

The Republic of Uganda
In the High Court of Uganda Holden at Soroti
Civil Suit No. 0037 of 2014

1. Isiagi Patrick
10 2. Akorimo Deo ::: Plaintiffs

Versus

1. Isiagi John
2. Omoding David ::: Defendants

Before: Hon. Justice Dr. Henry Peter Adonyo

15

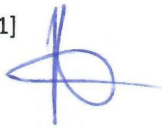
Judgement

1. Introduction:

Isiagi Patrick and Akorimo Deo, (hereinafter jointly referred to as “the Plaintiffs”) brought this suit against Isiagi John and Omoding David (hereinafter jointly referred to as “the defendants”) for trespass on their customary land located at Kachonga, Malera sub county, Bukedea district measuring approximately 40 acres which belongs to the plaintiffs having acquired it from their father, Silvanus Isiagi on 31st May, 2008, wherefore the plaintiffs seek for the following orders;

- a) A declaration that the land located at Kachonga, Malera sub county, Bukedea district measuring approximately 40 acres belongs to the plaintiffs,
- b) A declaration that the defendants are trespassers on the plaintiffs’ land,
- c) A permanent injunction restraining the defendants from interfering with the land in dispute,
- d) Special damages, general damages and costs of the suit

[1]



5 2. Background:

 a. The Plaintiffs' case:

 The 1st plaintiff is a son of Isiagi Silvanus. The 2nd plaintiff is a son of Akorimo Ochom. Isiagi Silvanus and Akorimo Ochom are biological brothers and their father was Solomon Opejo aka Suleiman and mother
10 was Solome Oluka. Sulaiman Opejo, the father of Isiagi Silvanus and Akorimo Ochom, by a will and a gift *inter vivos* bequeathed, in 2010 the suit land located at Malera, Bukedea district measuring approximately 40 acres to his two (2) sons during a clan meeting. The disputed land was then became individually owned by Isiagi Silvanus and Ochom Akorimo.

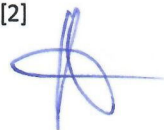
15 Upon the death of Akorimo Ochom, the land remained in ownership of the Isiagi Sylvanus who bequeathed the said land to the plaintiffs. The plaintiffs occupied the land by possession and use it for cultivation and cattle grazing.

 The defendants, claim the suit land is theirs and have on several occasions
20 said to have trespassed part of the suit land measuring about 4-6 acres since 23rd September 2010 and have in addition committed criminal offences to wit, the cutting down of a mini forest of trees and gardens found on the suit land with the 1st defendant, Isiagi John being charged and convicted by court for the removal of boundary marks that were
25 planted by the clan separating the land of Opejo and Osire.

 Due to consistent disagreements between the parties herein, a clan meeting chaired by one Ochom Anthony, the clan leader of the two parties, met and resolved to establish a clear boundary between the parties in 2011.

30 The defendants did not follow the resolution of the boundary by the clan hence this protracted dispute which has been in court since 2011 between

[2]



5 the two family members. The plaintiffs are aggrieved with the action of the defendants of trespass and hence this suit for which they pray for the declaration that the suit land belongs to them, general damages and costs.

b. The Defendants' case:

10 The defendants in their joint written statement of defence deny the plaintiffs' claim in total and insist that the suit land is theirs by way of customs and ancestral inheritance which they legitimately acquired from their late father Omoding Michael who was a brother of Isiagi Silvanus who is the father of the 1st plaintiff. The defendants contend that their father Omoding Michael inherited the suit land from his father called
15 Osire Joseph who had also inherited it from his father called Isiagi who was theirs' and plaintiffs' great grandfather.

The defendants further contend that they had lived on the suit land since childhood but that their living on the suit land was only interrupted by the rebellion in Teso in the late 1980s when they had to flee from the suit land
20 for their safety and only to return to the same in 1995.

They defendants further assert that the suit land was also their ancestral burial grounds with their grandmother one Atiang, their brothers, Joseph Osire and Joseph Osire having been buried on the suit land in 1945, 1988 and 1985, respectively.

25 The defendants further contend that the suit land is inhabited by their families who include among others their uncle called Ilukor Paul, who is also the brother of Isiagi Silvanus and who is the 1st plaintiffs' father.

The defendants aver that they have establishments and developments on the suit land where they live with their extended families, cultivate for
30 survival and ordinarily call home.

5 The defendants additionally contend that neither the plaintiffs nor
Silvanus Isiagi had any establishment, owned the suit land or any land at
the neighborhood to claim removal of boundary marks from the suit land.
Accordingly, the defendants prayed that this suit by the appellants should
be dismissed with costs.

10 3. Representation:

In this suit, M/s Engulu and Co. Advocates represented the plaintiffs while
M/s Wamimbi Advocates and Solicitors represented the defendants.

The plaintiffs adduced evidence of four witnesses in proof of their case and
these were; Isiagi Patrick (PW1), the first plaintiff, Otialuk Patrick (PW2),
15 Isiagi Silvanus (PW3), the father to the 1st plaintiff and a paternal uncle to
the 2nd plaintiff, and Ochom Anthony (PW4), a neighbor to the suit land
and the clan parish chairperson.

The defendants led the evidence of four witnesses and these were Isiagi
John (DW1) - the 1st defendant, Omoding David (DW2) -the 2nd defendant,
20 Patrick Isiagi Opolot (DW3) –a son to PW3, and Emorut James (DW4).

This dispute was first handled by His Worship Godfrey Kaweesa,
Magistrate Grade One Bukedea vide **Civil Suit No. 035 of 2011**. It is
not clear from the records whether the suit before the magistrate's court
was heard and determined finally in the favour of any of the party.

25 The record, however, show that **Civil Appeal No. 5 of 2013** and **Civil
Appeal No. 5 of 2013** were filed before the High Court in Soroti but were
subsequently ordered consolidated with the latter becoming a cross
appeal by the then Resident Judge Honourable Lady Justice Henrietta
Wolayo who then on 22nd August, 2014 ordered of a retrial before the High
30 Court hence this **High Court Civil Suit No. 37 of 2014**.

5 The history of this suit is sad in that two very close family members are fighting for land which both claim they have inherited from their fathers leading to a protracted trial both before the magistrate's court and in the High Court.

10 As for the trial before the High Court, it is clear from the record that it has had its fair share of delay given the fact that this suit was first heard by Honourable lady Justice Henrietta Wolayo who heard the testimonies of PW1 and PW2 between October 2015 and about June 2016. She was transferred.

15 The hearing of the suit was then presided over by His Lordship Justice David Batema who heard testimonies of some witnesses. On 2nd July, 2019 His Lordship Justice David Batema ordered for the repeat of the testimony of PW1. The Learned Judge while hearing the case ordered on 26th September, 2019 that the matter be handled by way of ADR by himself assisted by clan leaders to restore known customary boundaries between
20 the parties and that the court was to visit locus on 1st November, 2019 at 11.00 am.

25 Unfortunately, the learned judge was transferred before carrying out the ADR. He was replaced by Hon. Justice Wilson Masalu Musene, before whom the file apparently was never placed. He subsequently retired. I replaced him. The file which then had lost position was placed before me on 5th October, 2021. On that date I was updated in regard to the position of the file by counsels for both sides who included Mr. Engulu Phillip of M/s Engulu and Co Advocates and Mr. Menya Paul who was holding brief for Mr. Wamimbi Samuel of M/s Wamimbi and Co Advocates.

30 In my review of the file, I noted that PW3 had not testified and so I ordered that he testifies and he did so on 14th February 2022.

5 The defence witnesses' testimonies were then received in court beginning 17th March 2022 and was concluded on same date. A *locus in quo* was conducted on 29th April, 2022. Its report dated 26th July, 2022 is on record.

10 Upon conclusion of gathering evidence, the parties herein through their counsels filed final written submissions which are on record. The pleadings, documentary and oral evidence, the submissions and the content of the locus in quo proceedings, the relevant authorities and laws are all considered herein in resolving this dispute.

4. Issues:

15 The following issues were framed during scheduling on 3rd February, 2016. They are adopted by this Honourable Court in making this judgment.

- a) Whether the plaintiffs are the rightful owners of the land measuring 40 acres?
- 20 b) Whether the defendants trespassed on the land?
- c) What are the remedies available to the parties?

5. Resolution of the dispute by court:

- 25 a. *Whether the plaintiffs are the rightful owners of the land measuring 40 acres?*

PW1 Isiagi Patrick testified that his late grandfather Opejo Solomon bequeathed the land in dispute to his father, Isiagi Silvanus (PW3) and Stanislaus Ochom, the 2nd plaintiff's father. That upon the death of
30 Stanislaus Ochom, the share of Stanislaus Ochom reverted to Isiagi

5 Silvanus (PW3) who bequeathed it by gift *inter vivos* to his son, Isiagi Patrick, the 1st plaintiff and to his cousin Akorimo Deo, he 2nd plaintiff.

PW2 Akorimo Deo testified that the suit land belonged to Opejo Solomon, the father to Silvanus Isiagi who bequeathed it to Silvanus Isiagi (PW3) and his father called Stanislaus Ochom upon his death. That he
10 used to cultivate the suit land.

DW1 and DW2 in their testimony affirmed that on the suit land there are burial grounds of their direct relatives Osire Joseph (their biological brother, Onguran Simon Atiang (unbaptized) paternal grandmother.

The plaintiffs' witnesses were all consistent with the fact that the land
15 belonged to Isiagi Silvanus (PW3) who had inherited the same from his father Opejo Solomon. He PW3 is the 1st plaintiff's father and paternal uncle to the 2nd plaintiff who gave the land to the plaintiffs in 2008.

The land in question thus is one regarded as ancestral land of customary origin whose origin is key in determining ownership.

20 As counsel for the plaintiffs submitted, the defendants' witnesses majorly relied on the ownership of the land pegged to the outcome from the meeting of 24th March, 2012 which albeit was conducted when the parties were already in conflict and litigating in the court.

It is the submission of the plaintiffs that the defendants told deliberate lies
25 both in their written statement of defence and in evidence.

In Paragraph 2 (v) of the written statement of defence, the defendants aver that they have establishments on the suit land where they live which their families. The plaintiffs mocked this assertion pointing to the court locus visit findings which evidently proved that that the suit land did not have
30 any establishments on it.

5 Arising from that court *locus in quo* findings, the plaintiffs asserted that
the defendants indeed told court deliberate falsehood to try to gain
advantage over them, pointing out that the inconsistency between what
was pleaded and what was stated in evidence against what was revealed at
locus was major one which went to unearth the character of the
10 defendants.

In making this assertion, the plaintiffs relied on ***Bahemuka Patrick &
Another Vs Uganda Supreme Court Criminal Appeal No. 1 of
1999 at page 7*** where it was held that;

15 ***“Where discrepancies or contradictions are found in
evidence to be serious or grave unless reconciled will
result in the rejection of evidence”.***

The plaintiffs further submitted that their case is reinforced by the
evidence of the son to the late Isiret Joseph from whom the defendants
claim to have inherited the suit land, that is Akorimo Deo (PW2) who
20 naturally would have been the first to support the defendants case if was
indeed true that the suit land belonged to the defendants but pointed out
that Akorimo Deo (PW2) testified in court that the suit land belonged to
PW3 from whom the plaintiffs claim interest.

The defendants submitted that in 2011, the clan summoned the plaintiffs
25 and their father, Isiagi Silvanus (PW3) to determine the question of
ownership of the suit land but that they did not appear and that to date
the suit land was inhabited by the family of the defendants' who include
among others their uncle called Ilukor Paul, the brother to Isiagi Silvanus,
(PW3) who is the 1st plaintiff's father who purported to give out land that
30 did not belong to him.

5 The defendants further contended that they had establishments on the
suit land where they live with their extended families, cultivated the same
for survival and ordinarily called the suit land home. With the plaintiffs
nor Silvanus Isiagi (PW3) not having any establishment or even ever
owned the suit land or any land in its the neighbourhood so as to claim
10 removal of the boundary marks from the suit land but were merely using
their superior position to evict the defendants from the suit property that
belongs to them.

The assertions by the defendants are not premised on any concrete
evidence before this Hon Court for according to the *locus in quo* no
15 dwellings of the defendants were found on the suit land except for grass
thatched homestead of one Oтуру, a cassava plantation for the defendants
and graves belonging to relatives both parties.

DW1 and DW2 testified that they and other siblings acquired this land by
way of customary inheritance from their father the late Okwerede Michael
20 who had lived and used the land before. Both defendants further told court
that their father the late Okwerede Michael, left them that land and other
properties and that their father also previously inherited the land from his
father Osire/ Isiret Joseph who also used the land having inherited the
same from his father Isiagi (unbaptised).

25 The defendants', however, in their testimony admitted that they knew the
plaintiffs very well since they were their first cousins as they share a great
grandfather by the name Isiagi who was unbaptised who gave birth to
Opejo Solomon who fathered Isiagi Silvanus (PW3) who gifted the suit
land to the 1st plaintiff, Isiagi Patrick his biological son PW1 and to his
30 nephew, 2nd Plaintiff Akorimo Deo.

The defendants testified that the root cause of the dispute over the suit
land that Isiagi Silvanus (PW3) by his letter dated 13th September, 2011

5 gave away land which did not belong to him to the 1st plaintiff falsely well knowing that it was under for the defendants as their ancestral and inherited land from their father with the defendants having lived on the same all through their lives together with the people from whom they directly descend from being buried there as proof of ownership.

10 The plaintiffs submitted on this point that during the locus visit it was revealed that the suit land had no homesteads of the defendants or their relatives but was purely farming land contrary to the averments and testimonies of the defendants.

15 I agree with the plaintiffs' assertions for the locus visit and report indicates that the land is largely uncultivated save for a cassava plantation in the south belonging to the defendants and three (3) grass thatched houses belonging to one Oturu and graves of relatives of both parties.

The locus in quo report also show the extent that the suit land as it shows that the same borders an access road to the north with no name, the 20 defendants to the west, the late Opus Peter's land and Ochom Anthony to the south and south west and the plaintiffs to the west which finding is consistent with the testimony of Ochom Anthony (PW4) who testified that as a neighbour he knew very well that the suit land belonged to Isiagi Silvanus who later gave it to the plaintiffs.

25 The locus visit report also show that there were graves of deceased relatives of both parties were seen on the suit land. The defendants claimed two of the graves of Tino and Duke as theirs while the plaintiffs claimed the remaining two graves of Alphose Akawa Opolot and that Omongole's wife -Iuruko.

30 However, I note that the defendants claim in regard to the graves was in stark contradiction with what they testified to in for in court they told

5 court that the graves on the suit land were for Osire Joseph, their biological brother, for Onguran Simon and for Atiang an unbaptised paternal grandmother yet during *locus in quo*, they showed court only two graves of their relatives Tino and Duke.

The plaintiffs on the other hand had only claimed possession of the suit
10 land but did not inform court of any graves on the suit land as belonging to any of their relatives although at locus they found and showed graves belonging to their key relatives such as Alphose Akawa Opolot and Omongole's wife -Iuruko.

In cases of customary land ownership determination, the evidence of a
15 clan head comes in handy to buttress the testimonies of parties. In this case the only witness with deep clan background is Ochom Anthony who testified as PW4). He is the clan parish chairperson. He confirmed to court that as a clan leader of the two warring parties that the suit land belonged to the plaintiffs. This evidence was uncontroverted by the defendants.

20 The defendants' counsel submitted that on the orders and directives of the Chief Magistrates Court of Soroti and Bukedea (D. Ex 2) and by letter dated 2011 which was tendered in as D. Ex3, the Plaintiffs' father Isiagi Silvanus (PW3) sat and gave out the defendants' land after influencing (PW4) Ochom Anthony, the clan parish chairperson to unilaterally call for
25 a meeting and purportedly give out their land.

The plaintiffs disparaged this assertion and submitted that the meeting which was convened on 24th March,2012 and attended by parties herein with each party being heard had the clansmen of *Inyakot* clan rightfully diagnosing the issue regarding the suit land as being that of a boundary
30 dispute and that the said meeting had about 300 people who attended it including church leaders, politicians, police, RDC Bukedea and DPC Bukedea and it resolved that each side appoints and approves a committee

5 of elders to include neighbours to the suit land who would guide and establish the boundary. This is what is **DEx2**.

Isiagi Silvanus, (PW3) who headed the side of the plaintiffs is alleged by the defendants to have chosen most of the elders including Yowasi Angura 85 years, Iluko Paul 80 years, Okwerede John about 75 years, Okwerede Alfred about 80 years and Odonyi Nakalet but this choice was consented
10 to by the defendants as seen from **DEx2**.

The defendants further testified that the said committee of elders led and guided the meeting and had the boundaries made permanent between them and the Plaintiffs as sisal boundary marks were planted creating a
15 clear demarcation but that even after that resolution, they were still perturbed to see that the Plaintiffs were still pursuing the resolved matter by the clan in court which action was aimed at causing them discomfort.

What clearly comes out from these assertions is that while the defendants regard and rely heavily as to the meeting of 24th March, 2012 as having
20 diagnosed the issue between the parties and resolved the boundary dispute, they still went ahead to encroach into the area of the plaintiffs yet it is apparent from their testimonies that they consented to the leadership of PW3 who is the 1st the plaintiff's father and the 2nd plaintiff's paternal uncle in the appointment of the elders and the demarcation of
25 the boundaries between the two waring family members.

Given the fact that the defendants did not object to the appointment and the leadership of PW3 and elders who subsequently demarcated the boundaries between the parties herein, I am more inclined to believe the testimonies of PW2 and PW3's the suit land that the suit land belongs to
30 the plaintiffs with the defendants having their own land just nearby the same.

5 The defendants' counsel raised a strange assertion that the plaintiffs were
confused as to their claim as to the suit land given the fact that instead of
adducing evidence to substantiate their claim as to the garden 40 gardens,
the plaintiffs testified only about how the defendants were cultivating and
cutting trees on about 8 gardens of land yet they were praying that they be
10 declared as owners of 40 gardens yet PW3 testified to his father giving him
40 gardens that he eventually passed on to the plaintiffs and does not
dispute that the defendants also have about the same acreage.

However, my perusal of the pleadings show that the plaintiffs' claim is for
4-6 acres and not the entire 40 acres which they state the defendants had
15 trespassed upon and were seeking a declaration that they be pronounced
owners thereof.

Further, from the defendants submitted and also stated in their written
statement of defence that the suit land was inhabited by their family
members who include among others their uncle – Ilukor Paul, the brother
20 of PW3.

However, during locus in quo visit court did not find that the suit land was
inhabited by Ilukor Paul but only saw grass thatched houses belonging to
one Oturu.

Furthermore, the locus visit did not establish any dwelling of the
25 defendants except for a cassava garden and other and scattered cultivation
belonging to them. That fact contradicts especially the testimony that they
were living on the suit land with their extended family.

I therefore would agree with the plaintiffs' submission that as was
similarly held in *Bahemuka Patrick and another vs Uganda*,
30 *Supreme Court Criminal Appeal No. 1 of 1999 at page 7* that;

5 ***“Where discrepancies or contradictions are found in evidence to be serious or grave unless reconciled will result in the rejection of evidence”***

This was also the same position in ***Maku Nairuba Mabel Vs Crane Bank Ltd., HCC No. 380 of 2009*** per Obura J.; ***Okecho Alfred Vs Uganda, SC Crim. Appeal No. 24 of 2001.***

In that respect, I would find the defendants’ testimony is contradictory for as was pointed in ***Oryema Mark v. Ojok Robert, H.C.C.A. No. 13 of 1998*** by Justice Stephen Mubiru;

15 ***“Unlike oral testimony, physical evidence does not lie, does not forget, does not pursue self-interest. Unless manipulated or staged, physical evidence sits there and waits to be detected, evaluated, explained... the court looks at the physical evidence and attempts to determine how it fits into the overall scenario as presented in the contending versions”.***

20 Furthermore, while under **Article 237 (3) (a) of the Constitution of the Republic of Uganda, 1995** customary land tenure is recognised as one of the land tenure systems in Uganda and the same is re-echoed by **Section 2(a) of the Land Act, Cap 227** and is characterised by local
25 customary rules regulating transactions in land, individual, household, communal, and traditional institutional ownership, use, management and occupation of land, which rules are limited in their operation to a specific area of land and a specific description or class of persons, but are generally accepted as binding and authoritative by that class of persons or upon any
30 persons acquiring any part of that specific land in accordance with those rules. Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belongs to a specific description

5 or class of persons to whom customary rules limited in their operation,
regulating ownership, use, management and occupation of land, apply in
respect of a specific area of land or that he or she is a person who acquired
a part of that specific land to which such rules apply and that he or she
acquired the land in accordance with those rules. The onus of proving
10 customary ownership begins with establishing the nature and scope of the
applicable customary rules and their binding and authoritative character,
and thereafter, evidence of acquisition in accordance with those rules, of
a part of that specific land to which such rules apply.

Proof of mere occupancy and use of unregistered land, however, long that
15 occupancy and use may be, without more evidence, is not proof of
customary tenure.

Evidence of communal ownership of land must be shown through a
system of governance that enforces exclusive use and occupation by the
community, the exclusivity being related to the rights exercised by the
20 community and not to individualised rights. The indigenous community
must have had exclusive occupation of the land from time immemorial, an
established uniform system or set of customary norms that regulate
possession and use of the land, which, although they may be highly
flexible, are certain, considered as binding and are frequently followed by
25 members of the community. These may be practices, customs, and
traditions that are integral to the distinctive culture of the group claiming
the right with all decisions pertaining to the land use being made by the
community as to the beneficial occupation and use of the subject land i.e.
personal and usufructuary rights (inclusivity), forming part of their
30 inclusive communal activities, and that the usufructuary rights in issue
are not irreconcilable with the nature of the community's attachment to
the land.

5 It is for the latter reasons that land held as communal customary land may not be alienated without the consent of the specific community.

While I would agree with the defendant that the clan has the power to resolve the dispute and the dispute as to boundaries, it also true that in respect of this matter, the rightful clan resolved the dispute between the parties herein by demarcating the boundaries which was encroached upon by the defendants as there were four (4) clan mediatory meetings to resolve the recurring dispute over the suit land with the first two called by clan of Inyakot at the parish level under the chairmanship of PW4 and the other two at sub county level under the leadership of Adome Idi overseen by the neutral person called Ejiet upon the directions of the Chief Magistrates Court of Soroti at Bukedea wherein PW3 acceptable elders to both parties including Angura Yowasi over aged 80 years, Odong Nakalet aged 70 years, Okwerede John aged 80 years, who is an uncle to the parties, Illukor Paul aged 80 years and biological brother of Okwerede Michael even though their exercise purportedly ended prematurely with the defendants not causing any of these elderly persons or cultural person to come to court to testify on their behalf over the customary ownership of the suit land yet the plaintiffs through PW2 and PW3 who were present in the clan meetings and who played vital roles with PW3 chairing at parish level and PW4 mobilising the elderly, all came to court and testified as to the real ownership of the suit land making me to be more inclined to believe the testimonies of the plaintiffs than those of the defendants.

The defendants further submitted that since PW3 himself admitted that he had left the place for some time hence he had gone to his other land in Kachumbala and so since they had been longer on the land then it was theirs.

5 I would thus find here that since the defendants alludes to a previous
presence on the land by PW3 but who left to go elsewhere, then I would
conclude that this is an admission by the defendants that PW3 was
actually an earlier occupier of the land than them but was only forced to
leave it and go to elsewhere for a time but eventually returned to claim
10 what was rightfully his.

In light of the above I am more likely to believe the plaintiffs' evidence is
more believable as all the plaintiffs' witnesses are 60 years plus and are
well conversant with the history of the suit land which they narrated with
ease coupled with the fact of the evidence which is not controverted that
15 the 1st defendant was earlier on convicted for removing boundary marks
(refer to PEX 3), an indication that it was the defendants who caused the
conflict by crossing the known boundary lines.

Again, PW2, who is a step brother to the defendants' father and a son to
Isiret Joseph, the grandfather of the defendants from whom the
20 defendants allegedly trace their lineage, confirmed to court as to the
ownership by PW3 of the suit land. He testified that he used to cultivate
the suit land for PW3 who inherited the land from his father Opejo
Solomon. His evidence was equally not controverted by the defendants.

From the above, I am persuaded by the plaintiffs' evidence as to their
25 ownership of the disputed land and more so in light of the defendants'
grave inconsistencies which watered down their evidence. In the premises,
I would conclude that the plaintiffs have proved on a balance of
probability their ownership of the suit land which I do thus declared as
theirs. This issue succeeds accordingly.

30

5 b. Whether the defendants trespassed on the suit land?

In regard to this issue, case of ***Onega Obel & Anor vs. The Attorney General & Anor HCCS 006 of 2002*** is of great relevant for in that case trespass to land was said to consist of the following unjustifiable acts;

- (a) entering upon the land in possession of another,
- 10 (b) remaining upon such land, or
- (c) placing any material object upon it.

In the same case, it was observed that trespass by wrongful entry consists of entry by a defendant, or by some other person through his procurement, into land or building occupied by the Plaintiff. He
15 accordingly concluded that the Defendant committed trespass when it entered and remained on the suit land by leasing it out to its agents without the Plaintiff's consent. I am in agreement with the submission of the Plaintiff's Counsel as to what denotes trespass to land.

For the Plaintiff, therefore, to succeed on trespass to land, he must prove
20 the following;

- That the suit land belonged to him;
- That the Defendant had entered upon it, and
- That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the suit land.

25 It was the plaintiff's submission that the defendants confirmed that there was a boundary created in 2010 for the plaintiffs. This was the boundary which the 1st defendant destroyed leading to his arrest, prosecution and conviction (Refer to PEX 1).

30 Furthermore, the plaintiffs submitted that by the time the defendants and others purported to create a new boundary in 2012, it was the plaintiffs in possession of the suit land. The creation of the new boundary by the defendants was done without the authority of the plaintiffs who at the time

5 were in possession of the suit land pursuant to the clan created boundary in 2010. The conduct of the defendants in removing the existing boundary and placing new ones against the will of the plaintiffs who were in possession automatically makes them trespassers.

10 Furthermore, the Locus visit confirmed the defendants' insensitive deeds there were freshly lands ploughed by the defendants yet the same was under dispute in court meaning that the defendants were not amenable to accepting the fact that the 2010 boundary demarcation removed them from where they were cultivating and placed them elsewhere. This acts of the defendants are clear evidence of trespass on the plaintiffs' land.

15 The defendants further submitted that for the plaintiffs to sustain an action in trespass, they must have been in possession of the suit land. The did this while relying on ***Onegi Obel and Anor versus The Attorney General & Gulu District Local Government, HCT-02-CV-CS-0066-2002***, where Hon Augustus Kania held that, ***"It is trite law that tort of trespass is interference with right of occupation and not the interference with ownership, ownership alone unaccompanied by possession is protected by different remedies..."***

25 According to the defendants since they were the ones in possession of the land and not the plaintiffs, then then they could not have trespassed on their own land. In regard to possession, it was the submission of the plaintiffs that DW1 who is the 1st defendant testified that he inherited the suit land from his late father and has lived on it all his life. DW1 testified that his descendants were buried on the suit land and this is proof of

30 ownership.

PW2 testified that he used to cultivate the suit land for PW3 from whom the plaintiffs derive their interest.

5 When court visited locus it was evident that the disputed land was largely
uncultivated save for a cassava plantation in the south belonging to the
defendants, that other cultivation was scattered and by the defendants.
Court noted that contrary to the defendants' claim that they had
establishments thereon, except the gardens, there were thatched houses
10 belonging to one Otulu and there were also graves of deceased relatives of
both the defendants and the plaintiffs.

Going further, it was the evidence of the Plaintiffs that the Defendant
entered and remained onto the suit land without their consent. It is
indicated in the images attached to the valuation report indicate that the
15 suit land is now developed with several buildings.

What is of note is that both parties have graves on the disputed land, in
the premises and since the plaintiffs have already been declared the
owners of the suit land, by virtue of the graves and also the submission of
the defendants that PW3 admitted that he had left the place for some time
20 hence he had gone to his other land in Kachumbala, it would mean that it
was more probable than not that the plaintiffs were in possession of the
land.

Considering all this evidence, I am convinced that the Defendant also
trespassed on the suit land which belongs to the Plaintiff.

25 However, this court having resolved issue one above in the affirmative,
would conclude that since it was the plaintiffs who were in actual
possession of the suit land then the defendants trespassed on the suit land
with the court agreeing with PW4 that the defendants had never lived on
the suit land since childhood and were only interrupted by the rebellion
30 in Teso in the late 1980's where they fled and returned in 1995 given the
fact that they could not even point out any grave belonging to their

5 grandmother Atiang, brothers Joseph Osire and Osire Joseph who were allegedly buried in 1945, 1988 and 1985 , on the suit land ,respectively.

I would thus conclude that since the suit land belongs to the plaintiffs, the defendants' occupation by cultivation of the same without consent of the plaintiffs constitutes trespass and as such they are declared trespassers.

10 c. What remedies are available to the parties?

Counsel for the Plaintiff invited Court to grant declaratory orders as prayed by the Plaintiff on the premise of Order 27 of the Civil Procedure Rules SI 71-1.

15 The Plaintiff prayed for an order of cancellation of the Defendants' names from the certificate of title to the suit land and reinstatement of their names or full compensation for the economic market value of the land which is Shs. 1,000,000,000/- as per the valuation report.

20 I have considered as according to the locus in quo report that there is not much development on as the structures on it belonging to third parties are few and can easily and without much financial difficulties be removed given that only two graves belonging to Duke and Tino who are related to the defendants and three grass thatched houses belonging to Oturu are on the suit land.

25 Accordingly, I would allow the prayers for cancellation of the Defendants' names from the certificate of title to the suit land and reinstatement of the plaintiffs' names on it and order that in order to avoid any future conflicts between the plaintiffs and in order to encourage harmonious neighbourhood residency between the two who are clearly no longer sociable, the two graves belonging to the defendants' relatives are directed
30 to be removed from the suit land by the defendants to their on land which is nearby within a period of Three (3) months and at their own costs taking into account all religious and social norms.

5 Furthermore, I do also order the removal of the three grass thatched houses belonging to Oturu from the suit land although, if he is willing to negotiate with the plaintiffs and arrive at an agreed compensation, then he may remain where his three grass thatched are located.

I make no award for any compensation considering the protracted nature
10 of this dispute where both parties appear to have suffered tremendously.

In regard to general damages for trespass and exemplary damages, Counsel for the Plaintiff submitted that the Plaintiff is entitled to these owing to the unconstitutional and arbitrary conduct of the Defendants.

In support of this submission, counsel cited the cases of *Esso Standard*
15 *(U) Ltd versus Semu Amanu Opio SCCA No.3 of 1993* and *Onegi Obel & Anor versus The Attorney General & Anor* and invited court to grant declaratory orders as prayed by the Plaintiff.

Having noted as above, I am inclined to grant the plaintiffs only the declaratory orders sought.

20 In the result this suit succeeds on all issues accordingly.

6. Orders:

- a) Judgment is entered against the defendants in the favour of the plaintiffs;
- b) The plaintiffs are hereby declared the owners of the suit land as demarcated in the *locus in quo* report located at Kachonga village,
25 Malera sub county, Bukedea district.
- c) It is hereby found and declared that the defendants are trespassers onto the plaintiffs' land.
- d) This Hon. Court orders the cancellation of the Defendants' names
30 from the certificate of title to the suit land which was unlawfully entered onto the same and further order the reinstatement of the plaintiffs' names on it.

5
10
15
20
25

defendants
r

- e) In order to avoid any future conflicts between the plaintiffs and in order to encourage harmonious neighbourhood residency between the two parties who are clearly no longer amiable to each other , although close relatives, it is hereby ordered that the two graves belonging to the defendants' relatives be removed from the suit land by the defendants to their on land which is nearby within a period of Three (3) months and at their own costs taking into account all cultural, religious and social norms.
- f) Furthermore, the three grass thatched houses belonging to Oturu are ordered removed from the suit land by Oturu within three (3) months, although if he is willing to negotiate and agree with the plaintiffs and arrive at an agreed compensation, he may with the permission of the plaintiffs remain on the portion where his three grass thatched are located.
- g) This Honorable Court makes no award for any compensation considering the protracted nature of this dispute.
- h) A permanent injunction hereby issued restraining the defendants and or their agents from interfering with the suit land.
- i) This Honourable Court makes no award for General or Exemplary damages of as it is found not equitable.
- j) The costs of this suit shall be borne by the defendants in any event.

I so order.

.....

Hon. Justice Dr Henry Peter Adonyo

Judge

30th September 2022

30