

Weaponisation of trespass to land and its implications for land justice and enjoyment of property rights in neoliberal Uganda

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Abstract: *Protection of the right to property is among the central concerns of Uganda's Constitution and laws. The law on civil and criminal trespass aims at facilitating enjoyment of property by prescribing damages for civil trespass and penalty for criminal trespass. Despite this, criminal and civil trespass have been used as weapons by some actors in land conflicts to undermine property rights of weaker parties and escalate land conflicts. The relationship among property, land conflicts and trespass is a theme of empirical significance in Uganda. Yet, weaponisation of trespass and its repercussions on property rights and resolution of land conflicts in Uganda is not significantly studied. This paper fills this gap. It conceptualizes criminal and civil trespass as embedded in the law, and how they have been weaponised. Using qualitative methods (analysis of literature, court decisions, and web-based material) the paper finds that criminal trespass has been weaponized to target weaker parties to land conflicts hence impacting on their property rights and access to land justice. Using the criminal justice system, they are charged with criminal trespass, incarcerated, and are unable to pursue civil remedies from courts of law, hence protracting the underlying civil/land dispute. Civil trespass has also been misused within Uganda's escalating land dispute terrain; in pursuit of selfish objectives rather than of justice. Uganda's neoliberal context is an enabler of all the above. Recalibration of the civil justice system for efficiency and amendment to section 302 to offer clarity on the boundaries of its application are recommended.*

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I. Introduction

Land is a very important factor in the social, economic and political spheres of Uganda, making it an arena for contestation. Land conflicts in Uganda are increasing and their dynamics changing and impacting property rights. The law on civil and criminal trespass was intended to strengthen possibilities for enjoyment of property by laying down circumstances under which it may be infringed upon, and how to atone to that by damages, compensation or criminal punishment respectively.¹The land dispute terrain has however created an enabling environment for weaponisation of civil and criminal trespass to the detriment of property rights and justice. Weaponisation arises where civil and criminal trespass are misused in order to achieve agendas/goals other than those that were intended by the law.

In the 1950s, land disputes were not rampant. In Buganda, they were few, mostly arising from boundary conflicts in cash crop growing areas and nearby towns.² In the 1990s, their nature and numbers mutated. The typologies of disputes were; between subjects and subjects, among members of the same

¹ Merrill TW, 'Trespass, nuisance, and the costs of determining property rights' XIV *Journal of Legal studies*, 1985, 13.

² Mukwaya AB, *Land tenure in Buganda: Present day tendencies*, East Africa Study Series 1, 1953.

family, government and encroachers, etc.³ In 2009, assessed literature on land disputes showed that they could only escalate for the next thirty years.⁴ Indeed, they have escalated and are associated with all land tenure systems in Uganda, with customary tenure more prone to them.⁵ Land disputes form one of the highest percentages of cases in courts of law.⁶ Law reforms to curb them have neither been fully implemented nor successfully curbed them.⁷ Factors fuelling land disputes such as high population, increased demand for land for investment, are escalating yet the sizes of available hectares are dwindling.⁸ Land conflicts are therefore predominant in neoliberal Uganda, greatly impacting on the enjoyment of property rights and delivery of justice to those most in need of it.

The right to property is guaranteed in international human rights law and the constitution of Uganda, 1995.⁹ It is enjoyed in person or community with others.¹⁰ It includes the right to acquire, use and freely dispose of property. Property rights are recognized as the foundation of freedom.¹¹ The right to property is not absolute; the law prescribes exceptions to it.¹² In

³ Kigula J, 'Land disputes in Uganda: An overview of the types of land disputes and the dispute settlement fora, access to land and other natural resources in Uganda' Makerere Institute of Social Research and the Land Tenure Center, Research paper 3,1993 — <https://minds.wisconsin.edu/handle/1793/28974> on 18 August 2022.

⁴ Rugadya M, 'Escalating land conflicts in Uganda: A review of evidence from recent studies and surveys' International Republican Institute (IRI) and the Uganda Round Table Foundation, 2009 — http://mokoro.co.uk/wpcontent/uploads/escalating_Uganda_landconflicts.pdf on 8 July 2020.

⁵ Rugadya M, Nsamba-Gayiiya E and Kamusiime H, *Analysis of post conflict land policy and land administration issues and lessons: A survey of IDP return and resettlement issues and lesson: Acholi and Lango Regions*, Northern Uganda land study for the World Bank, February 2008, 21.

⁶ A case backlog report of 2015 put the cases on land that were before courts of law for over 10 years at 257, coming after Criminal cases at 379. The Judiciary, *A report of the case backlog reduction Committee*, 29 March 2017, 23 — <http://judiciary.go.ug/files/downloads/case%20backlog%20Report%20final.pdf> accessed 9 February 2021.

⁷ Rugadya *et al*, *Analysis of Post Conflict land policy and land administration issues and lessons*, 3.

⁸ Human Rights and Peace Center (HURIPPEC), *Land capping in Uganda: Tackling the land crisis through regulated acquisition: Citizens' perspectives*, December 2020, 55.

⁹ Article 17(1), *Universal declaration of human rights*, 10 December 1948, UNGA Res 217 A (III) (UDHR), *African charter on human and peoples' rights*, 27 June 1981, 21 ILM 58 (African Charter), Article 26, *Constitution of Uganda* (1995).

¹⁰ Article 17, UDHR and Article 26 1) *Constitution of Uganda* (1995).

¹¹ Pipes R, *Property and freedom*, Vintage Publishers, 2000, 291.

¹² Hutcheson JC, 'Natural law and the right to property' 26(4) *Notre Dame Law*, 1951, 640, 643.

Uganda, deprivation of property has to be in accordance with the law of compulsory acquisition,¹³ with conditions including: taking in public interest, on the basis of law which provides for prompt payment of fair and adequate compensation and a right to access courts of law regarding the taking.¹⁴ Deprivation of property in an arbitrary manner is not only contrary to national law but also international human rights law.¹⁵

For optimal enjoyment of property, the owner has a right to exclude other persons from it:¹⁶

For every man's land is in the eye of the law enclosed and set apart from his neighbour's . . . either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law,' (a). The slightest crossing of the boundary is sufficient, as where the defendant drives a holdfast into the plaintiff's wall (b) but the boundary must be crossed, otherwise the defendant cannot be said to have broken and entered.¹⁷

This protectionist approach is what triggers contestations on land where those closed out struggle for ownership, access or use. Land disputes have increased as a result.¹⁸ A constellation of factors play out to shape and heighten disputes/conflicts on land. Civil and criminal trespass have become tools in the settlement (or perpetuation) of land disputes or deprivations of the right to property. A number of factors have facilitated this.

First, weak laws on trespass and imperfections in land tenure systems which are exploited by land grabbers with impunity. For example, civil trespass can only be committed against a person in possession of land and not an owner without possession.¹⁹ Yet, among the land tenure systems of Uganda is

¹³ Article 26(2), *Constitution of Uganda* (1995) and Article 17, *UDHR*.

¹⁴ Hutcheson JC, 'Natural law and the right to property'.

¹⁵ Article 17(2), *UDHR*.

¹⁶ Merrill TW, 'Trespass, nuisance, and the costs of determining property rights'.

¹⁷ Clerk JF & Lindsell WHB, *Law of torts* (1889) Sweet& Maxwell, London, 1907, 267.

¹⁸ International Justice Mission (IJM), *Property grabbing from Ugandan widows and the justice system: A mixed methods assessment in Mukono County, Uganda' Study report*, 2014, 37 — <https://www.ijm.org/studies/property-grabbing-from-ugandan-widows-and-the-public-justice-system-response> on July 28, 2022.

¹⁹ Merrill TW 'Trespass, nuisance, and the costs of determining property rights', 36.

mailo, allowing 'ownership' without possession.²⁰ 'Mailo' tenure resulted from the 1900 Agreement signed by the British government and the king of Buganda by which land was privatized and distributed in square miles. 'Mailo' is a derivative of the English word 'mile'. The 'mailo' system of land holding allows dual rights on the same land for a title holder and tenant in occupation ('lawful' or 'bona fide' occupant) Lawful occupants are successors in title to those whose occupancy rights are rooted in historical laws such as the *Landlord and tenant laws* (1937) in Buganda, Ankole and Toro, or the *Busuulu and Envujjo law* (1928). The 'bona fide occupants' are those who settled on land for twelve years before the constitution came into place in 1995. The Constitution validated their rather irregular occupation of land, as long as it was unchallenged.²¹ Technically an owner of mailo land should find difficulties to draw benefit from the law on civil trespass, since the possessors rights are statutory and protected.²²

In reality title holders (without possession) have succeeded in trespass against occupiers of their land.²³ Normally, the plaintiff needs to show that the defendant intruded on his space and therefore possessory right under the *Cuius est solum, eius est usque ad coelum et ad inferos rule*,²⁴(the *ad coelum doctrine*). It means an owner of the surface owns the airspace above and the soils beneath that surface to the bottom of the earth,²⁵ (with exceptions). Its origin is placed in Roman law or Jewish law jurisprudence.²⁶ It was first applied in English law

²⁰ Article 237(9), *Constitution of Uganda* (1995); West HW, *The Mailo system in Buganda: A preliminary case study in African land tenure*, Government Printer, Entebbe-Uganda 1965, 2 – 7; Mukwaya AB, 'Land Tenure in Buganda'; Section 29, *Land Act of Uganda* (Chapter 227).

²¹ The Constitution of Uganda (as amended) 1995, Article 237 (8) & (9)

²² Section 29, *Land Act of Uganda* (Chapter 227).

²³ *Sonko v Banoba*, (2014), High Court of Uganda.

²⁴ After referred to as *the ad coelum doctrine*; see, Donahue C, Kauper T, Martin P *Cases and materials on property: An introduction to the concept and the institution*, 2nd ed, West Academic Publishing, 1983, ch. 3.

²⁵ Badbrook AJ, 'The relevance of the *cuius est solum* doctrine to the surface land owner's claims to natural resources located above and beneath the land' 11 *Adelaid Law Review*, 1987-1988, 462, 462.

²⁶ Badbrook AJ, 'The relevance of the *cuius est solum* doctrine to the surface land owner's claims to natural resources located above and beneath the land'; Also see Wright R, 'Airspace utilisation on highway rights of way' 55 *Iowa Law Review*, 1970, 761, 782.

setting in *Bury v Pope*.²⁷ The general rule is that intrusion on that space leads to an action in trespass. This interpretation is ‘simplistic’.²⁸

[The] social function of trespass law is to guarantee private property both by providing a remedy for interference with possession (through the ordinary tort action) and by enabling those with greater rights of possession to recover land from occupiers with lesser interests (through the action for recovery of land).²⁹

Today some of the purported objectives of civil trespass are not in pursuit of justice but violation of property rights.

Second criminal trespass is a property crime: punishable in accordance with the penal laws.³⁰ Property crimes are at three levels: taking another’s property, destroying it or evading it.³¹ The Penal Code Act of Uganda provides for criminal trespass and stipulates punishment for it.³² Criminal trespass is at times committed within a context of property grabbing, which is unknown to Uganda’s penal laws, leaving it unabated.³³ The Police find it difficult to identify criminal trespass and this is a challenge to its investigation and prosecution.³⁴ Property is normally hard earned and penalization of interference with it is justified.³⁵ Its protection on that ground has moral justification.³⁶

Third, the need to protect holders of fraudulently acquired property. Fraud is a feature of neoliberal restructuring in a number of sectors in Uganda.

²⁷ *Bury v Pope* (1586). Court in England.

²⁸ Badbrook AJ, ‘The relevance of the *cujus est solum* doctrine to the surface land owner’s claims to natural resources located above and beneath the land’.

²⁹ Jones PV ‘Private property and public order: The hippy convoy and criminal trespass’ 13(3) *Journal of Law and Society*, 1986, 343.

³⁰ Johnson UB, ‘Sentencing in context: A multilevel analysis’ 42(1) *Criminology*, 2004, 137-178, 151.

³¹ Mays LG, Ball J and Fidelie L, *Criminal law: Core concepts*, Aspen Publishing, 2014, 92.

³² Section 302, *The Penal Code Act* (Uganda).

³³ International Justice Mission (IJM), *Property grabbing from Ugandan widows and the justice system: A mixed methods assessment in Mukono County, Uganda’ Study report*, 2014, 37 — <https://www.ijm.org/studies/property-grabbing-from-ugandan-widows-and-the-public-justice-system-response>, on 28 July, 2022.

³⁴ International Justice Mission (IJM), *Property grabbing from Ugandan widows and the justice system: A mixed methods assessment in Mukono County, Uganda’ Study report*, 2014, 82 — <https://www.ijm.org/studies/property-grabbing-from-ugandan-widows-and-the-public-justice-system-response> on 28 July 2022.

³⁵ Mays LG *et al*, *Criminal law*.

³⁶ Pipes R, *Property and freedom*.

Land fraud is regular in courts of law.³⁷ The state and professionals are among the major enablers of fraud, therefore driving it to greater heights and making it difficult to annihilate.³⁸ Institutionalised fraud in the era of neoliberalism produces ‘structures and conditions that are fraud enabling’.³⁹ Neoliberalism for Uganda is an enabler of weaponisation of trespass, in a bid to escalate conflicts and protect irregularly acquired property.

Trends show increased placing of criminal charges on weaker parties to land disputes, issuance of arrest warrants without evidence and use of trumped-up charges. Incarceration of the party to the conflict creates an opportunity for the opponent to occupy the land/entrench control over it. This delays resolution of civil land disputes by concentrating on punishing one party to the dispute using the criminal justice system, leaving civil contest to escalate.

This paper uses qualitative research methods through analysis of existing literature, web-based material and court decisions. Cases of weaponisation of trespass reported to the Commission of inquiry into the effectiveness of the law and processes of land acquisition, land administration, land management and land registration in Uganda, are referred to.⁴⁰ Information on these is extracted from newspaper reports since the Commission report is not yet public.

The paper is divided into seven sections as follows: introduction, history to trespass, normative framework of civil trespass, weaponisation of civil trespass, distinguishes between criminal and civil trespass, weaponisation of criminal trespass, and the conclusion.

II. A Brief on the Historical Origin of Civil and Criminal Trespass

Trespass has been around for long, and actions of trespass in England were entertained in the king’s courts, or on appeal.⁴¹

³⁷ See, *Simba (K) Ltd and 4 others v Uganda Broadcasting Corporation (UBC)* (2014), Supreme court of Uganda.

³⁸ Whyte D, and Wiegatz J, *Neoliberalism and the moral economy of fraud*, Routledge, London, 2016.

³⁹ Wiegatz J, ‘They’re all in it together’: The social production of fraud in capitalist Africa’ 46 (161) *Review of African Political Economy*, 2019.

⁴⁰ *Legal Notice No. 2 of 2017*, hereafter called ‘Commission of Inquiry into Land’.

⁴¹ Woodbine GE, ‘The origins of the action of trespass’ 34(4) *Yale Law Journal*, 1924.

The origin of criminal trespass in England is only traceable from the 1940s. Later, the work of a commission set up to investigate squatting on residential property led to part II of the Criminal Law Act 1977 on offences relating to entering and remaining on property.⁴² Its section 6 (1) criminalizes violence for securing entry:

Subject to the following provisions . . . any person who, without lawful authority, uses or threatens violence for the purpose of securing entry into any premises for himself or for any other person is guilty of an offence, provided that

(a) There is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure; and

(b) The person using or threatening the violence knows that that is the case.

(2) Subject to subsection (1A) above, the fact that a person has any interest in or right to possession or occupation of any premises shall not for the purposes of subsection (1) above constitute lawful authority for the use or threat of violence by him or anyone else . . . securing his entry into those premises.

It is not clear whether the above offence on violence for securing entry is synonymous with criminal trespass, but Jones opines so.⁴³

In England debates on criminal trespass were heightened in 1982, following Michael Fagan's entry into Buckingham palace on two occasions.⁴⁴ On the first (7 June) he paced around and drunk a bottle of wine and on the second (July 9) he sat on the queen's bed and opened the curtain.⁴⁵ His charges at Bow street magistrate Court were not for criminal trespass but theft of half a bottle of wine.⁴⁶ The justification was that trespass was not a criminal offence in Britain: he could only be prosecuted if his second entry was motivated by an

⁴² Jones PV, 'Private property and public order', 343.

⁴³ Jones PV, 'Private property and public order', 343.

⁴⁴ Proctor C, 'On this day in 1982: The Queen fends off bedroom intruder' Royal Central, 9 July 2017 — <https://royalcentral.co.uk/uk/queen/on-this-day-in-1982-the-queen-fends-off-bedroom-intruder-85074/> on 5 February 2021.

⁴⁵ '1982: Queen fends off bedroom intruder' BBC, 9 July 2017 — http://news.bbc.co.uk/onthisday/hi/dates/stories/july/9/newsid_2498000/2498731.stm on 5 February 2021

⁴⁶ Proctor C, 'On this day in 1982: The Queen fends off bedroom intruder' Royal Central 9 July 2017 — <https://royalcentral.co.uk/uk/queen/on-this-day-in-1982-the-queen-fends-off-bedroom-intruder-85074/> on 5 February 2021.

intention to steal or damage something, which evidence was not there.⁴⁷ This implies that part II of the Criminal Law Act, 1977 could only be applied in very specific cases and does not necessarily cover criminal trespass.

Further discussion on trespass to a home are seen in debates around the Criminal trespass bill of 1984, meant to cover cases where the intruder intended to cause fear, annoy or cause distress to the occupier.⁴⁸ The bill aborted.⁴⁹ Historical incontrovertible evidence about the origin and rationale for criminal and civil trespass in Uganda is very scanty.

III. The Normative Framework of Civil Trespass: When Does Trespass Arise?

Civil trespass can be traced in the common law.⁵⁰ At its core is the wrongful interference with another person's possessory rights in property: unlawful entry into premises of another leading to damages ensuing.⁵¹ One must enter property without permission, remain there, place or project any object upon it.⁵² Although it has a number of 'degrees of generality', it is limited to the technical trespass to land.⁵³ It does not matter that no harm was caused to the land, or its possessor. This means that trespass is classified as a tort of an 'intentional' nature whereby merely entering property in possession of another is sufficient for a claim in tort to stand.⁵⁴

Ugandans courts have evolved jurisprudence that clarifies on the normative confines of trespass. The case of *Justine E M N Lutaya v Stirling civil engineering company Ltd*⁵⁵, was an appeal arising from a suit brought by the

⁴⁷ Rattner, 'Britain will not prosecute in case of palace intruder' The New York Times, 20 July 1982 — <https://www.nytimes.com/1982/07/20/world/britain-will-not-prosecute-in-case-of-palace-intruder.html> on 5 February 2021.

⁴⁸ The Hansard, 'Criminal trespass Bill HL Deb 29 Feb 1984, Vol 448 cc140-57' — <https://api.parliament.uk/historic-hansard/lords/1984/feb/29/criminal-trespass-bill-hl> on 5 February 2021.

⁴⁹ Jones PV, 'Private property and public order'.

⁵⁰ *Mostyn v Fabrigas* (1774), 1021,1022,1025, High Court of England and Wales

⁵¹ Restatement (second) of torts § 163, (1965).

⁵² Salmond J.W, *et al*, *The law of torts*, 9th ed, 1987, London,1937, 46.

⁵³ Heuston RF, *Salmond on the law of Torts*, 7th ed, Sweet & Maxwell, 1907, 6.

⁵⁴ Christensen G, 'Creating bright-line rules for tribal court jurisdiction over non-Indians: The case of trespass to real property' 35(2), *American Indian Law Review*, 2011, 527, 549.

⁵⁵ *Justine E M N Lutaya v Stirling civil engineering company Ltd* (2002), The Supreme Court of Uganda.

appellant, registered as proprietor of mailo land in 1981 who granted a lease of it to a company in 1984. She claimed damages for trespass from the respondent, whereupon the court of appeal dismissed her appeal hence the appeal to the supreme court. Deciding this appeal, the supreme court said

Trespass to land occurs when a person makes unauthorized entry upon the land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land, but against the person who is in the actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue, but a land owner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land . . .⁵⁶

There is literature emphasizing that trespass should not accrue to an owner who is not in possession.⁵⁷ In the *Lutaya* case above the land had been purportedly leased to a company. There was an issue as to whether it indeed belonged to the plaintiff and could bring an action in trespass against the respondent. The court found that she had a right to bring an action for trespass committed during the time she was the registered mailo owner.⁵⁸

To prove trespass, it is stated in *Sheik H Mohamed Lubowa v Kitaka Enterprises*⁵⁹ that 'It's incumbent on the appellant to prove that the disputed land belonged to him. That the respondent entered upon that land and entry was unlawful in that it was made without permission'.

An action for trespass to land can be intentional or negligent, and arises in the following instances:

(i) Where one without lawful permission enters onto the land of another, without any right to enter onto it.⁶⁰ Beyond physical entry by the tortfeasor, placing or throwing objects onto the land of another is regarded as entry. In *Basely v Clarkson*,⁶¹ the defendant owned land adjoining the plaintiff's, and in mowing his own land he involuntarily and by mistake mowed down some grass on the plaintiff's land. Court entered judgment for the plaintiff and awarded him damages.

⁵⁶ *Justine E M N Lutaya v Stirling civil engineering company Ltd* (2002), Supreme Court of Uganda, 6-7.

⁵⁷ Merrill TW, 'Trespass, nuisance, and the costs of determining property', 36.

⁵⁸ *Justine E M N Lutaya v Stirling civil engineering company Ltd* (2002), Supreme Court of Uganda, 11, 4.

⁵⁹ *Sheik H Mohamed Lubowa v Kitaka Enterprises* (1987), Court of Appeal of Uganda.

⁶⁰ *Adrabo Stanley v Madira Jimmy* (2013), High Court of Uganda.

⁶¹ *Basely v Clarkson* (1681) 3 Lev 37; 83 ER 565,

(ii) Refusal to leave one's land where permission for continued stay has been revoked amounts to unlawful entry onto land; and

(iii) Where the defendant unlawfully enters onto the space above the land or beneath the surface of the plaintiff's land, infringing on the *ad coelum* doctrine.⁶² Under the doctrine, a property holder not only has rights to the surface/plot of land itself, but also to the air space above and what is beneath the ground. The *ad coelum*⁶³ doctrine has exceptions.⁶⁴

The doctrine was applied in two English decisions: (i) In *Kelsen v Imperial Tobacco*,⁶⁵ the court held that the defendant committed trespass by allowing an advertising board to project inches into plaintiff's property; and (ii) In *Bulli Coal Mining Co v Osborne*,⁶⁶ the defendant mined from their land through to the plaintiff's land. This was held to be trespass to the subsoil.

The *ad coelum* doctrine does not give the landowner rights to unlimited heights above the ground.⁶⁷ In *Bernstein of Leigh (Baron) v Sky views and General Limited*,⁶⁸ the defendants took an aerial photograph of the plaintiff's house at about a height of one hundred meters without prior authority from the plaintiff. He instituted proceedings alleging that the defendants had wrongfully entered the airspace above his house, claiming damages for trespass. The *ad coelum* doctrine was upheld but court noted that the surface owner's rights extended only to such a height as is reasonably necessary for the ordinary use and enjoyment of his land and the structures on it. Infringement in the space beyond what is reasonably usable and enjoyable does not entitle the plaintiff to remedies in trespass. Uganda's statutes contain limitations to the doctrine. For example, ownership and control of all minerals in Uganda is vested in the Government.⁶⁹ Also, the Civil Aviation Authority Act, Cap 354, s 58 (1) provides that, 'the mere over flight of an aircraft over a property at a height

⁶² Mugambwa JT, *Principles of land law in Uganda*, Fountain Publishers, Kampala, 2002, 50 - 51.

⁶³ Donahue *et al*, *Cases and materials on property: An introduction to the concept and the institution*.

⁶⁴ Badbrook AJ, 'The relevance of the *cujus est solum* doctrine to the surface land owner's claims to natural resources located above and beneath the land'.

⁶⁵ *Kelsen v Imperial Tobacco* (1957), Queens Bench, 334.

⁶⁶ *Bulli Coal Mining Co v Osborne* (1899), Privy Council , AC 351.

⁶⁷ *Bulli Coal Mining Co v Osborne*, (1899, AC Privy Council , AC 351.

⁶⁸ *Bernstein of Leigh (Baron) v Sky views and General Limited* (1978), Queen's Bench, 334.

⁶⁹ Article 244, *The Constitution of Uganda* (1995), Section 9(1), *The Mining and minerals Act*, 2022 (Uganda).

above the ground in accordance with authority regulations made under this Act shall not be considered trespass or nuisance.’

According to the Restatement of the law of torts,

Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other’s use and enjoyment of his land.⁷⁰

Therefore, interference with ‘use and enjoyment’ of land is a key factor in determining existence of trespass.

Besides humans, trespass may arise in situations involving animals. In *Ellis v Loftus Iron Co*⁷¹ trespass by cattle was actionable:

. . . the liability extends only to the trespass of cattle and other animals in which at common law a right of property could exist, and such a condition was a *sine qua non* of the remedy in an action of trespass.⁷²

In such cases, the property owner can apprehend the trespassing animals until the owner makes good the damage caused.⁷³

a) Must there be fault or damage?

There is no need to prove damage or fault. In fact, ‘trifling inconveniences’ that do not interfere with the plaintiff’s use and enjoyment of property are actionable.⁷⁴ What would seem flimsy actions have been found to be actionable in trespass in for example the US, in *Hannabalson v. Sessions*, 90 N.W.93,95 (Iowa 1902) it was found that stretching a hand across a wall marking a boundary between the defendant and another amounted to a trespass by the defendant. It does not matter how trivial, as long as it is an entry not justified by law, whether or not damage is caused.⁷⁵

⁷⁰ Restatement (Second) of torts § 159(2), (1965).

⁷¹ *Ellis v Loftus Iron Co* (1874), High court of England and Wales, 40.

⁷² Robson WN, *Principles of legal liability for trespasses & injuries by animals*, Forgotten Books, 2018, 47.

⁷³ Underhill A, *A Summary of the law of torts, or wrongs independent of contract*, Forgotten Books Butterworths, London, 1884, (10th ed 279b).

⁷⁴ Prosser WL, *Handbook of the law of torts*, West Publishing Co., St. Paul, 4th ed 1971, 63, quoting Street TA, *Foundations of legal liability*, 1906, 66.

⁷⁵ Lunney M, ‘Trespass to land’, in Oliphant K (ed), *The law of tort*, 3rd ed, Butterworths, London, 2015, 467-517.

Similar principals are espoused in the case of *Kelsen v Imperial Tobacco*,⁷⁶ where the defendant's signage protruded in the plaintiff's airspace by a few inches. McNaire J said

The invasion of the plaintiff's airspace by the sign amounted to a trespass on the part of the defendant, and not merely a nuisance . . . and, on the facts of the case, although the injury to the plaintiff's legal rights was small, he was entitled to a mandatory injunction requiring the defendants to remove the sign . . .

So however small the infringement can be, a remedy is issued to protect the plaintiff's right to enjoyment of property.

Trespass is a tort of strict liability except in circumstances where the defendant can prove that the act constituting the trespass was beyond his/her control, for example where one is forced onto the land of another by a third party. Among the justifications for such strict rules of application is that the protection of property rights must be 'exceptionally simple and exceptionally rigorous.' If it is about infringement on property, there is no need to prove fault or reasonableness.⁷⁷

Where there is a conclusion that the defendant trespassed, reasonableness is not available to the bench in the process of arriving at final conclusions in the case and awarding damages. In *James Nsibambi v. Lovinsa Nankya*⁷⁸, the respondent inherited a kibanja (plot of land) in 1950, cultivated it and the appellant entered upon it and built a house in 1976, alleging that he had purchased it. The trial magistrate declared him a trespasser but allowed him to remain on the portion of the land with his house, and pay 1500 shillings as compensation. On appeal, court found that a trespasser had no right to stay on the land on which he trespassed. In addition, the compensation ordered by the grade II magistrate went beyond the pecuniary jurisdiction of that court.⁷⁹ An attempt to be reasonable by the magistrate in a trespass case without justification on record was not supported by the appeal court.

⁷⁶ *Kelsen v Imperial Tobacco Co* (1957)2 Queen's Bench, 334.

⁷⁷ Dorfman A and Jacob A, 'The fault of trespass' 65(1) *The University of Toronto Law Journal*, 2015, 48-98, 50.

⁷⁸ *James Nsibambi v. Lovinsa Nankya* (1980) High Court of Uganda.

⁷⁹ Under Section 219, *Magistrates Court Act* (1977), pecuniary jurisdiction of that court was Shillings 1000.

Finally, if an action is brought under the common law of trespass there 'is no exception for *deminimis harms*' since strict liability applies and injunctions can issue to prevent future repetition.⁸⁰

In cases of trespass, there is no need to prove financial injury but unlawful entry. So damages 'depend upon the acts perpetrated by the trespasser to the land and the extent of injury therefrom'.⁸¹

b) Who can bring an action in civil trespass?

Traditionally, only a person in possession of the land has capacity to sue in trespass, but what amounts to possession is subject of interpretation by courts of law. An action in trespass is commonly used as a means of settling a disputed title. In practice its determination may revolve around an analysis of the facts necessary to support a possessory title.⁸²

Whereas ownership and possession are often concurrent and vest in the same person, in certain instances, they do not. In such cases, the person with possession is in a better position to sue in trespass than the other without. The examples where ownership and possession are in different people are:

First, during the subsistence of a lease, the lessee in possession of land has capacity to sue in trespass, more than the lessor.⁸³ According to *Lutaaya v Gandesha and another*,⁸⁴ an action in trespass can be filed against the lessor (land owner) 'if he unreasonably and unnecessarily interferes with the tenant's quiet possession/enjoyment of the land contrary to the tenancy' The unique dynamic in this case which exonerated the land lord from trespass was that the plaintiff failed to prove that he had a genuine right to the property, and therefore a legitimate right to protection against the landlord's purported trespass.

Second, under the mailo system of land holding where ownership of land is separate from ownership of developments on it, the lawful or bona fide occupant of the land is in a better position to sue in trespass than the title holder/owner who is not in possession.⁸⁵ Case law however, suggests that

⁸⁰ Merrill TW, 'Trespass, nuisance, and the costs of determining property', 48.

⁸¹ Christensen G, 'Creating bright-line rules for tribal court jurisdiction' 550.

⁸² Underhill A, *A Summary of the law of torts, or wrongs independent of contract*, 279a.

⁸³ *Justine E M N Lutaya v Stirling Civil Engineering Company Ltd* (2002), The Supreme Court of Uganda.

⁸⁴ *Lutaaya v Gandesha and another* (1986) High Court Bulletin (HCB) (unreported).

⁸⁵ See Sections 29 and 31(1) and 32A, *Land (Amendment) Act* (Uganda) (2010).

possession is not always physical active possession (established by fencing off land or utilizing it say through construction or cultivation), but ‘the slightest amount of possession suffices’.⁸⁶

*One holding an indefeasible title under the Registration of Titles Act is considered to have ‘conclusive evidence of title’ (with a few exceptions in in the Act such as fraud) and is considered to be in legal possession of the land that is described on the title.*⁸⁷ In the *Moya Drift case*, the trial court dismissed the registered proprietor’s suit in trespass, on ground that at the time of the unlawful entry complained of, he was not in possession. On appeal, counsel for the proprietor argued that although that outcome is in line with English law, it contradicted the Registration of Titles Act of Kenya section 23. To Spry, ‘title carries with it legal possession’. This is the concept of ‘legal possession’ for a title holder without physical possession of land. The question remains: what if one has legal possession (certificate of title) but physical possession is legally in another? The *Moya Drift case* creates an exception to the effect that in the absence of any other person lawfully in possession, the holder of a certificate of title is considered to be in possession and can file a case in trespass on the basis of indefeasibility of his title. The position therefore changes where possession is lawfully in another, such as statutory tenants protected in Uganda’s Land Act.

c) Can both the landlord and occupant bring an action in trespass?

The above situation arose in *Kiconco Medard v Persis Namuganza*.⁸⁸ The plaintiff purchased registered land between 2013 to 2016 from Paul Bitarabeho, administrator of the estate of the late Bitarabeho. There were 17 lawful occupants on sections of the land whom he requested to vacate in return for a promise of compensation. Other people (majority defendants) claimed to be tenants on the land having purchased it from Chrisper Bitarabeho (sister to the Paul Bitarabeho), and resisted the plaintiff’s takeover of the land. There was evidence that they purchased land located in another place (Lusanja), but were occupying the plaintiff’s land in a place called Sekanyonyi. Chrisper had no authority to sell the Sekanyonyi land, she was not the administrator of the

⁸⁶ *Wuta-Ofei v Danquab*, (1961), High Court of Ghana.

⁸⁷ *Moya Drift Farm Ltd v Theuri* (1973) East African Court of Justice. Section 59 of the *Registration of Titles Act* (Uganda) (Chapter 207).

⁸⁸ *Kiconco Medard v Persis Namuganza* (2019), High Court of Uganda.

estate. One of the issues was whether the defendants trespassed on the land and the plaintiff had a right to bring an action in trespass:

Court's position is that enjoyment of one's private property is a constitutional right. It is an offence to interfere with one's right to property. That is why trespass is still a criminal offence in the laws of Uganda. It is intended to punish those who interfere with one's private ownership of property.

The plaintiff had a constitutional right to his private property. He had title and the defendants had physical possession. With approval, this case cites *Lutaaya*,⁸⁹ where it was said that possession can be physical occupation but also constructive possession. Specifically, that, 'it is this court's finding that the 20th to 147th defendants trespassed on the plaintiff's land comprised in Kyadondo block 206 plot 671 since their purported bibanja interests are not located in the suit land and'

IV. Weaponising Civil Trespass: Agendas, Actors and Victims

This arises where civil trespass is used as weapon, most times against the weak or innocent party in a land conflict. It amounts to misuse of the tort of trespass for the wrong purposes that it was not meant to serve. Weaponisation of trespass has mainly been by land grabbers to either grab land, or inhibit genuine owners' property rights. In *Owinyi v Echonga & Okello*⁹⁰ the cause of action was trespass, and not the contestations on ownership of the land. The trespass case does not always lead to resolution of the underlying land ownership dispute, it bars interference with possessory rights to property. The value of the subject matter in this case was way beyond the pecuniary jurisdiction of the chief magistrate court. Therefore, that court should not be in position to (lawfully) resolve the case about ownership. In such a case, litigation on trespass may become protracted as long as the contention on ownership remains unresolved.

Weaponized or abuse of trespass may be by burdening persons not party to a suit with a decree arising from that suit who's cause of action was in trespass. Technically, a decision reached in a legal contest should not burden or benefit persons who were not parties to the case; a decree should not be

⁸⁹ Merrill TW, 'Trespass, nuisance, and the costs of determining property'.

⁹⁰ *Owinyi v Echonga & Okello*, (2018), Chief Magistrate's Court.

executed against a non-party to the suit from which it arises.⁹¹ The case of *Owinyi above* involved three parties and not all the members of the affected community in hundreds.

There are cases showing that misapplication of decrees from courts in trespass cases have put courts in the limelight as active reagents that indirectly precipitate land disputes. *Banoba v Mukiiibi*⁹² was an action in trespass brought against the respondents seeking eviction orders, a permanent injunction and general damage for trespass. The plaintiff was the registered proprietor of land described as Kyagwe Block 189. He alleged that the defendants trespassed on it. The defendants alleged that they occupied the land during various years, such as before 1986, as early as the 1950s and 1960s and therefore are entitled to the protections of the Land Act for tenants by occupancy.⁹³ The magistrate declared some of the residents trespassers. They failed to prove validity of their rights to the land under Uganda's Busulu and Envujjo Law (1928) and the Land Reform Decree (1975) and had to be evicted.⁹⁴ This is notwithstanding that at the time of hearing the case, their protection against eviction was guaranteed under the Land Act of Uganda (1998), which was not applied in the case.

The above decision was appealed in *Ssonko v. Banoba*⁹⁵ (Godfrey Namundi J), where decision of the magistrate was upheld and the eviction orders indiscriminately enforced against everyone on the land including non-parties to the suit.⁹⁶ The underlying conflict in which the evictees claim to be lawful and bona fide occupants whose rights are protected by the Land Act, (a thing that the respondent denies) remained unresolved, yet the defendants' property on the land was indiscriminating destroyed.

⁹¹ *Rajimpex v National Textile Board* (1986), High Court of Uganda.

⁹² *Banoba v Mukiiibi* (1994), Magistrate court of Uganda.

⁹³ Article 237(8), *Constitution of Uganda* (1995), Section 31, *Land Act* (Chapter 227) (Uganda) as amended, guarantee security of tenure for lawful and bona fide occupants described in Section 29(1). Including (a) occupants of land in accordance with the *Busulu and Envujjo Laws* (1928).

⁹⁴ Under the Busulu and Envujjo Law (1928), Sections 8(1)(a)(i) and 8(2) for one to claim to be *kibanja* holder, he had to prove that his rights accrue from being a child of the *kibanja* holder, a customary successor, or that he had the consent of the mailo holder to reside on the land. In absence of the above, any agreement purporting to grant *kibanja* interest is invalid. So, Hosea Sonko who claimed to have purchased in 1969 could not succeed.

⁹⁵ *Ssonko v. Banoba* (2014), High Court of Uganda.

⁹⁶ *Ssonko v. Banoba* (2014), High Court of Uganda; 'Evicted Kirangira Residents Struggling for New Living' Uganda Radio Network (URN), October 2019 — <https://ugandaradionetwork.com/story/evicted-kirangira-residents-struggling-for-new-living-> on 8 February 2021.

From the above, trespass has mainly been weaponized to target persons with statutory yet weaker property rights (unregistered interests), who are most times member of the lower rungs of society. The fact that they are in possession has not helped them to wedge off the stronger force of persons registered as proprietors of land, also protected under the law.

V. Criminal Trespass and Civil Trespass Distinguished

Criminal trespass and civil trespass are partly intended to facilitate enjoyment of property. Within the context of the escalating land conflict terrain of Uganda, criminal trespass is a common charge in the courts of law. It is distinguishable from civil trespass in nature and scope.

Criminal trespass is provided for under of the Penal Code Act of Uganda, section 302,

Any person who—

enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person; or

(b) having lawfully entered into or upon such property remains there with intent thereby to intimidate, insult or annoy any person or with intent to commit any offence, commits the misdemeanor termed criminal trespass and is liable to imprisonment for one year.

The elements of criminal trespass are: (i) entering or remaining on property; the ‘unlawful remaining’ is usually after expiration of permission to remain (‘surreptitious remaining’);⁹⁷ (ii) which property is in possession of another; and (iii) with an intention to commit an offence, or to intimidate or annoy someone. In *Odeke son of Taram v R* (Sir Audley McKisaack CJ),⁹⁸ the accused was found at 11.00 p.m. in an enclosed compound by a night watchman loitering near a parked vehicle and was cut with a panga by the watchman. He was charged under section 285 (f) of the Penal Code Act with being in a building with intent to commit a felony while there, contrary to that section. A conviction could not be sustained on that section since a compound surrounded by a wall fence was not a building for purposes of section 285 (f).

⁹⁷ Mays LG *et al*, *Criminal Law*, 113.

⁹⁸ *Odeke son of Taram v R* (1988), High Court.

On appeal, the court found that the evidence in the case instead supported a conviction under section 285 of the Penal Code Act on criminal trespass, and it substituted conviction under section 285 (1) of the Penal Code. From this case, the intent to commit an offence or to intimidate or annoy someone is deducible from the circumstances of the case.

It should further be noted that the offences that one may intend to commit on entry of property include those related to land grabbing, e.g., eviction and intermeddling in the estate of a deceased person.⁹⁹

More case law further echoes the elements of criminal trespass.¹⁰⁰ Traditionally, property crimes were restricted to homes, animals, equipment, but now the categories have changed.¹⁰¹ Criminal trespass is of broader application and entails trespass onto other properties such as automobiles or aircrafts than land.¹⁰² In Kenya, liability in trespass and fines are chargeable where it was committed by animals.¹⁰³

On the other hand, in an action of civil trespass to land, the slightest amount of possession (not physical occupation) suffices. However, for criminal trespass, the words ‘in the possession of another’ under the Penal Code Act section 302 refer to actual possession.¹⁰⁴ It entails effective, physical/manual control/occupation, portrayed by some outward act, also called *de facto* possession as distinct from a legal right to possession.¹⁰⁵ In *Okello v Uganda*,¹⁰⁶ both appellants were charged with criminal trespass contrary to section 302 of the Penal Code Act. It was alleged that they and others at large, in April at Lamin Lupabo village in Gulu district entered the land of Betty Nyeko with an

⁹⁹ International Justice Mission (IJM), *Property grabbing from Ugandan widows and the justice system: A mixed methods assessment in Mukono County, Uganda’ Study report*, 2014, 21 — <https://www.ijm.org/studies/property-grabbing-from-ugandan-widows-and-the-public-justice-system-response>, on 28 July 2022.

¹⁰⁰ *Katusiime Edward v Uganda*, (2013) High Court of Uganda.

¹⁰¹ Mays LG *et al*, *Criminal Law*, 92.

¹⁰² Gillespie J, ‘Criminal Trespassing Law’ — <https://www.nolo.com/legal-encyclopedia/criminal-trespassing-law.html> on 8 August 2022 and Mays LG *et al*, *Criminal Law*.

¹⁰³ Section 12(4), *The Trespass Act of Kenya*, Cap 294 (Rev. 2012); see also Wambui C, ‘Kenyan herders flout trespassing law as conflict over grazing heats up’ Thomas Reuters Foundation, 10 April 2017 — <https://www.reuters.com/article/ozatp-us-kenya-herders-idAFKBN17C0QN-OZATP> on 26 January 2021.

¹⁰⁴ Wambui C, ‘Kenyan herders flout trespassing law as conflict over grazing heats up’ Thomas Reuters Foundation, 10 April 2017 — <https://www.reuters.com/article/ozatp-us-kenya-herders-idAFKBN17C0QN-OZATP> on 26 January 2021.

¹⁰⁵ *Opio Enrico v Uganda* (2014), High Court of Uganda.

¹⁰⁶ *Okello v Uganda* (2013), High Court of Uganda.

intention of intimidating or annoying her. Betty stated that her late husband Nyeko James was given land by Olal Atama, they both resided on it from 1981 to 1996, when they were displaced as a result of armed conflict between the Government of Uganda's Uganda Peoples' Defense Forces (UPDF) and the Lord's Resistance Army (LRA).¹⁰⁷

The accused denied the allegation, asserting ownership of the land as a bequest from their grandfather Olal Atama. The trial court convicted and sentenced the appellants. They appealed on ground that the trial magistrate did not fully/properly evaluate the evidence on ownership, possession, entry and intentions thereby reaching the wrong decision. The appeal was upheld and court held:

The above excerpt (quoting the testimony of Betty from his judgment) clearly reveals a land dispute between the complainant and the accused. She claims her husband was given land by Olal Atama and the defendants are also claiming they inherited land from their grandfather Olal Atama. Had the trial magistrate evaluated the evidence and applied the law to the evidence, he would have appreciated that the case before him was more of a civil nature than criminal.

Clearly, convicting the appellants on criminal trespass charges leaves the civil conflict unresolved. Criminal trespass charges can offer short term solutions to deep rooted conflicts on land.

On possession, the court found,

The trial magistrate failed to apply the facts to the law because he did not know that possession is one of the essential ingredients of the offence of criminal trespass . . . the accused must enter on the land and in order to intimidate or annoy, the complainant must be in possession of the property. In the instant case, she (Betty Nyeko) was last on the land in 1996 she was therefore not in possession of the land.

This case shows that criminal trespass is at times misapplied in such a way that it becomes a stumbling block to resolution of deeper-rooted contestations about land ownership. The perpetrator is convicted of criminal trespass, may serve sentence and return to refuel the protracted ownership conflict, which may present further potential for new criminal trespass charges as long as the civil conflict is unresolved.

¹⁰⁷ Finnström S, *Living with bad surroundings: War, history, and everyday moments in northern Uganda*, Duke University Press, 2008.

The above may partly be arising from a structural setting where at common law, criminal matters take precedence over civil matters that may be previously instituted. The argument is backed by a belief that criminal matters are perpetrated against society in general (represented by the state), therefore of public interest and should take precedence over civil matters between a few individuals, the public interest is of utmost priority.¹⁰⁸ In *Uganda v Ssonko Edward*¹⁰⁹ the Director of Public Prosecution (DPP) sought to revise an order of a magistrate court staying criminal case No. C0-0760-2018 (under section 209 of the Magistrates Court Act) which was already on trial in preference for a civil matter (Civil suite No. 172 of 2018), on ground among others that the civil case would offer sufficient sanctions for crimes allegedly committed by Ssonko Edward contrary to sections of the Penal Code of Uganda, related to destruction of growing crops (section 329) and forcible entry (section 77). In the civil matter, the accused is the plaintiff seeking damages for destruction to his property, and the respondent too sought a counter claim for the same remedies. On appeal Justice Mutony found that it was an error to stay prosecution of a criminal matter that was already under way in preference for a civil matter, and rather suggested expeditious hearing of the criminal matter.

There is an intricate relationship between criminal and civil matters on the domain of land. Crimes may be committed to defend a genuine claim to land, or to discredit and dispossess another (genuine owner). In the second instance where crimes are committed to grab/dispossess, criminalization of land disputes can be a handy tool for grabbers. In a situation where criminal cases take precedence over civil matters genuine owners may lose property as grabbers utilize criminal justice systems to take over property when civil matters are postponed.

The case of *Okello v Uganda*,¹¹⁰ is a classic example of criminalization of civil land cases. Such criminalisation is usually for a number of reasons: first, there is a lesser prosecutorial burden on the complainant in criminal matters; investigations and the prosecutorial burden rest on the state, which is by law a party to the case. The victim is an interested witness who gives evidence in the state's case. Second, the complainant may be aware of his/her weak civil case or claim to ownership and therefore chooses criminal trespass as a weapon to

¹⁰⁸ *Joseph Agenda v Uganda* (2011), High Court of Uganda

¹⁰⁹ *Uganda v Ssonko Edward* (2019), High Court of Uganda.

¹¹⁰ *Okello v Uganda* (2013), High Court of Uganda.

delay a losing decision against him/her in a civil ownership contest. Third is corruption since state agencies are deeply involved in criminal matters, it may be easier to secure an arrest of the suspect pending investigations, to scare him/her into giving up pursuing any further civil cases to resolve the ownership dispute.

Against this background, it is common for prosecutors and courts to give priority to criminal trespass over civil disputes over land, in line with the law and disregard to the ramifications this may have on land dispute resolution and justice.¹¹¹

The tort of trespass to land and criminal trespass are also distinguishable based on the nature of the unlawful entry. Where the entry does not constitute an offence, the affected party's remedy is in an action of civil trespass. Where it constitutes an offence, the perpetrator of such entry is criminally liable for criminal trespass contrary to the Penal Code Act, section 302. In *Opio Enrico v Uganda*¹¹² the appellant was charged with criminal trespass at the chief magistrate's court of Nebbi. The allegation was that on 7 March 2012 the appellant and others entered on land in possession of Nyacara Primary School, with intent to intimidate or annoy the School. Their conviction was quashed and sentence set aside when it was held among others that:

Although an intent to commit an offence may accrue in respect of a juridical person, reference to the intent "to intimidate, insult or annoy any person" in s 302 (a) of The Penal Code Act bears meaning only in reference to natural persons since it is only natural persons that are capable of experiencing those emotions Being an artificial person, Nyacara Primary School is incapable of being insulted, intimidated or annoyed.

The court further held that:

An unlawful act of entry onto land in possession of another may be a trespass but is not necessarily an offence an unlawful act which does not amount to an offence is a matter which has to be investigated by a Civil Court. The complainant in this case sought the aid of the criminal process to obtain a remedy that was available only through a civil suit. This prosecution was in a way an abuse of court process and the conviction cannot be allowed to stand.

¹¹¹ *Okello v Uganda* (2013), High Court of Uganda.

¹¹² *Opio Enrico v Uganda* (2014), High Court of Uganda.

Evoking criminal trespass where it is not applicable is an abuse of court processes. Courts are supposed to be channels for delivery of justice and such misapplication of the crime diverts them from that core purpose. The practical application of criminal trespass has superseded its rationale of punishing those that harm the proprietary interests of others. Rather, the ambit of the crime has been extended to serve other selfish interests, not envisaged in the Penal Code Act. The *Opio*¹¹³ decision also shows that courts of law have been reluctant to expand the ambit of application of criminal trespass, by detecting situations where it has been abused.

Last, civil and criminal trespasses attract varying remedies. Criminal trespass leads to a conviction whereas civil trespass to an award of damages and orders or declarations.¹¹⁴ In *Medard Kinconco's* case,¹¹⁵ Tadeo Asimwe J. stated:

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.

In this case, court did not exercise its discretion to award damages.

Generally, section 302 of Uganda's penal code is narrow and too succinct to allow possibilities of generic application to all nature of interference with property. For Kenya, trespass occupies the whole Trespass Act Cap 294, giving details of varying degrees of culpability and corresponding punishment. They include trespass to private property, tampering with fences, trespass with intent to commit an offence., intimidate insult or annoy (punishment - imprisonment for a term not exceeding 6 months or a fine of a maximum of 2000 Kenya shillings or both), trespass with intent to steal agricultural produce or steal stock (punishment, maximum term of imprisonment of one year or a fine of a maximum of 5000 Kenya shillings or both), trespass in stock enclosure etc.

Application of Uganda's lone section 302 of the Penal Code Act may promote a one-size- fits -all approach for all manner of criminal trespass.

¹¹³ *Opio Enrico v Uganda* (2014), High Court of Uganda.

¹¹⁴ *Okello Oris Atama & Another v Uganda* (2013), High Court of Uganda

¹¹⁵ *Kiconco Medard v. Hon Persis Namuganza and 148 others* (2019), High Court of Uganda..

Uganda and Kenya stipulate punishments (a maximum of one-year jail sentence and less than the equivalent of one hundred US dollars) which are not deterrent. There are instances reported in Kenya where herders committed trespass wantonly, knowing that the burden of paying the fine is less than the benefit derived from trespassing to access pasture for their cattle.¹¹⁶

VI. Criminal Trespass as a Weapon in Land Disputes. Context, Issues and Examples

The *acts reus* for criminal trespass is unlawful entry or remaining on the land after permission is expired and the *mens rea* is knowledge that one has no licence.¹¹⁷ Uganda's experience shows that there are new dynamics in application of the criminal justice system to land disputes. Offences such as murder, malicious damage to property, arson and criminal trespass have been weaponized /misused/abused.¹¹⁸ Criminal trespass in particular has been weaponized and a number of factors/circumstances have made this possible.

The mailo land tenure characterized by 'dual carriage of rights' to land: landlord with title and the tenant with possession and immediate use of land.¹¹⁹ The proprietary ownership of land by the landlord is susceptible to permanent encumbrance by the tenant's occupancy as long as nominal rent is paid.¹²⁰

Long history of unlawful evictions perpetrated against tenants by occupancy made them darlings of populist politicians, putting land high on elections agendas.¹²¹ Issues of evictions are raw material for populist politicians who make promises for solutions but deliver little. Therefore, politicization of

¹¹⁶ Wambi C Thomas Reuters Foundation, 'Kenyan herders flout trespassing law as conflict over grazing heats up' <https://www.reuters.com/article/ozatp-us-kenya-herders-idAFKBN17C0QN-OZATP> on 26 January 2021.

¹¹⁷ Section 302, *Penal Code Act*; Mays LG *et al*, *Criminal Law*, 113.

¹¹⁸ The *Penal Code Act* criminalises them.

¹¹⁹ Nakayi R, 'The perceived protection of tenants on registered land against evictions: An assessment of the legal challenges faced by victims of land evictions in Kampala and Wakiso District', Public Interest Law Clinic (PILAC) Working Paper No. 4, November 2015, 2.

¹²⁰ Eviction under the law is only allowed for non-payment of rent. See Section 32A, *Land (Amendment) Act* (2010).

¹²¹ Lirri E, 'Uganda's presidential hopefuls campaign on promises of better land rights' Reuters, 9 February 2016 — <http://www.reuters.com/article/uganda-politics-landrights-idUSL8N15E03O> on 10 September 2021.

land disputes, backlogs in courts,¹²² delays at dispute resolution, make the pursuit of civil remedies from courts of law a daunting task.¹²³ Yet criminal trespass is a ready-made tool to use against the so-called trespasser.

A declining moral economy, increased demand for scarce land, abundant illicitly acquired money to invest in land have led to increase in land frauds.¹²⁴ Capitalist transformation in Uganda is driving the waves of change, making the abnormal normal, the unacceptable acceptable.¹²⁵ Wiegatz has argued, ‘we are currently living in the age of fraud. Fraud has become mainstream. It is at high levels, institutionalized, at the core of ‘the system’ and part and parcel of the (re)production of contemporary society’.¹²⁶ Land frauds take many forms such as double titling, forgery on titles, acquisition of title to land belonging to others or customarily held, purchase of land occupied by tenants with imminent plans to evict them, etc.¹²⁷

Not all perceived victims/plaintiffs in land conflicts are genuine, capable of winning a case in a civil court. These therefore shun the pursuit of civil remedies which would most likely resolve the underlying land ownership dispute in preference for avenues in the criminal justice system as explained below.

Criminalization of land disputes has been on the rise, in central Uganda as seen from many cases reported to the Commission of inquiry into land.¹²⁸

The case filed against FORMASA a tree planting company is an example. The company acquired land occupied by tenants and registered it as

¹²² Nakayi R and Twesiime-Kiryra M, ‘The legal, policy and institutional framework of land governance in Uganda: A critical analysis’ Human Rights and Peace Center (HURIPPEC) Working Paper No. 38 of 2017, 26.

¹²³ Nakayi R and Twesiime-Kiryra M, ‘The legal, policy and institutional framework of land governance in Uganda’.

¹²⁴ Lirri E, ‘Uganda's presidential hopefuls campaign on promises of better land rights’ Reuters, 9 February 2016 — <http://www.reuters.com/article/uganda-politics-landrights-idUSL8N15E03O> on 10 September 2021.

¹²⁵ Wiegatz J, ‘This land is broken’: Reflections on changing perceptions of morality in capitalist societies’, *The Elephant*, 14 November 2019 — <https://www.theelephant.info/ideas/2019/11/14/this-land-is-broken-reflections-on-changing-perceptions-of-morality-in-capitalist-societies/> on 23 January 2021.

¹²⁶ Wiegatz J, ‘The age of fraud: The link between capitalism and profiteering by deception’ London School of Economics (LSE) Blog, 13 November 2018 — <https://blogs.lse.ac.uk/afri-caatlse/2018/11/13/the-age-of-fraud-the-link-between-capitalism-and-profiteering-by-deception/> on 23 January 2021.

¹²⁷ Nakayi R and Twesiime-Kiryra M, ‘The legal, policy and institutional framework of land governance in Uganda’.

¹²⁸ See the FARMOSA case.

Quality Parts limited. Having planted trees on all the available free land to capacity, the company sought to negotiate with tenants on the land to accept compensation and free up some of their occupied land for it. These processes were securitized, involving the head of security in the district (the Resident District Commissioner) and police. The criminal justice system was (mis)used in the following ways to benefit FORMASA:

(i) Persons who resisted the low compensation rates in exchange for vacating land were put in jail on trumped up charges such as malicious damage to property and criminal trespass, to compel them to accept the rates in return for their freedom. Such criminalization reduces the tenants' confidence and ability to negotiate in their interest.

(ii) The company forcefully planted trees on land from which the occupants harvested food amidst resistance. Keeping the tenant away in jail on criminal trespass charges enabled the company to cultivate the land without resistance from its occupiers.

(iii) As a result of the land conflict, an employee of FORMASA was murdered, leading to unrest and arrest of a number of male residents on trumped up charges including murder and criminal trespass. On return, the seven remanded found their land taken away by the company.

In some other instances, criminal trespass has been used to delay/defeat efforts at resolution of disputes on customary land tenure questionably converted to freehold. An example, is the Commission of inquiry case¹²⁹ concerning land registered as Awilodyang Mixed Farm Company Ltd (Folio 8 Maruzi Block 2 Plot 66)¹³⁰ Its registration was pursuant to conversion from customary land to freehold, allowed in law.¹³¹ The community at Oreta, (Okii Okabo clan) asserted that that this was their customary land they occupied for over 50 years but the respondents grabbed it and registered it as their private freehold in 2016 where upon they attempted to evict approximately 700 households of about 10.000 people.

The proprietors of the company dispute those allegations insisting that the land belonged to them.

¹²⁹ Muwambi SK, 'Enanga's dad Echonga assures Bamugemereire: The land I'm accused of grabbing is actually my personal inheritance' The Investigator, 15 October 2019 — <https://theinvestigatornews.com/2019/10/enangas-dad-echonga-assures-bamugemereire-the-land-im-accused-of-grabbing-is-actually-my-personal-inheritance/> on 26 January 2021.

¹³⁰ Registered 3 October 2018.

¹³¹ Section 7, *Land Act of Uganda* (Chapter 227) (1998).

In this case, the criminal justice system was used against a number of people who challenged the company's title. The proprietors of the company are a retired police officer and his still serving son. Weaker parties to the conflict were arrested and charged with offences including criminal trespass, malicious damage to property, convicted and imprisoned. This did not resolve the question about who the genuine customary land owner entitled to convert it to private freehold was.

Criminalisation of civil disputes overwhelms the weaker party by putting him/her in a conflict with the republic since criminal cases are usually prosecuted in the name of the state. Such weaker parties may fail to navigate the criminal justice system, yet in some instances the stronger of the parties have the capacity and the requisite connections with which to win cases.

Courts' jurisdiction threshold in trespass cases and implications for property

The hierarchy of Uganda's courts of judicature is a constitutional matter.¹³² They include lower courts (such as magistrate courts), high court, court of appeal and the supreme court.¹³³ Magistrate grade one court, chief magistrate court or the high court can entertain actions in trespass. The Magistrate Court Act (MCA) section 207 (1) gives chief magistrate courts unlimited jurisdiction to entertain actions in trespass (irrespective of the monetary value of the land in issue),¹³⁴ just like the high court with unlimited jurisdiction covering trespass.¹³⁵

This interpretation is founded on the reasoning that the tort of trespass to land just like assault, battery and defamation is incapable of pecuniary estimation. Whereas that is the literal interpretation of the section 207 (1) MCA, it is a narrow inference of what a court must take into account when determining whether or not it has jurisdiction to entertain a matter. Jurisdiction is not only determined by the cause of action or value of the subject matter but also the remedies sought. Jurisdiction was defined in *Uganda Revenue Authority v Rabbo Enterprises (U) Ltd & another*¹³⁶ (Prof. Lillian Tibatemwa- Ekirikubinza JSC) as

¹³² Article 129(1), *Constitution of Uganda* (1995).

¹³³ Article 129(1), *Constitution of Uganda* (1995).

¹³⁴ As amended by the *Magistrate Courts (Amendment) Act* (2007).

¹³⁵ Article 139, *Constitution of Uganda* (1995) (As amended).

¹³⁶ *Uganda Revenue Authority v Rabbo Enterprises (U) Ltd & another* (2004), Supreme Court of Uganda.

Authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. ...where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.

Statutory jurisdiction limits which should be observed by court include restrictions on pecuniary jurisdiction (extending to type/nature of the remedies court can grant), geographical jurisdiction and the nature of the cause of action. Restrictions ensure that disputes are handled by courts with the requisite competences to deliver justice and protect property within their pecuniary jurisdiction.

In *National Medical Stores v Penguins Ltd*,¹³⁷ the respondents sought to recover 13 million Uganda shillings from the appellants. The magistrate grade 1, awarded them Uganda shillings 59,535,362/= (special, general damages and interest). It was challenged for being in excess of pecuniary jurisdiction of 20 million shillings for that court. Upholding the appeal, court held

. . . the law is that a magistrate cannot award damages over and above the pecuniary jurisdiction when a grade one magistrate makes an order awarding general damages the sum of which exceeds the monetary jurisdiction . . . set by the law, such magistrate would be exercising jurisdiction not vested in him. An order made without jurisdiction is a nullity.

In *Opedo Patrick & 16 others v Medard Kiconco*,¹³⁸ the respondent was the registered proprietor of land in Kyadondo Block 206 Plot 671 at Mpererwe. He brought an action in trespass to land and nuisance against the appellants seeking orders including vacant possession. The chief magistrate of Nabweru had found in favor of the plaintiff and issued eviction orders against the defendants. The properties on the land were valued at more than 200 million Uganda shillings. On appeal to the high court, the chief magistrate's orders were declared null and void for lack of jurisdiction. Eudes Keitirima J stated

. . . the jurisdiction of the court should not only be determined from the cause of action or value of the subject matter where it applies, but also the remedies being sought A suit to recover possession of land includes broadly speaking a claim to everything above the surface of the land. The value of the structures that were to be

¹³⁷ *National Medical Stores v Penguins Ltd* (2010), High Court of Uganda.

¹³⁸ *Patrick & 16 others v Medard Kiconco* (2018), High Court of Uganda.

demolished had to be ascertained for the trial magistrate to determine whether she had the pecuniary jurisdiction to order for their demolition.

Despite the unlimited jurisdiction of chief magistrates' courts in trespass cases, they should not award damages greater than their pecuniary jurisdiction of 50 million Uganda shillings. Where consequential orders for demolition and eviction orders are sought. The court must take into account the monetary value of the properties sought to be demolished in assessing whether it has jurisdiction. If this exceeds its pecuniary jurisdiction, the court has no jurisdiction. The MCA section 207 (4) is instructive on this

In any suit where it is impossible to estimate the subject matter at a money value... no decree shall be issued for an amount on the claim exceeding the pecuniary limits of the ordinary jurisdiction of the court passing the decree.

To do so would be in violation of the rights of persons affected by such demolition orders. It is therefore argued that weaponisation of trespass has been by abuse of jurisdiction thresholds by courts of law, thereby delivering injustice in trespass cases.

VII. Conclusion

This paper has shown that civil trespass and criminal trespass were intended to facilitate enjoyment of property by either payment of damages or criminal sanctions for the transgressor. This paper shows that increased values of land, higher demand for it, population pressure, have intensified conflicts over land.¹³⁹ Tenure insecurity, malfunctioning land governance and dispute resolution institutions lead to a search for quicker alternatives by which to secure interests in land (within the law) amidst intense competition for it.

(Mis)-application or weaponisation of criminal and civil trespass is a growing phenomenon, whereby the tort of trespass and the penal laws on criminal trespass are used as tools to perpetuate land fraud. Fraud/corruption which is a big factor in Uganda's land governance practice.¹⁴⁰ It is mostly used by highly placed individuals in society to create a space within which to purport and assert property and use rights to land, while keeping out others with legal

¹³⁹ Deman B, 'Introduction', in Deman B, Odegaard R & Sjaastad E (eds) *Conflict over land and water in Africa*, James Carrey Ltd, 2007 2.

¹⁴⁰ Nakayi R and Twesiime-Kirya M, 'The legal, policy and institutional framework of land governance in Uganda', 21, 41.

rights to property such as statutory tenants under the Land Act. Maladministration in both land and criminal justice sectors as a result of greater systems' transformation. Peeling the discursive frames of the foregoing is beyond the scope of this paper.

The proliferation of institution and dichotomies between the statutory and customary is another factor leading to lack of clarity about where to file a suit regarding property/land rights.¹⁴¹ Limited knowledge among the common people about the distinction between civil and criminal trespass and implications for filing each is at times abused by those with knowledge to criminalise civil disputes for their benefit.

Weaponisation of trespass in general arises when legal processes are abused, to deter proper administration of justice. This has been experienced by many and also raised in cases before court of law. In *Uganda v Ssonko*¹⁴² it was noted

Courts have taken judicial notice of the state criminalizing land disputes and would look for possible charges under the Penal Code Act to criminalise a civil land matter. It is also common knowledge that disagreements in Land matters especially over land ownership have also led to commission of crime in either defence of the land or in an effort to grab the land. It is therefore the responsibility of the court to execute its constitutional mandate of resolving disputes between the parties following the well laid legal principals of the law and procedure. *Where evidence adduced before court shows that it is purely a land matter that was criminalized, by the officers of the DPP working in cohorts with the complainant, the court should pronounce itself on the criminal matter using the known standard and burden of proof and where necessary award damages for malicious prosecution against the complainants.* This might deter instances of criminalising land or civil matters because there is no justification whatsoever for criminalizing civil matters when we have functioning civil courts, delays and challenges notwithstanding. (emphasis added)

Granting damages in malicious prosecution to the victim of criminal charges where a civil action would be most suited is commendable. It may reduce cases of criminalization of land disputes but may not be a cure-all. It should be in addition to an overhaul of the justice system to improve the functioning of civil courts to make them attractive to disputants and put safe guards in the criminal justice system against criminalisation of land disputes.

¹⁴¹ Kobusingye DN, Van Leeuwen M and Van Dijk H, 'Where do I report my land dispute? The impact of institutional proliferation on land governance in post-conflict Northern Uganda' 48 (2) *Journal of Legal Pluralism and Unofficial Law*, 2016, 238, 255, 240.

¹⁴² *Uganda v Ssonko* (2019), High Court of Uganda.

Punishing criminal trespassers under the penal law benefits some victims with genuine cases. No doubt that section 302 of the Penal code is valuable although evidence here shows it is susceptible to abuse. Uganda needs to subject that section to scrutiny, amend it to offer more clarity and detail on more degrees of culpability and corresponding punishment. This may offer clarity on instances where it should be applied and not, excluding its application to cases where civil land disputes are underlying. The system should also be recalibrated such that the DPP can identify such cases with underlying civil land conflicts and advise the parties on where to rechannel them for resolution. The civil justice system need to be functional and fast to be attractive to litigants if referred there.

Also, the negative consequences of handling trespass cases in lower courts should be addressed, especially in situations where they arise amidst land ownership contests. Change the system to have civil trespass handled by the High Court, in a holistic manner that involves resolving underlying conflicts related to ownership rather than in the lower courts where they are protracted and at times affected by pecuniary jurisdiction thresholds.