

5 **THE REPUBLIC OF UGANDA**
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 359 OF 2014
CONSOLIDATED WITH CIVIL SUIT NO 116 OF 2014 FROM THE HIGH COURT
10 **CENTRAL CIRCUIT AT NAKAWA**
BUGINGO WILFRED ::: PLAINTIFF
VERSUS
WILLY JAGWE & 3 OTHERS ::: DEFENDANTS

15 **BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW**

J U D G M E N T:

WILFRED BUGINGO (hereinafter referred to as the “plaintiff”) brought this suit against the *WILLY JAGWE, & OTHERS (hereinafter referred to as the “defendants”)* jointly and severally.

20 The plaintiff seeks declaratory orders that he is the lawful registered owner of land comprised in FRV HQT 177 Folio 7 Block 427 Plot 380 at Lwensololo, in the Mubende District, measuring approximately 414.3480 hectares (*hereinafter referred to as the “suit land”*) that the defendants jointly and severally have no legal or equitable interest or otherwise in the suit land and are mere trespassers; a permanent injunction restraining the defendants, their agents, servants, and persons
25 claiming interest from them from further entering, cultivating and /or using the suit land in any manner that affects the plaintiff’s quiet possession, use, and proprietary interest therein, special and general damages, interest, and costs of the suit.

It is called for to set the record straight as regards facts of the case which apparently were presented in a distorted manner, particularly in submissions of Counsel for the 1st defendant.

30 ***Background:***

The plaintiff essentially contends that prior to his acquisition of the certificate of title as the registered proprietor, he was at all material times, since 2005, in occupation and use of the suit land carrying out tree planting and other agricultural activities including animal and crop husbandry. That subsequently in 2012 he applied to the controlling authority, the Mubende

35 District Land Board, as an occupier and he was granted a lease on the suit land devoid of any third party claims.

Further, that around June, 2014, the 1st defendant who is the registered owner of the adjacent land comprised in Singo Block 426 Plot 43 measuring 5 sq. miles instructed his agents, the other defendants, to enter on to the suit land and they trespassed thereon and exacted immense
40 destruction of his barbed wire fence and a wide expanse of planted trees which he had grown and nurtured primarily for commercial purpose. That the destruction extended to the other adjoining plots of land comprised in Singo Block 427 Plot 119, and Plot 142 also belonging to the plaintiff. The plaintiff avers that the defendants were motivated by greed, ill will, and acted illegally and maliciously in order to frustrate his activities with the aim of driving him out and forcefully
45 grabbing his land. That as a result, he has suffered enormous financial loss, immediate and future economic loss for which he holds the defendants liable and seeks the remedies outlined above.

Initially on 27th June 2014, the plaintiff instituted a suit against 26 defendants who did not include the current 1st defendant. On 17th July, 2014, the 26 defendants filed a joint defence and counterclaim against the plaintiff and his farm manager one Deziderio Biryomumeisho. The
50 defendants contended that they have at all material times been on the suit land as bona fide occupants and /or lawful occupants as customary tenants. They also averred that in 2012 they instituted a suit against Willy Jagwe, the current 1st defendant, the registered owner of Plot 43 measuring 5 sq miles, but discovered that they were in fact settled outside his title but on the suit land under Plot 380 the titled land of the plaintiff, which they alleged the 1st Plaintiff obtained
55 illegally and/or fraudulently; the particulars of which they set out in their counterclaim.

On 3rd October, 2014, the plaintiff amended the plaint and included the current 1st defendant while dropping others leaving only 18 defendants. Subsequently on 17th October, 2014, under *HCMA No.1183 of 2014*, and pursuant to **Order 11 r.2 CPR**, *Civil Suit No. 116 of 2014 Willy Jagwe vs. Bugingo Wilfred & Another*, which the current 1st defendant had earlier instituted at
60 Nakawa High Court against the current plaintiff and his farm manager was transferred by the Nakawa High Court to the Land Division and consolidated with the instant *Civil Suit No. 359 of 2014 Bugingo Wilfred vs. Willy Jagwe & Others*.

After the consolidation the plaintiff entered into consent settlements with some of the defendants and they withdrew their respective claims against one another. The plaintiff maintained the suit
65 against 1st, 2nd, 6th, and 18th defendants; the latter three of whom also maintained their

counterclaim filed earlier with their joint defence. The 2nd defendant in particular averred that he is a lawful occupant on the suit land having been settled there by the Government of Uganda. The 6th defendant had a defence filed but did not testify or attend court proceedings. The 18th defendant plainly averred that he came on the suit land at the invitation of his brother, one
70 Nsimbi Robert.

On 3rd December, 2014, the 1st defendant filed his defence in the consolidated suits and denied the plaintiff's allegations. Even though he never specifically set up a counterclaim in accordance with the formal requirements under **Order 8 r.7 CPR**, the substance of 1st defendant's pleadings clearly depicts that he advanced a claim against the plaintiff. This is discernible from
75 the particulars of fraud and /or illegality he leveled alleged against the plaintiff. Taking the substance over the form of the pleadings, court has taken due consideration of that fact in the resolution of issues.

The 1st defendant contends that he bought land comprised in Singo Block 426 Plot 43 measuring 5 sq. miles from West Mengo Co-operative Growers previously in occupation for over 20 years,
80 and

that he became registered owner and was in occupation for 10 years. That on 14th April, 2012, he purchased bona fide and/or lawful customary interests from the tenants on the land neighboring his registered land. That unknown to him the plaintiff in September, 2013, applied to the Area Land Committee for conversion of the plaintiff's purported customary interest to freehold tenure
85 on the same land which the 1st defendant had purchased from the tenants. That as such the plaintiff illegally and fraudulently obtained title to the suit land. Further, that the suit land overlaps on and encroaches upon the 1st defendant's titled land comprised in Plot 43, and that the plaintiff's title ought to be cancelled and the plaintiff's suit dismissed with costs.

The plaintiffs and 2nd counter defendant were jointly represented by Mr. Swabur Marzuq and Mr.
90 Allan Peters of *M/s Lwere, Lwanyaga & Co. Advocates*, the 1st defendant jointly by Mr. Paul Kuteesa of *M/s. Arcadia Advocates*, and Mr. Jet Tumwebaze of *M/s. Kampala Associated Advocates*, the 2nd and 18th defendants were represented by Mr. AbuBakr M. Kaweesa of *M/s Kaweesa & Co. Advocates*. Counsel filed written submissions and supplied copies of authorities on which they relied, and I must thank them for that. Copies of typed submissions are on court
95 record and I need not to reproduce them in detail in this judgment. I will only make specific references to them when it is necessary. The parties adduced evidence to prove and support their

respective claims and defences. It is also on court record and I will not reproduce it in this judgment in detail to avoid repetition when evaluating the same.

A scheduling conference was conducted pursuant to provisions of **Order 12 CPR**, and the following issues were agreed for determination;

1. ***Whether the suit discloses a cause of action against the 1st defendant.***
2. ***Whether the plaintiff's title to the suit land was obtained illegally and/or through fraud.***
3. ***Whether all the defendants are customary tenants or bona fide/ lawful occupants on the suit land.***
4. ***Whether the certificate of title of the plaintiff for Plot 380 overlaps that of the 1st defendant in Plot 43.***
5. ***Whether the defendants are trespassers on the suit land of the plaintiff.***
6. ***Whether the counter-defendants are trespassers on the land of the 1st defendant/counterclaimant.***
7. ***Whether the parties are entitled to the remedies sought.***

The logical sequence of events and facts of this case necessitate that *Issue No.2: "Whether the plaintiff's title to the suit land was obtained illegally and/or through fraud"*, be resolved first. This will invariably ease disposal of *Issue No. 3, and 6*, and to a large extent *Issue No. 5 and 1*. I will therefore not follow the order in which the issues were framed and argued by Counsel for the parties.

Resolution of the Issues:

Issue No. 2: Whether the plaintiff's title was obtained illegally and/or through fraud.

There is a wealth of authorities on what in law constitutes "fraud". In ***Waimiha Saw Milling Co. Ltd.vs. Waione Timber Co. Ltd. (1926) AC 101***, at page 106, it was held that fraud implies some act of dishonesty. In ***Assets Co. vs. Mere Roihi (1905) AC 176***, it was held that fraud in actions seeking to affect a registered title means actual fraud, dishonesty of some sort, not what is called constructive fraud; an unfortunate expression and one may opt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud. Similarly, ***Kampala Bottlers Ltd vs. Daminico Ltd SCCA No. 22 of 1992***, Wambuzi CJ, at page 5 of his judgment quoting the trial judge on the definition of fraud, held that it is well established that fraud means actual fraud or some act of dishonesty. The same

definition was adopted *FJK Zaabwe vs. Orient Bank & 5 O’rs SCCA No. 4 of 2006* (at page 28) in the lead judgment by Katerebe JSC (as he then was) relying on the definition of “fraud” in *Black’s Law Dictionary (6th Edition)* at page 660.

On how to plead and prove fraud, the Supreme Court gave guidance in *J.W.R Kazzora vs. M.L.S Rukuba, SCCA No. 13 of 1992*, that fraud must be particularly pleaded and strictly proved and cannot be left to be inferred from the facts. Regarding the standard of proof in *FJK Zaabwe vs. Orient Bank & Others (supra)*, it was held that the standard of proof for fraud is higher than that required in ordinary civil cases, which on balance of probabilities, but not beyond reasonable doubt required in criminal cases. Further, in *David Sejjaaka vs. Rebecca Musoke, SCCA No. 12 of 1985*, it was held that fraud must be attributable to the transferee, either directly or by necessary implication.

The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and participated in it or taken advantage of it. These principles will guide court in resolution of *Issue No.2*.

To prove that he obtained title to the suit land lawfully and without fraud, the plaintiff adduced in evidence *Exhibit P1*, a copy of a certificate of title for the suit land comprised in FRV HQT 117 Folio 7 Block 427 Plot 380 at Lwensololo. The title basically shows that the land is in his names having been registered thereon on 03/03/2014. The plaintiff testified that he acquired the title to the suit land following the due process of the law without overriding any third party interests or claims on the suit land.

The plaintiff further stated that prior to his application for registration, he had occupied and utilised the suit land since 2005 for animal and crop husbandry and commercial tree planting. He elaborated the process through which he obtained the title by adducing in evidence *Exhibit P2, P3, and P4* respectively; copies of the application forms for conversion from customary tenure to freehold tenure. A look at the forms reveals that they have a provision for names of owners of adjacent land, and also for names and signatures of the members of the Area Land Committee. The names of owners of the adjacent lands are required to be filled in. The names of members of the Area Land Committee are also required to be filled in addition to being countersigned. Under *PART 11 (for official use only)* the forms have a provision for remarks and recommendations of the Area Land Committee, and for the attachment of a report. In this case, the Area Land Committee in its remarks stated as follows;

“We have visited the said piece of land we therefore recommend for its conversion.”

160 Prior to the visit and inspection, the Area Land Committee issued a notice of hearing, *Exhibit P6*, which was addressed through the LC1 Chairman of the area where the suit land is situate, to any person claiming any interest in the suit land which was the subject of the application or adjacent land which may be affected by the application to attend the Area Land Committee meeting so that they put forward their respective claims.

165 In *Exhibit P9*, a form dated 01/10/2013, it is shown that the suit land was visited and inspected by the Area Land Committee which found and recommended that the land was available for leasing to the plaintiff and that it was free of any disputes. On 02/10/2013 the Area Land Committee made a report *Exhibit P7* to the Senior Land Officer, Mubende District, indicating that they visited the suit land in presence of neighbors who all agreed that the suit land belongs to
170 the plaintiff and was being used for cattle keeping, tree planting and cultivation. The committee recommended that the plaintiff’s application be considered. The report shows that about 22 people in all witnessed and participated in the site visit including the LC1 Chairman for Bunakabwa Village, one Sselugunda.

The plaintiff further adduced evidence under *Exhibit P5*, the demarcation form for certificate of
175 customary ownership. He also tendered in *Exhibit P8* dated 18/12/2013; a request by the Mubende District Land Board addressed to the Commissioner for Land Registration through the Commissioner for Land Administration, Ministry of Lands, Housing & Urban Development to prepare a freehold title for the suit land for the plaintiff. The Board quotes its Minute No. 6/22/10/2013 (3) A of 22/10 2013 in which it approved the application and survey and confirmed
180 that the land was available for leasing to the plaintiff. In the same letter the Board also quotes its Min. No. 7/16/12/12/2013 (12) FT of 16/12/2013, in which it approved the application for freehold title to the suit land by the plaintiff.

The plaintiff further adduced in evidence *Exhibit P8* showing that he applied for 500 hectares but that the area surveyed was only 414.348 hectares, and the deed plans were attached. *Exhibit P8*
185 also indicates that all dues except stamp duty had been paid on *Exhibit P10*; a receipt No.00050350 issued by the Mubende District Local Government. The District Land Board further quoting its earlier cited minutes endorsed the conversion in favour of the plaintiff on 18/12/2013. The Board in *Exhibit P11*; a letter dated 24/10/2013 citing its aforesaid respective minutes requested the Senior Land Management Officer, Mubende District, for the instruction to

190 survey the suit land in favour of the plaintiff. A survey was done as requested under *Exhibit P12*, and the plaintiff was given a freehold offer of the suit land in *Exhibit P13. Exhibit 14*; copies of receipts dated 12/09/2013, show that the plaintiff paid the necessary dues to the Controlling Authority at Mubende. He was eventually issued with a certificate of title, *Exhibit P1*, in his name for the suit land.

195 The 1st defendant for his part alleged that the plaintiff's acquisition of title for the suit land was flout with fraud and illegalities. He set out the particulars thereof as follows;

- (a) *Applying for a freehold interest over the suit land under the pretext that he owned and had been occupying the suit land whereas not.*
- (b) *Applying for conversion of from customary tenure for freehold, when the plaintiff had*
200 *never been a customary owner of the land.*
- (c) *Forging the 1st defendant's signature on the application for freehold, purporting that he had signed and consented to the application whereas not.*
- (d) *Obtaining a freehold interest over the suit land, which measures in total to over 100 hectares, without paying to the Government the full market value of land.*
- 205 (e) *Colluding and conniving with District Land (sic) to issue a freehold interest in contravention of the law.*
- (f) *Obtaining a freehold certificate of the title to defeat the 1st defendant's unregistered interest."*

The 2nd 6th and 18th defendants also alleged fraud against the plaintiff in their counterclaim under
210 the following particulars;

- a) *Applying for suit land title in breach of a court order from the High court which served to maintain the status quo.*
- b) *Presenting an application for title to the suit land with forged signatures of neighbors to the suit land.*
- 215 c) *Forging the signatures of area Local Council Chairpersons as having consented to his application of title to the suit land.*
- d) *Representing in his application for the title to the suit land that he has been in occupation of the suit land whereas not.*
- e) *Representing to the controlling authority that there are no occupants to the suit land*
220 *whereas not.*

As earlier indicated the 6th defendant did not attend the court proceedings or give his evidence. The legal implications are that he is taken to have admitted the claim against him by the plaintiff in as much as he failed to prove his counterclaim, which is dismissed against the counter defendants with costs.

225 After evaluating the evidence presented on both sides as a whole on *Issue No.2*, it is clear enough that other than merely stating the particulars of the alleged illegality and fraud against the plaintiff in their respective pleadings, the defendants failed to adduced evidence proving the same. In particular the 1st defendant's attempt to show that the plaintiff forged his signature on the application forms fell far too short of the required standard.

230 The 1st defendant testified that the signatures on the application forms (*Exhibit P2, P3, and P4*) attributed to him were not his and were forged by PW2, Kalyango Rashid. To prove this allegation, the 1st defendant adduced in evidence a report of a handwriting expert in *Exhibit D5*, even though the expert who authored the report was not called to testify.

Before, delving into the implications of the hand writing expert's report, it should be noted that 235 there are no particulars of illegality and/ or fraud pleaded at all as against the 2nd counter defendant, Biryomumaisho Deziderio. To that end, there is nothing to prove against him in the respective counterclaims.

Back to the hand writing expert's report, *Exhibit D5*, it was adduced in evidence by the 1st defendant essentially to prove that he did not sign on the forms *Exhibit P2, P3 and P4*. He stated 240 that PW2, Kalyango Rashid, wrote the 1st defendant's name on the said application forms. With this piece of evidence, I am constrained to state that no evidential value can be attached to *Exhibit D5* as it does not prove any point in contention. PW2 Kalyango Rashid indeed testified that he is the one who filled in the names of the 1st defendant in space provided for that purpose on the forms. He stated that at that time he was the estates manager of the 1st defendant and that 245 he was approached by PW6, Biryomumaisho Deziderio, the plaintiff's farm manager, with the application forms for a title to the suit land. That PW6 was looking for the registered owners of the adjacent lands to fill in their names as per the provision on the forms. PW2 further stated that as the estates manager he was quite conversant with the boundaries of his master's registered land in Plot 43 adjacent to the plaintiff's land, and that since his master was not readily available, 250 PW2 filled in his master's names on the space provided for that purpose on the forms. PW2 stressed that he never signed for or as his master, but only filled in the 1st defendant's names as it

is required on the forms. PW2 maintained that he filled in the names on the forms well aware that no prejudice would be occasioned to the 1st defendant since the boundaries of his master's land were clearly marked and well known.

255 A cursory look at application forms in *Exhibit P2, P3 and P4*, indeed confirms that each has a provision in Item 7 thereof, for “*Names of owners*” of adjacent land to the suit land, but not for their signatures. It means that the names could ordinarily be filled in by anybody seized with sufficient information and or knowledge of the material facts required to be filled on the forms. I hasten to add that it is not a mandatory requirement that the registered owner of the adjacent land
260 must personally write his or her names, more so when he or she is not readily available. This inference is fortified by yet another provision on the same forms in Item A, for both the “*Names and signatures*” of members of the Area Land Committee. This is markedly different from the provision in “Item 7” where only “*Names of owners*” of adjacent land are required to be filled in. This clear distinction is intended to serve a specific purpose for the members of the Area Land
265 Committee to fill in their names and countersign against them. This is in stark contrast to the owners of adjacent lands whose names are only required to be filled in but no countersigning is required. If signatures of the owners of adjacent lands were required, a provision would have been made for that purpose on the forms. In that case only and only the owners of the adjacent lands would be required to fill in their names and countersign against them on the forms. That is
270 not the position in this case.

I therefore agree with the proposition that PW2 did not sign or purport to sign for the first defendant, but simply filled in the names of his master the owner of the adjacent land to the suit land. That could not by any stretch of imagination amount to forgery or fraud; which ultimately renders the evidence of the hand writing expert's report quite irrelevant to the fact in issue.

275 Even assuming that the filling in of the 1st defendant's name on the forms by PW2 was forgery or fraud, which it is not, the principle in ***Kampala Bottlers Ltd. vs. Damanico (U) Ltd. case(supra)*** applies *mutatis mutandis*. Fraud must be attributable either directly or by necessary implication to the plaintiff in the context of the facts of the instant case. Going by the 1st defendant's evidence, fraud could not be attributable to the plaintiff even remotely since he did not fill in the
280 names of the 1st defendant in forms. ***Black's Law Dictionary, 8th Edition***, at page 667, defines the term “forgery” to mean; the act of fraudulently making a false document or altering a real one to be used as if genuine; a false or altered document made to look genuine by someone with

the intention to deceive. The **Penal Code Act (Cap. 120)** under **Section 342** similarly defines forgery as the making of a false document with intent to defraud or to deceive. In the instant case, filling of the 1st defendant's names on the forms by his estates manager PW2 does not fit within the meaning of forgery under the law. Similarly, it cannot amount to fraud attributable to the plaintiff who did not make a false document or alter a genuine one.

More importantly, **Section 59 RTA** provides, *inter alia*, that that a certificate of title is conclusive evidence of ownership and cannot be impeached or defeated by reason or on account of any informality or irregularity in the application or proceedings to bring the land under the Act. What this implies within the context of this case is that merely filling in the names of the 1st defendant on the forms by his estates manager would still fall within the ambit of; "the informality or irregularity in the application or proceedings to bring the land under this Act", envisaged under **Section 59 RTA (supra)** and hence it would not impeach the plaintiff's title on that account.

The other alleged particulars of fraud in the 1st defendant pleadings in item (a) and (b) are similar to those of the co - defendants in item (f) of their counterclaim. They all relate to the plaintiff having applied for a freehold interest over the suit land falsely claiming to have owned and occupied it as a customary tenant whereas he has never even occupied it. I will handle them together.

The 1st defendant, in his defence in the consolidated suits, in paragraph 5(b) averred that on or about 14/04/2012, he bought customary interests from occupants on the land neighboring his registered land. That unknown to him, in September, 2013, the plaintiff purporting to hold customary interest in the suit land applied to the Area Land Committee for conversion of the land in which the 1st defendant had purchased interest from the customary owners and the plaintiff converted it to freehold. These allegations constitute the particulars of fraud and illegality against the plaintiff in item (a) and (b) in the 1st defendant's pleadings.

The 2nd and 18th defendants in their counterclaim also averred that they are customary tenants on the suit land. In particular, the 2nd defendant claimed to have been born on the suit land 43 years ago and inherited his interest from his mother who also inherited it from her father. He further stated in his evidence that he had been settled on the suit land by the Government of Uganda together with 14 other persons.

The plaintiff denied the defendants' claims and testified that he had since 2005 been settled on the suit as customary tenant carrying on commercial tree planting, crop and animal husbandry.

Further, that he followed the due process and applied to convert his customary occupancy over
315 public land to the controlling authority which granted him the title to the suit land. That the land
was never occupied by anyone and that the defendants trespassed thereon only in June, 2014,
when he had long been in occupation and utilisation as a customary owner since 2005.

After carefully evaluating the evidence on this particular point, the inevitable conclusion is that
the 1st defendant has no interest whatsoever in the suit land. *Exhibit D2*, the sale agreement
320 which he sought to rely on sharply contradicts rather than supports his claim in the pleadings.
The customary interests he purports to have purchased from tenants on the suit land do not
ordinarily fall within land regulated under the **RTA (Cap.230)** which is the subject of sale
agreement. The sale agreement is specifically in respect to;

325 “*LAND COMPRISED IN LEASEHOLD REGISTER VOLUME 2640 FOLIO 14 PLOT 43*
SINGO BLOCK 426.”

This could only mean that the customary interests the 1st defendant purchased, if any, existed
only on his registered land in Plot 43, and not outside it as he erroneously seems to suggest by
his claim.

The conclusion above is reinforced by affidavit evidence which was adduced earlier in *HCMA*
330 *No.745 of 2014*, sworn by one Yowana Ssebisumba the area LC1 Chairman of Lwensololo,
Manyogaseka, where the suit land is situate, and one Sselugunda Sam also the area LC1
Chairman of Rwamujenyi, Manyogaseka, where the suit land is partly situate. In particular,
Yowana Ssebisumba deponed that he was once a caretaker of the suit land, and that it neighbors
Plot 43 on which he was a customary tenant before he was compensated by Willy Jagwe the
335 registered owner of Plot 43 and he left. He further confirmed that the plaintiff herein has since
2005 occupied the suit land free from other occupants, and used it for grazing animals and
cultivation. Similar evidence was deponed by Sselugunda Sam that he knew the plaintiff as
having been in occupation and use of the suit land since 2005 free from any third party claims.
Sselugunda further stated that some of the defendants in March, 2014, through his office
340 requested the plaintiff as owner of the suit land to allow them cultivate seasonal crops thereon
and that he allowed them and agreements were made to that effect. That he was surprised that
later June, 2014, some of them turned around and started laying claim that they own the suit
land.

Indeed Sebisumba is listed as No.9 on *Exhibit D2* as one of the customary tenants on Plot 43
345 whose interest was compensated by the 1st defendant and he left. This goes a long way to prove
that *Exhibit D2* could have only been in respect of customary tenants who were on Plot 43, and
not Plot 380.

Apart from the above finding, **Section 91** of the **Evidence Act (Cap 6)** renders inadmissible the
oral evidence of the 1st defendant's in respect to sale agreement, which is precluded because the
350 terms of the agreement are contractual in nature reduced into writing in document form. This is
more so given that the 1st defendant attempted to give evidence that sharply contradicts the spirit
and letter of the sale agreement.

In addition, the 2nd defendant, Crespo Buyondo, adduced in evidence *Exhibit D6* which
completely dispels any suggestion that there could have been any land outside Plot 43 which the
355 1st defendant bought from the purported customary tenants. *Exhibit D6*, is a letter authored by the
then Deputy Minister of Lands & Surveys, Hon. Matia Baguma – Isoke, dated 21/07/1989. It
made reference to 15 sq. miles of land at Kiganda that was leased to West Mengo Growers Co –
operative Union Ltd. It is indicated therein that the said Co-operative had failed to develop all
the land allocated to it and that it be reduced to only 5 sq. miles. This happens to be the same 5
360 sq. miles now in Plot 43 that the 1st defendant confirmed in his testimony to have bought from
West Mengo Co – operative Union Ltd. It follows logically that if there were any customary
interests that the 1st defendant purchased, they existed on his 5 sq miles within Plot 43, and not
outside.

The 1st defendant's own testimony that he bought 5 sq. miles from West Mengo Co – operative
365 Union Ltd., but that he had not opened the boundaries when he found out that the plaintiff had
obtained title for Plot 380 further fortifies the findings above. It means that Plot 43 boundaries
already existed before Plot 380 was created. This further renders the 1st defendant's claim of
having purchased customary interests on the suit land in Plot 380 quite unsustainable. The 5 sq.
miles which he bought from West Mengo Co- operative Union Ltd on which the customary
370 tenants were was comprised in Plot 43, and not Plot 380.

Regarding the claim by the 2nd defendant of having been on the suit land at all material times, it
needs to be recalled that the 2nd defendant and others had previously instituted a suit at Nakawa
High Court *vide HCCS No 102 of 2012*, against Willy Jagwe, the current 1st defendant, in which
they claimed interest as customary tenants in his Plot 43 measuring 5 sq. miles. They never

375 claimed interest in any part of Plot 380. Needless to state, that parties are bound by their pleadings and any subsequent departure can only be by amendment to the previous pleadings; which they did not do in this case.

The findings above are further buttressed by the evidence of the Area Land Committee's visit and inspection of the suit land in presence of neighbors of the adjacent lands including other 22
380 persons and the Local Council officials of the area. In fact, one of the members of the Committee, one Benon Katamba, who participated in the visit and inspection deponed an affidavit, in the earlier stated *HCMA No. 745 of 2014*, that that the suit land had no occupants and no disputes on it. This is similar to the affidavit evidence of Sebisumba and Ssselugunda the respective LC1 Chairpersons of the area that the suit land was free from any third party claims at
385 the time until later in June 2014. Therefore, the claim of the 2nd defendant having been an occupant with customary interests on the suit land is unsupported as it is untenable.

The 18th defendant Musa Serunjogi, testifying as DW1, stated that he first came to the village of Bunakabwa in 2012. He conceded that he was never been on the suit land for a period of over 20 years as stated in his pleadings. He stated that he actually came to Mubende upon the invitation
390 of his brother PW3, Nsimbi Robert, who was working on the farm of the 1st defendant who also invited him onto Plot 43 and allocated to him a piece of land to cultivate. This evidence leaves no doubt that the 18th defendant has never had any customary interest in the suit land at all.

The remainder of the particulars of the alleged fraud and/ or illegality in the counterclaimants' respective pleadings remained entirely unproven as no evidence in any form was canvassed by
395 the defendants. It is only the Counsel for the defendants who strenuously tried to bolster, by their submissions, the alleged particulars in the defendants' pleadings. This nevertheless still fell far too short because lawyers' addresses cannot substitute or pass for evidence to prove a fact in issue. Only parties by their evidence bear that burden under ***Section 101 (1) and (2) of the Evidence Act (supra)***. All the defendants have no interest whatsoever in the suit land and their
400 respective counterclaims are dismissed with costs. *Issue No.3* is answered in the negative.

On the other hand the plaintiff satisfactorily discharged the burden by proving that he lawfully and without fraud obtained title to the suit land. He demonstrated that he followed the due process in the acquisition of registration and title to the suit land. He also showed that he did not deprive the defendants of any interest whatsoever in the suit land and that they did not have any
405 in the first place. *Issue No.2* is answered in the negative.

Having found as above, it would also follow that the 1st counter defendant/plaintiff could not have trespassed on land of the 1st defendant in the suit land because the 1st defendant never had interest the suit land in the first place. Logically, the plaintiff/1st counter defendant could not have trespassed on the suit land which he acquired lawfully and without fraud. This disposes of *Issue*
410 *No.6*, which is answered in the negative.

Issue No.4: Whether the certificate of title for Plot 380 overlaps on to Plot 43.

The issue of overlap is principally born out of 1st defendant's contention that as a result of the plaintiff alleged fraudulent and/or unlawful obtaining of a lease over the suit land which was or is part of the 1st defendant's land, the plaintiff title under Plot 380 overlaps on the 1st defendant's
415 titled land in Plot 43 to the extent of 1.5 sq miles. I have already resolved issues regarding the alleged fraud and or illegality, and I will therefore only confine my evaluation to the technical aspect of the alleged overlap.

To support the claim of the alleged overlap, the 1st defendant testified that he actually does not have the 5 sq. miles intact in Plot 43 since the same was overlapped by the suit land in Plot 380
420 owned by the plaintiff. The 1st defendant called evidence of DW5, Albert Birungi, the District Staff Surveyor for Mubende District where the suit land is located. DW5, however, categorically denied that there was any overlap at all in this case. He reasoned that the Commissioner for Mapping and Surveys could not issue deed prints for Plot 380 if it overlapped in any way over Plot 43.

The plaintiff for his part denied the claim that his land in Plot 380 overlaps into the 1st
425 defendant's land in Plot 43. He stated that the 1st defendant has never acquired any interest legal or equitable in any other land neighboring or adjacent to Plot 43 and that the claim of possession of an extra 1.5 sq miles is false and a means intended to grab the plaintiff's land in Plot 380.

The plaintiff called evidence of PW4 Frank Mugisha, a qualified surveyor who echoed DW5 on
430 the issue of the alleged overlap, that it was not possible for the Commissioner for Mapping and Surveys to issue a deed print for Plot 380 if overlapped on Plot 43. PW4 further stated that 1st defendant's 5 sq. miles under Plot 43 was intact, and produced *Exhibit P18*, which is the Area Schedule form showing that the 1st defendant's 5 sq miles in Plot 43 was still intact at the time Plot 380 was created. PW4 also stated that Plot 43 has since been subdivided into several Plots;
435 Nos. 202 -206 apparent on the Area Schedule form. This evidence confirms the 1st defendant's earlier testimony that he sold off much of Plot 43 to a company called M/s. Indo Agencies and

remained with only a small residue. This fact is also corroborated by DW4, Godfrey Lule, a lawyer and 1st defendant's son and manager of his father's property, that Plot 43 has since been subdivided into several other plots.

440 Taking the evidence on this particular issue as a whole, it is in no doubt that the 1st defendant totally failed to prove his allegations that the suit land under Plot 380 overlaps and encroaches on Plot 43. The 1st defendant's own witness DW5 the District Staff Surveyor refuted the claim of overlap as much as PW4, an expert surveyor, that it was totally impossible in the circumstances. The two witnesses are technical persons and experts in their field of mapping and surveys. There
445 is no good reason to doubt their independent professional evidence.

It may be true that the 5 sq. miles in Plot 43 is no longer intact. The 1st defendant himself explained that he subdivided his land into several plots and sold off most of them to third parties. Logically, having sold them off he could not expect Plot 43 to remain intact. Nevertheless, the Area Schedule form plainly demonstrates that while it still existed, Plot 43 was 5 sq intact. *Issue*
450 *No.4* is answered in the negative.

Issue No.5: Whether the defendants are trespassers on the suit land.

Issue No.1: Whether the suit discloses a cause of action against the 1st defendant.

I will resolve both issues simultaneously as they are interrelated. In the case of ***Justine EM Lutaya vs. Stirling Civil Engineering SCCA No. 11 of 2002***, Mulenga JSC (R.I.P.) held that
455 trespass to land occurs when a person makes an unauthorised entry upon land and thereby interferes or portends to interfere with another person's lawful possession of that land. Further, that possession does not only mean physical occupation but constructive possession which includes actual possession and possession of certificate of title.

On what constitutes a cause of action, the law was correctly restated by Counsel on both sides in
460 their submissions. In ***Mulindwa Birimumaso vs. Government Central Purchasing Corporation, Civil Appeal No.03 of 2002***, and in ***Ben Makalu T/a Cinematex Services vs. John Tumwebaze, HCMA No.125 of 2008*** (unreported) citing the *locus classicus* case of ***Auto Garage vs. Motokov [1971] EA 514***, the essential elements of a cause of action are that the plaintiff enjoyed a right, the right has been violated and the defendant is liable. It was further held that if any of these
465 essential elements is missing, the plaint is a nullity and no amendment can be made as there is nothing to amend. The case of ***Kapeka Coffee Works Ltd & A' nor vs. NPART CACA No.3 of***

2000, provided guidance that in determining whether a plaint discloses a cause of action, the court looks only at the plaint and its annexures if any, and nowhere else.

The plaintiff adduced in evidence *Exhibit P1*, a copy of the certificate of title for Plot 380 showing him as the registered owner of the suit land. The certificate of title supports his averments in the plaint that he has title to the suit land in his name without any incumbrance.

Section 59 RTA provides, *inter alia*, that possession of a certificate of title is conclusive evidence of ownership of land described therein. **Section 64 RTA** recognises the estate of a registered proprietor as paramount except for certain grounds which include fraud. Similarly, **Section 176 (c) RTA**, provides that the interest of a registered proprietor is protected except in certain circumstances which include fraud.

The legal implication is that regardless of whether the plaintiff's title is challenged or disputed by the defendants or any other person for whatever reason, for as long as it has not been cancelled it still stands and the plaintiff's legal right as the registered proprietor is recognised and protected. This bestows on the plaintiff all rights accruing to the owner of such land under the law, which invariably vests him with a cause of action against any person who may be in violation his rights in the suit land. That disposes of *Issue No.1* which is answered in the affirmative.

On the issue as to whether the defendants trespassed on the suit land, the plaintiff testified that defendants in June, 2014, forcefully entered on to the suit land on which he has been in occupation of since 2005. That they destroyed his property on the suit land and extended their tortuous activities to the other adjoining lands also belonging to the plaintiff. That they first cut and burnt the barbed wire fence that protected the suit land from incursions by stray animals and livestock of neighbors, and proceeded to clear the land and destroyed wide expanses of commercial trees which he had earlier planted on the suit land and on his other adjoining plots of land.

The plaintiff's evidence was echoed by PW2, Kalyango Rashid who was at the time the estates manager of the 1st defendant, and PW6 Biryomumaisho Deziderio, the plaintiff's farm manager. In particular, PW6 gave a detailed account of how the other defendants on instructions of the 1st defendant invaded the suit land and other adjoining lands of the plaintiff and proceeded to destroy wide expanses of planted commercial trees and other properties. PW6 stated that the 1st

defendant sent a truck of eucalyptus seedlings to be distributed to the co - defendants to plant on the suit land in attempt to lay claim on it. PW6 also stated that skirmishes ensued between the workers of the 1st defendant and those of the plaintiff and a case was reported to police who
500 arrested some of the defendants and charged them with malicious damage to property, and that the 2nd defendant is still in prison over charges arising from the same case.

The evidence of PW6 was corroborated by PW3 Nsimbi Robert, and PW5 Vincent Kibirango who at the time were workers of the 1st defendant on his farm. They stated that they were initially also charged with the same offences, but that upon realising that the suit land belonged to the
505 plaintiff and that they had been misled by the 1st defendant into trespassing and destroying the plaintiff's property, they approached the plaintiff and asked for forgiveness, and he obliged. They subsequently entered into consent settlements with him indicating that they had no claim whatsoever over the suit land. The consents are on court record.

The 2nd defendant, for his part, denied the allegations of trespass stating that he was staying on the
510 suit land where he cultivated various food crops and grazed livestock prior to the acquisition by the plaintiff. That he was born on the suit land 43 years ago, and that initially part of it belonged to his grandfather who died in 1984, and that his mother inherited it. That upon her death in 1995, he inherited the same and that to date he is in occupation. That it was PW6 Biryomumaisho Deziderio together with others who unlawfully destroyed his food crops and
515 evicted him from the land.

After carefully evaluating the evidence as a whole on this issue, it is inevitable to conclude that the defendants trespassed on the plaintiff's land. The 2nd defendant admitted to having entered on to the suit land albeit claiming to have customary interest thereon and having been born there. It has already been found that he has no interest whatsoever in the suit land. He made an
520 unsupported claim that along with other 14 people he was settled on the suit land by Government of Uganda, but he could not produce any proof showing that he was even among the so – called 14 people.

It is recalled that the 2nd defendant and others sued Willy in Jagwe in **Civil Suit No.102 of 2012** in the Nakawa High Court for attempting to evict them allegedly from their customary interests.
525 Under paragraph 1 and 2 of their plaint they specifically averred that the suit land in that case is LRV 2640 Folio 14 Singo Block 426 Plot 43. Later in its ruling in *HCMA No.745 of 2014*, court found that the suit land the subject of the Nakawa court case by the defendants was quite

different from FRV HQT 177 Folio 7 Singo Block 427 Plot 380 land at Lwensololo which is the
suit land in the instant case. Court further observed that if the two descriptions referred to the
530 same land, it would be an issue for investigation in the head suit, which is the instant suit. In
Issue No 4 above material facts in evidence have amply shown that Plot 43 in which the 2nd
defendant claimed interest in the earlier consolidated suit is quite different from Plot 380, and
that there is no overlap of the latter on the former. This logically means that the 2nd defendant has
no interest whatsoever in the suit land.

535 The above conclusion is fortified by evidence of the Area Land Committee of Mubende District
having visited and inspected the suit land. Neither the 2nd defendant nor the other purported 14
people settled by the Government were found on the suit land. The documented findings of the
Committee are that it was unoccupied and it had no disputes. If the 2nd defendant got on the suit
land as he claims, he did so unlawfully without the authority and or consent of the registered
540 owner, which renders him trespasser as already found in *Issue No.6*.

Regarding the 1st defendant, the plaintiff adduced evidence that he was the architect of the
trespass of the co - defendants and the resultant destruction of the plaintiff's property on the suit
land and other adjoining plots of the plaintiff. PW1 testified that even though the 1st defendant
was not physically present on the suit land, he planned and orchestrated the trespass and
545 destruction of the property done by the other defendants who were his workers and merely
followed his instructions in their collective actions.

The plaintiff's evidence in that respect was corroborated by PW3 Nsimbi Robert, who stated that
he was one of the workers of the 1st defendant on his farm having been hired by PW2 Kalyango
Rashid, then the 1st defendant's farm manager. That the 1st defendant instructed them to enter on
550 to the suit land saying that it was public land and that the plaintiff, a Mukiga by tribe, should not
take their land while they looked on. PW3 further stated that the 1st defendant even brought tree
seedlings on a truck vehicle to plant on portions of the suit land they were each promised to
claim as their own.

The evidence of PW3 was also corroborated by PW5 Kibirango Vincent, also a former worker
555 on the 1st defendant's farm, who stated that they started by first cutting the plaintiff's barbed wire
fence and cleared the suit land of the vegetation and started digging holes and planting the trees
seedlings which the 1st defendant had distributed to them. Further, that they set fire to the
vegetation and trees on the suit land and that it extended to the other adjoining lands of the

560 plaintiff. That in the process the farm workers of the plaintiff led by PW6 the farm manager attacked them which resulted into a fight and injuries to some of them. That the case was reported to police who arrested the defendants and charged them with malicious damage to property and trespass to the plaintiff's land.

565 The 1st defendant denied the allegations of trespass. He also denied any knowledge of PW2, PW3, and PW5 having been his workers on his farm. Based mainly on that denial Counsel for the 1st defendant submitted that there was no principal – agent relationship between the 1st defendant and the other defendants established by evidence of the plaintiff's witnesses. Counsel argued that each of the defendants is an adult of sound mind and acted independently and that the 1st defendant is not vicariously liable for their tortuous acts. That everyone is liable for their own actions. For this proposition Counsel relied on *The Law of Torts, a Treatise on the English Law*
570 *of Liability for Civil Injuries*, By John W. Salmond at page 7.

Counsel further submitted that there was no nexus established either in the evidence or pleadings of the plaintiff between the 1st defendant and the alleged tort – feasons. Further, that the plaintiff personally testified that the 1st defendant was not physically at the scene, and that the remaining defendants, i.e.; the 2nd, 6th, and 18th defendants were not his servants or agents, and that it would
575 be unjust to stretch the law and facts to make the 1st defendant liable for their actions.

On the whole, I do not find submissions of Counsel for the 1st defendant persuasive on this particular issue. In paragraph 5 of the amended plaintiff, the plaintiff's claim is clearly stated as being against the defendants "jointly and severally". Therefore, it would be incorrect to argue that there are no pleaded facts by the plaintiff that link the 1st defendant to the alleged trespass.
580 While it is true that PW1 testified that the 1st defendant was not physically present at the scene, merely not being at the scene does not imply that the 1st defendant never played any role in the alleged trespass. There is cogent evidence directly linking him and pointing to his role as the master - mind of the trespass and hence the resultant destruction of the plaintiff's property. PW3 Nsimbi Robert and PW5 Kibirango testified of to how they were instructed by the 1st defendant for whom they worked on his farm, to invade the suit land. These were co - defendants with the
585 1st defendant in the suit before they settled it by consent with the plaintiff and withdrew their respective claims. Therefore, even assuming that the defendants who were retained in the suit were not workers of the 1st defendant, as inaccurately opined by Counsel for the 1st defendant, the corroborated evidence of the others defendants who settled their case with the plaintiff still

590 places the 1st defendant squarely at the centre of the whole scheme of things as a master - mind of their actions and the resultant destruction.

The findings above are buttressed further by the fact in evidence which was never challenged at all, that when the defendants were first sued it was the 1st defendant who hired for them lawyers to defend them in the suit before court. DW4 Godfrey Lule, a lawyer and son of the 1st defendant
595 who testified that he handles his father's estate affairs, also confirmed that he represented PW3 Nsimbi Robert, in the *HCMA No. 745 of 2014* as Counsel. That is indeed true according to the court record. DW4 further stated as part of his father's estate management roles he employed the defendants to work for his father.

Worthy of note also is that in *HCMA No. 745 of 2014. Wilfred Bugingo vs. Kamugisha Frank
600 & Others*, arising from the instant suit, DW4 Godfrey Lule and another lawyer Sselulika Allan appeared for the all the defendants; the respondents therein. While opposing the application, they clearly stated on court record, at page 4 of the typed proceedings line 70, that the respondents therein, the defendants in the instant case, are; "agents and servants of Willy Jagwe in this suit". This undoubtedly places the 1st defendant in the position of a principal and the co - defendants as
605 his agents. In light of these obvious facts which were amply corroborated by evidence of the co – defendants that the 1st defendant directed his agents/servants to enter on to the suit land, the 1st defendant would scarcely divorce himself from their actions. He is in no uncertain terms vicariously liable in equal measure for whatever damage his agents/servants occasioned to the plaintiff on the suit land, and in the same measure he committed the trespass through his
610 agents/servants, more so that he gave them explicit instructions as to what to do. *Issue No.5* is answered in the affirmative.

Issue No. 7: Whether the parties are entitled to the remedies sought.

Having found as above, the plaintiff is declared the lawful and rightful owner of the suit land. It is also declared that the defendants jointly and severally have no interest whatsoever in the suit
615 land and are mere trespassers thereon. An order of a permanent injunction doth issue restraining the defendants, their agents , servants and or persons claiming interest from them from further interfering, cultivating and /or using the suit land in any way whatsoever that affects the plaintiff's use and quiet possession and proprietary interests therein.

The plaintiff also made a prayer for the award of special damages. In the case of *Stroms vs.
620 Hutchinson (1905) AC 515*; and *Dr. Godwin Turyasingura vs. Wheels of Africa HCCS 485 of*

1995, It was held that special damages must be specifically pleaded and strictly proved. Further, in the case of *Musoke David vs. Departed Asian's Property Custodian Board [1990 – 1994) EA, 219*, it was held that due to their peculiar nature the law requires that a plaintiff gives warning in his pleadings of the items constituting his claim for special damages with sufficient
625 specificity in order that there may be no surprised at the trial.

The plaintiff, in paragraph 16 of the amended plaint, pleaded the particulars of special damages of what he claims to have lost as a result of the defendants tortuous acts. PW6 Biryomumaisho Deziderio the plaintiff's farm manager adduced in evidence *Exhibit P19*; the "Record of Farm Expenditure" as proof of the claimed loss. PW6 presented the contents of *Exhibit P19* explaining
630 at length each item of the particulars of the special damages pleaded. They include loss of commercial income from 500 hectares of pine trees; clearing of 500 hectares at Shs. 300,000 per hectare which comes to Shs150,000,000=; lining and pitting the same area at Shs. 200,000= per hectare which comes to Shs.100,000,000=; pre-spraying herbicides on all 500 hectares at Shs.300,000 per hectare which comes to Shs150,000,000=; the cost of seedlings for each hectare
635 at Shs.650,000 for the area covering 500 hectares amounting to Shs.325,000,000=; planting 500 at Shs.150,000 per hectare which comes to Shs.325,000,000=; weeding 3 times per year at Shs. 200,000= per hectare for 500 hectares which comes to Shs.500,000,000=; hiring of 10 guards each at a monthly salary of Shs. 500,000= from June 2014 amounting to Shs.25,000,000=; destroyed barbed wire all amounting to Shs.2,000,000=; loss of salaries already advanced to
640 workers who left their jobs due to the defendants' attack on the suit land amounting to Shs. 10,000,000=; 500,000 seedlings at a cost of Shs.500= per seedling which was paid for but not planted amounting to Shs. 250,000,000=. The grand total claimed loss according to evidence of PW6, based on the records in *Exhibit P19* is Shs.2, 837,000,000=.

Exhibit P19 was admitted in evidence with no objection from the defendants. Similarly, the
645 testimony of PW6 in respect to the content of *Exhibit P19* regarding the claimed loss presented as special damages was never challenged in any way by contrary evidence in rebuttal or through cross - examination by Counsel for the defendants. It is only at submission stage that Counsel for the 1st defendant raised questions on some of the items in *Exhibit P19* regarding the special damages. He argued that the plaintiff failed to satisfactorily prove that the alleged loss was
650 incurred and that it was the direct result of the 1st defendant's actions. Further, that no evidence

was brought to prove that the loss pleaded in paragraph 16(a) (i) to (vi), (b), (c) and (d) of the
655 complaint occurred.

With due respect to Counsel, his criticism is not justified as it is based on facts in evidence.
Indeed evidence was adduced which satisfactorily proves that the plaintiff incurred the loss and
660 that it was a direct consequence of the proven tortuous acts of the defendants. Court has
evaluated the evidence and come to that finding that the defendants committed trespass and
occasioned destruction of property on the suit land and other adjoining lands of the plaintiff, and
it is not called for to repeat the same.

Counsel for the 1st defendant further advanced the argument that there is no way the alleged
660 trespass that is said to have taken place on a single day would have led to loss of Shs.150m/=
allegedly spent on clearing the land, lining and pitting, weeding etc. I find this proposition
certainly not correct because the trespass was not a one day event. Evidence adduced by plaintiff
and his witnesses detailed how it started by the defendants first cutting down the long stretches
of barbed wire fence along the suit land boundaries, then clearing the vegetation therein and
665 setting the suit land on fire which spread to the other adjoin lands; which are not part of the suit
land but also belong to the plaintiff. PW1 at pages 103 -104 of typed proceedings, clarified that
the trespass and destruction was on Plot 380 and that in the process the activities on Plot 119 and
Plot 142 were all affected due to the insecurity and that he lost developments on all the farm.
This is corroborated evidence of PW6, at pages 460-461 of typed proceedings, where he referred
670 to the whole land as “the farm” that includes Plot 380 the suit land, Plot 119 and Plot 142. PW6
stated that all the farm suffered destruction because it is in one place and one cannot tell the
boundaries of each plot by merely looking at it. In my considered view, this clarifies the claim
for special damages being in respect of the destruction on the suit land because it is the particular
land in issue, but generally the destruction extended beyond to other property in the other
675 adjoining plots of the plaintiff.

Basing on the above evidence therefore, a clear distinction ought to be made between the claim
as to the ownership as to the suit land, and the claim as to the damage on the suit land and
beyond the suit land. Even though evidence was adduced as to the destruction and loss
occasioned on the other adjoining lands of the plaintiff, that does not fall within the particulars of
680 special damages pleaded in respect to the suit land, but would invariably be proof of general
damages. To that end, I do not find that there is any discrepancy in the claim for special damages

as pleaded merely because the size of the suit land is different from the extent of the special damages pleaded and proved.

685 Counsel for the 1st defendant further faulted the plaintiff for only adducing oral evidence and not any “tangible evidence” as Counsel preferred to call it, in form of photographs, or report of a professional to prove the alleged destruction of the property. With due respect to Counsel, there is no law against oral evidence which, in any case, meets the standards of the best evidence rule. What is required of a party is to adduce evidence in any form provided it passes the threshold reliability and relevancy tests, and satisfies the standard of proof. This does not necessarily have
690 to be professional or photographic evidence. Professional evidence would be required if the subject in contention was of such a nature that it falls within a special field not easily comprehensible to the ordinary mind. I do not find that clearing or burning of vegetation on a farm or cutting of barbed wire fence would require expert or professional evidence to prove. If the issue was on the quantification and calculations, the figures were succinctly presented in
695 *Exhibit P19* which passed unchallenged. I find no merit in the arguments of Counsel on that point.

The same Counsel also attacked the documentary evidence adduced by the plaintiff to prove the alleged loss as inconsistent and contradictory. In particular, that *Exhibit P17*, the receipts/delivery note for the seedlings were issued and received by a different company namely Basepo
700 Tree Nurseries and not the plaintiff, and that the writing of the plaintiff’s name was merely an afterthought as he never acknowledged receipt of them.

With due respect, I am unable to find the basis for such conclusions on that point. The particular questions regarding Basepo Tree Nurseries were never put to PW6, and no contrary evidence was adduced on that point by the 1st defendant. In light of such deficiencies on part of the
705 defence, it would be difficult to conclude that the evidence of receipts is contradictory at submission stage by merely looking at them yet no question regarding the same were put to the witness to solicit for such evidence when he testified on the particular receipt.

Counsel yet again raised issue with the evidence of the plaintiff that he paid for, but never took delivery of some of the seedlings. Counsel argued that the plaintiff cannot not seek damages for
710 the cost, and that even the delivery notes indicate that delivery was made in August 2007/2008 approximately five years before the alleged trespass occurred.

After evaluating the evidence on this point, I fail to appreciate the basis for Counsel's argument at all. Questions regarding the same issue were put to the plaintiff who, at pages 222 – 223 of typed proceedings, clarified that he would place orders for the seedlings by effecting payment
715 five months prior to the planting season, and on the due date he would go and collect them after preparing the land. That in this case the he did not collect the seedlings due to the activities on the farm being interfered with by acts of trespass of the defendants, and that he lost money as well as the seedlings. PW1 further clarified that he could not demand a refund of the money because the company preparing seedlings had done its work and it was him who could not collect
720 the seedlings. The logical inference is that trespass and the destruction did not occur at the time of making payment for the particular seedlings, which was much earlier, but later when planting was due to be done but could not owing to the defendants' tortuous acts. Also, the delivery notes of 2007/ 2008 prove that the commercial trees had been planted much earlier going through the phases enumerated in the particulars of special damages, but they were destroyed before the
725 plaintiff could harvest any gains from them.

Counsel for the 1st defendant also submitted that the plaintiff maintained his suit against only four defendants when initially at the hearing he dropped the others, and that the plaintiff did not amend his pleadings to state that it is only the remaining defendants who occasioned the alleged trespass and alleged destruction of his property and that its only them liable for the alleged loss.
730 It needs to be pointed out that the consent settlements on which the other defendants were dropped were endorsed by court. Therefore, they duly constitute court orders in that regard. It meant that the record was amended to that extent as indeed it bears all the details, and there cannot be any confusion as to whom the claim was maintained against. It is also true that once the other defendants were dropped, the suit stood amended and the action continued as if the
735 amendment had been inserted from the beginning. Therefore, what stood before the amendment was no longer the material before court as it no longer defined the issues to be tried. See: ***Eastern Radio Services vs. Patel [1962] EA 818***. In the instant case the plaintiff maintained the suit as against the remaining defendants jointly and severally and he has the option to recover from one or any or all of them.

740 I find that the plaintiff specifically pleaded and strictly proved special damages to the tune of Shs. 2,837,000,000 (Two billion, eight hundred thirty seven million only), which I award as special damages to the plaintiff. Given that the destroyed property particularly the tree plantation

was for commercial purposes, the amount shall attract interest at a commercial rate of 25% per annum from the June 2014 until payment in full.

745 Regarding the prayer for general damages, the position as it relates to trespass is clearly elucidated in *Halsbury's Law of England 3rd Edition Vol. 38 paragraph 1222*, which was cited and relied upon in *Placid Weli vs. Hippo Tours & 2 Others HCCS No. 939 of 1996* that trespass is actionable parse even if no damage was done to land, and that a plaintiff is entitled to recover damages even though he has suffered no actual loss, but where trespass has caused the loss the
750 plaintiff is entitled to receive such an amount as will compensate him or her for the loss. Further, that the purpose of damages is to put the plaintiff in as good a position as he would be if the trespass had not occurred.

Based on these principles, having found that the defendants trespassed on the suit land and caused enormous damage and loss to the plaintiff, it entitles him to the award of general
755 damages. In determining the quantum, the guiding factors include, but are not limited to the value of the subject matter, the immediate and future economic loss as much as money can do it, the inconvenience that a party may have been put through, and the nature and extent of the injury or loss suffered.

In this case, I have taken into account the nature of the trespass, which at any rate was done
760 maliciously with the intention of depriving the plaintiff of his land and property merely because he belongs to a different tribe. I have also considered the impunity with which the tortuous acts were executed, the general inconvenience the plaintiff was put through at the instance of the defendants, and in general the extent of the destruction occasioned on the suit land and adjoining plots of land of the plaintiff. It is in no doubt that the plaintiff suffered immediate and future
765 economic loss given that it had taken him since 2007/2008 to laboriously plant and nurture the extensive commercial tree plantation. It will no doubt equally take him quite long to recover from the economic loss before he can benefit from the tree plantation. I am fortified by similar considerations that were taken in arriving at general damages as a result of future economic loss in the case of *Robert Cuossens vs. Attorney General, SCCA No. 8 of 1999*. Applying the test
770 therein to all factors and circumstances of the instant case, I would agree that Shs. 500 million is fair and adequate recompense, and I award the same as general damages to the plaintiff. It shall attract interest at a commercial rate of 25% per annum from the date of this judgment until payment in full.

On the issue of costs, **Section 27 CPA** provides that costs are in the discretion of the court, but
775 shall follow the event unless for good reason court directs otherwise. There is no good reason to
deny the plaintiff costs of the suit, which are awarded to him.

BASHAIJA K. ANDREW

JUDGE

780 **26/02/2016**

Mr. Saul Kikomeko for 1st Defendant present.

Counsel for Plaintiff Swabur Marzuq present.

785 Plaintiff present.

Godfrey Tumwikirize – Court Clerk in court.

Court: Judgment read in open Court.

BASHAIJA K. ANDREW

790 **JUDGE**

26/02/2016