occupying land under customary tenure. There was no evidence to show what kind of custom or practice they occupied the land and whether that custom had been recognised and regulated by a particular group or class of persons living in the area.

In the instant case, Counsel for the Plaintiff submitted that the Plaintiff occupied the land under custom but she failed to explain what kind of custom or practice it was. The documentation presented by the Plaintiff to prove ownership, the inventory, Exb.P1, listing the suit land as part of the property under the sub county, dated back to 1982. All the Plaintiff's witnesses testified that the suit land was Government land. These testimonies did not amount to recognition of the suit land being held under customary tenure under the customs and practices of the people of Kisoro. I, find that the Plaintiff has failed to prove that they were customary owners of the suit land.

I shall now turn to whether the Defendants' evidence on customary ownership.

b. Defendants' claim

DW1 testified that of the three hills on the suit land, only 'Rwembogo- Muko' hill was not fully cultivated. The other two hills were fully cultivated by the Defendants as proof

of their possession, occupation and utilization of the suit land. DW1 owned 5 acres on the land. The late Cosma planted eucalyptus trees on all three hills in the 1970's in a scattered fashion, which allowed the DW1 and his co-defendants to cultivate the land. This Court visited the locus. The hills are covered in trees but not in a scattered fashion.

5 The trees are close together and look like a forest. From Court's vantage point, there was no visible garden to support the evidence of 40 years of cultivation by DW1. Further, when, DW8, step mother to DW1 was asked how many trees her husband planted in 1973, she stated that they were about 10 trees. She added that, she and her husband left the suit land between 1978 and 1979 but continued to cultivate the land
10 until 1999 when they were forced out by a government official called, 'Force'(Wilberforce) who said it belonged to Government. They have never returned on the land since then. This evidence of DW8 contradicted the evidence of quiet and uninterrupted possession by the DW1. By the time the late Cosma died in 2004, he was not living or carrying out cultivation on the suit land.

15 DW2, Byarugaba Peter, 62 years old had a National Identity card where he was registered as a resident of Mubende District. His claim is that he lives close to the suit land and owns 3 acres on it as a son of the late Thomas Nduhira. As a child in 1973, he helped the late Cosma carry tea seedlings for planting on the suit land. They also cultivated maize, beans and sorghum on the suit land from 1968 to 2016. Again, on the
20 part of the suit land that this Court could see, there was no evidence of cultivation.

DW3 testified that he was the son of Yohana Kasimba who died in the 1970's. He owned 20 acres out of the 350 acres of the suit land. He too, had been utilizing the suit land since the 1970's by cultivating on it and growing eucalyptus and indigenous trees. DW11 was one of his workers who had been wrongfully sued in this matter. DW3 did
25 not testify as to which of the three hills he occupied.

DW4, Manihukure Aloysius, 48 years old, a resident of Mpigi District, according to his National Identity card, testified that the late Cosma Sembeba was his father. He testified that he was arrested before he was able to utilize the suit land.

5 DW5, Garubanda Innocent, 51 years, testified that he was a son to Thomas Nduhira and his father's family owned approximately 8 acres on 'Rwembogo- Muko' hill. His personal share was 2 acres. The trees on the land were in scattered formation owing to the cultivation.

10 DW6, Tushemereirwe Joy, 47 years testified that she was married to Apollo Ngendahimana, a son to the late Thomas Nduhira. He died in 2004. She told court that she cultivates 20 acres of the suit land. However, since she got married in 1993, she had only cultivated the suit land on two occasions, on 1 acre. DW6, testified that on the date of their arrest, they had, together with her co-defendants, her brothers in law, cut down, 300 trees on 4 acres of land so they could plant sorghum. It was virgin land.

15 DW7, Rwabisira Fransisco, 79 years old testified that he was a neighbour to the suit land and it was Cosma and Nduhira whom he knew as owners of the suit land. They grew maize, sorghum and beans on the land. He did not mention tree planting as an activity on the land.

Resolution of Issue 1

20 Court is satisfied that the Defendants have led evidence to prove that the late Cosma Sembeba and his family resided on part of the suit land for a period between the 1960s and the 1970s. By his own wife, DW8's testimony, the family moved from the suit land, to live in a village called Rutooma in 1978/9, for purposes of growing bananas, since the soils on the suit land were not suitable for the crop. DW8 testified that they continued occupation by way of cultivation until 1999 when they were stopped, Cosma
25 did not return to the land.

Counsel for the Defendants submitted that the four years of inactivity on the land, caused by the temporary injunction issued by this Court in this suit, accounted for the thick appearance of the vegetation, which obscured the evidence of past cultivation. However, the Defendants all testified in their statements in evidence in chief that their ancestors, the late Cosma Sembeba, the late Thomas Nduhira and the late Kasimba, from whom they derived rights of customary ownership, had been in possession of the suit land, ‘since colonial times’. The Protectorate of Uganda was a protectorate of the British Empire from 1894 to 1962. If these assertions were true, 4 years of inactivity would not, in this Court’s opinion, have a significant effect on 40 years of cultivation. As it stood, the largest part of the suit land, which was visible to the Court, out of its 161 acres, was untouched by human activity. It was forest; *a large area of land that is thickly covered with trees*; See, the Oxford Advanced Learner’s Dictionary. The Online Dictionary defines a forest as; *a large area covered chiefly with trees and undergrowth*. Exb. D.3, is the sketch plan of the suit land, from the point of view of the Defendants. According to the map, the fairly thin strip of Kahulire LC1 separates the suit land from the Bwindi Impenetrable Forest.

Exb. P.6, aided this Court in locating the portion of the suit land where the Plaintiff claimed that trees were cut, since it was not visible from where Court stood at the locus in quo. It was a patch of what PW8, estimated was about five acres of land. DW6, told this Court that she and her brothers in law, cut down approximately 300 trees to secure virgin land for planting sorghum. She estimated that 2 acres of trees were cleared in the cutting. This was the reason they were arrested. Her understanding is that the land belonged to the family and they were within their rights as customary owners to cut the trees down, after all, they owned all the three hills. There was no other area of on the map, that had such a clearing. The report was dated 15th July 2016, Exb. D.1, the court proceedings following the arrest of the Defendants were dated 25th May 2016. The map therefore depicted the state of affairs on the suit land after the trees were cut. There

was no evidence of food crops growing on the part of the suit land seen by the Court. Coupled with Exb. P.6, which depicted the portion of the suit land not seen by Court, showing only trees, rivers, grassland, the claim of the Defendants having 40 -year old gardens on the suit land, was left unsupported. It is this Court's finding that the locus in quo and Exb. P.6, the cadastral map revealed sufficient evidence that there was no previous cultivation on the suit land.

Counsel for the Defendant submitted that signs of previous occupation including the approximately half acre of tea plantation planted by the late Cosma, the eucalyptus trees and the two graves were evidence of the Defendants' customary ownership. This would have been sufficient if the late Cosma had not been stopped from cultivating the land 1999. An action which was never challenged by Cosma himself during his lifetime. There is no evidence of the Defendants' utilization of the land between 1999 and 2016. Which strongly suggests that the tree cutting of 2016 and 2017 marked their efforts to take fresh possession of the suit land not as an inheritance but on their own cognizance.

A key feature of customary tenure is ownership in perpetuity. See section 3(1) (h) of the Land Act cap 227. There is no evidence that Thomas Nduhira, Lazaro Maguniko or Mathias Banturaki, were ever resident on the suit land at any time. At least no physical evidence was led in Court or at the locus in quo to prove evidence of previous occupation. Therefore, when late Cosma, the only resident relative, was prohibited from cultivation on the land in 1999, his customary rights, and those of his descendants, if any, were interrupted and were never restored.

It is the finding of this Court that neither the Plaintiff nor the Defendants have adduced sufficient evidence on a balance of probabilities that they are customary owners of the suit land.

Be that as it may, the Plaintiff claimed to be the lawful custodians of the suit land and the forest on it. A claim which Counsel for the Defendants refuted. He submitted that

the forest was not gazetted and it was for this reason that the Defendants were acquitted of charges brought under the National Tree Planting and Forestry Act 2003. He added that the claim of the Plaintiff was baseless and amounted to res judicata under section 7 of the Civil Procedure Act. On the issue of res judicata, this Court finds no merit in this argument. Res judicata specifically refers to, ‘former suits’, of a civil nature. The previous proceedings were of a criminal nature. *See section 7 of the Civil Procedure Act S.I 71.*

With regard to the failure to gazette the forest, the Plaintiffs claim is that they held the land as a local government, in trust for the people of Kisoro District, which was formerly under Kabale District. The activity carried out on the land, at least since 1982, was tree growing, the trees were in addition to the already existing Kafuga pocket forest. The visit to the locus in quo demonstrated that there was indeed what appears to the naked eye to be a forest within the ordinary meaning of the word on at least $\frac{3}{4}$ of the tree cover on the suit land. There were no visible signs of human habitation anywhere on that part of the land.

Article 237 of the Constitution of the Republic of Uganda, 1995 provides for land ownership. Before providing for the types of land ownership in Uganda, the Article makes some preliminary declarations in Article 237(1) and Article 237(2) (a) as follows;

(1) *Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.*

(2) (b) *Notwithstanding clause (1) of this article-*

The Government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens. (emphasis mine)

The suit land is not freehold, mailo, leasehold tenure, neither did it meet the incidents of customary tenure as envisaged under section 3 of the Land Act Cap 227. It is former public land that is unregistered. Exb. P.1, an inventory dated, 3rd November 1982, lists the land at Kafuga as, ‘reserved land’. The inventory lists other land held by Nyabwishenya sub county at the time under the categories of, ‘Gombolola’ headquarters, Parish headquarters, Trading centre, sub parish headquarters, road camp, sub – dispensary and aid post. It is this Court’s finding that by setting the Kafuga land apart, under the heading, ‘reserved land’ and planting trees on it, was intentional act on the part of the Plaintiff, that fell squarely in line with Article 237(2)(a) of the Constitution.

It was the Defendants’ evidence that the Plaintiff’s employees, including some of the Plaintiff’s witnesses, participated in the parcelling out of the real Kafuga forest converting it into farms for personal use. There were no farms on the suit land. The Plaintiff, as the local government, had a constitutional mandate to reserve land for ecological and touristic purposes. This mandate, in this Court’s opinion, was not encumbered by the specifications of land tenure under Article 237(3) of the 1995 Constitution. The Plaintiff was exercising the lawful and constitutional right to hold the land in trust for the common good of all citizens.

The suit land is surrounded by communities on all sides who would be willing to encroach on it to support their livelihoods. And yet it remained largely intact.

The plausible explanation for the Kafuga forest survival is found in the evidence of two Plaintiffs witnesses. PW7, Tumuhirwe John testified that the Kafuga forest was referred to as, ‘AkahambaKomukura’ meaning the forest of the Parish and it was owned by Kabale District Administration. It was under the custody of Nyabwishenya and Kirundo sub counties and used as public land. PW7 worked as forest guard of the then Bwindi Forest Reserve and Kafuga pocket forest was part of the forests under his jurisdiction. Due to the increased encroachment on the suit land by the neighbouring community,

Kirundo sub county embarked on tree planting. A large number of trees were planted and they matured into the current Kafuga forest adding to the indigenous trees that existed on the suit land. PW6, Nyirimanzi Henry testified that he was the current forest guard of the Kafuga forest and had been for 15 years. He was not bothered by encroachers until the 23rd May 2016 when the Defendants came to the forest, cut down trees and burnt them.

In conclusion, this Court finds that the Plaintiff is the lawful custodian of the Kafuga Pocket Forest holding it in trust and on behalf of the common good of the people of Uganda.

10 c. Whether the Defendants are trespassers on the suit land?

Turning to whether the Defendants are trespassers on the Kafuga Pocket Forest, the trespass complained of in the Plaint was cutting and burning of trees. DW6, admitted to cutting the trees on approximately two acres of land within the suit land. DW2 also testified to cutting the trees. Besides, these two admissions, the other Defendants were silent about cutting trees on the suit land. The admissions of the other Defendants were that they entered on the suit land to plant crops. This was sufficient to establish the tort of trespass to land. *The wrong of trespass to land consists of the act of entering upon land in the possession of the Plaintiff without lawful justification.* See Salmond on Torts, 15th Edition, at page 48.

20 On whether, all the Defendants participated in cutting down trees, the evidence was scanty in this Court's view. It would appear that the Plaintiff clustered all the Defendants together and in leading evidence did not deal with each Defendant individually to prove trespass by cutting and burning trees against each and every one of them. He who alleges must prove. The Plaintiff is seeking a hefty amount of money in special damages arising out of the damage caused by the tree cutting, it was not 25 enough to submit that the 'Defendants did it'. Evidence had to be led about who

specifically did it. This was not done. This Court finds that all Defendants are trespassers on the suit land by entry on the land without legal justification. DW2 and DW6 are trespassers by unlawful entry and cutting down of trees.

Issue 2

5 Remedies

DW6 admitted to cutting down approximately 300 trees on about 2 acres of land. This was in 2016. DW2's admission did not include the number of trees. The Plaintiff through PW9, Akankwasa Eunice Wafula, adduced evidence of a valuation report of the extent of damage, Exb. P.9. The estimated acreage affected was 9 acres and
10 according to the report 6,788 trees were cut down. The two photographs attached that captured the scene of tree cutting and burning showed some sticks lying on the ground, but hardly any tree stumps. If destruction of 6,788 trees had taken place, stumps and logs would be evident in the photographs. Especially since DW6 testified that she was caught in the very act of clearing the land.

15 And there was a second incident. DW6 admitted to returning to the land in 2017, with a few others. To clear a different piece for cultivation. She was arrested a second time. In all this, where were the authorities? The Plaintiff has gone to great lengths to establish that it is the lawful custodian of the suit forest but so far, it has fallen terribly short of its constitutional mandate as custodian of the suit forest.

20 This Court is satisfied that DW6 and DW2 participated in cutting down trees on the 23rd May 2016 and the 9th January 2017 along with others. When a trespass has caused physical damage to the land, the measure of damages is the loss thereby caused to the Plaintiff, which in all ordinary cases is measured by the resulting diminution in the value of the property. The measure of damages is not the cost of reinstatement- the cost
25 of restoring the land to the condition in which it formerly was- a cost which may greatly exceed the actual diminution in the value of the land. See **Nalder v Ilford Corporation**

(1951) 1 KB 822. As far as the extent of damage, in the instant suit is concerned, the 300 trees admittedly cut down by the DW6 are not in dispute. I was, however, not convinced by the valuation report, which appeared to be a wild estimate not supported by the pictorial evidence. The Plaintiff is therefore awarded the value of 300 young trees in special damages.

The Plaintiff prayed for general damages which are awarded by the Courts for pain, suffering and loss of amenities. The history of this suit is that it was preceded by two criminal prosecutions which were concluded in 2017. An injunction was issued by the Court after the suit was filed, preserving the status quo since 2017. It is apparent that was an interim remedy which was of benefit to the Plaintiff. General damages are awarded to heal past wounds. This Court finds that the Plaintiff has not led evidence to justify an award for general damages.

Before I take leave of this matter, I must state that climate change is a global and national concern. See *Uganda National Climate Change Policy; Transformation through Climate Change Mitigation and Adaptation, April 2015 and September 2018*. Kisoro District is largely susceptible, in light of population pressure and limited land for cultivation. There is need to balance societal need for food and sustenance with the protection and the preservation of the suit land to keep the eco system stable. Sustainable development and a green environment should not be mutually exclusive. Documented sensitization of the communities surrounding the suit land must be regular to avert further incidents of deforestation if future generations are to survive. Engaging the communities in environmental protection initiatives should be encouraged and promoted.

To that end, I enter judgment for the Plaintiff and order as follows;

1. **The Plaintiff is the lawful custodian of land/forest situate at Kafuga, Nombe, Nyabicenkye, villages, Rubuguri Parish, Kirundo Sub county in Kisoro District, holding it in trust for the common good of the people of Uganda.**
2. **The Defendants are Trespassers on the suit land/forest.**
- 5 3. **A Permanent injunction is issued restraining the Defendants, their agents, servants and/or employees and any one rightly acting under them from trespassing on the suit land/forest.**
4. **Special Damages of UGX 12,000,000/= are awarded to the Plaintiff.**
- 10 5. **The Plaintiff is directed to commence and conclude the process of gazetting the Kafuga Pocket forest within 12 months of the date of this judgment.**
6. **Costs of the suit are awarded to the Plaintiff.**

15 **Olive Kazaarwe Mukwaya**

Judge

21st September 2020

Delivered by email to:

Ms. Rachel Lubowa- for the Plaintiff

20 Mr. James Byamukama- for the Defendants

