

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT FORT PORTAL  
CIVIL SUIT NO. 009 OF 2015**

**BETTY KAFUREKA**

5 **(Administratrix of the Estate of the late Hezzy Kafureke) :::::::::::PLAINTIFF**

**VERSUS**

**1. BIHANGA SUB COUNTY LOCAL COUNCIL III**

**2. ATUHAIRE EDWARD**

**3. EMMANUEL MUJUNI**

10 **4. ROBERT KAHANGI**

**5. MUHUKYA FRANK**

**6. STEVEN KISEMBO**

**7. MUGISHA GEORGE WILLIAM**

**8. MUBARAKA**

15 **9. MUFUMBIRA**

**10. RAMANZAN**

**11. MBONGYERA**

**12. GODFREY NDAGYIJEIMANA**

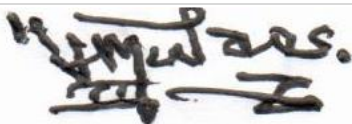
**13. KYALIMPA NATHAN**

20 **14. MRS. HARRIER MUJUNI ::::::::::: DEFENDANTS**

**BEFORE HON. JUSTICE VINCENT WAGONA**

**JUDGMENT**

25



**Introduction:**

The plaintiff sued the defendants for trespass; a declaration that the disputed land belongs to the plaintiff; a permanent injunction; an order for compensation; special  
5 and general damages and costs of the suit.

**The case of the Plaintiff**

The plaintiff contended that her husband Hezzy Kafureka (**the deceased**) was the  
10 owner of the suit land since 1982, used as farm land. That in 2014, the defendants laid false claims on the suit land and trespassed thereon and in 2015, the 1<sup>st</sup> and 2<sup>nd</sup> defendants assisted by the rest of the defendants destroyed the fence and divided the suit land amongst themselves, started cultivating and ferrying materials to construct illegal structures in an attempt to create an interest in the suit land and destroyed the  
15 plaintiff's farm house, the kraal and chased and or harassed the plaintiff's workers and cattle. The plaintiff avers that the 1<sup>st</sup> defendant is vicariously liable for the actions of the rest of the defendants.

**The case of the Defendants:**

20 The defendants filed a joint written statement of defense in which they denied the plaintiff's claims and contended that the plaintiff had no cause of action against the 2<sup>nd</sup> to the 14<sup>th</sup> defendants and that the suit land belonged to the 1<sup>st</sup> defendant and had never been property of the deceased. It was the case of the defendants that the suit  
25 land belonged to the 1<sup>st</sup> defendant and that the deceased who owned a neighboring peace of land and other farmers were utilizing the suit land for grazing and there was

a cattle dip tank constructed on land of the 1<sup>st</sup> defendant since 1970, used by the community.

That in 1982 and again in the year 2000, the deceased had applied for allocation  
5 and/or use of the dip tank but his application remained unconsidered and  
subsequently a meeting of the community users of the dip tank resolved and fenced  
off the suit land. That it was after the death of the deceased that the plaintiff started  
to claim the suit land and applied for issuance of a title when the 1<sup>st</sup> defendant had  
lodged already an application for the same and the plaintiff's application was  
10 rejected and the 1<sup>st</sup> defendant was later issued a freehold offer. The defendants thus  
asked court to dismiss the suit with costs.

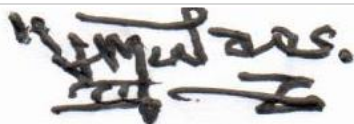
### **Issues:**

15 Three issues were agreed upon for determination during scheduling thus:

- 1. Whether the suit land belongs to the plaintiff.**
- 2. Whether the defendants are trespassers on the suit land.**
- 3. What remedies are available to the parties?**

### **Representation and Hearing:**

**Mr. James Bwatota** of M/s Bwatota Bashonga & Co. Advocates appeared for the  
plaintiff and **Mr. Richard Bwiruka** of M/s Kaahwa, Kafuuzi, Bwiruka & Co.  
Advocates appeared for the defendants. Parties led evidence and filed written  
25 submissions which I have considered herein.



## **Burden of Proof and Standard of proof:**

The burden of proof is in two broad categories that is the legal burden and the evidential burden. Sections 101 and 102 of the Evidence Act Cap 6 rests the burden of proof on whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts to prove that those facts exist or who would fail if no evidence is adduced at all. Therefore, the plaintiff bears the legal burden of proof to prove his case on the balance of probability.

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Section 103 of the Evidence on the other hand places the evidential burden on any party who alleges the existence of a set facts to prove such facts. It provides thus;

*The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

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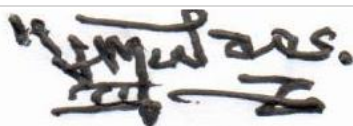
Therefore, the plaintiff bears the legal burden to prove that the suit land formed part of the estate of the late Kezzy Kafuleka and that the defendants are trespassers.

20 **Issue No. 1: Whether the suit land belongs to the plaintiff.**

### **Evidence of the Plaintiff:**

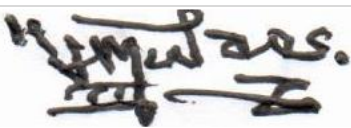
It was the position of the plaintiff that the evidence of the plaintiff supported by her former workers PW1, PW2 and PW5, that the deceased and the plaintiff occupied the suit land since 1982 and used it as farm land. That part of the land was acquired

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by purchase through PEX4, PEX5, PEX6, PEX8 and PEX9. That after the death of the deceased, the plaintiff applied and was granted letters of administration (PEX1) and subsequently applied to convert the same from customary to freehold and that the dip tank was outside the land that the plaintiff applied for. It was contended that the evidence on record suggested in strong terms that the plaintiff was a customary owner of the suit land.

**PW1 Nathan Bwiruka** who had been a herdsman of the deceased since 1999 testified that when he started working with the deceased in 1999, the deceased was grazing on the suit land together with David Murokere Benard, Serugyenda and Byingabo and others. That deceased kept buying the land from those people until he bought the entire land and continued grazing in the suit land alone. That around 1999 to 2000 he was among the workers who fenced off the suit land and they continued grazing cows there up to 2014 when he left the and went to on another farm of the deceased. In cross examination the witness stated that before the suit land was fenced off, all cattle keepers were grazing on the land. That after fencing, others could not access the land because it now belonged to the owner. PW1 testified that around July 2015 he heard that the sub county had come on the suit land. That he saw people demolishing the house, latrine, kitchen and also the cattle crash. In cross examination PW1 stated that he was aware that on the disputed land there was a government dip tank and that it was made for dipping animals for all farmers. He told court that the deceased also had a separate land from the one where the dip tank was located and that the deceased had bought the suit land from the people who had settled there, including David Murokole who had been the deceased's neighbor. PW1 stated that when he reached the disputed he found a grass thatched house and a kraal destroyed and people were standing aside. That he saw Muhukya, Robert Kahangi, Stephen



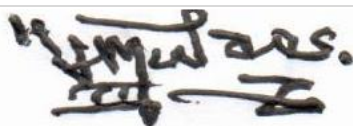
Kisembo, Mubaraka, Ramathan destroying the kraal. In re-examination the witness said that the people the deceased bought the land from had homesteads on the land.

**PW2 James Tumusiime** stated that he worked for the plaintiff's family between 5 2000 and 2016 grazing cattle on the suit land. That he was surprised around July 2015 when the defendants in the company of Muhukya Frank grabbed the land of Mrs. Betty Kafureka. That he saw Muhukya Frank, the chairman NRM, Mujuni the chairperson L.C II and Mrs. Harriet Mujuni the then chairperson L.C.III, Steven 10 Kisembo, Robert and Mr. Kahangi the councilor L.C.III and other people destroying structures like a grass thatched house, a kitchen, Kraal and a toilet. That these people started chasing and harassing him and other workers to vacate the land stating that it was theirs. In cross examination the witness stated that at the time he came on the land, he found only the deceased grazing on the land and that he did not find the dip tank and did not know where it was.

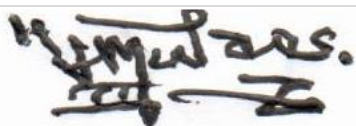
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**PW3 Muhairwe Robert** testified that he had been a herdsman for the plaintiff since 7<sup>th</sup> June 2013 and he was grazing the plaintiff's cows on the disputed land until 11<sup>th</sup> 5 July 2015. That on 11<sup>th</sup> July 2015, he was told that his home had been demolished and his belongings and family members had been chased from the suit land. That he 20 found many people led by Muhukya Frank who is a neighbor and the chairman NRM, Mujuni Harriet who was also the chairperson L.C III Bihanga Subcounty and Kihembo Steven together with other people. In cross examination he stated that when he started to work for Kafureka in June 2013 he found the land fenced and it was only Kafureka who was grazing there.

25 **PW4 Betty Kafureka** stated that the deceased died on 29<sup>th</sup> April 2009 and that the family had been in full occupation and use of the disputed land since 1982 and it was



properly fenced off. That the 1<sup>st</sup> defendant through her agents, the sub-county chief trespassed on the suit land in 2014 and attempted to grab the same by laying false claims upon her land. That they had purchased the part of the suit land from people they found living on the land and these included Bernard Bizimana, Barnabas Juuko (by agreement PX4), Bahati Julius (by agreement PX9), Beat Namahoro, Kagoro (by agreement PX6), Mr. Byenaku (by agreement PX7), Emmanuel Serugyendo (by agreement PX10) and Christopher Muhutu (by agreement PX8). The witness stated that after they vacated, the plaintiff applied through Bihanga Sub-County Area Land committee (PX11) for grant of a title. That they came and inspected the land and they confirmed that there was no conflicts. That Muhukya Frank and Moses acknowledged signing on the application for grant of the title (PX11). That she was later summoned to appear before the District Land Board on 21<sup>st</sup> May 2015 to show cause why she should not be granted a certificate of title for the land in dispute together with the defendant who she was informed had also applied for a freehold title over the same land. That she appeared before the land board and later the board informed her that a decision would be communicated in due course. That she remained in possession until July 2015 when the first defendant through the 2<sup>nd</sup> defendant led a mob of people including the defendants who cut and destroyed her fence, removed boundary marks, divided land amongst themselves and started to cultivate the same, ferried materials and started to construct illegal structures on the land in an attempt to create an interest in the suit land. That the defendant also destroyed her farm house, cattle kraal and started chasing and harassing her workers to shield their illegal acts and further deployed four police officers with instructions to keep her away from the land. That she thus lodged the case at hand. In cross examination PW4 stated that when they first came on the suit land, they found people using the land for grazing and cultivation and there was a dip tank that was no longer



in use. Regarding why some of her purchase agreements were not signed by the LCs, she said she did not know why because she was not the one who bought the land and would only take the money. That when they settled on the land they fenced it off using plants around 1990 to 1991 and later used barbed wire and that the dip tank  
5 was outside the fenced area and not in the land she applied for.

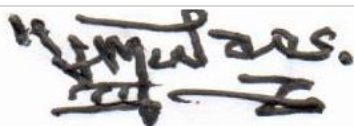
**PW5 David Kamusiime** corroborated the evidence of PW4 in material particulars and in cross examination stated that it was the sub-county that was currently in possession of the suit land that has a government seed school built there.

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**PW6 Kahesi Daphin** the wife of PW3 testified that on the 11<sup>th</sup> July 2015, she saw people with hoes and pangas led by Muhukyi Frank, the chairman NRM, Mujuni the chairperson L.C 2, Mrs. Harriet Mujuni the then chairperson L.C.III and the rest she did not know and they started to destroy the house she was staying in, a kitchen,  
15 kraal, toilet and all the gardens they had grown and threatened to put her and the kids in the house and lock them in and set it on fire in case they refused to leave and they left and ran away. In cross examination she stated that the farm belonged to the deceased and that it had been fenced off.

20 **Evidence of the Defendants:**

The 1<sup>st</sup> defendant claimed ownership of the suit land and pointed out that the deceased had only applied (DE2 and DE3) to use the same before later applying for a land title. That whereas the plaintiff testified that the land was purchased from  
25 customary holders, none testified in court.



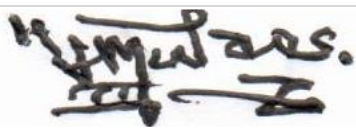


**DW1 Muhukya Frank** stated that the suit land belonged to the 1<sup>st</sup> defendant and he used to graze his cattle thereon with other residents. That in the 1970's, a dip tank was constructed on the suit land belonging to the 1<sup>st</sup> defendant for communal utilization by cattle keepers including him, the deceased, some of the defendants and other cattle keepers. That they used the said dip tank and it was later abandoned and the dilapidated tank is still visible on the suit land. DW1 said that in 2002, the deceased contacted them to contribute money to repair the dip tank and the cattle keepers failed to raise the money. In cross examination stated that disputed land was now used by government and there is a government school thereon. That it was not true that people attacked the deceased's farm. That government summoned all the people and told them never to go back to the suit land and later established a school and that the plaintiff has her own land neighboring the suit land. in re-examination the witness said that there were no structures on the disputed land and it was only grass

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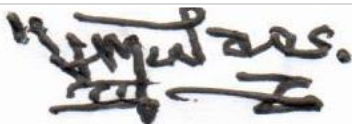
**DW2 Muhangi Gad** stated that a technical handover report dated 13<sup>th</sup> September 2014 (DX4) confirmed that the suit land belonged to the 1<sup>st</sup> defendant. That he also found on record an application for conversion of the suit land from customary tenure to freehold tenure which was accompanied by the demarcation form for the certificate of customary ownership (DX5 and DX6). That on 9<sup>th</sup> September 2015, the area land committee inspected the suit land (DX7) and found it free for grant of freehold. That due to the claim of the suit land by the plaintiff the District Land Board of Kamwenge did not grant the 1<sup>st</sup> defendant the freehold. That he also inspected the suit land and found the remains of the collapsed dip tank which were visible and that the plaintiff was trying to alienate the 1<sup>st</sup> defendant's land where the cattle for all farmers assembled before and after dipping. In cross examination the

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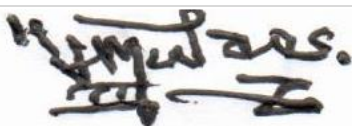
witness stated that he attached the application form for the plaintiff to show that by the time she applied, the board had granted a freehold to the 1<sup>st</sup> defendant. That the sub-county was not granted a title because in due course another person applied for the same and when the conflicts on land started they could not grant it until it is resolved. The witness said that the plaintiff also later applied for a freehold though and that currently the land is owned by government but it is not yet titled. That from the beginning UNHCR had constructed a dip tank on the suit land implying it was public land and not for an individual. That he was aware that in 1970 the land belonged to government and it was used by the public. That Bihanga sub county is a department of government. DW2 said that there is a seed school on the disputed land.

**DW3 Emmanuel Mjuni** stated that the suit land belongs to the 1<sup>st</sup> defendant. That the deceased owned land which neighbors the suit land and did not own or have an interest in the suit land. That in 1970's, government constructed a dip tank on the suit land for communal utilization of all cattle keepers. That the dip tank was used and later abandoned by the community and the dilapidated tank is still on the suit land. That in 1982 the deceased wrote a letter to the Ministry of Culture and Community Development requesting for the allocation of the said dip tank and his letter was replied to on 26<sup>th</sup> November 1982 (DX2) that his request was still under consideration. That on the 1<sup>st</sup> of August 2000, the deceased wrote another letter to the minister of Agriculture, Animal, Industry and Fisheries through the Chairperson L.C III (DX2) requesting for authorization to re-construct and utilize the said abandoned dip tank. That on the 5<sup>th</sup> February 2004 the deceased wrote a letter to Mr. E, Rwakuringa, the Chairperson of Bihanga Farmers to convene a meeting of farmers who wished to contribute to the repair of the said dip tank (DX2). That on



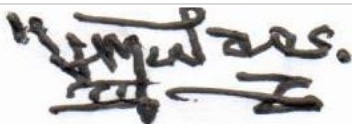
the 29<sup>th</sup> march 2004, the Bihanga Parish Council met and resolved under minute 9/PCM/2004, and the Chairperson informed the members that the suit land had been illegally occupied by the late deceased and it was resolved that the sub-county writes to the people on the suit land to vacate there from starting with the deceased who occupied the biggest portion. That after the death of the deceased, the plaintiff started claiming ownership of the suit land and applied for a freehold title in respect of the same and her application was rejected by the District Land Board on the 12<sup>th</sup> May 2015. That the 1<sup>st</sup> defendant made several verbal and written communications to the plaintiff that the land she was occupying was no hers and that she had occupied the same illegally. The witness stated that on the 23<sup>rd</sup> of December 2014, the Council made a resolution to write to the plaintiff to vacate her land. The witness was empathic that the plaintiff was not the rightful owner of the suit land and that she was occupying the same illegally.

**DW4 Harriet Ajuna** a former L.C.III Chairperson of Bihanga Sub – County from 2015 to 2016 stated that the suit land belonged to the 1<sup>st</sup> defendant with all the developments thereon. That in the 1970's, a dip tank was constructed on the suit land belonging to the 1<sup>st</sup> defendant for communal utilization by cattle keepers including the deceased. The witness stated that in 2002, the deceased contacted them to contribute to repair the dip tank on the suit land and the cattle keepers failed to raise the required money. That they were later informed that the land was going to be used by its owner, the 1<sup>st</sup> defendant and they were told not to graze there anymore and they complied. In cross examination the witness stated that she knew that the plaintiff had land in the same area neighboring the suit land where the sub county has a school. That what she knew was that the suit land belonged to government. That it was the sub-county that applied for it first.



**DW5 Kisembo David** stated that in 1970's, a dip tank was constructed on the suit land for communal utilization by cattle keepers. That they used the said dip tank for some time but later it was abandoned and the dilapidated structures are still visible  
5 on the suit land. That the deceased acquired land in the neighborhood of the suit land around 1982 which he surveyed in 1987. The witness said that in 2002, the deceased contacted them to contribute to repair the dip tank and the cattle keepers failed to raise the required money. That the deceased, some of the defendants and other cattle keepers were using the suit land for grazing and watering their animals well knowing  
10 that it belonged to the 1<sup>st</sup> defendant. That they were informed that the land was going to be used by the first defendant who established a seed school thereon and they stopped grazing on the land. In cross examination the witness stated that the plaintiff was not on the land in July 2015. In cross examination the witness stated that he was using the land for grazing in 1970 and that the deceased came in the area around  
15 1984 and brought cows from Ankole and was among the farmers who were using the land.

**DW6 Kyalimpa Nathan** the chairperson L.C. III of Kanara II Village, Bihanga Sub-County where the suit land is situate stated that since his childhood, he had seen the  
20 suit land being used by cattle keepers and there was a cattle dip tank owned by the 1<sup>st</sup> defendant. That the said dip tank was used for some time and later abandoned and the dilapidated structures are still visible. That the suit land belonged to the 1<sup>st</sup> defendant and all cattle keepers who were grazing thereon were aware of the fact that the said land did not belong to the plaintiff. That he had found a letter in the  
25 office of the area chairperson where the deceased was requesting Bihanga farmers to contribute for the repair of the dip tank. In cross examination he stated that he was

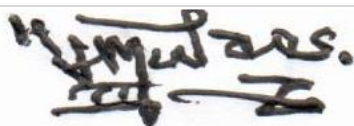


the former chairperson of Kanara II, Bihanga Sub County. That he was the area chairperson and knew what was happening on the suit land. That since his childhood the land was used by cattle farmers and there was a dip.

5 **Analysis of the Evidence:**

There is no dispute that the plaintiff owns titled land which neighbors the suit land which is untitled. It is also not in dispute that the suit land had a cattle dip. The dip tank is within the suit land. The plaintiff averred in the plaint that her family had  
10 been in full possession of the suit land, utilizing it, grazing thereon and cultivating the same since 1982 and adduced evidence that the suit land was acquired through purchases from those were originally in occupation of the suit land. The first agreement of purchase was on 10<sup>th</sup> April 1993 exhibited as PX4. No evidence of acquisition either through purchase or any other form was presented by the plaintiff  
15 for the period before 1993. Therefore if others were in occupation prior to the purchases, then it cannot be the case that the plaintiff's family was on the suit land in 1982 by purchase as contended by the plaintiff. In that case, lending credence to the evidence of the defendants, the plaintiff's family could only have been users of the land for community grazing together with other community members as  
20 contended by the defendants.

Secondly, no evidence was placed before me by the plaintiff of the nature of interests that the former owners had over the land that they transferred to the plaintiff. It is settled law that a vendor cannot transfer interest in property more than what he or  
25 she possesses at the time. A purchaser of land must ensure that the vendor's title to the land in issue is solid and does not call for further inquiries. This burden is higher



when it comes to unregistered land where the law imposes a heavier duty on the purchaser to ensure that the person he or she is transacting with has an impeccable title to the land in issue so as to be able to pass over the same. This principle was put in proper perspective by *Nakachwa J* as regards unregistered land in *Yokio Investment Co. Ltd v Administrator General, Civil Suit No. 271 of 2018* thus: “*In the case of unregistered land, there is no central register and as such the burden is on the buyer to ascertain whether the land has been properly conveyed over years and that the current vendor is the party to whom it was last vested. This requires a thorough examination of the vendor’s title from the root title onwards....*”

In this case the plaintiff claimed that the suit land was acquired by way of purchase from several people and presented sale agreements to that effect. The defendant on the other hand contended that the land was formerly public land used by the whole community for grazing cattle and it has a dip tank constructed in the 1970s. The best evidence to counter the defendants’ evidence in this regard would have been the testimonies of those from whom the deceased bought the suit land to explain to court the nature of interests which they had in the suit land that they passed on to the deceased and hence to the plaintiff. In the absence of such evidence, I find the evidence presented by the defendants of the land being used as a community grazing field more believable. The defendants’ witnesses all testified that the suit land was community or public land which was used for grazing and had a dip tank constructed in 1970’s which later got disused. That attempts were made by the late Kafureka to apply to renovate and / or use the dip tank right from 1982 through DX1 and other subsequently letters admitted as DX2 and DX3. It was the evidence of the defendants that all the community members including the late Kafureka used the suit land for

cultivation and grazing. Exhibit DX4, is a hand over report by the Chief Administrative Officer of Kamwenge where he stated that among the properties handover to the 1<sup>st</sup> defendant was land at Kanara II approximately 82 acres. I find that the plaintiff has on a balance of probabilities failed to prove that the suit land belongs to her and I thus resolve this issue in the negative.

**Issue No. 2: Whether the defendants are trespassers on the suit land.**

Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. (See *Justine E.M.N Lutaya Vs. Stirling Civil Enginerring Co. Ltd, Civil Suit No. 11 of 2002*). Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see *Salmond and Heuston on the Law of Torts, 19<sup>th</sup> edition (London: Sweet & Maxwell, (1987) 46)*). The entry by the defendant onto the plaintiff's land must be unauthorized. The defendant should not have had any right to enter into plaintiff's land. (See *Odek Alex & Anor Vs. Gena Yokonani & 4 others, Civil Appeal No. 0097 of 2017*).

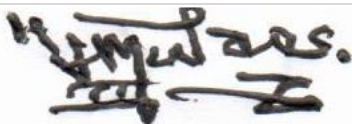
The plaintiff contended that the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant led a mob of people including the defendants who stormed the plaintiff's land, cut down and destroyed her fence, barbered wire, removed boundary marks and divided the land amongst themselves. It was contended that the entry was not authorized and thus

amounted to trespass. The plaintiff's case was supported by the testimony of PW1, PW2, PW3 and PW5 who saw the defendants commit the acts of trespass and destruction of his properties and chasing away cattle. The defendants on the other hand denied the alleged trespass and contended that the land was community/public land used by all members of the community for grazing. That there was no trespass since the land belonged to the first defendant and the plaintiff was not in possession.

I have under Issue No. 1 found that the plaintiff failed to prove that she was the owner of the suit land. I am not therefore satisfied that the plaintiff was in possession of the suit land in July 2015 when the alleged trespass happened. My visit at locus and the nature of the land suggested in strong terms that the land was a grazing field used by cattle keepers in the area including the plaintiff. Therefore the plaintiff's claim under trespass fails and I resolve this issue in the negative.

**Issue No. 3: Remedies available to the parties.**

The plaintiff having failed to prove her case, this suit is hereby dismissed and she is not entitled to any of the remedies sought. Regarding costs, Section 27 of the Civil Procedure Act provides that costs follow the event. A successful defendant is entitled to costs unless exceptions are presented that disentitle him or her of such. In **Kiska Limited V. Vittorio Angelis [1968] EACA 7**, it was held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit has led to litigation which but for his own conduct might have been averted. In this case the plaintiff applied for conversion of the suit land from customary tenure to freehold. The area land committee inspected the land. The plaintiff was summoned to appear before the District Land Board.

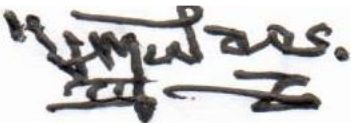




These actions may have led the plaintiff to believe that she was entitled to the land, which may have convinced her to bring this suit. I therefore find it unjust to condemn the plaintiff to costs. I issue the following declarations and orders:

1. A declaration that the suit land belongs to the 1<sup>st</sup> defendant and as such the 1<sup>st</sup> defendant is not a trespasser.
2. A permanent injunction is hereby issued against the plaintiff restraining her or her agents and any other person from interfering with the 1<sup>st</sup> defendant's use of the suit land.
3. Each party shall bear their own costs of the suit.

10 It is so ordered.



Vincent Wagona

**High Court Judge / FORTPORTAL**

15 **DATE: 30/11/2023**

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