

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0009 OF 2011

5 **PROFESSOR HENRY KERALI** **PLAINTIFF**

VERSUS

1. **FATUMA BONA** }
2. **REMO MUSA** } **DEFENDANTS**
10 3. **HARUNA SEBBI** }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The plaintiff sued the defendants jointly and severally for general damages for trespass to land, a permanent injunction against further acts of trespass, interest and costs. The plaintiff's case is that he is the customary heir and administrator of the estate of his father the late Claude Mamba Kerali, who before his death was the registered proprietor of a 49 year lease over land comprised in L.R.V 824 Folio 2, plots 1 and 1A Ezama Crescent, since 1st July, 1972. The lease runs from 1st September, 1970. The plaintiff's father constructed a permanent residential building and guest wing on that land and his family resided thereat until 1985, and thereafter moved to their country home in Erusi village, from where the plaintiff's father was murdered in 1996. The buildings on the land were from time to time let out to divers tenants until 7th June, 2011 when they were required to vacate so as to enable renovations of the premises to take place. The defendants took advantage of that development and began encroaching on the land by planting crops thereon on or about 26th - 27th June, 2011. Despite the plaintiff's repeated demands, the defendants refused to cease their activities on the land. The plaintiff sought and was granted permission by the Municipal authorities to open the boundaries of the land. On 21st July, 2011, an attempt was made at opening the boundaries, fencing it off and the defendants' crops were leveled by heavy earth moving equipment. The boundaries of the land were then verified on 28th July, 2011.

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In the joint written statement of defence of the first and second defendants, the first defendant retorted that she is the lawful owner of a portion of the land in dispute, measuring 20 metres by

40 metres, where her father Iddi Akerabi lived until his death in the year 2006 which unknown to her deceased father was fraudulently included in the plaintiff's title. She inherited the land from her deceased father and has since then been cultivating it. Her late father during the 1960s, gave a portion of his land to the plaintiff's father (now comprised in plot 1 Ezama Crescent) leaving plot 1A which he continued to occupy until his death. She therefore counterclaimed for a declaration that she owns plot 1A, an order of rectification of the plaintiff's certificate of title to exclude plot 1A, a permanent injunction against further acts of trespass, special and general damages for trespass to land.

10 In his written statement of defence, the third defendant refuted the plaintiff's claim contending that he is the Local Council I Chairman of the area where the land in dispute is situate and was in that capacity invited by the first defendant on 20th and 21st July, 2011 to arbitrate when her crops on the disputed land were destroyed by the plaintiff. He has no personal interest in the disputed land and therefore prayed that the suit against him be dismissed with costs.

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In his testimony, P.W.1 Opio Robert Kerali stated that the land in dispute belonged to his late father, Claudio Mamba Kerali who died on 9th September, 1996 having acquired it during 1970. Upon the death of their father, their elder brother, the plaintiff, applied for and was granted letters of administration to the estate. The land comprises plots 1 and 1A Ezama Crescent, On plot 1 Claudio Mamba Kerali had constructed a residential building and guest wing while plot 1a remained undeveloped but was from time to time used for the cultivation of perennial and seasonal crops. In the years leading to the current dispute, the family of the late Claudio Mamba Kerali let out both buildings to divers periodical tenants and when during the year 2010 it was decided to terminate their tenancies in order to give way to renovations of the buildings, the defendants took advantage and trespassed onto the land by planting crops on the vacant part of the land, plot 1A, claiming that it belonged to their late father. The defendants refused to vacate the land despite the multiple notices issued to them prompting the plaintiff to hire a grader which on 21st July, 2011 proceeded to level the ground, destroying crops that had been planted by the defendants in the process. The first and second defendants are husband and wife who trespassed onto the land by planting crops thereon. The claim against the third defendant is that in his

capacity as L.C.1 Chairman of the area, he stopped the plaintiff from fencing off his land in support of the first and second defendant's false claim to the land.

The plaintiff, Henry Godfrey Rupiny Kerali testified as P.W.2 and stated that his late father
5 Claudio Mamba Kerali was the registered proprietor of the land in dispute comprised in L.R.V
824 Folio 2, plot Nos. 1 and 1A, and the certificate of title was issued on 1st September, 1972
(exhibit P. Ex.1). He obtained a grant of letters of administration to the estate of the deceased on
20th March, 2015 (exhibit P. Ex.2). The land was fenced with a barbed wire fence during the
10 years 2006 and 2010 but the defendants pulled down the fence on both occasions where after
they proceeded to wrongfully grow seasonal crops on part of the land as trespassers. These crops
were destroyed when the grading of plot 1A commenced in July, 2011. His late father had
purchased both plots from the first defendant's late father during the year 1970.

P.W.3 Dudu John Ongetho testified that on 12th July, 2011 when he went out to serve a notice of
15 intention to sue on the defendants, he found that the defendants had freshly planted a garden of
sweet potatoes and about 10 - 12 suckers of bananas, covering approximately a quarter of plot
1A. He took photographs of the crops and sent them to the plaintiff in the USA. On 28th July,
2011 he participated in an exercise of boundary opening on the land. On 30th July, 2011 he
participated in fencing the land off but the defendants pulled down part of the fence.

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P.W.4 Benardine Okello Oyarmoi testified that he is a former tenant on plot 1, where he rented a
unit of the main house from around March or April, 1987 until October 2006 when he was asked,
together with other tenants, to vacate the premises to give way to intended renovations of the
building. During his tenancy, his wife and other tenants occupying both the main house and the
25 boys' quarters used to grow seasonal crops on the then vacant plot 1A. He never saw any of the
defendants undertake any activity on plot 1A during that 19 year period.

P.W.5 Ayiru Grace testified that she was a tenant on plot 1 from February 2010 to July 2011,
renting from P.W.1. Opio Kerali. She and other tenants on plot 1 had gardens on plot 1A. During
30 her tenancy, none of the defendants had activities on the land. There were no graves on either
plot. There were no oranges on either plot. They were later told to vacate to allow for

renovations and had to leave their crops behind. Before they left, she found Musa's family planting a single line of potatoes between plots 1 and 1A. On top of the mounds they planted some banana suckers. Later the entire plot was leveled and in the process the potato garden was cleared. She was compensated for the maize and the beans she had planted.

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P.W.6 Nusura Osman testified that when she married in 1971, she migrated to Nsambya where she owns plot 2 Ezama Crescent where he found the plaintiff owned two plots, one with a house and the other without. She began growing crops on the one without a house around 1987. She just saw bush on vacant land and started cultivating but she knew it belonged to Kerali. She grew potatoes and maize. The father of the first defendant Iddi Akerabi was a neighbour. His land was adjoining the land in dispute. She found the plaintiff and Iddi Akerabi each in their respective plots. Later, the first defendant's brother Mohamed planted a ten or twelve Nsambya tree fence to mark the boundary between his family land and the plot now in dispute. During the time she cultivated the land there were no graves. There were no oranges on it but only one mango tree. There was a Congolese called Neapanepa who died and was buried at the boundary between the plaintiff and Iddi Akerabi. In 2011 there was a grader which came to level the land. The first defendant had encroached on Kerali's land by hiring labourers and they planted potatoes. She covered almost the entire plot. The plaintiff's son came from Nebbi with a grader and leveled the land. One month had elapsed when the leveling was done. The potatoes were not mature. No trees were pulled down. The first defendant had planted a few banana suckers and these were destroyed as well.

P.W.7 Angundro Dennis testified that he undertook a boundary re-opening of the land in dispute in 2011. He located the mark-stones of the two plots 1 and 1A and found that the first defendant encroached onto plot IA by growing some sweet potatoes and bananas as indicated in his report (exhibit P. Ex 3). That was the close of the plaintiff's case

D.W.1 Fatuma Bona testified that her claim is restricted to the vacant plot 1A where her late father Iddi Akerabi had constructed a house (Boma) a long time ago which they occupied until their death about five years before the filing of this suit. The boma, was accidentally burnt down by children. Her father had given the plaintiff's father the land comprised in plot 1 on which he

built a residential house. Her father retained the area now comprised in plot 1A. Her father's house is located on land that borders plot 1A. At the time of her father's death, there was no activity on plot 1A. She subsequently planted thereon a garden of about 300 sweet potato heaps, 72 banana suckers, twenty lemon trees, 300 Cyprus trees, 30 mango trees before they were
5 destroyed by the plaintiff using a grader that leveled the land in July, 2011. There were also ten graves on the land but they were levelled. They were behind the grass-thatched house (boma) on plot IA before it was burnt. At the time the grader came, her sweet potatoes were flowering and some potatoes were visible after the land was graded. It is not true that she had just planted them. The bigger area had potatoes that were maturing but there was a smaller one which was the
10 newly planted part. There were seedlings of lemon trees planted within the potatoes garden. She had planted seedlings of Cyprus. The mangoes were seedlings as well. The bananas were big enough and had began to yield. She planted the bananas after the death of her father. There was no banana plantation on the land before her father died. Her husband would not go to that field. He was not in the garden when the grader came. Neither had Haruna Sebi ever used this land. He
15 is just an L.C.1 Chairman, Nsambya Cell where the suit land is. Members of the family would be buried on the adjacent land. Plot 1A was for burial of in-laws whose bodies could not be taken back, cousins from her mother's side and relatives of her father.

D.W.2 Remoloty Juma testified that he has never trespassed on the land in dispute because it is
20 not his land and has no claim over the land. Plot IA does not belong to the plaintiff. They began claiming it in the year 2010. It is after the death of Fatuma's father that a grader was brought by Opio's brother. When Opio brought the grader to the land, he levelled Fatum'a crops. There were mangoes, potatoes, lemon, paw-paws, graves and so on. The potatoes were about to mature. Members of the family would be buried on the adjacent land. On plot 1A they would bury
25 someone who was visiting and died from there. Plot IA belongs to Fatuma Bona. Her father left the plot to her because all her brothers had died. They died before their father. There are two other sisters, one in Soroti and the other lives near him after she lost her husband. Her only brother has a mental disorder and lives in Arua, with Fatuma Bona but is ever drunk. The land belongs to the four of them. Haruna Sebi has no interest in the land but is protecting the land for
30 them.

D.W.3 Kakura Mohammed testified that Plot IA belongs to Iddi and plot I to Akerabi. Mango trees formed the boundary between the two plots of land. On Fatuma's side there were bananas and graves. Fatuma's father used to cultivate crops on plot 1A before he died about seven years ago. There were graves on plot 1A including that of Nepanepa. Counsel Oy'armoi lived there for
5 over five years. He was digging within plot 1 and not in plot IA. People were free to grow seasonal crops anywhere without restriction. Nepanepa was buried on this land. It was at the boundary. There were other small graves there.

D.W.4 Ajidia Charles testified that he received a letter from the Town Clerk requesting for a
10 surveyor to open the boundary of the land in dispute. He consulted with the senior staff surveyor, carried out the work and submitted a report of his findings (exhibit D. Ex.1). Plot 1A long Ezama Crescent measures about 0.11.hectares. That was the close of the defence case.

In their joint memorandum of scheduling filed in court on 23rd October, 2003, the following are
15 the issues that were agreed upon by the parties for the determination of the court;

1. Whether the plaintiff is the lawful owner of the suit land.
2. Whether the defendants are trespassers on the suit land.
3. Whether the plaintiff's late father Claude Mamba Kerali obtained the leasehold certificate of title for the suit land fraudulently.
- 20 4. What remedies are available to the parties, if any?

In his written final submissions, counsel for the plaintiff Mr. Samuel Ondoma argued that being the holder of a valid certificate of title to the land, the plaintiff is the rightful owner of the land in dispute. The first defendant who claims to be the proprietor of a customary interest has never
25 been in possession and has no developments on the land. Her activities on the land commenced in 2011 and they constitute acts of trespass on the plaintiff's land. It is the plaintiff's family and their tenants who have been in physical occupation of the land since 1972. Although the first and second defendants pleaded that the plaintiff's father had acquired the land in dispute by fraud, they failed to prove any of the particulars of fraud to the required standard. The defendants
30 instead trespassed on the land when they stopped the plaintiff from fencing the land off during the year 2010 and when they undertook agricultural activities thereon in June, 2011. All this was

done by the three defendants in collaboration with one another. He therefore prayed for dismissal of the first defendant's counterclaim and judgment in favour of the plaintiff in accordance with the prayers contained in the plaint.

5 In reply, counsel for the first defendant Mr. Paul Manzi submitted that the first defendant proved that the land in dispute belonged to her late father Iddi Akerabi and that she inherited it after his death. At the time the plaintiff's father obtained a certificate of title to Plot 1A, it is her father who was in possession as a customary tenant. The plaintiff's father was given only plot 1 and therefore he fraudulently acquired title to plot 1A which her father never gave him. In the
10 alternative, she qualifies as a bona fide occupant of the plot. She took over possession of the plot from her late father. She and her husband the second defendant therefore are not trespassers on the land. The second defendant has never undertaken any activity on the land. He therefore prayed that the suit be dismissed with costs to the defendants and judgment be entered in favour of the first defendant against the plaintiff on the counterclaim in accordance with the prayers
15 contained therein.

On her part, counsel for the third defendant Ms. Patience Daisy Bandaru submitted that the third defendant was unable to testify in court since he suffered a stroke in the course of hearing of the suit. His pleadings nevertheless show that he intervened in the dispute between the plaintiff and
20 the first defendant in his capacity as the L.C.1 Chairman of that village, by stopping the plaintiff from fencing off the plot pending the resolution of the dispute. He neither claims any interest in the land nor challenges the validity of the plaintiff's title. None of the witnesses who testified ever saw the third defendant participate in the destruction of the fence. She submitted further that the suit against the third defendant is misconceived and should be dismissed with costs.

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First issue: Whether the plaintiff is the lawful owner of the suit land.

Third issue: Whether the plaintiff's late father Claude Mamba Kerali obtained the leasehold certificate of title for the suit land fraudulently.

30 The two issues arise from paragraph 13 of the defendants' counterclaim where the first defendant avers that the plaintiff "fraudulently included her late father's portion of land comprised in plot

1A along Ezama Crescent in Awindiri Ward, Arua Hill Division, Arua Municipality in his certificate of title when this portion of land has at all times been owned and utilized by the counterclaimant's father. The counterclaimant inherited this land after her father's death and is the current beneficiary owner." It is on that basis that she seeks rectification of boundaries of the plaintiff's title so as to exclude the "counter-claimant's portion of land."

On the other hand, the plaintiff relies on exhibit P. Ex. 1 being a leasehold certificate of title to land comprised in L.R.V. 834 Folio 2, plots 1 and 1A Ezama Crescent, Arua Municipality. It is a 49 year lease running from 1st September, 1970, the corresponding lease agreement having been executed on 13th June, 1972 and the title deed issued on 1st July, 1972.

Under the Torrens System of land registration, it is the fact of registration and registration alone that confers title (see *Breskvar v. Wall (1971) 126 CLR 376*). It is registration that gives or extinguishes title. Consequently section 59 of *The Registration of Titles Act*, guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*, which essentially relate to fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker [1967] AC 569*).

One aspect of title is the location of a land parcel boundary which in fact defines the parcel. The plot or parcel of land is usually specified by its boundaries and their location. The factual details in the register will include the identity of the land parcel and that identity necessarily includes the location of the boundaries of the parcel. Section 38 (5) (b) of *The Registration of Titles Act* requires every certificate of title to bear a reference to the block and plot number of the land in respect of which the certificate is registered, as shown on a plan approved by the commissioner of lands and surveys. A deed plan is a map produced by the Land Registry to record the general position of the boundaries of a registered title in accordance with this requirement. A red edging

is placed to the inside of black general boundary lines to which it draws attention. It is the product of cadastral surveying whose primary purpose of is to define the land parcel on the ground and within the cadastre by a process of survey, adjudication, monumentation and description of the boundaries.

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The Land Registry is not responsible for deciding where to place the boundaries that divide individual parcels of land. The primary decision as to where boundaries are located falls to the owner of a larger piece of land who divides his or her land in order to sell or otherwise dispose of the divided-off part. Each time a proprietor or other authorised person introduces a new line of severance by disposing of part of his or her property by sale or otherwise a new boundary is created. The deed plan is but an interpretation of the transfer deed that attended the division and sale of the land. There are no laws or regulations governing the standards by which the boundaries are described by the vendor or transferor or by his or her conveyancing agent, and it is usually not known which of these people made the original description of the boundary. It is of the utmost importance to understand that deed plans do not show the exact (or the precise) position of the boundaries of the land in the title.

From compass or circumferentor and Gunter's chain to angular and distance measurement by total station and more recently global navigation satellite systems, advances of technology over the years have dramatically changed the accuracies obtainable for the survey and measurement of boundaries. Nevertheless, the deed plan shows only the general position, not the exact line, of the boundaries since it may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground. It is the reason why under section 18 of *The Registration of Titles Act*, in case of error in Government survey, the registrar may issue a certificate in respect of that land as if the dimensions marked on the ground had been the dimensions given in the grant, to ensure that the title corresponds to actual dimensions on the ground. The technology available at the time of original survey can create an inaccurate cadastre whereby abutting lots may conceivably overlap or create gaps where there is no gap.

30 Unless there is an express agreement to the contrary, section 151 of *The Registration of Titles Act*, allows for a margin of error in the dimensions of boundaries which does not exceed one in

five hundred or any encroachment, excess or deficit which does not exceed 1 percent. An error will therefore require correction only if it exceeds the stipulated minimums. The provision prevents legal action over minor discrepancies on the description of land in title documents compared with the results of a survey of the land. This provision serves to introduce flexibility
5 into the dimensions shown on the title documents so that minor differences between the physical measurement of the boundary and its representation on the title documents don't give rise to legal action. Rectification will only be ordered where the occupation of land within the area does not accord to a substantial extent, with the boundaries of land as shown in records or plans held in the Land Registry. Section 151 of *The Registration of Titles Act* though does not affect an
10 owner's right to sue for an actual physical infringement of the boundary of the property (see *Break Fast Investments Pty Ltd v. PCH Melbourne Pty Ltd (2007) VSCA 311* and *Woollerton and Wilson Limited v. Richard Costain Limited [1970] 1 WLR 411*).

It should be remembered that under section 64 of *The Registration of Titles Act*, the proprietor of
15 land or of any estate or interest in land under the operation of the Act, except in the case of fraud, holds the land or estate or interest in land subject only to such encumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other encumbrances, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that by wrong
20 description of parcels or boundaries is included in the certificate of title or instrument evidencing the title of such proprietor. Under section 64 (2) of *The Registration of Titles Act*, land included in any certificate of title is deemed to be subject to the reservations, exceptions, covenants, conditions and powers, if any, contained in the grant of that land, and to any rights subsisting under any adverse possession of the land. In essence, the registered proprietor's estate is not
25 paramount where any part of the proprietor's parcel has been adversely occupied.

Therefore, to succeed in her counterclaim for rectification of title, the first defendant is required to prove that there is a substantial error in the dimensions of the boundaries of land comprised in L.R.V 824 Folio 2, plots 1 and 1A Ezama Crescent, that is in excess of the permissible errors
30 under section 151 of *The Registration of Titles Act*, the same having arisen from any of the following, either;

- (i) That the plaintiff acquired title to the land comprised within the boundaries of plot 1A illegally, by fraud or inadvertent error and in violation of her customary proprietary rights therein; or
- (ii) That through fraud, illegality or error resulting in a wrong description of parcels or boundaries, part of her land was included in the plaintiff's certificate of title; or
- (iii) That since the plaintiff's acquisition of the title to the land, she has acquired rights to part of it under adverse possession as an owner of adjoining land.

10 The thrust of her claim is that the plaintiff's father acquired plot 1A by fraud. Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practice to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see 15 *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya* S.C. Civil Appeal No. 36 of 1995). In seeking cancellation or rectification of title on account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is 20 impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others*, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd.*, S.C. Civil Appeal No. 22of 1992). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank 25 Limited [1987] HCB 130* and *M. Kibalya v. Kibalya [1994-95] HCB 80*)

In support of her claim, the first defendant pleaded the following particulars of fraud;- (i) the plaintiff had notice of her late father's physical possession of the land at the time he included it in his title, evidenced by a house and garden on the land; (ii) the plaintiff surveyed the land secretly 30 without notice to her father or her family members then in physical possession; (iii) the plaintiff's refusal or failure to make inquiries as to the owners of the crops and graves thereon. She averred

that she discovered this fraud during July, 2011 with the plaintiff's destruction of her crops on the land. It is trite that a party is bound by his or her pleadings and that only evidence relevant to the pleadings may be received (see *Mohan Musisi Kiwanuka v. Asha Chand*, S. C. Civil Appeal No. 14 of 2002; *Lukyamuzi v. House and Tennant Agencies Ltd* [1983] HCB 74 and *Dhamji Ramji v. Rambhai and Company (U) Ltd* [1970] EA 515). I will in due course proceed to evaluate the evidence to determine whether or not the first defendant has proved the respective aspects of fraud as against the plaintiff to the requisite standard, but first I must address the capacity in which she instituted the counterclaim.

10 In her counterclaim, the first defendant claims interest in Plot 1A by virtue of inheritance following the death of her late father, Iddi Akerabi, who died sometime during the year 2006. To take by inheritance is defined as “to take as heir on death of ancestor; to take by descent from ancestor; to take or receive, as right or title, by law from ancestor at his demise” (see *Black’s Law Dictionary*, 8th edition, 2004). Inheritance therefore denotes devolution of property under the law of descent and distribution. Inheritance entails a process guided by rules that govern the devolution and administration of a deceased person’s estate. It follows that an individual who claims property of a deceased person only by dint of family affiliation does not necessarily claim by inheritance unless and until it is proved that the devolution was in accordance with the relevant law of descent and distribution under custom or enactment.

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It was the testimony of D.W.2 Remoloty Juma that the first defendant lays claim to the land in dispute because all her brothers pre-deceased her father. She only has two surviving sisters, one lives in Soroti and the other lives in her neighbourhood after she lost her husband. Her only surviving brother has a mental disorder and lives in Arua with the first defendant but is ever drunk. He concluded by stating that the land belongs to the four of them. This evidence discloses multiple would-be beneficiaries of the estate, if indeed the land in dispute comprises part of it, yet the third defendant does not claim as beneficiary but as owner by inheritance. Having claimed ownership by inheritance, she bore the burden to prove that she acquired the land in dispute following rules that govern the devolution and administration of a deceased person’s estate under a specific customary or statutory law. She did not adduce any evidence in that regard. Apart from her averment that she inherited the land, the customary rules and practices or

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in the alternative compliance with statutory procedures that guide succession to land was never proved. Neither is there proof that part of the land was given to the plaintiff's father by her father.

5 An *inter vivos* gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift (See *Standard Trust Co. v Hill*, [1922] 2 W.W.R. 1003, 1004 (*Alta. Sup. Ct. App. D*)). It involves an owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land from one person to another, made gratuitously, and not upon any consideration of blood or money. It
10 has been legally defined as “the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee” (see *Black's Law Dictionary*, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187).

15 In her testimony, the first defendant stated that she married in 1962 and lived in Juba for a long time she estimated to have been over nine years (hence was living with her husband and not her father thereafter) yet she claims that she was present when her father gave Plot 1 to the plaintiff's father during 1970. She said she was present when the request was made and when her father took the plaintiff's father, Mamba, to the land and gave him a portion, although the land was not
20 surveyed. That Mamba began construction on the land given to him and she participated in fetching water used during the construction. I have found the credibility of this witness wanting due to the internal inconsistency of her testimony and its overall inconsistency with the rest of the evidence of proved facts. Common sense, good judgment and experience of life suggests that it is improbable that while married in Juba, she was in position to witness the alleged transaction. I
25 find this testimony to be unreliable to an extent that requires corroboration, yet there is none offered. I have not found credible evidence to prove that the first defendant's father gave part of his land to the plaintiff's father. The plaintiff therefore has failed to adduce evidence to prove that the land was owned by her late father and that it was her late father who gave part of it to the plaintiff's father. I now proceed to determine whether or not the first defendant has proved the
30 respective aspects of fraud as against the plaintiff to the requisite standard.

(i) The plaintiff had notice of her late father's physical possession of the land at the time he included it in his title, evidenced by a house and garden on the land;

5 The first particular of fraud pleaded by the third defendant is that of her father having been in possession of the land as customary owner thereof from the colonial time until his death sometime in 2016. He father had a house (Boma) on the land in which both hare parents lived until their death two weeks apart in the year 2006. The Boma was accidentally burnt down by children and she reconstructed it on her return from Juba. Her parents continued to occupy the
10 land and after their death she took over possession and continued to live on the land together with the widows and orphans of her deceased brothers.

It is trite that evidence of user of unregistered land may be sufficient to establish customary ownership of such land (see *Marko Matovu and two others v. Mohammed Sseviiri and two*
15 *others, S.C. Civil Appeal No. 7 of 1978*). Possession can sometimes be used as an indicator of ownership or even to create ownership. Proof of customary tenure at the least requires evidence of possession in the sense of physical or manual control, or occupation and user of the land or acts of possession done on parts of the land as establishing title to the whole area, evidenced by some outward act, sometimes called *de facto* possession or detention as distinct from a legal right
20 to possession.

When the court visited the *locus in quo*, the first defendant pointed to a location where her father's Boma used to stand but she could not explain when it was demolished following its replacement after the fire. Although she testified in court that her parents had been in actual
25 possession of the land, it was evident at the *locus in quo* that the house she was referring to lay outside and on land bordering plot 1A and is now occupied by her nephew. She testified as well that her father had no activity on the land in dispute by the time of his death in 2006. There was no banana plantation on the land before her father died. She planted bananas and other crops on the land after the death of her father, and it is those crops that the plaintiff destroyed with a
30 grader. Consequently, I have not found any credible evidence either adduced in court or seen at the *locus in quo* to suggest that the first defendant's father had physical or manual control, or

occupation and user of the land in dispute by way of a dwelling house and garden during the year 1972 or thereabout, at the time the plaintiff's father acquired title to the land or thereafter.

On the other hand, it was the testimony of P.W.2 Henry Godfrey Rupiny Kerali that his late
5 father had purchased both plots 1 and 1A Ezama Crescent from the first defendant's late father during the year 1970. The land was subsequently fenced with a barbed wire fence during the years 2006 and 2010 but the defendants pulled down the fence on both occasions where after they proceeded to wrongfully grow seasonal crops on part of the land as trespassers. These crops were destroyed when the grading of plot 1A commenced in July, 2011. This was corroborated by
10 P.W.1 Opio Robert Kerali who testified that upon their late father's acquisition of the land comprising plots 1 and 1A Ezama Crescent during 1970, he constructed a residential building and guest wing on Plot 1 while plot 1A remained undeveloped but was from time to time used for the cultivation of perennial and seasonal crops. Subsequently the family let out both buildings to divers periodical tenants and when during the year 2010 it was decided to terminate their
15 tenancies in order to give way to renovations of the buildings, the defendants took advantage and trespassed onto the land by planting crops on the vacant part of the land, plot 1A, claiming that it belonged to their late father.

Further corroboration of the plaintiff's case is found in the testimony of former tenants of the
20 buildings on plot 1. P.W.4 Benardine Okello Oyarmoi testified that he he rented a unit of the main house from around March or April, 1987 until October 2006 when he was asked, together with other tenants, to vacate the premises to give way to intended renovations of the building. During his tenancy, his wife and other tenants occupying both the main house and the boys' quarters used to grow seasonal crops on the then vacant plot 1A. He never saw any of the
25 defendants undertake any activity on plot 1A during that 19 year period. At the *locus in quo*, he was able to demonstrate the extent of his wife's agricultural activities and they clearly extended into plot 1A. P.W.5 Ayiru Grace testified that she was a tenant on plot 1 from February 2010 to July 2011. She and other tenants on plot 1 had gardens on plot 1A. During her tenancy, none of the defendants had activities on the land. When subsequently they were told to vacate to allow
30 for renovations, that is when the defendants commenced growing crops on the land.

Lastly, P.W.6 Nusura Osman testified that she migrated to Nsambya plot 2 Ezama Crescent following her marriage in 1971. She began growing crops on plot 1A that was by then vacant during 1987. The father of the first defendant Iddi Akerabi was a neighbour whose land was adjoining plot 1A. Later, the first defendant's brother Mohamed planted a ten or twelve Nsambya tree fence to mark the boundary between his family land and plot 1A now in dispute. It is during the year 2011 that the first defendant encroached on plot 1A by planting crops covering almost the entire plot. The plaintiff's son then hired a grader and leveled the land. At the *locus in quo*, she too was able to demonstrate the extent of her agricultural activities and they were clearly undertaken on plot 1A. She was also able to show court the ten or twelve Nsambya tree fence that was planted by the first defendant's brother Mohamed to mark the boundary between his family land and plot 1A now in dispute. None of these witnesses was discredited during cross-examination.

Having considered the evidence as a whole, I find that the first defendant has failed to prove to the required standard that the plaintiff's father had notice of her late father's physical possession of the land at the time he included it in his title, evidenced by a house and garden on the land the plaintiff's family. To the contrary, the evidence has established that the plaintiff's family directly and through their tenants, have had effective physical control of plot 1A, the land in dispute, since 1970 until the eruption of this dispute around the year 2006.

20

(ii) The plaintiff surveyed the land secretly without notice to her father or her family members then in physical possession;

I have found above that the first defendant has not proved that her late father had a dwelling house and garden on the land before its acquisition by the plaintiff's late father and hence he was not in physical possession of the land. It has however been established that he was an owner of adjoining land. This aspect then can only be considered from the perspective of the fact that *The Public Lands Regulations, 1969* (and subsequently *The Land Reform Regulations, 1976*) then in force required the Uganda Land Commission, Urban Authority or Controlling Authority before grant of a lease to an applicant, to inspect the land applied for in the presence of the applicant, owners of land, if any, who are neighbours of the applicant and other interested parties.

30

They were required to walk around the land, trace, ascertain, verify, determine and mark the boundary of the land in their presence. The owners of neighbouring land, and at least two adult residents of the area present at the time of inspection of the land, would then certify the correctness of the boundaries by signing the requisite form. The survey would then ensue.

5

The plaintiff's certificate of title, exhibit P. Ex.1, was issued on 1st September, 1972 contains a lease agreement executed on 13th June, 1972 between the plaintiff's late father and Arua Town Council, therein described as an Urban Authority. It contains a deed plan dated 31st December, 1970 comprising both plot 1 and plot 1A. According to section 90 of *The Evidence Act*, when
10 any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of that document, which purports to be in the handwriting of any particular person, is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

15

The onus was therefore upon the first defendant to rebut that presumption by adducing evidence to show that the persons who made entries on the title deed, executed the lease agreement and endorsed the deed plan did so in error in absence of proof of a proper survey undertaken with the knowledge of owners of adjoining property, particularly her father. The process of obtaining a
20 lease leaves a detailed paper trail of mainly standard documents right from the application form up to the grant of an offer of a lease. None of these documents were produced to demonstrate that her father was never notified of the application and survey. To find to the contrary would be highly speculative. Having considered the evidence as a whole, I find that the first defendant has failed to prove to the required standard that the plaintiff surveyed the land secretly without notice
25 to her father or her family members then in physical possession.

(ii) The plaintiff's refusal or failure to make inquiries as to the owners of the crops and graves thereon.

The first defendant postulated this as an element established fraud or error resulting in a wrong
30 description of the boundaries of this parcel of land. To succeed in this respect, the third defendant was required to prove an existing interest in land at the time of survey that resulted in

a wrong description of parcels or boundaries or in the alternative, an interest acquired subsequent to the survey by virtue of long adverse possession.

When considering the first element of fraud pleaded, I made a finding that no satisfactory
5 evidence had been adduced to prove the averment that the third defendant's father had crops on the land in dispute at the time of the plaintiff's father's acquisition. However, the first defendant further testified that her family had multiple graves on the land which were decimated by the grader in July, 2011 including that of a one Nepanepa said to be her maternal Congolese uncle. She was supported in this by D.W.3 Kakura Mohammed who testified that there were bananas and
10 graves of the third defendant's relatives on Plot IA including that of Nepanepa. To the contrary, P.W.5 Ayiru Grace testified that during her tenancy, none of the defendants had activities on the land. There were no graves on either plot. P.W.6 Nusura Osman too testified that during the time she cultivated the land there were no graves. There was only one grave of a Congolese called Nepanepa who died and was buried at the boundary between the plaintiff and Iddi Akerabi.

15

At the *locus in quo*, neither the third defendant nor D.W.3 Kakura Mohammed was able to demonstrate to court the previous location of the graves they had claimed to have existed on the disputed land which had been decimated by grading / leveling. She managed to demonstrate the location of the burial site of Nepanepa which happened to be only a few meters from the point
20 indicated by P.W.6 Nusura Osman. Both points were along the boundary between plot IA and the third defendant's late father's land along the boundary marked by the Nsambya trees planted by Mohammed, the third defendant's brother. Instead, both in court and at the *locus in quo*, D.W.3 Kakura Mohammed, stated that people were free to grow seasonal crops anywhere without restriction. The evidence did not establish boundary encroachment.

25

Although the purpose of a fence is not always to demarcate a boundary and a fence is only a physical manifestation of a boundary when it is intended to be so, a boundary may be marked by physical features such as a hedge or line of trees and such physical features. P.W.6 Nusura Osman testified that the first defendant's brother Mohamed planted a ten or twelve Nsambya tree
30 fence to mark the boundary between his family land and the plot now in dispute. It is reasonable to assume that people would take more care in erecting an object that would take more time and

money to remove if it was found to be in the incorrect position (see *Turner v. Hubner (1923) 24 SR 3*). A boundary has been defined as "... the imaginary line which divides two pieces of land from one another..." (Burke 1977, vol I, 243), and "... every separation, natural or artificial, which marks the confines or line of division of two contiguous properties" (Black 1979, 169).

5 The "invisible" or "imaginary" nature of the boundary is a consequence of the lack of obligation on a landowner to fence his land, there being no requirement to mark the limits of his land for the limits of his or her land are bounded as a consequence of law. I find that from the evidence available, the Nsambya trees were more probably intended to mark the boundary than for the achievement of any other purpose in light of the fact that generally features seen at the *locus in*
10 *quo* are more consistent with the plaintiff's than the defence version of testimony in court.

A deed plan may not be the primary source of information as to the location of a boundary given that it lacks quality information concerning aspects of the dimensions given (such as who measured these dimensions, how and with what instrumentation were they measured, what steps
15 were taken to ensure their accuracy, etc.). Since the person who is granting land has the greater power and level of control, then the onus is on them to exercise that control carefully to ensure that the physical evidence of boundaries is in accord with the documentary evidence of the boundaries, hence the well used principle that a grant ought to be construed according to the intention of the parties, and that where any doubt arises the deed ought to be construed more
20 strongly as against the grantor (see *Jaques v. Doyle (1881) 2 NSW 113 at 117*).

The location of a boundary is primarily governed by the expressed intention of the originating party or parties or, where the intention is uncertain by the behaviour of the parties. Boundaries are legal objects that are created by individuals and they come into being by an action. Before
25 there can be an action there needs to be an intention to perform that action. Courts have agreed that the intention needs to be the "expressed" intention of the parties rather than what can be surmised, in light of existing conditions and circumstances at the time of the transaction. Therefore one of the keys to ascertaining the intention of the parties is resolving how it was expressed in the actions of the parties.

30

For example in *Attorney-General v. Nicholas* [1927] G.L.R 340 it was held that where "...the original survey marks are gone, a long occupation, acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which the grant conveys..." (see also *Equitable Building and Investment Co. v Ross* (1886) NZLR 5SC
5 229 at 234). The occupier has a right to assert that the land he or she holds is the very land granted. Consequently, the greatest weight must always be given to lines, natural and artificial monuments, actually marked on the ground. There may be mistakes in measuring land, but there can be none in monuments. In *James v. Stevenson* [1893] AC 162 at p166, a fence that had been
10 fence, except the boundary drawn by the release of 1839." The fact that this fence had been erected in "1839, or very soon after" led the court to the compelling presumption in favour of the fence being on the line intended to be the boundary. External and visible acts and conduct serve to indicate, more or less forcibly, the particular intention.

15 The importance of monuments in the determination of boundary disputes was underlined in *McIver's Lessee v. Walker* 9 Cranch ,13 U.S. 173 (1815) at 178, thus;

But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey;
20 consequently if marked trees and marked corners be found conformably to the calls of the patent, or if water courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances, are
25 more probable and more frequent, than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described.

The location of a boundary is primarily governed by the expressed intention of the originating party or parties, or where the intention is uncertain by the behaviour of the parties. The reason
30 monuments control when the determination depends on the behaviour of the parties is because they are less liable to mistake. If there are conflicting calls, features which, from their nature, are less liable to mistake, must control those which are more liable to mistake. Survey marks aside, there can be no better indication of the land to which the grant relates than long and unchallenged occupation corroborated by other physical and documentary evidence. In *Turner v.*

Myerson (1917) 18 SR (NSW) 133 at 135, where a suburban lot in a plan had been in undisputed occupation for some 30 years, the occupation yielding dimensions that accorded well with the certificate of title dimensions, then in the absence of original survey marks and monuments, there was a cogent presumption that fences and walls erected soon after the division which
5 marked the occupation were erected on the true boundary lines. Harvey J. said;

I say unhesitatingly that occupation that has continued uninterrupted for 30 years requires the most positive and direct overwhelming evidence to upset the presumption that the land so occupied is in accordance with the boundaries as originally plotted...I do not think that the evidence comes anywhere near the
10 certainty which is required to justify the upsetting of such a long continued possession.

Similarly *Turner v. Hubner (1923) 24 S.R. 3*, was a case that was heard some 60 years after subdivision, meaning that the occupation (a house wall) had been erected within about 18 years
15 of boundary creation but there were no reliable start points, for the side streets had been aligned since that subdivision. The party claiming encroachment had done so on the basis of laying subdivision data from the aligned side street position, but the position of the house wall was supported by evidence of other occupation. The court held that since the land had been uninterruptedly occupied for 42 years, the most positive evidence was required to rebut the
20 presumption that the land occupied was in accordance with the boundaries as originally plotted.

In the instant case, the boundary in dispute was plotted around 1970, some 41 years before the filing of this suit. Evidence has established that the plaintiff and his late father before him had uninterrupted occupation of the land now in dispute until the year 2006 (36 years) when the first
25 defendant commenced her encroachment on the land. Evidence of this long period of occupation that is contemporary with the boundary creation which is more or less consistent with the boundary position shown by the deed plan, should be preferred to the first defendant's claims of a customary interest that is uncorroborated by documentary or physical evidence. The presumption that the land occupied is in accordance with the boundaries as originally plotted required the
30 most conclusive evidence of error in the actual position of the boundary. the evidence adduced by the first defendant has not displaced the presumption. In the circumstances, there is no better identification of the land to which the title relates than long and unchallenged occupation by the

grantee and those who claim through him of an allotment which in position, dimensions and area corresponds with the description in the deed plan.

5 Having considered the evidence as a whole, I find that the first defendant has failed to prove to the required standard that the plaintiff refused or failed to make inquiries as to the owners of the crops and graves on the disputed land, since it has not been established he that any of these features existed on the land at the time.

10 Although the third defendant has failed to establish her case on basis of any of the pleaded elements of fraud, a trial court is entitled to consider an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision; on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it (see *Odd Jobs v Mubia* [1970] E.A. 476; *Nkalubo v Kibirige* [1973] E.A. 102 and *Railways Corporation v. East African Road Services Ltd.* [1975] E.A. 128). I will
15 accordingly consider the question of the third defendant's possible adverse possession.

The extent of an owner's dominion is delineated by the boundary of that owner's land. Private proprietary interests in land, and the boundaries of those interests are inextricably linked. The rights to exclude others, to alienate, and to subdivide are contingent on secure ownership and
20 important features of private ownership of land which are directly related to the creation and maintenance of boundaries including their location. These three features necessarily involve the concept of a boundary wherein the rights of private ownership begin and end.

A private owner cannot exercise or enjoy any of these features on land over which the owner has
25 no dominion, and similarly, a private owner cannot be prevented by a neighbouring owner from exercising or enjoying any of these features on land over which the owner has dominion. Although certainty of boundaries is essential to our system of land registration, *The registration of Titles Act* under sections 64 (2), 73, 157, and 184 envisages boundary adjustment by reason of any error in a survey or other misdescription. It is a tacit recognition that the physical
30 representation of the boundary in the title deed will, all too often, diverge from that of the legal

boundary such that the physical manifestation of the abstract legal boundary is divergent from the abstract legal boundary.

5 The provisions cater for circumstances where through fraud or inadvertent errors a
misdescription has occurred or in situations where occupational or possessory boundaries differ
from the location of the legal boundaries and such differences have existed for such long periods
that the restoration of the legal boundaries would present great difficulty. Part-parcel adverse
possession as a basis for rectification of title is thus founded upon pragmatic expedience.
10 Resolution of the two issues under consideration now requires either permitting the occupational
or possessory boundary (if any) to prevail over the legal boundary or vice versa.

There are different ways of resolving a boundary discrepancy in situations where the boundary as
indicated in the title deed and the dividing fence between two adjoining or abutting properties do
not coincide. The general approach is either by choosing the location of the boundary indicated
15 in the title deed prevailing over that of the fence; or the fence location, being the line of
occupation, prevailing over the boundary indicated in the title deed and in effect becoming the
new boundary. In situations where it is more important that an established and peaceable
possession should be protected as opposed to the law assisting the agitation of old or stale
claims, the *de facto* boundary will become the *de jure* boundary.

20

Adverse possession is a doctrine of land law whereby a person either occupying or in possession
of land legally owned by another may acquire ownership and title to the occupied land. In
essence adverse possession is *The Limitation Act* applied to real property interests by which
long-continued possession crystallises a title. The resolution of a discrepancy between title and
25 occupation boundaries can, in time, be performed by adverse possession of part only of a land
parcel. The consequence of such adverse possession on part only of a parcel is that the location
of the boundary demarcating the limits of the respective domains of two adjoining land parcels
may be displaced. Otherwise, the plaintiff's title would be indefeasible and absolutely free from
all other encumbrances.

30

Therefore in the instant case, if the first defendant proves part-parcel adverse possession consequent to long term occupation, that possession may prevail over the strict technical legal boundary. It would effectively transfer ownership of a small portion of that abutting parcel. The occupational or possessory boundary then prevails over the legal boundary certified in the register and the boundaries would then be shifted by rectification. On the other hand, if part-parcel adverse possession is ineffective to transfer ownership of registered land, the technical legal boundary prevails over the occupational or possessory boundary despite the fact that it is not the boundary accepted by the parties involved as governing.

10 Whole parcel adverse possession, based upon possession encompassing the entire parcel, can result in vitiation of title. For a successful adverse possession claim there are a number of common law requirements, typically the following common law elements are required: exclusive, continuous and uninterrupted possession; possession must be adverse to the interests of the legal owner and without permission of the legal owner; open and notorious, using the land in a manner so as to place the legal owner on notice that a trespasser is in possession; and for a defined period of time, a statute of limitations applies for a definite period of time which limits the action taken by the legal owner to recover the land to that period of time (see *J. A. Pye (Oxford) Ltd and Others v. Graham and another* [2002] 3 All ER 865, [2002] 3 WLR 221, [2003] 1 AC 419). Consequently case law does not recognise actual possession of part as constructive possession of the whole. That common law concept of adverse possession is thus unhelpful in the instant case in that it appears to be directed towards the adverse possession of whole parcels of land yet discrepancies between occupational and registered boundaries is directly related to the occupation of part only.

25 However, since adverse possession simply means possession inconsistent with the title of the true owner, once it is accepted that a proprietor can subdivide lesser interests in his land and that these lesser interests can be the subject of adverse possession independent of the other lesser interests, it becomes acceptable to subject such a lesser interest to adverse possession independent of other lesser interests even when all the lesser interests are held by the one proprietor, that is, where the proprietor has not subdivided his property and carved out independent lesser interests, hence the concept of part-parcel adverse possession.

In its most commonly encountered form part-parcel adverse possession involves the inadvertent trespass by one landholder over a portion of land belonging to an adjoining landholder where there is confusion with regard to the correct position of the boundary dividing the two landholdings. The distinction between whole and part-parcel adverse possession is that whole
5 parcel adverse possession is always intentional and not inadvertent while part-parcel adverse possession is usually inadvertent although deliberate (and not inadvertent) adverse occupation of part of another's landholding. While the doctrine of whole parcel adverse possession is determinant of ownership of the parcel, part-parcel adverse possession is used in resolving the extents of ownership of the parcel.

10

Sections 64 (2), 73, 157 and 162 of *The registration of Titles Act* implicitly envisage adverse part parcel possession as a basis for adjustment or repair of erroneously located boundaries and boundary redetermination by way of rectification of title. In this context, part-parcel adverse possession that is capable of overriding title, i.e. which can have the effect of altering the
15 location of land parcel boundaries, is possession that has the capacity to inhibit or render the holder of the rights incapable of legally enforcing those rights against the adverse occupier, with the eventual effect of extinguishing of the true holder's title, where the adverse occupier has been in possession for a period sufficient to invoke the limitation period as a defence. It follows that part-parcel adverse possession does not only alter the boundary of the occupier's original land
20 parcel, but by adding the smaller parcel to the original holding of the occupier, the boundary of the whole holding is changed.

25

Under section 156 of *The Registration of Titles Act*, a proprietor may accordingly apply to have his or her certificate of title amended in any case in which the boundaries, area or position of the land described in it differ from the boundaries, area or position of the land actually and bona fide
occupied by him or her and purporting to be so occupied under the title in respect of which the certificate of title was issued, or in any case in which the description in the certificate of title is erroneous or imperfect on the face of it. If it is proved to the satisfaction of the Registrar of titles that the encroachment was not intentional and did not arise from gross negligence, then the
30 Registrar may rectify the title. Part-parcel adverse possession should thus be viewed as a

boundary repair mechanism, especially pertaining to strips of land between abutting plots generally based upon occupation and fencing.

5 Where the occupational or possessory boundary is a recently created fence and is not located on the actual boundary, the location of the fence will not prevail over that of the actual boundary because any adverse occupation has not matured for the required limitation period necessary to extinguish the title of the landholder over that land portion lying between the actual and occupational or possessory boundaries. In the instant case, the third defendant in her own planted crops on plot 1A after death of her father and tenants vacating the premises in 2006 and not 1972
10 when the title was issued. She therefore cannot claim an adjustment in the location of the boundary based on adverse possession. Considered on a balance of probabilities, the evidence is in favour of the conclusion that the plaintiff's occupation is in accordance with the lines actually run, or recognised, at the time of the grant.

15 In conclusion, the plaintiff's title has not been impeached by the evidence adduced by the third defendant and in accordance with section 59 of *The Registration of Titles Act*, it is conclusive evidence of the plaintiff's ownership of the land. The plaintiff's late father Claude Mamba Kerali did not obtain the leasehold certificate of title for the suit land fraudulently and therefore the plaintiff is the lawful owner of the suit land.

20

Second issue: Whether the defendants are trespassers on the suit land.

Private property is a recognised system by which a single party is vested with the right to exclude others from exercising or enjoying the rights attached to that property. The right to
25 exclude others from exercising or enjoying those property rights associated with land necessarily entails the demarcation of the private owner's domain to allow others to recognise that from which they are excluded. The limit of the owner's domain is defined by the boundary and the physical manifestation of the boundary could be a fence or other physical object.

30 Trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or projects any object upon the land (see *Salmond and*

Heuston on the Law of Torts, 19th edition (London: Sweet & Maxwell, (1987) 46). The entry by the defendant onto the plaintiff's land must be unauthorised in the sense that the defendant should not have had any right to enter onto plaintiff's land. In her own admission, following the death of her father, the third defendant proceeded to plant crops on the plaintiff's land. This was
5 unauthorized entry by the first defendant and for that reason judgment is entered for the plaintiff against the first defendant in this respect.

However, it has not been proved that the second defendant undertook any activities on the land as well. The plaintiff's claim that he supported and encouraged the first defendant in her unlawful
10 activities on the land is not supported by any credible evidence. On the other hand, the third defendant responded to a dispute over this land in his capacity as the L.C.1 Chairperson for purposes of preventing violence and promoting its resolution by a lawful process. A person is excused from liability for trespass to land if the entry is strictly necessary to prevent public disaster, to abate any public or private nuisance or in order to prevent harm to person or property
15 (hence the maxim *salus populi suprema lex* - the welfare of the people is the supreme law).

For example in *Southport Corporation v. Esso Petroleum Co Ltd*, [1953] 3 WLR 773, [1953] 2 All ER 1204, an oil tanker ran aground in an estuary. The master jettisoned 400 tons of oil cargo to prevent the tanker breaking her back. The tide carried the oil slick on to a foreshore causing
20 damage. The foreshore owners sued the shipowners in trespass, nuisance and negligence. However, the only negligence alleged on the pleadings was faulty navigation by the master for which it was said the owners were vicariously liable. The owners' case was that the stranding was due to faulty steering gear caused by a crack in the stern frame. The defence of necessity was raised. It was held that the defence succeeded. Devlin J spoke in terms of an imminent
25 danger to life rendering it necessary to inflict damage on another's property.

In the instant case, the third defendant's acts complained of were done in good faith, without negligence and without any wrongful intention to cause harm, and for the purpose of preventing or avoiding other harm to person or property. He acted to prevent imminent harm. The third
30 defendant therefore has the defence of necessity available to him and the suit against him and the second defendant is accordingly dismissed.

Fourth issue: What remedies are available to the parties, if any?

In the determination of the quantum of damages to be awarded, the defendant's conduct is key. If the trespass was accidental or inadvertent, damages are lower. If the trespass was willful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant's negligence or indifference, then the damages are in-between as well (see *Halsbury's Laws of England*, 4th edition, vol. 45, at para 1403). Thus an honest but mistaken belief in the location of a boundary will be looked upon more favourably than a cavalier disregard of the proprietary rights of another landholder, a neighbour. Generally, the amount in general damages the plaintiff deserves should reflect the repulsion with which the law countenances the defendant's indifference and more or less cynical disregard of the appellant's property rights. It should take into account the fall in the value of money since the trespass began, but at the same time take into account the plaintiff's duty to mitigate his loss.

Bearing all the above factors in mind, I consider an award of shs. 5,000,000/= as general damages for trespass to land to be adequate compensation to the plaintiff in this case against the first defendant.

In summary, the counterclaim is dismissed with costs to the plaintiff. The suit against the second and third defendants is dismissed with costs to each of them while judgment is entered for the plaintiff against the first defendant in the following terms;-

- a) A declaration that the first defendant is a trespasser on the plaintiff's land.
- b) a permanent injunction restraining the first defendant, her relatives, agents, servants and assignees from trespassing or in any other way interfering with the plaintiff's possession and user of the land.
- c) General damages of shs. 5,000,000/=
- d) Interest on the award in (c) above at the rate of 8% per annum from the date of judgment until payment in full.
- e) The costs of the suit

Dated at Arua this 17th day of May, 2018

.....
Stephen Mubiru
Judge,
17th May, 2018.