

- f) In February 2014, 1st Defendant led a group of 2nd, 3rd and 4th defendants into the suit land and they harvested the plaintiff's bananas, cut down 400 mature coffee trees and sold off the trees for their own use.
- g) and (h) that defendants trespassed and continue to trespass on the said land.

The Plaintiff alleged that the defendants were served with notice of intention to sue but they ignored the same, and continued in their trespass.

The cause of action arose in Manafwa District within the jurisdiction of this court.

The Plaintiff sued defendant for;

- a) Declaration that the defendants are trespassers on the suit land.
- b) An order giving the Plaintiff vacant possession of the suit land.
- c) A permanent injunction restraining the defendants and their agents from any further acts of trespass.
- d) General damages.
- e) Mesne profits.
- f) Costs of the suit.

Though served, the defendants did not enter appearance nor file a written statement of defence. The matter was therefore set down for hearing *ex parte* under O.9 r. 11(2) of the Civil Procedure Rules.

Plaintiff has the burden to prove the case on the balance of probabilities. The burden is contained in Sections 101, 102 and 103 of the Evidence Act in that whoever asserts a fact has the burden to prove the same.

In court the Plaintiff through his counsel M/s Mutembuli led evidence of **PW.1 Wambigwa John, PW.2 Wakama Masa, PW.3 Peter Nalanya, PW.4 Lwandanyi Fred**. The Plaintiff also presented his agreements which were noted by court respectively.

The matter was adjourned to enable court visit locus, which was done on 15.5.2017.

At locus court moved around the land as directed and shown by the Plaintiff. Court also heard oral testimony from court witnesses **Wabuyeha** and **Patrick Wandeba** the clan leaders. By leave of Court, a defendant, **Mr. Wakama Joseph Ben** requested to say something and was given chance.

During scheduling, three issues were stated for determination.

These were;

1. Whether the Plaintiff is the owner of the suit land.
2. Whether the defendants trespassed on the land.
3. What remedies are available to the parties?

From the evidence on record I do resolve the above issues as herebelow:

1. Whether the Plaintiff is the owner of the suit land.

Court heard from **PW.1 Wambigwa John** that he was given part of the suit land by his father (7 acres) while the other two pieces he added them on by purchase from **Wakama Masa**, and **Nalyanya Peter**. He submitted to court the relevant sale agreements. He further told court that in 2014, the defendants entered on his land and cut down his bananas and trees; all valued at about 100 millions.

PW.2 Masa Wakama, said he is a neighbour to the plaintiff and sold to him land at 1.5 million, and signed an agreement for him confirming the agreement tendered as ID.2. He also confirmed that defendants have encroached on the land in 2014; and cut down the trees and destroyed all coffee and matooke. He also confirmed that the plaintiff bought another piece of land from **Peter Nalyanya**.

PW.3 Peter Nalyanya told court that given a piece of land by his father. He however sold him another piece of 60 feet by 30 feet. He also confirmed that there were other pieces of land adjacent which Plaintiff had bought from other people like PW.2.

He confirmed that the defendants entered on that land in 2014 and have remained there on todate. He showed court his handwritten agreement in lieu of the sale received earlier on by court as PID3.

PW.4 Lwandanyi Fred, said he was the present chairman of the Wambigwa clan; and confirmed that the land is for the plaintiff. He first got a portion from his father in 1997. In 2004 he bought another piece from **Masa Wakama**; and in 2013 that the defendants have encroached and are in occupation of the said lands.

At the locus, Court was taken around the land and heard from **CW.1 Pramwer Wabuyeha**, who confirmed that though Plaintiff owns the disputed land, defendants have chased him therefrom. **CW.2 Patrick Wandeba** also confirmed that the land is for the Plaintiff, but defendants have taken it over.

DW.1 Wakama Joseph confessed that he was involved in a deal with Plaintiff whereby Plaintiff was to reward him with a piece of the land in dispute. When

Plaintiff failed to satisfy his part of the bargain he forcefully entered on the land is not about to leave until plaintiff performs his part.

From that evidence there is no doubt that Plaintiff led enough evidence to prove that he owns the land in dispute. This issue is terminated in the affirmative.

2. Whether Defendants trespassed on the suit land.

Trespass to land is committed where a person enters upon another person's land unlawfully and intrudes upon that persons rights thereon. Trespass to land at common law is actionable perse. It is a common law principle that to sustain an action in trespass to land, it is enough to prove possession of the land. The claimant must have an interest in the land in possession or at least exclusive possession to maintain an action for trespass- per *Nicholas v. Elly Beet Sugar Factory (1931) 2 Ch. 84*.

The evidence on record indicates that the Plaintiff possessed the land in dispute, planted thereon bananas and eucalyptus trees, and was in control until 2004, when the defendants entered on the land and unlawfully occupied it. **DW.1 Wakama** personally confessed at locus that he forcefully entered on this land. All evidence on record proves that the defendants entered on Plaintiff's land unlawfully and trespassed thereon. This issue is also found in the affirmative.

3. What remedies are available to the parties?

In matters of trespass, the ordinary remedies of damages and an injunction maybe be obtained for trespass. If the trespass is continuous, the claimant will have a right to see far as long as it lasts (see *Maxwell's Tort-Paula Culver & Silas Bekwith 2nd Edn, 351-352*).

Also at page 35, of Maxwell's Tort series supra, the claimant may sue for an order for possession of land that an order of ejectment, mesne profits can also be recovered (page 353).

"These will be usually be claimed in addition to the action for recovery of possession of the land. They are a form of consequential damages given to the claimant for the time he or she has been kept out of possession of his/her land.

The common law position was further elucidated in the *Invenrugie Investments Ltd v. Hackett (1995) 1 WLR 713* where the privy council held that:

"The Plaintiff could recover a reasonable rent for every apartment in a hotel block inspite of defendant's objections- it was held that it was not a question of the actual loss suffered or whether defendant had derived any actual benefit from the use of the apartment, but of assessing a reasonable rate for the 15 ½ years the Plaintiff had been out of possession."

Applying the above common law standard to the facts of this case, I agree with counsel for Plaintiff's prayers in submissions that the plaintiff being proved that he is the rightful owner of the suit land and that defendants are trespassers thereon, Plaintiff is entitled to a declaration that the suit land belongs to him. He is also entitled to the orders for vacant possession, permanent injunction; and orders for general damages and compensation.

This issue is found in the affirmative.

Court finds that the Plaintiff has proved the claim on the balance of probability.

The plaintiff is granted declaratory orders that:

1. The suit land belongs to the Plaintiff and vacant possession doth issue.
2. Defendants are trespassers and a permanent injunction is accordingly issued against them from further trespass.
3. General damages of shs. 50,000,000/=.
4. Compensation of shs. 100,000,000/= for the Eucalyptus and banana plants cut therefrom.
5. Costs of the suit.

I so order.

Henry I. Kawesa

JUDGE

16.06.2017