

IN THE REPUBLIC OF UGANDA
IN THE CHIEF MAGISTRATE'S COURT OF NWOYA AT ATIAK
CIVIL SUIT NO. 003 OF 2024

[FORMERLY AMURU CIVIL SUIT NO. 001 OF 2021]

ODOKI JOE ALFRED ::::::::::::::: PLAINTIFF/ COUNTER-DEFENDANT

VERSUS

DR. ONEK AWIL PAUL ::::::::::::::: DEFENDANT/COUNTER-CLAIMANT

BEFORE: H/W KYEMBE KARIM ESQ MAGISTRATE G.I

JUDGMENT

Background:

The plaintiff brought this suit against the defendant seeking declarations that the defendant is a trespasser and instead, it is he who is the rightful owner of land measuring approximately 3 acres situated at Kal center, Pakwany parish, Pabbo sub county, Amuru district (*hereinafter referred to as the suit land*), orders for general damages and costs of the suit.

Plaintiff's case:

In his amended pleadings, the plaintiff pleaded facts to the effect that; at all material times, he has been the lawful owner of land situated at Kal center, Pakwany parish, Pabbo subcounty, Amuru district, whose total size is 10 acres, having inherited it from his late father, a one, Lino Okot, who had also acquired the same in the 1940's from a one, Mr. Leri, who is also now deceased.



The plaintiff pleaded further that his said father took possession, settled thereon until his death in 1985 and he was buried on that said land without any dispute at all.

That in the year 2004, the defendant sued the registered trustees of Gulu Arch diocese over his land which neighbours that of the plaintiff and obtained judgment in his favour; that in the course of hearing that case, the court visited the *locus in quo* whereof the plaintiff attended and categorically showed court that his boundary with the defendant was the Mvule tree, and now, there are water tanks; that in the year, 2011, the plaintiff, without protest from any one received compensation from the Uganda National Roads Authority in exchange for part of the suit land for construction of the Gulu - Nimule road; that since the 2004 diocese case, the plaintiff and defendant lived peacefully as neighbours until the year, 2020 when the defendant encroached and started cultivating approximately 3 acres of the plaintiff's land (now suit land).

Defendant's case:

The defendant filed an amended written statement of defence denying the entire claim and also filed a counter suit seeking declaratory orders to the effect that he is the rightful owner of the Suitland, an order of permanent injunction, eviction order, general damages, interest, costs of the countersuit and any other relief this hon. Court may deem fit.

In support of his defence and countersuit, the defendant pleaded facts to the effect that; he is the administrator of the estate of the late Mzee Benedicto Awil who was the lawful owner of land measuring approximately 270m X 225m X 275m X 280m situated along Gulu-Juba road at Kal B cell Pabbo Town council, Kilak- North county, Amuru

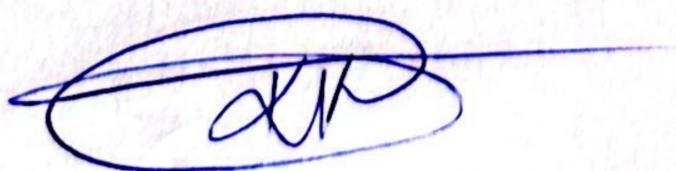


district; that in the year 2004, Gulu Arch diocese trespassed upon to the aforesaid land, prompting him to file a civil suit no. 012 of 2004, whereupon judgment was pronounced in his favour; that whereas, admittedly, the plaintiff participated in the visit to the *locus in quo* in the course of hearing the said 2004 diocese case and duly showed court the boundaries of his land, it is not true that the 3 acres being claimed by the plaintiff actually belong to him.

The defendant pleaded further that in 2006 he granted permission to the International Committee of the Red Cross to set up drinking water tanks for the internally displaced persons (IDPs), which were duly set up without complaint from any one and they remain in place, to-date; that in 2008, the defendant allowed the plaintiff to use approximately 1 acre of his land during the traditional marriage of his daughter; that in 2010, the plaintiff trespassed on the defendant's land and later apologized and promised to stop; that in 2019, the plaintiff ferried building materials onto the defendant's land prompting complaints to the Rwot Kweri, who ruled in favour of the defendant; he prayed that the plaintiff's suit be dismissed and instead, his counter suit be decided in his favour.

Representation:

At the hearing, the plaintiff was represented by FRANCIS-OWINY & CO. ADVOCATES, while the defendant was represented by M/S ODONGO & CO. ADVOCATES



Issues:

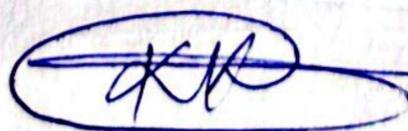
In a joint scheduling memorandum signed by both counsel for either party, the following were the issues framed for this court's determination.

1. Who of the parties is the owner of the Suitland?
2. Who of the parties has trespassed on the Suitland?
3. What remedies are available to the parties?

The plaintiff called a total of 4 witnesses, including himself. He testified as his lead witness and his witness statement was admitted as **PW1-Odoki Joel Alfred.**

In a nutshell, PW1 told court that he has at all material times been the owner of land measuring approximately 10 acres, 3 acres of which are currently in dispute, hereinafter referred as the Suitland; that he inherited his land from his father, the late Lino Okot, who had also acquired the same from a one mr. Leti Leri. In the 1940's; that during a visit to the *locus in quo* in the course of hearing a court case between the defendant and the Trustees of Gulu Arch diocese, PW1 attended, whereof he showed court that his boundary with the defendant was the Mvule tree, now with an addition of motorized water installations inside the plaintiff's land and that the defendant did not dispute the installations.

PW1 testified further that from the time the defendant had a dispute with the Diocese, himself and the defendant never had any dispute until the year 2012 when the defendant encroached on his land and started cultivating beyond the Mvule tree which constituted the common boundary between his land and that of the defendant; that amongst other features, PW1 has mango trees, tamarind tree, palm tree, olam



trees, banana plantation anthill, graves of his late cousin sister, Sabino Angu, Jakeri and graves of some two other young children.

In support of his case and testimony, PW1 exhibited:

PEX1- Form of Exploration of land for the road reserve from UNRA

PEX2- Form of Exploration of land for the road reserve from UNRA

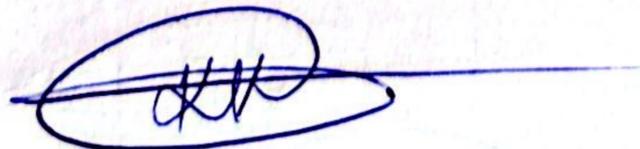
PEX3- Form of Transfer (assignment) from UNRA

On cross-examination, PW1 testified that he doesn't have proof to show that he contributed money to facilitate the defendant's lawyer during the 2004 diocese case; that he doesn't have the attendance list of the visit to the *locus in quo* in the said 2004 diocese case; that he doesn't have a record of proceedings at the said visit to the *locus in quo* in the diocese case; that the Mvule tree was not natural; that it was cut in 2011; that there is no tree stamp since it was uprooted by the caterpillar tractor; that he knows other trees later grew out of that stamp.

PW1 testified further that both organizations which erected the motorized water tank installations did not ask him for permission; that in 2015, PW1 was reported to the LC2 by the defendant but that he won the defendant.

In response to a question in respect to paragraph 12 of his witness statement, PW1 testified that he doesn't have death certificates of the deceased but that Saabino Angu was buried in 2005, Jakeri buried in 2002 while the 2 young children were buried around 2006-2007.

In further response to questions relating to paragraph 12 of his witness statement, PW1 testified further that in all those years, the people were



in the internally Displaced People's camps (*hereinafter referred as IDP camps*); that he did not mention mango trees, bananas tamarind, palm tree and ant hill in the plaint.

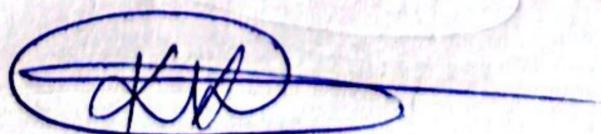
PW1 told court further that in 2018, his daughter, Stella Aber Odoki was traditionally married off and that is the reason why he constructed 2 huts on the disputed portion of the land.

In re-examination, PW1 testified that the two organizations that installed the water tanks did not seek his permission because the people were in the IDP camps, at the time and that the installations were made on humanitarian grounds.

The material crux of evidence given by PW1 set forth here above was re-echoed by all his 4 witnesses (PW2, PW3 and PW4).

The defendant on the other hand called a total of 5 witnesses including himself. He testified as his 1st and lead witness and his witness statement was admitted as **DW1- DR. ONEK AWIL PAUL.**

DW1 testified, in a nutshell that he is the lawful owner of the suit land comprised in the land of which he inherited from his father, the late Awil Benedicto Francis in 1998 upon his demise; that the said Awil Benedicto Francis had also inherited the same from his father, the late Logwiri in 1928 and he used the same for settlement, cultivation of crops; that the boundary of his entire land is bordered by the family of the late ocheng Vincent (*now, partly, Ocitti Ronald and others*) and Aworaga stream to the east, Gulu-Nimule main road on the west, Awil Path/road to the main home of Awil towards the North and Mateo Okwong towards the south.



DW1 told court that the natural boundary between his land and the plaintiff's land in the North and that of DW1 towards the south was the path to Awil's home; that in 2018, DW1 was paid compensation upon verification of ownership by UNRA in the course of road construction works on the Gulu-Atiak-Nimule road; that DW1 is currently using the Suitland for cultivation of food crops; that earlier, in 2008, the plaintiff approached DW1 for permission to construct two huts on DW1's land to facilitate the plaintiff's customary marriage of his daughter, since, the plaintiff's land was still under contention with one of the plaintiff's relatives; that out of good faith, DW1 allowed the plaintiff an approximate size of 1 acre in the presence of witnesses.

DW1 testified further that the boundary between him and the plaintiff's land on the North is the cut Labwori tree stretching to the tall big ant hill in the line with an Olam tree, with the plaintiff in the North and DW1 in the south; that the Labwori tree was cut down by the plaintiff in 2021 to destroy the boundary marks; that there are DW1's relatives graves on the Suitland, about 10 mango trees and in the year 2001, they held a memorial prayer for DW1's late uncle on the Suitland without challenge; that in 2005, two organizations requested for permission of DW1 to erect water tank installations on part of the Suitland which he granted and the said water tanks accordingly established without objection from any one.

DW1 testified further that the plaintiff first encroached on DW1's land in 2010 but stopped upon complaints from DW1 and his late brother but the plaintiff resumed the encroachment in 2019; that matters were reported to the Rwot Kweri and LC2, amongst others who resolved in favour of DW1.

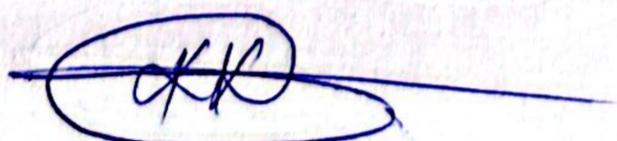


The defendant exhibited:

1. DEX1- Letters of Administration
2. DEX2 – Transfer and assignment form from UNRA
3. DEX3- Photograph of the memorial prayer ceremony
4. DEX4- letter from the LC2
5. DEX5 – mediation report from office of cultural chieftdom of Kilak
6. DEX6 –Demarcation report from the office of the LC2
7. DEX7 – pictures of portion of disputed land
8. DEX 8 – Decree in Civil suit no. 012 of 2004

On cross examination, DW1 testified that he doesn't have a house on the disputed land; that he lived on the disputed land briefly with his father in the 1960's; that the house is not visible; that DW1 lives on the other side of the land, about 200 meters away; that DW1's late sister used to live there and the site is still visible; that right now, DW1 has no relative on the land; that DW1's sister stayed there from 1975 and left around 2015; that the house wherein she lived was destroyed by fire which gutted it down in 2016; that the suit land once served as an IDP camp and the other people left the land around 2016-2017 living behind the water tanks erected by the Red Cross still standing together with a mobile toilet that was used by the people in the IDP camp; that the land was left to the defendant after the death of his father in 1998.

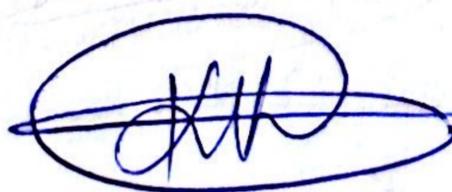
DW1 testified further that he was compensated about 978,000/= by UNRA; that the Mvule tree was cut down by Red cross and the stamp was handed over to DW1; that DW1 did not have any document showing the Red cross requesting permissions; that at that time, the plaintiff did not have any structure on the land and it is only DW1 who allowed him approximately 1 acre of land to set up two huts to facilitate the



customary marriage of the plaintiff's daughter around 2008 and that part constitutes a portion of the disputed land; that the plaintiff now stays in that portion where DW1 had licensed him to erect the two huts for the customary marriage of his daughter; that DW1 was with 5 others to witness when he was licensing the plaintiff to erect the huts; that the Rwot Kweri died and the other 4 were present in court; that the plaintiff's family land is on the North of the Awir path; that the plaintiff's family land is less than 10 meters from the Suitland; that at the point of giving the plaintiff 1 acre to erect the huts, the plaintiff's family land was also there; that he gave the plaintiff the 1 acre because the plaintiff's family land was under contest; that the plaintiff started by cultivating beyond the 1 acre given to him and DW1's brother wrote to him protesting.

DW1 testified further that from what he gave the plaintiff, the plaintiff cultivated approximately 80 meters beyond; that the aggressive trespassing took root in 2019; that the main house also goes beyond the 1 acre of land that DW1 gave the plaintiff; that DW1's grave yards are outside the 1 acre he gave to the plaintiff, but the plaintiff also trespassed on the portion where they are; that the LC1 was present and DW1 did not know the LC2 of the area then; that the 1 acre also constitutes part of the portion that DW1 received compensation for from UNRA; that the plaintiff was not party to the dispute between DW1 and the diocese but he only came as a witness.

On re-examination, DW1 testified further that he could show court where he lived with his father in the 1960's and where his sister Maria Achola lived; that the government started resettling the people from the IDP camps around 2018 and that Genesis Computer center took the photos that he exhibited; that he gave the plaintiff only 1 acre of which he is not



claiming back but his only problem with the plaintiff is exceeding the boundary features; that the land in dispute in the 2004 civil suit between himself and the diocese, the subject of the decree in DEX8 is the same land in dispute in the instant suit and it is true that the plaintiff was aware of the said 2004 diocese case but he did not come to claim the same.

On being questioned by court, DW1 testified that the conflict between the plaintiff and his family concerning their family land is still ongoing; that the plaintiff started construction of his house on the disputed land around 2018-2019; that the first encroachment through cultivation started around 2010 but the aggressive encroachment took root in 2019.

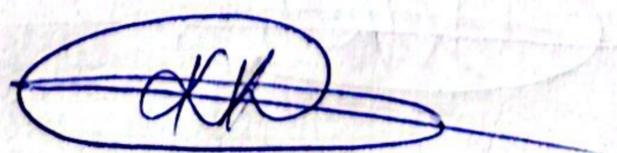
The subsequent witnesses called by the defendant all re-echoed the testimony of DW1.

CONSIDERATION BY COURT.

Preliminary objection:

While concluding his submission on resolution of **issue 1**, learned counsel for the plaintiff/ counter defendant raised a point of law in respect to the counter claim stating that it offends **Order XXXI r. 1** of the Civil procedure Rules since the counter-claimant brought the counter claim in his own personal capacity and not in the capacity of the administrator of the estate of the late Benedisto Awil.

Learned counsel submitted that in **paragraph 6(a)** of his written statement of defence, the counter claimant pleaded facts to the effect that he is the administrator of the estate of the late Benedisto Awil who is the customary owner of land measuring approximately 250m in length X



240m in width situated along Gulu Juba road at Kal center, Pukwany Parish, Pabo sub county, Amuru district.

Learned counsel submitted further that the defendant/counter claimant went ahead and attached the letters of administration and the same was admitted in court and marked **Annexure "A."** Learned counsel concluded by submitting and praying to this hon. Court that as such, the counter claim ought to be struck out with costs.

I have read the entire submissions from learned counsel for the defendant/ counter claimant and I notice that he did not address court in response to the preliminary objection.

For ease of reference, **Order XXXI r. 1** of the civil procedure Rules provides thus;

In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in the property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit but the court may, if it thinks fit, order them or any of them to be made parties.

Order 6 r. 28 CPR provides:

Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.

On perusal of the plaintiff's/counter defendant's reply to the counter claim filed on court record on the 16th March, 2021 I notice that the said preliminary point of law was not pleaded. Neither was notice given that



the same would be raised nor was it framed as an issue during scheduling.

Learned counsel for the counter Defendant only raised the same in his submissions, specifically, in the concluding paragraphs in his resolution of the agreed **issue 1**.

I must say, the style of raising the preliminary objection was rather unorthodox. Conventional practice has always been to raise the objection at the commencement, before delving into the merits of the case. In this case, the objection was raised together with resolution of issues relating to evidence adduced at trial. This might explain why counsel for the counter claimant did not submit in response thereto and I have no doubt in my mind that he actually did not take notice of the same.

That be as it may, it is the submission of learned counsel for the counter defendant that *"... the defendant/counter claimant went ahead and attached the letter of administration and the same was admitted in court and marked **annexure "A"***

My understanding of the rules relating to pleadings is that they have to be read and construed as a whole together with any annexures thereof. Reading paragraphs in isolation results into absurdity. As submitted by learned counsel for the counter defendant, I have read **paragraph 6(a)** of his written statement of defence and it appears to me that the capacity in which the counter claimant brought the counter claim was properly pleaded and supported with annexures.

Of course, the conventional practice has always been to disclose the capacity in the title of the pleadings. But omission thereof, in my humble view, does not amount to a defect in pleadings as to justify rejection.



After all, **Order 6 r. 17 CPR** also implores this hon. Court not to reject any pleading on mere want of form.

For those reasons, the plaintiff's/ counter defendant's preliminary objection is overruled with no orders as to costs.

The case on the merits:

Issue 1: Who of the parties is the owner of the Suitland?

Issue 2: Who of the parties has trespassed on the Suitland?

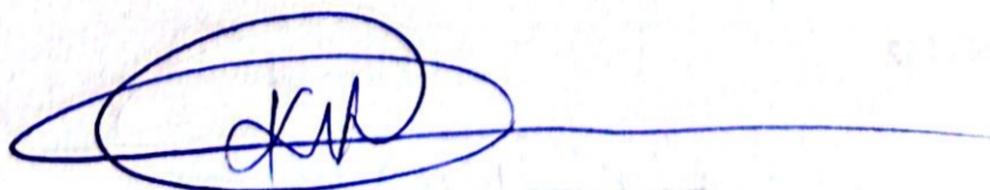
For expedience, I will consider the first two issues hand in hand since they are interconnected.

It is trite that a counter-suit is a separate suit whose merits are determined separately, but the evidence has to be considered and analyzed as a whole. But for expedience, I will refer to the parties respectively as plaintiff and defendant.

Resolution of these issues in the favour of the plaintiff will result into grant of the plaintiff's prayer seeking declarations of ownership of the suit land while also resulting in dismissal of the counter-claimant's prayer for declaration of ownership of the same Suitland.

Similarly, a finding on these issues in favour of the defendant also results in grant of the counter-claimant's prayers while also resulting into dismissal of the plaintiff's claim in the amended plaint.

Declarations of ownership will succeed upon proof of whom of the two, that is, plaintiff and defendant has a better title to the Suitland.



Although, not necessarily always, a declaration of ownership in favour of the plaintiff, will invariably attract consequential orders to the effect that the defendant is a trespasser on the suit-land, if the defendant does not advance a legally acceptable justification.

The key elements of trespass are; proof of ownership or possession (*actual or constructive*) and that the defendant entered thereupon without permission of the plaintiff or other lawful excuse. Proof of damage or loss is not necessary before declaration of trespass. Mere trespass is already damage enough and is actionable per se'. The same considerations apply to the counter-claimant in proof of his counter-suit.

The evidence before this court shows that the plaintiff is in actual possession and physical occupation of his claimed land, save for the Suitland (3acres) of which he pleads are being trespassed upon by the defendant. As regards the defendant/counter claimant the evidence shows that he is not in physical possession by way of residence but evidence on record is to the effect that he is cultivating the same Suitland, which would amount to constructive possession, thus, with a right to commence action in his counter suit.

Both parties, besides seeking declaration of trespass against each other, they also seek orders enabling them to recover that portion of the Suitland allegedly being trespassed upon by the other party. A suit for recovery of land is in essence an assertion of a right to enter into possession of the land, which then necessitates proof of ownership of that land as the first step.



It is trite that an out-of-possession owner of land may on the basis of constructive possession, even with no physical contact with the land, recover for an injury to the land by a trespasser which damages the ownership interest.

In **Adrabo Stanley -VS- Madira Jimmy Civil suit no. 0024 of 2013**, Hon. Justice Mr. Mubiru Stephen discussed that where trespass is pleaded as part of a suit for recovery of land, it requires the plaintiff to prove either actual physical possession or constructive possession, usually through holding legal title.

There must have been either an actual possession by the plaintiff at the time when the trespass was committed, either by himself or by his authorized representative, or a constructive possession with the lands unoccupied and no adverse possession.

In essence, an action for recovery of land is founded on trespass involving a wrongful dispossession. It is the mode by which conflicting claims to title, as well as possession, are adjudicated. Any person wrongfully dispossessed of land could sue for the specific restitution of that land in an action of ejectment.

In **Bramwell v. Bramwell, [1942] 1 K.B. 370**, it was discussed that an action for the recovery of land is the modern equivalent of the old action of ejectment. It is action by which a person not in possession of land can recover both possession and title from the person in possession if he or she can prove his or her title.

As the suit before me is one for both recovery of land and declarations of trespass, it was critical for the plaintiff to prove the validity of his title



since actions for recovery of land are premised on proof of a better title than that of the person from whom the land is sought to be recovered.

Similarly, the defendant/counter claimant is duty bound to prove a better title to the suit land if his counter suit has to succeed.

This being a civil suit, the burden of proof lies with the plaintiff, as per **Section 101 of the Evidence Act.**

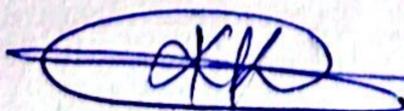
Burden of proof

Both counsel for the respective parties cited for this hon. Court **Section 101 of the Evidence Act, cap 6** which is to the effect that "*he who alleges must prove.*"

To decide in his favour, the court has to be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that the more probable conclusion is that for which the plaintiff contends, since the standard of proof is on the balance of probabilities / preponderance of evidence as discussed in **Lancaster v. Blackwell Colliery Co. Ltd 1918 WC Rep 345** and **Sebuliba v. Cooperative Bank Ltd [1982] HCB 130**).

In approval of the above proposition, learned counsel for the defendant cited to this court the case of **Miller Vs Minister of Pensions (1947)2 ALLER at 372** whereof Lord Denning stated that:

"...the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say we think it more probable than not, the burden is discharged but if the probabilities are equal, it is not."



In attempt to discharge this burden, the plaintiff adduced leading evidence through himself, testifying as PW1, to the effect that that he has at all material times been the owner of land measuring approximately 10 acres, 3 acres of which are currently in dispute. PW1 testified further that he inherited this land from his father, the late Lino Okot, who had also acquired the same from a one Mr. Leti Leri in the 1940's; that during a visit to the *locus in quo* in the course of hearing a court case between the defendant and the Trustees of Gulu Arch diocese, PW1 attended the same, whereof he showed court that his boundary with the defendant was the Mvule tree, now with an addition of motorized water installations. PW1, PW2, PW3 and PW4 all corroborated this testimony.

On the other hand, the defendant/ counter claimant led evidence through DW1, DW2, DW3 to show that that he is the lawful owner of the suit land, part of the land of which he inherited from his father, the late Awil Benedicto Francis in 1998 who had also inherited the same from his own father, the late Logwiri in 1928.

From the evidence adduced by both parties, this court discerns, that both plaintiff and defendant own pieces of land neighboring each other in the same location and with varying sizes as the same is not contested.

The plaintiff gave evidence that his land measures approximately 10 acres while the defendant gave evidence that his land measures approximately 270meters X 225meters X 275 meters X 280 meters.

Both plaintiff's and defendant's land share a common boundary, which is the basis of the current dispute.



The plaintiff maintains that the boundary line is on Mvule tree, now with an addition of motorized water installations which are inside the plaintiff's land.

On the other hand the defendant argues that the natural boundary between his land and the plaintiff's land in the North towards the south is the path to Awil's home.

On the 22nd April, 2024, this court visited the *locus in quo* to ascertain the evidence led in court. A sketch map was drawn and court made several observations and collusions.

With ocular observation, this court saw that the portion of the disputed land is between the said Awil path which branches off the main Gulu Juba high way and the Motorized water tanks which are also located along the said Gulu-Juba High way.

Along the said Juba High way and immediately, before branching off into the Awil path, there is an uncontested portion measuring approximately 100 meters. Inside that portion, there are visible features including a labwori tree, anthill, cemented graves, permanent building, round permanent building, and grass thatched huts.

The aforesaid undisputed portion is the last piece of land before one branches off to follow the Awil path. The length of that portion along the Awil path is approximately 100 meters, whereupon, there is a visible boundary feature of an ant hill, and an olam tree inward at a length of approximately 100 meters.

Beyond that ant hill is where the contested land begins. There is a constructed grass thatched house belonging to the plaintiff.



This court observed the position of the un-cemented graves of the plaintiff's relatives and the position of the graves of the defendant's relatives, some of which were exhumed. The defendant's relatives graves are located towards the middle of the disputed land while the plaintiff's relative's graves are slightly on the boundary between the uncontested 1 acre of land whereupon, the plaintiff's homestead is built, but inside the disputed land.

Learned counsel for the plaintiff submitted that the common boundary between the parties was the Mvule tree. Evidence before this court shows that the said Mvule tree was removed by the caterpillar tractor and the residual stamp handed over to the defendant (as testified by DW1).

Learned counsel for the plaintiff also submitted that because of the defendant's failure to adduce documentary evidence to prove his testimony to the effect that he is the one who received the stamp of the Muvule tree is indicative of the fact that he (DW1) also lied to court when he said he gave the plaintiff only 1 acre of land to facilitate the customary marriage of the plaintiff's daughter.

The plaintiff in his testimony of PW1 denied being given the said 1 acre of land and his learned counsel in submissions, wondered why the said 1 acre has never been reclaimed, if that was the case. The defendant, on the other hand, in testimony of DW1 testified that although his elder brother earlier asked the plaintiff to return the said land, he is currently not seeking to recover the same.

In reply, learned counsel for the defendant submitted that, whereas the plaintiff pleads in **paragraph 4(a)** of his amended plaint that he is a lawful customary owner of the suit land and thus bound by that pleading



as per the provisions under **O. 6 r. 7 of the CPR**, the plaintiff failed to adduce evidence to discharge the burden of proof to the required standard as per the aforesaid **Miller Vs Minister of Pensions case, supra.**

Learned counsel further submitted for the defendant that, the plaintiff failed to call any expert witness or otherwise or adduce any document to buttress his alleged claim of ownership by virtue of customary law. He submitted that, as a matter of fact, save for the pleading in the amended plaint, there is no evidence before this hon. Court to show that the suitland under dispute is actually customary land.

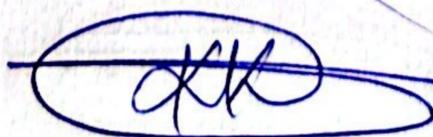
Learned counsel cited for this court the decision by the Court of Appeal of Uganda in the case of **Ndimwibo Sande & others Vs Allen Peace Ampaire Civil Appeal no. 0065 of 2011** whereof it was stated that:

"...not everyone who says I am a kibanja holder or customary tenant is in fact and in law, one. That fact requires proof"

Learned counsel for the defendant fortified his submission with the provisions under **S.46 of the Evidence Act** whereof it is provided that:

"when a court has to form an opinion as to the existence of any general custom, or right, the opinions as to the existence of that custom or right of persons who would be likely to know its existence if it existed are relevant"

In further support of his argument, learned counsel for the defendant further cited for this court the case of **Ernest Kinyanjui Kimani VS Muira Gikanga (1965)EA at page 735**, whereof **Duffus, J.A** stated, amongst others that:



“As a matter of necessity, the customary law must be accurately established. The court has wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law” (Underlining mine)

I agree with the principles expounded upon by learned counsel for the defendant in as far as he submits on ascertainment of whether or not a piece of land is subject of customary law, standard and burden of proof.

I however respectfully disagree with him in as far as how that discussion on land tenure system will help this court resolve **issue 1**, that seeks to establish, who of the parties is the rightful owner of the disputed 3 acres of land.

It is the considered view of this court that the factual historical background and pre-trial circumstances surrounding the disputed land are the material considerations in resolving this issue.

To that end, the plaintiff who testified as PW1 told court that he inherited this land from his father, the late Lino Okot, who had also acquired the same from a one Mr. Leti Leri in the 1940's;

On the other hand, the defendant/ counter claimant led evidence through DW1, DW2, DW3 to show that that he is the lawful owner of the suit land since it constitutes part of the land of which he inherited from his father, the late Awil Benedicto Francis in 1998 who had also inherited the same from his own father, the late Logwiri in 1928.

On cross-examination, PW1 testified that he doesn't have proof to show that he contributed money to facilitate the defendant's lawyer during the 2004 diocese case; that he doesn't have the attendance list of the visit to

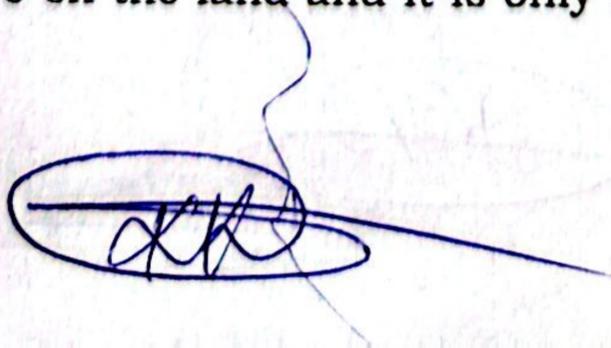


the *locus in quo* in the said 2004 diocese case; that he doesn't have a record of proceedings at the said visit to the *locus in quo* in the diocese case; that the Mvule tree was not natural; that it was cut in 2011; that there is no tree stamp since it was uprooted by the caterpillar tractor and that he knows other trees later grew out of that stamp.

PW1 testified further that both organizations which erected the motorized water tank installations did not ask him for permission; that in 2015, PW1 was reported to the LC2 by the defendant but that he won the defendant.

On the other hand, DW1 testified that, while he doesn't have a house on the disputed land, that he lived on the disputed land briefly with his father in the 1960's although, the house is no longer visible. DW1 told court that he lives on the other side of the land, about 200 meters away and that DW1's late sister used to live on the disputed portion and that the site is still visible; that right now, DW1 has no relative on the land but DW1's sister stayed there from 1975 and left around 2015 and that the house wherein she lived was destroyed by fire which gutted it down in 2016; that the suit land once served as an IDP camp and the other people left the land around 2016-2017 living behind the water tanks erected by the Red Cross still standing together with a mobile toilet that was used by the people in the IDP camp; that the land was left to the defendant after the death of his father in 1998.

DW1 testified further that he was compensated about 978,000/= by UNRA; that the Mvule tree was cut down by Red cross and the stamp was handed over to DW1; that DW1 did not have any document showing the Red cross requesting permissions; that at that time, the plaintiff did not have any structure on the land and it is only DW1 who allowed him



approximately 1 acre of land to set up two huts to facilitate the customary marriage of the plaintiff's daughter around 2008 and that part constitutes a portion of the disputed land; that the plaintiff now stays in that portion where DW1 had licensed him to erect the two huts for the customary marriage of his daughter;

With all due respect, I am not convinced with the evidence advanced by the plaintiff to prove his own claimed rights over the suit land. I also respectfully disagree with learned counsel for the plaintiff on the submission to the effect that the defendant did not prove having allowed the ICRC to install the motorized water tanks on the suit land or having received the stamp of the mvule tree that, evidently, was uprooted by a caterpillar because he did not exhibit documentary evidence to that effect.

First, Section 58 of the Evidence Act, cap 6 provides that a fact in issue can be proved by direct oral testimony, save for the contents of a document.

Second, in Haji Asuman Mutekanga -Vs- Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995, it was stated that it is trite law that strict proof does not necessarily always require documentary evidence. Oral testimony is good evidence to prove a fact in issue.

Third, in D.R Pandya -vs- R (1957) E.A 336 at 338 it was held;

"...it is now settled principle that when a question arises as to which witness to be believed, rather than another, the question turns on the general circumstances, the manner and demeanor/conduct of the witnesses before, during and after the fact, including the demeanor at trial" (EMPHASIS ADDED)

The evidence, truthfulness of witnesses and general circumstances surrounding this case appeared to be against the plaintiff in entirety. It is not clear why the plaintiff has never objected to the water installations by



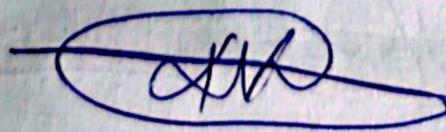
the Red Cross since way back in 2005 who, uncontroverted evidence has shown, that they got permission from the defendant.

Learned counsel for the plaintiff submitted that the defendant failed to adduce documentary proof of the paper trail of how the permission was sought and later granted. But like I mentioned earlier hereabove, I respectfully disagree with that submission. I already stated that **Section 58 of the Evidence Act, cap 6** provides that a fact in issue can be proved by direct oral testimony, save for the contents of a document. I did not see anywhere in evidence where learned counsel deduces that the transaction was conducted through documentation of the trail, as to require the defendant to adduce the said documents.

That be as it may, this court is satisfied with the testimony of DW1 in as far as it establishes that the plaintiff is only entitled to 1 acre of land which he apportioned him to facilitate his daughter's customary marriage and he is no longer desirous of reclaiming it.

The boundaries thereof were seen by court and that was the portion indeed that was not under dispute. It had developments belonging to the plaintiff, only that the plaintiff exceeded the boundaries of the said 1 acre and constructed a grass thatched wall and also buried some relatives in the portion beyond the boundaries of the said 1 acre.

I hasten to mention, that whereas proof of burial grounds has been relied upon by courts to prove occupation and potentially, ownership, I find, in this case that the plaintiff buried his said relatives on the disputed land with a calculated motive of laying claims over the same, like he is doing in this case.



In ***Holmes v. Bellingham, (1859) 144 ER 843***, it was stated that, for as long as the physical boundaries of the parcel of land can be ascertained on the ground by natural boundaries (e.g. rivers, cliffs), monumental lines (boundaries marked by survey or other defining marks, natural or artificial), old occupations, long undisputed Abuttals (a described "bound" of the property e.g. a natural or artificial feature such as a street or road), statements of length, bearing or direction (meters, feet or other measurements in a described direction), that suffices as to the proper identification of a parcel of land.

Contrary to the observed physical boundaries, court observed that the plaintiff is, instead, the one who exceeded the 1 acre (uncontested portion), whereof his homestead is established and continues to encroach on the remaining part of the defendant's land. The plaintiff even placed some grave yards inside the disputed portion of the land towards the Southside of the uncontested portion, beyond the visible boundary feature of the ant hill and olam tree.

Towards the East side of the uncontested portion, this court also finds that the plaintiff exceeded the common boundary of the anthill and olam tree when he constructed the grass thatched wall.

The plaintiff's testimony to the effect that the water tanks were installed in his land is hereby rejected. The same fall beyond the boundary of the labwori tree. In addition, not only did the plaintiff not participate in their installation, but also has never raised any known opposition thereto, since around 2005 when they were installed.



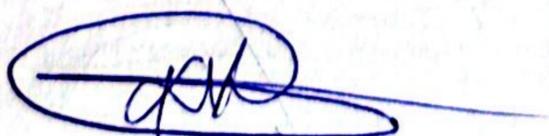
In as far as the compensation from UNRA is concerned; it is the finding of this court that both plaintiff and defendant were compensated for their respective affected portions that touch the Juba -Gulu high way, although, they are neighboring each other.

Learned counsel for the defendant submitted that **PEX1** and **PEX 3** which were exhibited by the plaintiff to depict compensation from UNRA are actually in respect of someone else who is not the plaintiff. This, he submitted that ODOKI JOE ALFRED and ODOKI JOEL are, in law, two different people, since the plaintiff has never complied with **Sections 7 and 12 of the Births and Deaths Registration Act** and he never exhibited any deed poll.

However, besides asserting as he did, I have not seen any evidence to support the submission. **Section 101 Evidence Act** places the burden of proof upon the person who asserts the contrary. The evidence before me shows that the plaintiff is in possession of the original documents in **PEX1** and **PEX3**. I have not seen any person claiming to be owner of the said documents besides the plaintiff. While it is a rebuttable assumption, this court finds it safer to assume that the author may have been careless in writing the names.

It is also the finding of this court that Red Cross which installed the water tanks in 2005 did not seek license from the plaintiff as was with the defendant and the plaintiff has never objected to the installations.

In attempt to water down the evidence of the defendant having been asked by Red Cross for permission to install the water tanks, learned



counsel for the plaintiff submitted that the water tank installations were on humanitarian grounds. If I understood him well, he seemed to state that, because the water tanks were for the common good of the IDPs in camps, Red Cross did not have to seek permission from the owner of the land prior to the installations. I also, respectfully disagree with that submission.

It is also unclear whether the plaintiff, upon notice of the water tank installations, has ever sought to regularize or object to the installation of the water tanks, even after the IDP camps were closed.

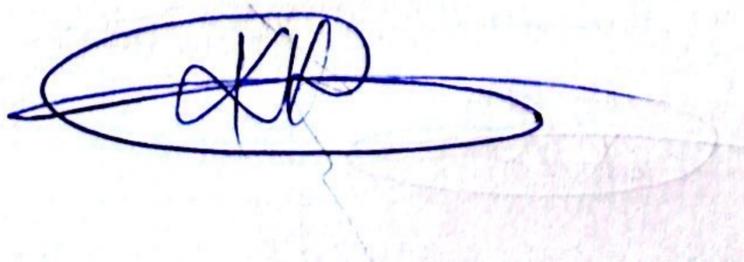
It is the finding of this court that such is not conventional conduct of a person who honestly and legitimately claims to be the owner of the suit land. The doctrine of **estoppels by conduct** operates against the plaintiff in such a circumstance.

Yet on the contrary, the defendant led oral testimony to show that he licensed the Red Cross to install the water tanks, notwithstanding the fact that there wasn't a paper trail to exhibit in court.

For the reasons given above, it is my finding on **issue 1** that the defendant is the rightful owner of the Suitland.

In ***Salmond and Heuston on the Law of Torts, 19th edition (London: Sweet & Maxwell, (1987) at 46***, it is stated that trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land.

Trespass is an unlawful interference with possession of property. It is an invasion of the interest in the exclusive possession of land, as by entry



upon it. It is an invasion affecting an interest in the exclusive possession of property.

The cause of action for trespass is principally designed to protect possessory, not necessarily ownership, interests in land from unlawful interference.

Learned counsel for the defendant, on the other hand cited for this court the Supreme Court decision in **Justine EMN Lutaaya Vs Sterling civil engineering co. SCCA no. 11 of 2002** for the proposition that:

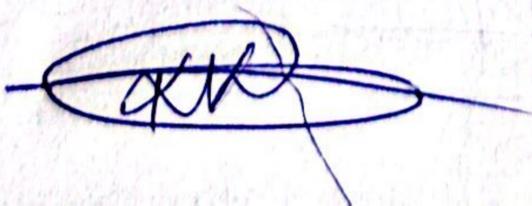
“trespass to land occurs when a person makes an unauthorized entry upon land and thereby interfering or potends to interfere with another person’s lawful possession of that land”.

Learned counsel for the defendant also cited **Sheikh Mohammed Lubowa Vs Kitara Enterprises ltd C.A no. 04 of 1987** for the proposition that a claimant must prove the following elements before declarations of trespass:

- a) The disputed land belonged to the claimant.*
- b) The defendant had entered thereupon.*
- c) The entry was unlawful in that it was made without permission or that the defendant had no claim or right in the disputed land.*

I absolutely agree with those holdings and this court is also bound by the same.

In this case before me, the parties seek orders in respect of both ownership and possessory rights.



In the **Adrabo Stanley case**, supra, Hon. Justice Mubiru Stephen discussed further that ownership comprises of a number of rights, and among these rights one of the most significant right is possession of property.

In ***Ocean Estates Ltd v. Pinder [1969] 2 AC 19***, it was stated that if the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them.

Therefore, where questions of who has a better title to the land like in the instant case, the court is concerned only with the relative strengths of the titles proved by the rival claimants.

Like I have already observed in the above analysis, I am not convinced that the plaintiff's evidence can safely give this court premise to order the defendant out of occupation/ cultivation of the suit land.

It is trite that the plaintiff must succeed by the strength of his own title and not by the weakness of the defendants'.

This Court is aware of the settled jurisprudence to the effect that long, acquiescent and undisturbed occupation is one of the most convincing evidence of a boundary between properties.

In the instant case before me, both parties testified to the long existence of the boundary features of which I have relied upon in making this judgment. Posterity would never forgive this court if it ignored, for example, the evidence of the water tanks which the defendant permitted



to be erected since around 2005 and the plaintiff has never raised any objection!

Be that as it may, it is also my finding on **issue 2** that it is the plaintiff who is the trespasser on the defendant's land when he erected the grass thatched wall and also buried some relatives on the suit land.

Issue 3: what remedies are available to the parties?

Having found as I have, here above, I hereby make the following orders:

1. The plaintiff's suit is wholly dismissed with no orders as to costs.
2. This court finds in favour of the counter- claimant and issues the following orders on the counter-suit:
 - a) A declaration doth issue that the Suitland belongs to the counter-claimant/defendant.
 - b) A permanent injunction doth issue against the counter defendant/ plaintiff, his agents, workmen, or any other person dealing on his behalf from interfering with the counter-claimant's quiet enjoyment of the suit land.
 - c) An eviction order doth issue against the counter-defendant in respect of the entire suit-land or portions whereof he is trespassing, **EXCEPT-**
 - d) By discretion granted to this Court under **S. 98 CPA**, I **DECLINE** to order exhumation, eviction and/or interference with the portion measuring 10meters X 10 meters wherein the plaintiff's relatives' un-cemented graves are located. This, I hold so because, remains of the deceased must be granted protection by this hon. Court to rest in peace.



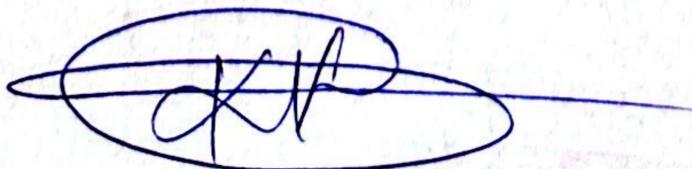
The squabbles between the parties herein are not reason enough to deprive the deceased of both statutory and moral right to a peaceful rest. After all, I haven't seen any evidence to show that the defendant has ever objected to the burial of those plaintiff's relatives on the suit land. I am fortified by the recent High Court Decision in **Mpumwire Magambo Vs Amanda Magambo HCT-05-CV-MA-0293-2023**, whereof **Hon. Justice Nshimye Allan Paul M** declined exhumation for purposes of conducting a DNA test and instead ordered kinship tests upon the living.

The said portion measuring 10meters X 10 meters shall be measured, fenced off and annexed to the undisputed portion belonging to the Counter- defendant/plaintiff and boundaries shall be revised accordingly.

- e) The counter claimant is granted general damages. In **Emmanuel Turyamuhika -Vs- Uganda Electricity Board HCCS NO. 05 OF 2004** the general principle which should govern the assessment of damages was laid down;

"... the tribunal should award such sum of money as will put the injured party in the same position as he would have been if he had not sustained the tort."

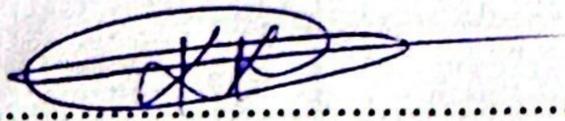
It is trite that trespass is actionable *per se*'. There is no need to prove actual damage. Accordingly, I grant UGX. 3,000,000/= (three million shillings only) as general damages to the counter-claimant.



- f) Interest at 8% per annum is granted on general damages and taxed costs from date of judgment until payment in full.
- g) The counter claimant is granted costs of the counter-claim.

I so order.

Dated at Atiak this.....^{24th}.....day ofJUNE.....2024



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H/W KEMBE KARIM

MAGISTRATE G.1

