

UGANDA / JUDGMENT

Katenta and Another v Mugisa (HCT-01-CV-CS 57 of 2007) [2024] UGHC 748 (16 August 2024) [2024] UGHC 748

COURT

High Court of Uganda

BEFORE

Wagona, J

CASE / FILE NUMBER

HCT-01-CV-CS 57 of 2007

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

3 HCT – 01 – CV – CS – 0057 OF 2007

1. NALONGO KATENTA

2. MASHEMERERWA WINSTONE :::::::::::::::::::: PLAINTIFFS

6 VERSUS

VINCENT MUGISA :::::::::::::::::::: DEFENDANT

Corum: HON. JUSTICE VINCENT WAGONA

9 Delivered on: 16/08/2024

Summary: Civil Procedure - Pleadings;- A defendant is required to plead facts upon which his or her defense is based. Where a defendant conceals his defense

- 12 *or fails to plead facts on which his or her defense is premised, he cannot be permitted to lead evidence outside his or her defense. This is premised on the view that a party who gives evidence contrary to his pleadings is deemed to be a liar.*
- 15 *Under the rule against departure from pleadings, such a defendant is estopped from leading evidence outside his or her defense.*

Introduction**

- ### The Case of the Plaintiffs:

- Katenta died in 1996. The 1st plaintiff acquired more land by purchase, on one of which, she constructed a homestead where she stays.
- In 1992, the 1 st 18 plaintiff, through a power of attorney, representing Charles Katenta, the 2 nd plaintiff, and Aurthur Katabazi filed a suit against William Kirokimu for trespass over the land where Judgment was entered in her favour.
- 21 The defendant in or about July 2007, without any claim or color of right entered upon the plaintiffs' land using his workers and extensively cut down 1000 mature trees covering over 120 acres. The defendant also cut down the plaintiffs' fully
- 24 grown tea covering 10 acres and further destroyed a semi-permanent house built by

the plaintiffs. The plaintiffs engaged a surveyor to have the issue solved which was ignored by the defendant. The defendant wantonly and whimsically continued to

- 3 trespass on the suit land. The acts of the defendant have caused loss to the plaintiffs where they seek to recover special damages for; (a) loss of 1000 mature trees cut valued at 200,000 each translating into shs 200,000,000/=; loss of income from tea
- 6 sales from the date of the cause action amounting to shs 98,000,000/=; loss of 3 years' income from 1 acre of destroyed Vanilla Gardens, costing shs 5000 per kilogram; general damages for the continued acts of trespass by the defendant.

9 The Case of the Defendant:

The defendant contended that the plaintiffs were not entitled to the claims sought in the plaint. That there existed no sale agreement for the land comprised in Mwenge

12 FRV Block 149, Plot 2, land at Gali and the same had never been surveyed and ascertained, it does not exist and was not registered.

That if the plaintiffs acquired a lease offer over the 120 acres, the lease offer expired 15 and the same was never renewed and as such the land reverted to the controlling authority and the plaintiffs have never occupied the said land. That defendant has never been asked by the plaintiffs to make any input to solve any survey errors.

- 18 That the defendant contended that he was the lawful owner of land comprised in FRV 149, Plot 5 at Gali which he bought from Polycarp Kanyankole who signed the sale agreement and transfer forms in his favour. Twezire Richard and Denis Sabiiti
- 21 relinquished their interests to the defendant. After the purchase, he assumed possession of the said land where he developed a permanent residential house, a farm, a big banana plantation, fish ponds and cut trees for timber. All the activities

of the defendant were restricted to his land and he has never trespassed on land owned by the plaintiffs.

- 3 The defendant included a counter claim where he sought a permanent injunction against the plaintiffs/counter defendants against acts of trespass, general damages and costs of the counter claim. He averred that in 2004 or thereabout, the 1st plaintiff
- started to plant tea on his land. That he protested and the 1st 6 plaintiff insisted that the defendant opens boundaries for his registered land to establish whether the land falls within the defendant's titled land or not. That a surveyor was appointed who upon

- 9 the boundary opening, it was established that the suit land fell within the defendant's titled land. That the defendant/counter claimant made several demands to the plaintiffs to stop the continued trespass which demands were ignored. The 1st
- 12 plaintiff continued with the illegal activities where she cleared the land and put a semi-permanent house. The counter claimant thus asked for reliefs inter-alia: a declaration that the suit land belongs to the defendant; a declaration that the plaintiffs
- 15 are trespassers; an order of vacant possession and eviction against the plaintiffs; a permanent injunction, general damages, costs and interests on general damages and costs.

18 Reply to the Defense and Counter Claim:

In reply to the written statement of defense and counter claim, the plaintiff averred that the allegations by the defendant that the late Polycarp Kanyankole did not sell

- 21 the land or sign on the agreement were not supported with a report of a handwriting expert. That the surveyor who was appointed by the defendant to open the boundaries was unqualified and as such his report and findings were baseless. That 24 the lease offer was secured way back in 1987 and granted by Uganda Land
- Commission in 1992 which was later converted into freehold. That the defendant

took possession of the land (Plot 5) in 2007 and not 1992 and thereafter he embarked on massive evictions. The plaintiffs thus asked court to reject the counter claim with 3 costs.

Issues:

At scheduling, the following issues were framed for determination by Court:

- 6 1. Whether the plaintiffs are the owners of the suit land.
- 2. Whether the defendant has trespassed on the suit land.
- 3. Whether the plaintiffs have trespassed on Block 149, Plot 5.
- 9 4. What remedies are available to the parties?

Legal Representation and Hearing:

Mr. Edwin Tabaro appeared for the plaintiffs while Mr. Musinguzi Bernard appeared

- 12 for the defendant. The plaintiffs relied on the evidence of four witnesses namely; Nalongo Katenta (PW1), Caleb Mwesigwa (PW2), Mashemererwa Winston (PW3) and Sam Ndagano (PW4)*.* The defendant on the other hand presented three witnesses

- 15 that is himself as DW1, Musiimenta Stephen (DW2) and Kugonza Peter (DW3)** Each party presented various forms of documentary exhibits. A schedule to file written submissions was issued out to both counsel and only learned counsel for the
- 18 plaintiffs adhered to the schedule.

Burden of Proof and Standard of Proof:

The long settled position of the law is that the legal burden of proof rests upon the 21 plaintiff who is bound to do so, on the balance of probabilities. This principle is anchored in section 101 of the Evidence Act which is to the effect that whoever

desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. The term

- 3 *balance of probabilities* was put in proper prospection by *Lord Nicholls of Birkenhead* in *[re H \ (Minors)\ (Sexual Abuse: Standard of Proof) \ [1996] AC 563,](https://www.bailii.org/uk/cases/UKHL/1995/16.html) 586D-H,* thus:
- 6 *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court* 9 *will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before* 12 *the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is* 15 *usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability* 18 *standard is a generous degree of flexibility in respect of the seriousness of the allegation."*

The evidential burden on the other hand per sections 102 and 103 of the Evidence 21 Act keeps shifting depending on facts as alleged by a given party to prove the existence of such facts.

CONSIDERATION BY COURT:

24 Issue No. 1: Whether The Plaintiffs Are The Owners of the Suit Land:

(1) Land Comprised in Block 149, Plot 2 Approximately 39.3 Acres Whose Ownership Is Claimed By The 2nd Plaintiff:

PW3 Mashemererwa Winstone the 2nd 3 plaintiff averred in the plaint that by an agreement dated 28/3/1987, he bought land from Polycarp Kanyankole at shs 1,600,000/=. Polycarp Kanyankole signed transfer forms in favor of the 2nd plaintiff 6 who had the land surveyed.

In his evidence in chief PW3 the 2nd plaintiff stated that he bought the said land from the late Polycarp Kanyankole and an agreement was made to that effect (NB-1).

- 9 They used to grow tea on the land. By the time they were chased, he had 7 acres of young tea and 2 acres of vanilla. The defendant trespassed on the said land, cut the tea and vanilla. In cross examination PW3 the 2nd plaintiff stated that he paid a sum
- 12 of shs 1,600,000/= as the consideration, in installments; he did not sign as a purchaser. The agreement did not show that he was buying part of Mailo Block 149. The agreement refers to 30 acres in Ganyinayo. The survey shows 29 acres and this
- 15 could be explained by the surveyor. The transfer forms were signed in 1989, 2 years after the purchase. The transfer forms indicated 29.2 acres though it looks it was tampered with (NB-1).
- 18 Sam Ndagano (PW4), a retired land surveyor for Kyenjojo District stated that he did the survey of the land for PW3 the 2nd plaintiff and submitted the file with a report and a sketch to the Senior Staff Surveyor Fort Portal together with the
- 21 instructions to survey (PEX1 & PEX2). He knew that Plot 2 Block 149 originally belonged to Polycarp Kanyankole. In cross examination he stated that he got the instruction in 1993 and did the work properly. He got the proper coordinates but 24 issues arose when it came to plotting.

On the other hand DW1 (the defendant) stated that the 2nd plaintiff had no agreement to confirm that he bought the land from Polycarp Kanyankole because the agreement

- 3 dated 28/03/1987 (NB-1) does not mention Block 149 Plot 2. The LC.1 Chairperson who signed on NB-1 was from Ganyinayo Village yet the 2nd plaintiff claimed the land was in Matiri. The purchase agreement is contradictory as to whether the 2nd
- 6 plaintiff paid shs 1,600,000/= or 900,0000/=. The transfer forms show that they were signed in 1989 yet Polycarp Kanyankole was not registered as proprietor then. On the transfer forms, Barongo Santo signed as LC1 Chairperson yet there were no LC
- 9 councils in 1989. The size of the land on the transfer form was inconsistent. The survey data obtained shows that plot 2 is at Ganyinayo next to the defendant's home. The contradictions show that the 2 nd plaintiff's claim was fabricated, fraudulent and

- 12 without merit. In cross examination DW1 the defendant stated that he was in possession of the entire land. That Plot 2 belonged to Polycarp Kanyankole which he gave to the surveyor who made for him a title. That he also bought land comprised
- 15 in Plot 2 but did not have a title. That he bought this land at the same time. That he bought it together with plot 1. That the report marked F shows that land identified as C is 29 acres and he bought the same from Polycarp Kanyankole.
- 18 DW2, **Mr. Kugonza Simon Peter**, the District Staff Surveyor for Kabarole District, testified that when he did boundary opening on the orders of this court together with Mr. Mwesigwa Caleb, the plaintiffs' surveyor, it was established that Plot 2 Block
- 21 149 existed on the ground and was computed as 11.8 hectares or 29.16 acres. That in the further survey directed by court and conducted on 2/1/2015, the said plot 2 was marked as area C measuring 29 acres which was land for Mr. Mashemererwa
- (the 2nd 24 plaintiff) bought from Polycarp Kanyankole.

Analysis:

I have examined the evidence and the pleadings of the parties. In the plaint, the 2nd plaintiff averred that the defendant trespassed on his land comprised in Block 149 3 Plot 2 which he had acquired by way purchase from the late Polycarp Kanyankole

- on 28th March 1987 by virtue of the purchase agreement NB-1.
- I have observed that the defendant in his written statement of defence and counter 6 claim did not lay any claim of ownership over **plot 2 of Block 149**. The defendant in his first written statement of defense filed on 7th August 2007 stated under paragraph 6 that: "**The defendant has no knowledge of the contents of paragraph**

9 7 and 8 as they refer to another plot 2 of Block 149 and not plot 5 over which the defendant holds interest". This averment in my reading clearly demonstrates that the defendant was originally not aware of the existence of Plot 2 Block 149 and

12 nor did not claim any interest therein.

The defendant in his amended written statement of defence filed on 27th September 2011 in Para 6(ii) stated that: "**That Mwenge Freehold Register Block 149 Plot**

- **15 No. 2, land at Gali does not exist and therefore the Plaintiff's allegation in paragraph 6(b) that the second Plaintiff's land is registered under Mwenge Freehold Register Block 149 Plot No. 2, land at Gali is false.**"

- 18 I have noted that the defendant in his pleadings that is the written statement of defense and counter claim, claimed ownership over **Block 149, Plot 5** land at Gali and made no claim over **Block 149, Plot 2** land at Gali claimed by the 2nd plaintiff,
- 21 and later in his same pleadings, the defendant claimed that the said Plot 2, did not exist. The defendant in his evidence in court came up with the claim that he bought the said Plot 2 from Polycarp Kanyankole. I find this testimony by the defendant to
- 24 be an afterthought and a complete departure from his pleadings where he emphasized that he only claimed interest in **Block 149, Plot 5**.

In his evidence in chief, apart from criticizing the documents of ownership presented by the 2nd plaintiff, the defendant adduced no evidence to support his claim of 3 ownership of plot 2 Block 149 or his purchase of it from Polycarp Kanyankole. I find the defendant's evidence as to his acquisition of plot 2 Block 149 weak and incredible, especially in the currency of his own WSD where he stated that he only 6 claimed interest in plot 5 Block 149.

The evidence of PW3 the 2nd plaintiff was consistent on how he acquired the same land and the payments made. He tendered in court NB-1 being an acknowledgement

- 9 by Polycarp Kanyankole for a sum of shs 1,600,000/=. The item in the acknowledgement was land per the description thus: **"The whole land goes via the small ditch, below Kyamulegu. He goes along the ditch facing Rwensama, at**
- **12 top he boarders with Forest Reserve. He goes along the ditch upto the end of the land going straight to the end of the line down to the straight bushes."** The said description clearly indicated that he was buying land. The 2nd plaintiff indicated
- 15 that after purchase, he assumed possession of the same land where he had planted tea of about 7 acres and Vanilla of 2 acres which were destroyed by the defendant. He also stated that the late Polycarp Kanyankole signed transfer form for 39 acres
- 18 and the consent to transfer. (*MD-1 and MD- 2*). This evidence was not successfully challenged by the defendant.

The defendant contended that NB-1 was forged on account that it had a stamp for a 21 Chairperson LC1 when in 1989 it was the RC system. Further that the acreage on MD-2 was tampered with, making the documents suspects of forgery. These claims of forgery by the defendant however, remained unproven and did not negate the 2 nd

24 plaintiff's evidence that he acquired the land from Polycarp Kanyankole by purchase

by virtue of NB-1, which evidence of ownership by the 2nd plaintiff, was not successfully countered by the defendant.

- The 2nd 3 plaintiff's ownership of the said land is further authenticated by the defendant's own submissions in HCT – 01 – CV – MA – 0070 – 2007 (PE10) where he stated that; **"I apply for lifting of the Interim Order. The applicants claim to**
- **6 own 39.2 acres of land on Block 149, Plot 2 at Gali while my land is comprised in Block 149 Plot 5."** This statement further supports my view that the defendant did not claim any interest in Plot 2 Block 149 but raised it as an afterthought.
- 9 It has been observed that the acreage of the land on paper seems to have been altered from 29.16 acres to 39.2 acres. This was admitted by the 2nd plaintiff in passing where he stated in cross examination that; **"*Application for consent to transfer. I***
- **12 *gave it to my lawyer. According to this form 39.2 acres. It looks 29.2 acres, there are tampering. It is 39.21 acres from 29.2 acres. Yes, again from 14.5 to 14.8 hectares. It is from my lawyer. No, we are not the ones who did the tampering*."**
- 15 However, DW2, Mr. Kugonza Simon Peter, the District Staff Surveyor for Kabarole District, testified that when he did boundary opening on the orders of this court together with Mr. Mwesigwa Caleb, the plaintiffs' surveyor, it was established that
- 18 Plot 2 Block 149 existed on the ground and was computed as 11.8 hectares or 29.16 acres. That in the further survey directed by court and conducted on 2/1/2015, plot 2 was marked as area C measuring 29 acres which was land of Mr. Mashemererwa
- (the 2nd 21 plaintiff) bought from Polycarp Kanyankole. I shall therefore take the area on the ground as the land that Polycarp Kanyankole sold to the 2 nd defendant comprised in Plot 2 Block 149 at Gali.
- In conclusion, it is my finding that the evidence of the 2nd 24 plaintiff is more believable, and that the 2nd plaintiff has, on a balance of probabilities, proved his claim against

the defendant, that Plot 2 Block 149 land at Gali exists on the ground and belongs to the 2nd plaintiff. I therefore find that the 2nd plaintiff is the rightful owner of land 3 comprised in Plot 2, Block 149 at Gali.

(2)120 Acres of Freehold Land At Matiri Whose Ownership is Jointly Claimed By The 1st And 2nd Plaintiffs:

- The 1st 6 plaintiff is a holder of letters of administration for the estate of her late husband Charles Katenta. It is the case of the plaintiffs that the late Charles Katenta, Aurthur Kabazi and the 2nd plaintiff owned the disputed 120 acres of land. The late
- Charles Katenta, Aurthur Kabazi and the 2nd 9 plaintiff subsequently obtained a lease offer under Min. No. 10/92(a) 39. The plaintiffs together with Arthur Katabazi later obtained a freehold. The late Charles Katenta, Arthur Katabazi, the 2nd plaintiff and

- their families, have occupied the land since 1987. In 1992, the 1st 12 plaintiff through a power of attorney representing Charles Katenta, the 2nd plaintiff and Arthur Katabazi filed a suit against William Kirokimu for trespass over the same land that is now in
- 15 dispute and judgment was delivered in her favour. Arthur Katabazi died in 1993; and Charles Katenta died in 1996 leaving the plaintiffs on the land. The defendant trespassed on the same land in 2007.
- 18 PW1 (Nalongo Jenina Katenta) testified that the 120 acres of land in Matiri/Ganyinayo was acquired in 1991 bought from the late Murasira a Forest Officer through the Parish Chief and the LCs. They later applied for the land together
- with the 2nd 21 plaintiff and Arthur Katabazi and were given a lease offer (**The Lease Offer is PE7 dated 8/5/1992, for 120 acres (48 hectares), addressed to the late Charles Katenta, the 2nd plaintiff, and Arthur Katabazi, citing their application**
- **24 dated 14.11.89)** and they surveyed the land before the defendant came in the area. Later they obtained a freehold offer from Kyenjojo District Land Board (**The**

Freehold Offer is PE8 dated 26/4/2007, for 120 acres, addressed to the plaintiffs and Arthur Katabazi, citing their application dated 25.4.2007).

- 3 PW1 told court that she had ever litigated over the suit land on behalf of Charles Katenta, the 2nd plaintiff and Aurthur Kabazi against William Kirokimu and obtained judgment in her favour (**PE9 is the Judgment dated 8.1.93 in Civil Suit No. MFP**
- **6 12/92 in the Chief Magistrates Court of Fort-portal holden at Nyantungo; C. Katenta, W. Mashemererwa, A. Katabazi versus William Kirokimu).**

PW1 testified that after the trespass by the defendant, she filed this suit and in the 9 proceedings in MA 070 of 2007, the defendant admitted that she has interest in the said land (**PE10 are the proceedings).**

In cross examination, PW1 stated that her husband died in 1996 and her brother 12 Arthur Katabazi in 1993. The land of her husband was where she was occupying. She was in possession before the trespass occurred. Her land is in two villages that is Ganyinayo and a small part in Matiri, although the lease offer (PE7) indicates that 15 the 120 acres is in Ganyinayo. It was the survey report that placed the land in

- Ganyinayo. At the time of inspection, the land was vacant. In 2007, they applied for conversion of the leasehold into freehold for 120 acres. The application was dated
- 18 25/4/2007 and the offer was granted on 26/04/2007. The 120 acres is now occupied by the defendant.

PW3 (Mashemererwa Winston) testified that he jointly owned the 120 acres with 21 Nalongo Katenta and Arthur Katabazi. They took possession and he built a house thereon. That by the time the defendant took over the land it had mature and young trees (a forest). In cross examination PW2 stated that they applied for a lease of 5 24 years and later converted it to freehold. The freehold offer was granted on

25/04/2007. The land was inspected by the land committee. In re-examination, PW2 stated that he first used the land in early 1990's before the defendant. That the lease

- 3 is dated 1992 and before it was granted, the inspection team inspected the land. The trespass by the defendant happened in 2007 though it started in 2002.
- **PW4 (Sam Ndakano)** testified that he is the one who surveyed the land for the three people, that is, Charles Katenta, the 2 nd 6 plaintiff, and Arthur Mutabazi, in 1993. He conducted the survey, compiled a Job Record Jacket (JRJ) (PEX1 & PEX2) and submitted it to the Senior Staff Surveyor, which was used for plotting by the
- 9 cartographer. The defendant was brought to court because he was claiming the land. At the time PW4 surveyed the land, the defendant did not own any land there. PW4 knew about the defendant's interests in 2009. In cross examination PW4 stated that
- 12 he picked the correct coordinates. The land was approximately 48 hectares. At the time he surveyed, the land had maize gardens of the 1st plaintiff and scattered trees. The problem was caused by the plotting at lands office. The mistake was not his
- 15 making. In re-examination, PW4 stated that the distance between where they surveyed and where the land was plotted is about 1 ½ kilometers.

PW2 (Caleb Mwesigwa), a registered private surveyor testified that he was 18 instructed by Mwesigwa Rukutana & Co. Advocates to survey and establish the status of Plot 3, Block 149 at Matiri. He did the work and produced a report (DE4). PW2 testified that there was also adjacent land described as public land 120 acres which the 1st 21 plaintiff applied for. PW2 observed that the same area was cultivated by the defendant.

DW1 Vincent Mugisa the defendant on the other hand stated that he acquired plot 24 5 Block 149 by way of purchase from the registered proprietor Polycarp Kanyankole and further went on to acquire the untitled neighbouring land by first occupation.

The untitled neighbouring land was between his titled land and land belonging to National Forestry Authority measuring 41 hectares. That he enjoyed quite 3 possession of the said land until 2007 when the plaintiffs started claiming interest therein by filing this suit. That all the defendant's activities were restricted to his titled land and the un-surveyed neighbouring land measuring 41 hectares and he 6 never trespassed on any customary land owned by the plaintiffs.

In cross examination DW1 stated that he was the first person to settle in the area in 1992 but he did not survey the land to establish its extent until 2007. That the 120 acres were 9 in Block 163, Plot 2 and it was former public land which he acquired which he acquired by first occupancy (first occupier) and he cleared it up. The land was between Polycarp Kanyankole's mailo land and the NFA forest. It was about 41 acres. That the 1st 12 plaintiffs' 120 acres existed separately from his 41 hectares.

DW2 (Kugonza Simon Peter), the District Staff Surveyor Kabarole District testified that in early November 2012, he received an order of court dated 2/11/2021 15 issued by Justice Mike Chibita in Civil Suit No 57 of 2007 to do a re-survey of Block 149 Plot 1, 2 and 3 and ascertain the location of the 120 acres allocated to the plaintiffs. On 14/11/2011, he and a one Mwesigwa Caleb, the plaintiff's registered 18 surveyor did a survey and prepared a report dated 20/11/2012. Before the survey, they obtained an updated cadastral print at different scales showing location of plot 2 and 3 (now plot 4 and 5), Block 149 from Kyenjojo and Kabarole District from 21 Entebbe. Their findings were that Plot 1 Block 163 under Ref LWFP 5154 registered in the names of Mashemererwa, Katabazi and Katenta with 48.65 hectares or 120 acres surveyed on 27/06/2004 was neither occupied by the defendant nor the 24 plaintiffs and its location was claimed by other customary tenants. The un-surveyed land between Block 149 and the forest reserve was occupied by the defendant, which

was computed as 41 hectares or 101 acres. **DW2** further testified that on the 15th/04/2012, he received another order directing him as a representative of the 3 defendant and Meridan Surveyors to return to the field and give a comprehensive report. The instructions were to locate the 30 acres claimed by the plaintiffs within the defendant's estate. They did a joint survey and prepared a report dated 2/1/2015.

- 6 They established that the 120 acres claimed by the plaintiffs was available but occupied by some other people. In cross examination **DW2** stated that they were provided with the map for 120 acres showing that Plot 1, Block 163 is surveyed and
- 9 titled in the names of Katenta and Mutabazi. The plaintiffs' claim was at variance with the survey. Where the map was showing is not where the 1st plaintiff's land was located. In his view, a re-survey could solve the problem. There was a possible error
- 12 during survey. In re-examination, **DW2** stated that for Plot 1 Block 163, they were given the survey data and they opened up the boundaries. The land was different from the one the plaintiffs showed them.
- 15 **DW3 (Musimenta Stephen)** stated that he was the General Manager of the defendant at his farm at Ganyinayo, Matiri Parish, Kihuura Sub County, Mwenge South Constituency since 2011 to 2019. The defendant used the land for cultivation.

- There was misplotting of the 120 acres which were supposed to be the land the 1st 18 plaintiff claimed.

Analysis:

- 21 The plaintiffs averred in their amended plaint and later testified to the basis of their claim to the land described as 120 acres that is claimed by the defendant. PW1 testified that they had been in occupation since 1987. They brought documentary
- 24 evidence of how they later applied for and obtained a lease offer and subsequently a freehold offer in respect of the same land. The Lease Offer is PE7, dated 8/5/1992,

for 120 acres (48 hectares), addressed to the late Charles Katenta, the 2nd plaintiff, and Arthur Katabazi, citing their application dated 14.11.1989. The Freehold Offer

- 3 is PE8 dated 26/4/2007, for 120 acres, addressed to the plaintiffs and Arthur Katabazi, citing their application dated 25.4.2007. This is the same land that PW4 (Sam Ndakano) surveyed for them. This is the same land described by **PW2 Caleb**
- 6 **Mwesigwa** described as public land 120 acres adjacent to Plot 3, Block 149. This is the same land that the plaintiffs showed **DW2 (Kugonza Simon Peter)**, to as the land they claimed, when court ordered PW2 to go on the ground and ascertain the
- 9 location of the 120 acres allocated to the plaintiffs. It was the evidence of the plaintiffs that the 120 acres is now occupied by the defendant. That by the time the defendant took over the land it had mature and young trees (a forest) and that the
- 12 trespass by the defendant happened in 2007.

PW1 told court that she had ever litigated over the suit land on behalf of Charles Katenta, the 2nd plaintiff and Aurthur Kabazi against William Kirokimu and obtained 15 judgment in her favour. PE9 is the Judgment dated 8.1.93 in Civil Suit No. MFP

- 12/92 in the Chief Magistrates Court of Fort-portal holden at Nyantungo; C. Katenta, W. Mashemererwa, A. Katabazi versus William Kirokimu.
- 18 The evidence of PW1 was that the said 120 acres was between the forest and the Mailo block belonging to Kanyankole. This is supported by PE9. The defendant in cross examination stated that this land was between his Mailo land that he had
- 21 bought from Polycarp Kanyankole and the NFA forest. This was further supported by PW2 and DW2. This is the same land claimed by the defendant on the basis that he was the first person to settle in the area in 1992. He states that in 1992, he did not 24 survey the land to establish its extent until 2007. That he enjoyed quite possession

of the said land until 2007 when the plaintiffs started claiming interest therein by filing this suit.

- 3 While in court testimony the defendant claims to have acquired the disputed 120 acres of land by way of first occupancy, it has been observed that the defendant in his first written statement of defense, the amended written statement of defence
- 6 (WSD), and in the counter claim, did not lay any specific claim of ownership over the disputed land and did not plead any facts in support of the manner of his acquisition of the land in issue. In the first WSD, his claim was restricted to land
- 9 comprised in Block 149 plot 5. He did not at all indicate in the written statement of defense and counter claim that he acquired the land in issue by first occupancy.

By adducing his reliance on acquisition or ownership by first occupancy only at trial, 12 the defendant is departing from his pleadings or introducing a new claim. The rule against departure under Order 6 rule 7 of the Civil Procedure Rules applies both to the plaintiff and the defendant. Where a defendant conceals his defense or fails to 15 plead facts on which his or her defense is premised, he cannot be permitted to lead evidence outside his defense. This is premised on the view that a party who gives evidence contrary to his pleadings is deemed to be a liar. (See: **Sebughingiriza v**

18 Attorney General in HCCS 251/2012). As such under the rule against departure, he is estopped from leading evidence in that angle.

Be that as it may, the defendant's evidence of acquisition by first occupancy is found 21 to be very weak when evaluated together with all the evidence as a whole. His evidence was not supported by any evidence either from a local leader or person who saw him use this land from 1992 as alleged. He stated in cross examination that after

24 purchase of the suit land, he never established the extent of the land and only surveyed it in 2007, which indicates that the defendant came to the suit land in 2007,

in line with the evidence of the plaintiffs that the trespass by the defendant happened in 2007 prompting them to file this suit in 2007.

- 3 In the proceedings in HCT 01 CV MA 0070 of 2007 (PE10), at page 1, the defendant indicated that his interests were in Block 149 plot 5. He did not talk about the unregistered land in issue which he now claims he acquired by first occupancy.
- 6 In the said proceedings he stated that his interests were confined to land comprised in Block 149 plot 5 and made no mention of the un-surveyed land in issue.

I have examined the totality of the evidence, the pleadings of the parties and the 9 exhibits relied upon by the parties. The plaintiffs were consistent on how they acquired the suit land and the fact that they were in uninterrupted possession, occupation, and use of the same until the defendant came in the picture. The 12 surveyors were shown the suit land to survey and that was

where the plaintiffs were in possession, occupation and use. During the course of their work, the surveyors and other professionals involved caused the plaintiffs' land to be located in a 15 different place in survey maps and other documents. This cannot dispossess the plaintiffs of their lawful interest or confer their interests in the suit land to the defendant or any other person. The identified survey errors of misplotting can be 18 addressed practically and separately. The contestation as to the exact village where the land in issue is located has little relevance to the established facts that the land in issue belonged to the plaintiffs. At locus, I observed that the two villages of 21 Ganyinayo and Matiri neighbor one another. It was the physical land in dispute where the plaintiffs claimed and established their interest with evidence; not the one wrongly plotted in survey and mapping documents.

24 I therefore find on a balance of probabilities that the plaintiffs presented a more credible and convincing case than that of the defendant. The plaintiffs have on a

balance of probabilities proved their claim against the defendant. I therefore find that the 120 acres of land at Matiri located between the National Forestry Authority 3 (NFA) forest and the Mailo block originally belonging to Polycarp Kanyankole,

- rightfully belongs to the plaintiffs.
- **3. 50 Acres of Land Claimed by the 1st Plaintiff as Having Been Purchased 6 out of Polycarp Kanyankole's Mailo Land; Five Pieces of Land Measuring Different Sizes Whose Ownership Is Claimed By The 1st Plaintiff; and the Status of Plot 5, Block 149 Claimed by the Defendant:**
- 9 PW1 (Nalongo Jenina Katenta) testified that she owned about 50 acres of land that she had bought from Polycarp Kanyankole from part his Mailo. PW1 further testified that she owned 30 acres bought from Kirokimu in 1989 (per agreements PE1 &
- 12 PE2). She also owned 30 acres bought from Colonel Kapere (per agreements PE3 & PE4), containing her home. That she was only using 5 acres and the rest had been trespassed upon by the defendant. That she also owned 20 acres bought from Mzee
- 15 Beyeza in 1987 (per agreements PE5 & PE6) located close to the defendant's home, but by then, the defendant was not in the area. In cross examination, PW1 stated that she was in possession before the trespass occurred. She bought the land in PE1 dated
- 18 26/10/1989 and in PE3 before the death of her husband. Her husband was giving her the money to buy the land. She also bought land after the death of her husband.
- PW2 (Caleb Mwesigwa), a registered private surveyor testified that he was 21 instructed by Mwesigwa Rukutana & Co. Advocates to survey and establish the status of Plot 3, Block 149 at Matiri. He did the work and produced a report (DE4). His findings were that the plot had been surveyed and mapped using the Plane Table

- 24 Method. When he surveyed using the Universal Transverse Mercator method (UTM) which was more accurate and uses satellite and geographical coordinates, he realized

that the plot had survey errors. The land was wrongly surveyed and this resulted into mislocation on the map. After opening the boundaries, PW3 realized that the land

- 3 had been plotted on the map, a distance of about one kilometer away from its correct position. The 1st plaintiff's land was therefore wrongly plotted on the map. PW3 therefore recommended that the 1st plaintiff's land should be accurately surveyed
- and plotted in its correct position on the map. PW3's interpretation was that the 1st 6 plaintiff's land, which he gave as Plot 2A, originated from Plot 1. The 1st plaintiff's plot was available on the ground but was wrongly plotted on the map – it was wrong
- in location, orientation, shape and scale. That he was informed by the 1st 9 plaintiff that the gardens on her land were for the defendant. That Plot 1 was subdivided into plots 2 and 3. Plot 2 for Nalongo and Plot 3 for Mugisha and both existed.
- 12 In cross examination PW3 stated that he did not go to the land physically. There was a field surveyor and PW3 was the supervisor. That he went to the ground after the initial survey and then made a report. PW3 testified that it was impossible that the
- 15 person who surveyed the land was shown the boundaries; the said person was only told to survey 39 acres. That plot 2A was the correct position of the 1st plaintiff's land since she claims it was part of plot 1. That the surveyor who subdivided plot 2
- 18 and 3 is the one who made the error or the cartographer misinterpreted the surveyor notes. That the problem had originated from the original survey and what was required was a resurvey and the problem would be solved. In re-examination the 21 witness said that if the boundary issue was solved then there would be no trespass.

DW1 Vincent Mugisa the defendant on the other hand stated that he acquired plot 5 Block 149 by way of purchase from the registered proprietor Polycarp 24 Kanyankole. That the agreement for purchase from the late Polycarp Kanyankole was made on 11th May 1992 and on the same date Polycarp Kanyankole signed

transfer forms and handed over the title to him. That upon purchase, he took possession of the land where he constructed a house thereon, established a cattle 3 farm, fish ponds and the rest was used for cultivation.

DW2 (Kugonza Simon Peter), the District Staff Surveyor Kabarole District testified that in early November 2012, he received an order of court dated 2/11/2021 6 issued by Justice Mike Chibita in Civil Suit No 57 of 2007 to do a re-survey of Block 149 Plot 1, 2 and 3. On 14/11/2011, he and a one Mwesigwa Caleb, the plaintiff's registered surveyor did a survey and prepared a report dated

20/11/2012. Before the 9 survey, they obtained an updated cadastral print at different scales showing location of plot 2 and 3 (now plot 4 and 5), Block 149 from Kyenjojo and Kabarole District from Entebbe. Their findings were that the house belonging to the 1st plaintiff was 12 partly in Plot 5 (formerly Plot 3) while that of the defendant was in Plot 2 and partly in Plot 5. The area of plot 4 was computed as 8.1 hectares or 20 acres and plot 5 as 146 hectares or 368.40 acres. DW2 further testified that on the 15th/04/2012, he 15 received another order directing him as a representative of the defendant and Meridan Surveyors to return to the field and give a comprehensive report. The

18 defendant's estate. They did a joint survey and prepared a report dated 2/1/2015. They established that the area marked A which is 3 acres occupied by the 1st plaintiff's homestead is outside the Mailo block originally of Polycarp Kanyankole.

instructions were to locate the 30 acres claimed by the plaintiffs within the

- 21 The original Mailo was 418.6 acres. The area Marked B measuring 51 acres belongs to the 1st plaintiff but located inside former Polycarp Kanyankole's mailo land. The area marked D measuring 325 acres belonged to the defendant and it is where he had 24 a homestead in the south west corner. The area marked E measuring 8 acres belongs
- to the defendant. In cross examination DW2 stated that the plaintiffs' claim was at

variance with the survey. The defendant's house was partly in plot 2. In his view, a re-survey could solve the problem.

3 Analysis:

- *(i) 50 Acres of Land Claimed by the 1st Plaintiff as Having Been Purchased out of Polycarp Kanyankole's Mailo Land*
- 6 PW1 (Nalongo Jenina Katenta) testified that she owned about 50 acres of land that she had bought from Polycarp Kanyankole from part his Mailo. When she attempted to tender the purchase agreement it was objected to on the basis that this claim was
- 9 not pleaded in the plaint. The agreement was not admitted by court on the ground that it was not supported by the plaint.

I have observed that the amended plant filed in court in September 2007 in paragraph

12 4, limited itself to 5 pieces of customary land and made no mention of land bought out of Polycarp Kanyankole's Mailo land anywhere in the said plaint.

Order 6 rule 7 of the Civil Procedure Rules prohibits departure from pleadings by 15 the parties and states as follows:

"7. Departure from previous pleadings.

No pleading shall, not being a petition or application, except by way of 18 *amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."*

21 The position in the above provision was re- affirmed in the cases of *Jani Properties Ltd. vs. Dar es Salaam City Council [1966] EA 281,* and *Struggle Ltd vs. Pan African Insurance Co. Ltd. (1990) ALR 46 – 47,* that the parties in civil matters are

bound by what they say in their pleadings which have the potential of forming the record and moreover, the court itself is also bound by what the parties have stated in

3 their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings.

It is now well established that a party cannot be granted a relief which it has not

- 6 claimed in the pleadings. In the case of*Ms. Fang Min vs. Belex Tours &Travel Ltd. SCCA No. 6 of 2013 consolidated with SCCA No. 1 of 2014 Crane Bank Ltd.vs. Belex Tours &Travel Ltd,* the Supreme Court, at page 27, underscored the 9 importance of the pleadings to describe precisely the respective cases of the parties and to define the issue in dispute for resolution by the court. Quoting an earlier decision in *Interfreight Forwarders (U) Ltd. vs. East African Development Bank,* 12 *SCCA No. 33 of 1992,*the Court held that;
- *"The system of pleading is necessary in litigating. It operates to define and deliver clarity and precision of the real matters in controversy between the* 15 *parties upon which they can prepare and present their respective cases and upon which court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the* 18 *opposite party and which will govern the interlocutory proceedings before the trial and what the court will have to determine at the trial. See Bullen & Leake and Jacobs Precedents of Pleadings, 12th Edition page 3. Thus, issues* 21 *are framed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and bound to prove the case* 24 *as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be not allowed at the*

trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by the way of amendment of the pleadings.

In this case, the claim relating to 50 acres of land bought by the 1st 3 plaintiff from Polycarp Kanyankole out of his Mailo land was not pleaded in the plaint and the 1st plaintiff was in effect prevented from leading evidence on it. I find that this claim is 6 not part of this suit and it is hereby excluded. I shall thus not determine or pronounce myself on this claim.

(ii) Five Pieces of Land Measuring Different Sizes Whose Ownership Is Claimed By The 1st* 9 *Plaintiff; and the Status of Plot 5, Block 149 Claimed by the Defendant

The 1st plaintiff claimed that she acquired several customary plots from several 12 people including where she has a homestead and land for cultivation some of which was found to be in the titled land. This was confirmed by both the first survey report (DX25) and the second one (DX27). At locus I also saw the land where the 1 st 15 plaintiff had a homestead and what she was cultivating for food which was alleged to be part of Block 149 Plot 5.

The defendant on the other hand claims the 1 st plaintiff trespassed on his land. In his 18 amended Written Statement of Defence, paragraph 7 (a) states as follows: **"that he is the owner of the land comprised in Freehold Register Block 149 Plot 5, land at Gali which he bought from one Polycarp Kanyankole (deceased) by sale 21 agreement dated 1992 and transfer and consent forms were accordingly signed by the said Polycarp Kanyankole in favour of the Defendant together with Richard Twezire and Denis Sabiiti who have since relinquished their interest in 24 the said land to the Defendant (A copy of the certificate of title, transfer and**

D and E respectively). The defendant repeats this claim in his counter claim at Paragraph 10".

- 3 The defendant's case per the purchase agreement (DX1) is that he bought land comprised in Block 149 plot 5 in May 1992 out of Polycarp Kanyankole's Mailo land. The land title DX3 confirms that the land described in the title is **146.09**
- **6 hectares** which translates into approximately **360.5** acres. On the ground per DX27 at pages 2, 3 and 4, it is indicated that the original Mailo Block for Polycarp Kanyankole was **418.6** acres. It has already been resolved herein that land comprised
- 9 in Block 149, Plot 2, approximately 39.3 acres obtained out of the same Poly Kanyankole's Mailo land, belongs to the 2nd plaintiff. It means logically that each party should limit themselves to the size of land that they bought out of Poly
- 12 Kanyankole's Mailo land.

DW2, the district staff surveyor gave credible and helpful evidence regarding the origin of the confusion. He stated that the land was originally Plot 1 Block 149. Plot

- 15 1 was sub-divided to create plots 2 and 3. Further, plot 3 was sub divided to create plot 4 and 5. PW2 also confirmed that Plot 3 was subdivided to create plot 4 and 5. The defendant asserts that he bought plot 5. The defendant's interests are thus limited
- 18 to plot 5. However, it seems, the extent of plots 2, 4 and 5 was not marked on the ground and titles were not issued out for plots 2 and 4. Therefore the defendant is relying on his title on paper, to claim on the ground, land beyond the extent of his
- 21 title of **146.09 hectares**, to include land belonging to the plaintiffs.

The defendant pleaded in his amended written statement of defence and counter claim, that he is the owner of the land comprised in Freehold Register Block 149 24 Plot 5, land at Gali which he bought from one Polycarp Kanyankole. The totality of

the evidence demonstrates that this is all that the defendant owned. The defendant's Plot 5, Block 149 measures 146.09 hectares per his title.

- 3 I therefore find and declare that all the disputed land, falling outside of the defendant's existing title for Plot 5, Block 149 measuring 146.09 hectares, and claimed by the plaintiffs, does not belong to the defendant. The defendant's land is
- 6 limited to Plot 5, Block 149 measuring 146.09 hectares. This finding as well takes care of the defendant's counter claim. I find and declare that the defendant is the lawful owner of the land comprised in Freehold Register Block 149 Plot 5,
- 9 measuring and limited to 146.09 hectares.

For the purpose of harmonizing the issue of boundaries, plotting and solving the allegations of trespass once for all, it is ordered that a fresh survey and mapping be

- conducted to clearly delineate the 2nd 12 plaintiff's land comprised in Block 149, Plot 2 approximately 39.3 acres and the defendant's Block 149 Plot 5 measuring and limited to 146.09 hectares.
- 15 **Issue No. 2: Whether the defendant has trespassed on the suit land:**

Issue No. 3: whether the plaintiffs have trespassed on Block 149, Plot 5:

I will consider the second and third issue concurrently since they relate to trespass 18 to the suit land. In **Justine E. M. N. Lutaya v Stirling Civil Engineering Company Ltd [2003] UGSC 39 (10 November 2003)**, the Supreme court observed in relation to trespass to land thus: *""Trespass to land occurs when a person makes an**

21 *unauthorised entry upon 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 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 in trespass."

- 3 Therefore, trespass to land occurs where one makes unauthorized entry upon land of another. In this case, the plaintiffs led evidence to demonstrate that they were in possession of the suit land when the defendant made an unauthorised entry upon
- 6 land, and thereby interfered with their lawful possession. The defendant entered onto the suit land, cut their trees, tea and vanilla which amounted to trespass. The defendant did not deny his entry and use of the land but contended that the land was
- 9 his and that the plaintiffs are the ones who had trespassed on the same. It is thus my finding, having already found that the suit land belongs to the plaintiff, that the defendant is a trespasser on the same. I am unable to find the plaintiffs trespassers
- 12 on Block 149 Plot 5 because the confusion as to the extent of the said land was caused by ineffective survey. The defendant seems to be claiming what is beyond the land described in his Block 149 Plot 5 measuring 146.09 hectares. Therefore, the
- 15 plaintiffs are not trespassers on land comprised in Block 149 Plot 5. I thus resolve the second issue in the affirmative and the third issue in the negative. I find and declare that the defendant is a trespasser on the suit land. I find that the defendant
- 18 has failed to prove his claim of trespass in the counter claim, and the same is hereby dismissed.

Other Remedies

21 (a) Special Damages:

It is crystallized principle of law that special damages must be specifically pleaded and proved but such proof need not necessarily always be by documentary evidence. 24 Special damages can be proved by direct evidence*; for example, by evidence of a

person who received or paid or testimonies of experts conversant with the matters". *(See Gapco (U) Ltd Vs A. S. Transporters (U) Ltd CACA No. 18/2004 and*

3 *Haji Asuman Mutekanga Vs Equator Growers (U) Ltd, SCCA No.7/1995)*

Therefore, such damages must not only be pleaded but evidence should be placed before court to prove the same. In the absence of documentary evidence, oral evidence to prove such must be direct, consistent, cogent and should be from persons who either have knowledge in the area or people that a party to a suit paid or who received something of value.

- 9 In the present case, learned counsel for the plaintiffs contended that the plaintiffs had 1000 mature trees valued at shs 200,000,000/= which were cut down by the defendant, a tea plantation which was also cut down worth 98,000,000/= and other
- 12 attendant costs and vanilla cleared/destroyed by the defendant. It is evident from the court record, that apart from alleging in the plaint, the plaintiffs did not lead material evidence to establish these assertions. I therefore find that the plaintiffs failed to 15 prove their claim for special damages.

(b) General damages:

The principle of law is that "general damages are such damages as the law presumes to be the natural or probable consequence of the Defendant's acts and need not be specifically pleaded. It arises by inference of law, and need not, therefore, be proved by evidence, and may be averred generally. According to the case of *Haji Asumani*

21 *Mutekanga vs. Equator Growers Ltd (Supra)–"general damages in breach of contract are what a court may award if it cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man". 24 (See *Kyadok Hardware Ltd v Kwik Building Contractors (supra).*

Further, Order JSC (as he then was) in *Haji Asuman Mutekanga v Equator Growers Ltd, SCCA No. 7 of 1995* cited the decision of *Ratcliffe v. Evan (1892) 2 Q. B.*

- 3 *524, Bowden L. J,* at pages 532-533 and stated thus: "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which"
- 6 *the damage ought to be..... proved. As such certainty must be insisted on..... in proof of damage as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done.*
- 9 *To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pandatory."*

He further observed that: "General damages consist, in all, items of normal loss¹² which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. Its distinction from special damages was defined by Lord Wright in *Monarch s.s. Co. V Karlshanus Oliefabriker* (1949)

15 AC, 196.... "With regard to proof, general damages in a breach of contract are what a Court (or jury) may award when the Court cannot point out any measure by which they are to be assessed, except the opinion and judgement of a reasonable"

18 "man."

In the present suit, learned counsel for the plaintiffs contended that the plaintiff lost trees which were cut by the defendant and burnt charcoal. That his actions caused

- 21 the plaintiffs untold suffering, mental anguish, inconveniences and the defendant has continued to use the plaintiffs' land to unjustly enrich himself. He thus prayed for a sum of shs 300,000,000/= as general damages.
- 24 General damages are intended to restore the plaintiff or any successful party to the position he or she was before the occurrence of the act complained of. It was pleaded

by the plaintiffs that they were in possession of the suit land where they had planted trees, a tea plantation, vanilla and other developments on the land which were 3 destroyed by the defendant. That the defendant cut trees, got timber and for the rest burnt charcoal which was to their detriment. PW3 stated that he had trees, a tea plantation and vanilla on the suit land which, were destroyed by the defendant to his 6 detriment. PW1 stated that the defendant cut their trees in 2007 and all the developments on the land to their detriment. In PE10, the defendant in his submissions in Misc. Application No. 070 of 2007 stated at page 1 last paragraph 9 and page 2, second paragraph thus:

"It is not true that they have been on the land since 1987 because apart from the tea, the rest is a natural forest of about 250 acres which has existed since time¹² immemorial....."

"As regards the cutting of timber, I have restricted the cutting to the said area of 50 acres where I intend to plant maize."

- 15 I therefore believe that the said tea plantation that the plaintiffs referred to existed. During the locus visit, the said tea estate was none existent. It is also admitted by the defendant that he cut trees for timber out of the suit land, which the plaintiffs have 18 proved belonged to them. In addition, the defendant has been in use of the land that
- is not his for about 17 years and the plaintiffs were denied access.

The tea estate which the defendant destroyed is a cash crop which generates income

- 21 for a long time. The vanilla that the plaintiffs stated were destroyed by the defendant is a cash crop as well as the mature trees which were harvested by the defendant. I find that the plaintiffs deserve an award of general damages to compensate them for
- 24 such loss and inconveniences that the plaintiffs were subjected to by the defendant.

I find an award of shs 250,000,000/= (Two Hundred and Fifty Million Shillings) sufficient to compensate the plaintiffs for any loss and inconveniences they were 3 subjected to by the defendant's actions.

(c) Costs:

Section 27 of the Civil Procedure Act is to the effect that costs follow the event.

6 Therefore, a successful party should be awarded costs unless his or her actions contributed to the case or was indifferent in prosecuting his claim. I find no reason not to award the plaintiffs costs. Therefore, the plaintiffs are awarded the costs of 9 the suit.

In the result, the plaintiffs' suit succeeds with the following orders:

- 1. A declaration that the plaintiffs are the lawful owners of the suit land and 12 in particular:
- (i) The 2nd plaintiff is the lawful owner of land comprised in Block 149, Plot 2 approximately 39.3 acres.
- 15 (ii) The plaintiffs are the lawful owners of land approximately 120 acres at Matiri located between the National Forestry Authority (NFA) forest and the Mailo block originally belonging to Polycarp 18 Kanyankole.
- (iii) The pieces of customary land measuring different sizes, whose ownership is claimed by the 1st plaintiff, belong to the 1st plaintiff.
- 21
- 2. A declaration that the defendant is a trespasser on the suit land. Except that defendant is the lawful owner of the land comprised in Freehold

Register Block 149 Plot 5, measuring and limited to 146.09 hectares. The rest of the defendant's counter claim is hereby dismissed.

- 3. The defendant is hereby ordered to vacate the suit land immediately, and in any event, within a period not exceeding 3 months from the date of 6 delivery of this judgment, in default of which, an eviction order hereby issued, shall be executed against the defendant.

- 9 4. A permanent injunction is hereby issued restraining the defendant, his agents, assignees and persons claiming under him from any further trespass on the suit land belonging to the plaintiffs.
- 5. A re-survey, mapping and plotting shall be conducted in respect of the suit land as necessary and in particular in respect of Block 149, Plot 2 approximately 39.3 acres belonging to the 2nd 15 plaintiff and Block 149 Plot 5, measuring and limited to 146.09 hectares belonging to the defendant, to ensure that each party is limited to the confines of the land that they 18 lawfully own. This exercise shall be carried out within 3 months from the date of delivery of this judgment by a team consisting of a surveyor appointed by the plaintiffs, a surveyor appointed by the defendant, and 21 led by the District Land Surveyor for Kyenjojo District, and submit a report to this court within the said period of 3 months.
- 24 6. The plaintiffs are awarded Shs. 250,000,000/= as General Damages with interest at the rate of 8% per annum from date of delivery of Judgment until payment in full.

7. The plaintiffs are awarded the costs of the suit.

It is so ordered.

6 Vincent Wagana

High Court Judge FORTPORTAL

DATE: 16/08/2024

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