THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUBENDE

CIVIL SUIT NO. 003 OF 2019

GRACE KABAYO MAJORO :::::::::::::::::::::::::::::::: PLAINTIFF/COUNTER DEFENDANT

VERSUS

GEORGE KIIZA :: DEFENDANT/COUNTER CLAIMANT

BEFORE: HON JUSTICE. DR. FLAVIAN ZEIJA

JUDGEMENT

The plaintiff herein filed the instant suit against the defendant seeking for, amongst others, a declaration that she is the lawful owner of property comprised in LRV 2030 Folio 17 and HQT 1730 Folio 6 Buwekula Block 379 land situate at Nalutete, Mubende District; a declaration that the defendant is a tenant at will having disputed the plaintiff's ownership of the suit land and a complete trespasser except on the 400 acres he bought from the plaintiff; an order for vacant possession and eviction of the defendant and or his agents and anyone claiming title under them; general damages, punitive damages, mesne profits and costs of the suit.

The defendant contests the suit and filed a defence and counter claim wherein he sought for orders that;

1. That the plaintiff/counter defendant acquired the lease on the suit land fraudulently.
2. Cancellation of the plaintiff/counter defendant certificate of title.

3. A declaration that the defendant/counterclaimant is entitled to apply to Mubende District Land Board for conversion of his 400 acres on Buwekula Block 379 Plot 3.
4. An order for specific performance to transfer the 400 acres customarily land to freehold.
5. An order for specific performance for transfer of the 400 acres from the plaintiff/counter defendant to the defendant/counterclaimant.
6. General damages.
7. Punitive damages for intentional breach and infliction of emotional distress.
8. Costs of the suit.

The plaintiff's case is that in 1987 she inherited negotiations and the process for acquisition of a lease for land measuring about 625 hectares in Nalutete, Mubende District from a one Mukasa. The plaintiff applied for and was granted a lease of the land by Uganda Land Commission vide ULC: MIN:2/77 (a) (115) on 13th January 1988 for an initial period of 5 years running from the 1st month after survey. The request for survey of the property was subsequently issued to the District Staff Surveyor and the plaintiff immediately took up possession of the property leaving her cousin Sam Mugabo as the caretaker. However, the plaintiff alleges that the district surveyor who had been allocated the file to carry out the survey of the property was at the time on high demand and only surveyed 241 hectares out of the 625 hectares and left. As a result, the remaining part of the property was not surveyed but still in the possession of the plaintiff. The plaintiff applied for and was later granted a leasehold interest in the surveyed land comprised in LRV HQT 1730 Folio 6 Buwekula Block 379 Plot 3 Land at Nalutete and became the registered proprietor thereon on the 4th May 1992. In or around 1990, after the passing of the care taker Sam Mugabo, the plaintiff alleges that the defendant, who is also her cousin, requested to stay on the land and graze his animals in return he would take care of the plaintiff's properties and developments thereon. Since the

plaintiff was at the time working in and out of the country, she accepted the request and allowed the defendant to continue caretaking the entire 625 hectares. That the defendant at all times stayed on the un-surveyed part and grazed his animals and grew his crops while caretaking both the un-surveyed and surveyed/titled property. In or about 2002, the plaintiff had financial problems and entered into a sale agreement with the defendant for the purchase of 400 acres in consideration of 50 heads of cattle. The plaintiff asserts that, as per the sale agreement, the 400 acres were to start from the location of the land where the defendant was already in possession that is the un-surveyed part and would care take the rest of the land and not assume ownership of the same. Later on, the plaintiff found that the defendant had relocated from his previous place of residence and moved to the surveyed part *(suit land)* without authority and permission from the plaintiff and sold off part of the suit property to a one Constance who went into occupation of the same. Despite the plaintiff's attempts to resolve the problem amicably the defendant refused to cooperate and led to several wrangles over the same hence the institution of this suit.

The defendant on the other hand concedes that the plaintiff is the registered proprietor of the suit land and that he indeed entered into a sale agreement with the defendant for 400 acres which he was already in possession of. That in the agreement, the plaintiff was to give him a certificate of title after curving off the 400 acres on Plot 3 and to continue caretaking the remainder of the plaintiff's land, having earlier been caretaking the whole 625 hectares before sale. The defendant states that he does not contest that the plaintiff applied for 625 hectares but was given 241 hectares. That this was because the remainder did not exist as the surveyor professionally indicated in the Job History at the 1990 survey that, *"Area offered is 625 hectares. Area surveyed is 241.4 hectares being the only free land available." The job was completed and the Deputy Staff Surveyor signed off with a brief letter to the Commissioner Surveys and Mapping with a heading "JOB COMPLETED".* That the plaintiff does not have

any equitable interest in the un-surveyed land but registered interest in the suit land where the defendant bought part of it. The plaintiff further states that the sale agreement is binding on the parties and the untitled land is not mentioned in the agreement but rather the titled land was described at the beginning of the agreement. The plaintiff insists that the 400 acres are part of the registered land where he is in possession and is not a trespasser thereof.

During the hearing of the matter the following issues were agreed for determination by this Court;

1. **Whether the plaintiff has an interest in 625 hectares contained in the lease offer.**
2. **Whether the defendant purchased 400 acres from the 625 hectares in the lease offer or from the titled 241 hectares?**
3. **Which portion of the 625 hectares was the defendant in possession in 2002 when he purchased 400 acres from the plaintiff?**
4. **What is the location of the 400 acres?**
5. **Whether the defendant sold and rented out the plaintiff's land that he was given to care take?**
6. **What remedies are available to the parties?**

Representation

The plaintiff was represented by M/s Kampala Associates Advocates whereas the defendant was represented by M/s Muhwezi Law Chambers Advocates.

In his submissions, Counsel for the defendant raised preliminary objections which I will determine as herein below.

Preliminary objections

Citing Order 6 rule 30 of the Civil Procedure Rules and the case of **Auto Garage vs. Motokov (1971) EA 514,** Counsel for the defendant submitted that the plaintiff has not established a cause of action against the defendant. Counsel submitted that under clause *(d)* of the sale agreement it was clear that the 400 acres that was subject of sale between the plaintiff and the defendant was out of the titled land *(suit land)* after due consideration was given and accepted by the plaintiff. Counsel submitted that the 3 essential elements to support a cause of action have not been satisfied since the defendant is lawfully in occupation of the plaintiff's titled land as described in the agreement which was sold to him at a consideration. That no reference was made in the agreement to un-surveyed land as alleged by the plaintiff. Counsel submitted that the plaintiff admitted to have sold the 400 acres to the defendant and received the 50 heads of cattle in consideration and as such the defendant had not violated any right of the plaintiff for which he should be held liable.

Counsel for the defendant also objected to the plaintiff's reply to the amended counterclaim on grounds that it was filed in respect of the defendant's first counterclaim that was abandoned on amendment together with the amended written statement of defence. Counsel submitted that the defendant filed an amended statement of defence and counterclaim on the 1st October 2019 wherein the counterclaimant reiterated and adopted his pleadings in the amended defence and prayed for reliefs, including a prayer in the alternative for an order of specific performance by the plaintiff/counter defendant to transfer him the 400 acres out of her registered 241 hectares. That the plaintiff/counter defendant did not make any valid reply to the amended defence and counterclaim since the one which was filed was in respect of the abandoned defence. Counsel prayed for the same to be struck out under Order 6 rule 30(1) CPR (as amended).

In reply to the preliminary objections counsel for the plaintiff submitted that the plaint raises a cause of action against the defendant to the effect that the defendant is a trespasser on the

titled land having shifted from the 400 acres located on the un surveyed and untitled land to the location just opposite the plaintiff's home on the titled land without her consent. That this clearly indicated that the plaint discloses a cause of action as it pleads the actions of the defendant which amount to trespass. Counsel submitted that the plaintiff does not dispute that the sale of the 400 acres took place between herself and defendant. What is disputed is the location of the 400 acres of the purchased land. Counsel submitted that under clause c of the agreement the point of the 400 acres was from the part where the defendant was already in possession which was on the un surveyed part and not the titled land (suit land). Counsel prayed for the objection to be overruled.

In regard to the second objection counsel for the plaintiff submitted that the same was untenable and ought to be overruled because the plaintiff ably replied to the amended defence and counterclaim by praying that the amended counterclaim be struck out and the defendant declared a trespasser. That the said replies materially contest and answer the defendant's allegations in his pleadings.

I have duly considered the arguments by both counsel on the preliminary objections. The defendant alleges that the suit does not disclose a cause of action. The question that follows then is what is a cause of action?

"A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."

That definition was given by Pearson J. in the case of **Drummond Jackson vs Britain Medical Association (1970) 2 WLR 688 at pg 616.** In an earlier case, **Read Vs Brown (1889), 22 QBD 128,** Lord Esher, M.R. had defined it as:

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court."

Lord Diplock, for his part in **Letang vs Cooper [1964] 2 All ER 929** at 934 rendered the following definition: -

"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

According to the case of **Auto Garage v. Motokov [1971] E.A 514**, there are three essential elements set down on what a cause of action should enunciate and these are; that the plaintiff enjoyed a right; the right has been violated; and that it was the defendant that was liable.

In considering whether a suit discloses a cause of action or not, one ordinarily looks at only at the plaint and assumes that the facts alleged therein are true. (See: **Jeraj Shariff & Co. v. Chotai Fancy Stores, [1960] E.A. 374** quoted with approval by **Spry Ag P** in the case of **Attorney General v. Oluoch [1972] E.A 392 at 394.)** In determining whether a plaint discloses a cause of action, the court must look only at the plaint and its annexures if any and nowhere else. (See **Kapeka Coffee Works Ltd v. NPART, Court of Appeal Civil Appeal No. 3 of 2000)**

I have looked at the plaint which is on record. Under paragraphs 4 e, g, h the plaintiff states how the defendant trespassed on the suit land without any authority or indulgence from her. Contrary to the defendant's arguments, the issue to be determined by the court is where the 400 acres the plaintiff sold to the defendant are located and not whether or not the 400 acres were sold to the defendant. The plaintiff throughout the plaint and hearing has never disputed the sale and the defendant has never disputed the same nor the plaintiff's ownership of the suit land before the sale, but rather where the location of the 400 acres are, that is, whether on the titled land or the un surveyed land. The plaintiff averred that she enjoys a right that is the right to possession, use and ownership of the suit land which right she claims was violated by the defendant by laying claims on part her land (the suit land) she did not sale to him. Whether this is true or not will be determined during analysis of the evidence presented to

court by both parties. From the plaint, it is clear that the plaintiff has established a cause of action against the defendant which warrants this court's attention. This preliminary objection lacks merit and is overruled.

The second preliminary objection to the effect that the plaintiff did not reply to the amended counter claim and amended defense, I find that this was an unnecessary objection since the plaintiff's failure to reply to the amended counter claim does not carry the effect of decisively disposing of the suit. In any case, the plaintiff's averments are already laid down in the plaint and she need not make a reply to an amended written statement of defense or counter claim if her case can be deciphered from her pleadings. It is now trite that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (**see; *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696).*** This preliminary objection lacks merits and it is hereby overruled.

I shall now proceed to determine all the issues raised concurrently since they are in my view inter related and resolving one would have the effect of determining the rest of the issues framed.

In her statement of claim the plaintiff averred that she has both legal and equitable interests in the 625 hectares of the land contained in the lease offer obtained from the Department of Lands in 1988 under minute number ULC: MIN:2/77(a)(115). The plaintiff's legal interest is in respect of the surveyed and titled land measuring 241 hectares *(the suit land)* while the equitable interest is in the residual land of the 625 hectares with an exception of the 400 acres that the plaintiff sold to the defendant in 2002. The plaintiff submitted that although an instruction to survey the 625 hectares were issued and requisite fees duly paid by the plaintiff, the survey was partially conducted which resulted to the plaintiff applying for and being issued

title of the suit land (241 hectares) for an initial term of 5 years which was subsequently extended to a full term of 49 years. The plaintiff also adduced and relied on documentary evidence EX.9 a letter issued by the Chairperson Uganda Land Commission to the Commissioner Surveys and Mapping which according to the plaintiff, proved that she is the recognized owner/lessee of the 625 hectares. The plaintiff submitted that the defendant did not adduce any documentary evidence to rebut or contradict the plaintiff's evidence.

In the instant case it is not disputed that the plaintiff applied for 625 hectares and was allocated the same neither is it disputed that she is the registered proprietor of 241 hectares *(suit land).* It is also not disputed that the plaintiff sold to the defendant 400 acres for consideration of 50 heads of cows. What is in dispute is the location of the 400 acres. Was the 400 acres' part of the titled land? This is the crux of the matter. In order to put this issue under consideration, into a proper perceptive, it is necessary to highlight the pith and substance of the dispute. In this regard I cannot think of a better way of doing so than reproducing the sale agreement, as I indicated below.

THE REPUBLIC OF UGANDA

THE CONTRACTS ACT CAP 75

LAND SITUATED AT NALUTETE BUWEKULA

MUBENDE DISTRICT BLOCK 379 PLOT 3

SALE AGREEMENT

This agreement made this 28th day of January 2002 between GRACE K. MAJORO of P.O Box 33371, Kampala (hereinafter referred to as the vendor) of the one part and MR. KIZZA GEORGE of Nalutete Buwekula Mubende District (hereinafter referred to as the purchaser) of the other part WITNESSETH as follows;

a) *Whereas the vendor guarantees and warrants that she owns good title in that piece of land as mentioned in the above schedule to this agreement*

and whereas the purchaser is the caretaker of the above piece of land

and whereas the vendor is now desirous of selling, conveying and transferring part of the said piece of land to wit: - 400 acres thereof to the purchaser for a consideration of 50 heads of cattle, both parties have hereunto agreed to carry out the transaction on the following terms:-

b) *Upon execution of these presents, the purchaser shall pay to the vendor 50 heads of cattle, which the vendor has already received and receipt thereto is hereby acknowledged by signature of the vendor upon execution of these presents.*

c) *IT IS AGREED by both parties that upon payment of the 50 heads of cattle the purchaser shall assume full ownership of that piece of land for which he is already in possession.*

d) *The parties further agree that the purchaser shall continue to be the caretaker of the rest of the vendor's land as mentioned in the above schedule to this agreement BUT SHALL NOT assume ownership of the same.*

e) *The parties agree that the purchaser having paid the agreed cattle, shall have undisturbed quiet enjoyment of the occupation without any interference from the vendor, her agents and successors in title.*

f) *It is agreed by the parties that while the vendor shall ensure that all steps are taken to acquire a land title for the purchaser in respect of the property as sold herein, which processes shall include survey and transfers thereof, the relevant government taxes for the purposes, and all expenses thereto shall be paid by the purchaser in as far as his piece of land is concerned.*

g) *It is further agreed by the parties that immediately the survey of the land is finished, the land title in respect of the said land will be given to the purchaser.*

h) *The vendor undertakes to indemnify the purchaser for any loss that he may hereinafter sustain due to want or defect in title.*

The above constitute the terms of the agreement duly signed by the parties for the sale of the 400 acres to the defendant/counterclaimant by the plaintiff/counter defendant.

The plaintiff's emphasis is under clause (c) and (f). The plaintiff's assertion is that at the time of the agreement the defendant was in possession of the un-surveyed land and not the surveyed/titled land. During hearing the plaintiff made clarifications about the description of the land in the schedule of the agreement. She stated that it was only included for purposes of identification of the situation of the land as the part of the land being sold at the time was yet to be surveyed and titled. Further that from the reading of clause (f) and (g) of the agreement it was clear that the 400 acres purchased by the defendant were part of the 625 hectares of the un surveyed land and had it not been the position, then the clauses would have been in respect of sub division and not survey of the land. The defendant on the other hand insists that the 400 acres he purchased were part of the titled land as evidenced with the description of land in the agreement and paragraph "a". Counsel submitted that court need not look anywhere but at the agreement itself as provided for under Section 91 and 92 of the Evidence Act. Further that clause *(f)* of the sale agreement makes it clear that the piece of land which the defendant purchased was part of the titled land. That it says that steps would be taken to acquire a land title and not to sub divide or do mutation of the existing land title.

In the instant case it is clear that both parties have different understanding and interpretation of the sale agreement. This court is now vested with the task to decide what the terms of the sale agreement meant. In expounding the implications of a sale agreement, the Court of Appeal in **Prudential Assurance Company of Kenya Limited –vs- Sukhwinder Singh Jutley & Another [2007] eKLR** held that, where the intentions of parties have been reduced

into writing, it was generally not permissible to adduce extrinsic evidence whether oral or written either to show the intention of the parties or to contradict or vary or add to the terms of the documents including implied terms. It went on to say that courts adopt the objective theory of contract intervention and profess to have the overriding aim of giving effect to the intentions of the parties when construing a contract otherwise known as the principle of the four corners of an instrument, which insists that a document's meaning should be derived from the document itself without reference, to anything outside the document, such as the circumstances and history surrounding the parties signing it.

In the case of **Lovell & Christmas Ltd Vs. Wall (1911) 104 LT 85, CA, Hardly MR** held:

> ***"If there is one principle more clearly established than another in English law it is surely this: it is for the court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. What is the meaning of the language that they have used therein? That is the problem and the only problem. In saying that, I do not mean to assert that no evidence can be admitted. Indeed, the contrary is clear..... but unless the case can be brought within some or one of the exceptions, it is the duty of the court, which is presumed to understand the English language, to construe the document according to the ordinary grammatical meaning of the words used therein, and without reference to anything which has previously passed between the parties to it."***

Contractual interpretation, in essence is, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. The courts would focus on the meaning of the relevant words used by the parties in their documentary, factual and commercial context, in the light of the following considerations:

a. *the natural and ordinary meaning of the clause;*

b. *any other relevant provisions of the contract;*

c. *the overall purpose of the clause and the contract;*

d. *the facts and circumstances known or assumed by the parties at the time that the document was executed; and*

e. *commercial common sense; but*

f. *disregarding subjective evidence of any party's intentions.*

In order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible. Courts would adopt a broad test for establishing the admissible background. The background to a contract included knowledge of the genesis of the transaction, the background, the context and the market in which the parties were operating. In interpreting contracts;

g. *the courts would endeavor to interpret the contract in cases of ambiguity in a way that ensured the validity of the contract rather than rendering the contract ineffective or uncertain.*

h. *the courts would strictly interpret contractual provisions that sought to limit rights or remedies, or exclude liability, which arose by operation of law; and*

i. *where a clause had been drafted by a party for its own benefit, it would be construed in favour of the other party (the contra proferentem rule). The last principle had limited applicability in cases involving sophisticated commercial agreements where a contract had been jointly drafted by the parties or where the parties were of comparable bargaining power*

I have keenly perused the sale agreement which is the heart of the instant dispute. It is clear that the agreement commenced by describing the titled land though without the volume and folio number, as Plot 3 Block 379 Buwekula Block land at Nalutete, Mubende district. However, in the agreement it was not specifically expressed whether the 400 acres the defendant purchased were part of the titled land that is Plot 3 Block 379. Recourse is then made to clause *(c)* of the agreement which states that;

> ***c) IT IS AGREED by both parties that upon payment of the 50 heads of cattle the purchaser shall assume full ownership of that piece of land for which he is already in possession.***

What location then was the defendant in possession of at the time of making the agreement? It was the defendant's own evidence that at the time of making the agreement he was located at a different place from where the plaintiff resided. In his examination in chief during locus, the defendant stated;

> ***"In 2002 I was living near the valley and I can show where my residence was. From my former residence, I shifted to the hill on another part of the suit land. Both my current home and former home are on Plot 3.***

The defendant further re-confirmed the same during cross examination and stated that it was true that he shifted from his former place *(the left side of the land)* to his current place *(the right side of the land)*.

These locations were shown in Exhibit P11 in the plaintiff's trial bundle, which is a deed plan from the Department of Mapping and Surveys where it was indicated that Point A was where the defendant originally resided which was on a hill outside the surveyed 241 hectares. Where the defendant moved to Point B fell within the titled land 241 hectares where the plaintiff resides and constructed a house thereon. According to the defendant he moved from Point A to Point B on his own belief that it fell under Plot 3 where he purchased the 400 acres from.

Unfortunately, this was not the case. The plaintiff led uncontroverted evidence that the defendant moved into the titled land which was contrary to what was agreed under the clause *(c)* of the agreement. No valid reason, apart from the belief that he was the rightful owner, was advanced by the defendant to moving from his original residence where he purchased the 400 acres from into the titled land *(suit land)* where his only obligation was to care take and not assume ownership as clearly agreed and expressed under clause *(d)* of the agreement. Additionally, this court made its own observations during locus visit where it established without a doubt that the plaintiff had indeed moved from his original residence which fell outside of the plaintiff's titled land into the suit land, without the plaintiff authorization or consent. The defendant's argument is that clause (a) part 1, (d), (f) and (g) of the sale agreement clearly provided that the plaintiff sold part of the titled land and that is why it was indicated that steps would be taken to acquire a land title and not to sub divide or do mutation of the existing land title. I find this argument rather confusing. Under clause *(f)* of the agreement it is expressed that;

> ***"It is agreed by the parties that while the vendor shall ensure that all steps are taken to acquire a land title for the purchaser in respect of the property as sold herein, which processes shall include survey and transfers thereof, the relevant government taxes for the purposes, and all expenses thereto shall be paid by the purchaser in as far as his piece of land is concerned."***

The above clause states that plaintiff would ensure to take steps to acquire land title for the defendant in respect of the property sold and the process would include survey and transfer thereof. Had the plaintiff sold part of the titled land then the ordinary understanding would be that there would not have been need to include the provision for the survey of an already surveyed and titled land. Furthermore, clause (g) also mentions that the defendant was to be given a land title upon completion of a survey. Again this is strong evidence that the plaintiff was not selling part of the titled land which had already been surveyed.

This evidence was corroborated by the defendant's own prayer in his amended counter claim. Under paragraph *1 (d)* the defendant prayed for a declaration that the counter claimant is entitled to apply to Mubende District Land Board for conversion of his 400 acres customarily held to freehold. The defendant in his own pleadings describes the land he purchased, the 400 acres, as customarily held, yet was clearly cutting the ground upon which he was standing in court by insisting that he purchased the 400 acres from the titled land (241 hectares). Parties are bound by their pleadings and therefore the contents of the amended counterclaim rightfully bind the defendant. In the case of **Malawi Supreme Court of Appeal in Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, in which the learned judges quoted with approval from an article by **Sir Jack Jacob entitled "The Present Importance of Pleadings"** the same was published in **[1960] Current Legal Problems at p 174** whereof the author had stated: -

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ..... for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence***

not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

Similarly, in **Adetonn Oladeji (NIG) Ltd vs Nigeria Breweries PLC S.C. 91/2002** Judge Pius Aderemi J.S.C expressed himself as follows: -

"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

In the circumstances and basing on the evidence elaborated above, this court finds that the 400 acres the defendant purchased did not form part of the titled land (241 hectares) where the plaintiff resides and is the lawful registered proprietor of the same. This answers the first, second, third and fourth issues raised for determination. In his submissions Counsel for the plaintiff stated that although it was not framed as an issue, it was clear from the proceedings that the main issue for determination is whether the defendant has committed trespass over the plaintiff's land. That the defendant denies this averment in his defence hence making it an issue. Counsel prayed for this court to invoke its inherent powers to frame this as a main issue.

Under Order 15 rule 3 of The Civil Procedure Rules, the court may frame issues from all or any of the following materials;

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and

(c) the contents of documents produced by either party.

In the instant case the plaintiff under paragraph 3 (c) of her plaint prayed for a declaration that;

> ***"The defendant is a tenant at will having disputed the plaintiff's ownership of the suit land, a complete trespasser except on the 400 acres that he bought from the plaintiff."***

This prayer was disputed by the defendant in his defence under paragraph 7. I find that although the issue of trespass was not raised as an issue for determination it is a crucial question which this court has to determine as the issues raised herein revolve around the same.

The Supreme Court while defining trespass as per the case of **Justine E. M. N Lutaaya versus Stirling Civil Eng. Civ. Appeal No. 11 of 2002**, held that;

> ***"Trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land'.***

In **Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4 of 1987**, the East African Court of Appeal noted that;

> ***'in order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land belonged to him, that the respondent had entered***

upon that land and that the entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land'.

In the instant case the plaintiff has proved that she is lawful registered owner of the 241 hectares of land (suit land), a fact not disputed by the defendant. It has also been proved that the defendant moved from his original residence into the suit land without the plaintiff's permission and the defendant's 400 acres he had purchased from the plaintiff were not on the suit land (241 hectares) where he is currently residing. As such the defendant is a trespasser.

The plaintiff also raised an issue as to whether the defendant sold or rented out the plaintiff's land he was given to care take. The plaintiff submitted that the defendant unlawfully sold land outside of the 241 hectares *(suit land)* to a one Constance and rented out part of the suit land to another. That the defendant failed in executing his responsibility of caretaking by allowing and selling/renting the suit land to third parties. The defendant on the other hand stated that there was no evidence that there was surveyed land anywhere around and outside Plot 3 and that during locus the plaintiff did not show any part that the defendant sold outside the suit land. That the occupants on Plot 3 were shown to court to be only the plaintiff, the defendant and their family members.

When court visited locus it is true that it was not shown of any squatters on the suit land. Also the issue of whether the defendant sold to Constance or not was subject of proof, the evidence of which the plaintiff did not adduce. No witnesses or documentary evidence was adduced by the plaintiff to prove that indeed the plaintiff sold or rented out the land. Mere presence of occupants on the land does not prove any sale by the defendant. I therefore find that this issue fails together with issue 5.

Defendant's amended counter claim

The defendant/counter claimant abandoned his prayers under paragraphs (a),(b), (c) and (d) of his amended counterclaim. His only prayer was an order of specific performance by the counter defendant to transfer to him his 400 acres out of the 241 hectares and general damages of UGX. 200,000,000/= for tremendous mental anguish and financial suffering. Having already found that the defendant's 400 acres did not form part of the 241 hectares registered land, it follows therefore that this prayer cannot be sustained. For reasons already mentioned, the counterclaim fails in its entirety.

Suffice to note is that even if this court was to find that the defendant's land formed part of the surveyed land (which is not the case), it would still have been a problem for the defendant in the sense that the plaintiff was to demarcate and give the defendant and not the defendant to demarcate for himself. Either way, the defendant was at fault.

In light of the above deliberations, I find that the defendant is a trespasser on the suit land (241 hectares being titled land) and make the following orders;

a) *A declaration doth issue that the Plaintiff is the lawful and rightful owner of the suit land* (241 hectares being titled land).

b) *The defendant has no claim or color of right in respect of the titled 241 hectares and is accordingly, a trespasser thereon.*

c) *An order for delivery of vacant possession evicting the defendants and or his agents or anyone claiming title under him from the titled 241 hectares.*

d) *A declaration that the defendant is only entitled to 400 acres outside the titled 241 hectares to be measured starting from the point at which he was ordinarily resident at the time of executing the sale agreement.*

e) *The plaintiff should facilitate the defendant's acquisition of the title on the un-surveyed land as agreed.*

f) *Mindful that the parties are relatives who may consider reconciling in future and given that the said trespass arose from an apparent lack of clarity as to the exact boundaries of the un-surveyed land and since the survey exercise according to the plaintiff's own evidence is not yet complete; I make no order as to general damages, mesne profits and punitive damages.*

g) *The counter claim fails for the reasons stated in this judgement.*

h) *Let parties bear their own costs both in the main suit and in the counterclaim, given that they are relatives.*

Dated at Kampala .....26th..... this day of ..October..... 2022

Flavian Zeija (PhD)

PRINCIPAL JUDGE