

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0008 OF 2016**  
**(Arising from Arua Grade One Magistrates Court Civil Suit No. 0005 of 2012)**

**HAVINDER JHASS SINGH** ..... **APPELLANT**

**VERSUS**

**1. ROSEMARY ASEA** }  
**2. ASEA COLLINS** } ..... **RESPONDENTS**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

In the court below, the appellant sued the respondents for recovery of land. He sought an order of vacant possession, general damages for trespass to land, a permanent injunction and costs in respect of L.R.V. 4244 Folio 6, plot 18 Weatherhead Park Lane, Arua Municipality in Arua District. His case was that he is the registered proprietor of the disputed land. In violation of his rights as proprietor thereof, the respondents constructed a perimeter wall on the plot adjacent to his, which intruded into his land. In doing so, they broke down his fence and removed some of the survey mark-stones demarcating his land, claiming that it formed part of what they said was their land comprised in the adjacent plot 11 Ahmed Awongo Close.

In their joint written statement of defence, the respondents denied the appellant's claim. They instead claimed that they are the rightful owners of plot 11 Ahmed Awongo Close which was allocated to the second appellant by Arua Municipal Council as a replacement for plot 28 Awudele Road. All the activities they have undertaken have been restricted to plot 11 Ahmed Awongo Close and therefore have not committed any acts of trespass on the appellant's land.

In his testimony, the appellant stated that on 16<sup>th</sup> November 2007, he purchased the plot in dispute from a one Jackson Ariko and later that year acquired a lease over it comprised in L.R.V. 4244 Folio 6, plot 18 Weatherhead Park Lane, Arua Municipality in Arua District, it was vacant

at the time and he immediately fenced it with barbed wire fencing. He began ferrying construction material and depositing on the plot, including sand, murrum and bricks. The respondents later intruded onto the land and threatened him with violence whereupon he was forced off the land. They constructed a perimeter wall for enclosing what they claimed was their plot 11 Ahmed Awongo Close. They also constructed a small unit for their security guard on his land. He had intended to construct a residential house on the plot and because of the respondents' activities he was unable to and has been renting since then for which reason he claims damages. The appellant then closed his case. P.W.2 Onen Paulo, the District Staff Surveyor testified that upon the direction of court, he undertook a boundary re-opening of both plot 18 Weatherhead Park Lane and plot 11 Ahmed Awongo Close. His findings were that plot 11 Ahmed Awongo Close was un-surveyed land and plot 18 Weatherhead Park Lane and was overlapped by both plot 11 Ahmed Awongo Close and plot 16 Weatherhead Park Lane. Developments on plot 11 Ahmed Awongo Close including a perimeter wall intruded into plot 18 Weatherhead Park Lane. He found the actual measurements of plot 18 Weatherhead Park Lane on the ground to be 0.045 hectares rather than the 0.46 hectares indicated on the title. The appellant closed his case.

In his defence, the second respondent who testified as D.W.1 stated that plot 11 Ahmed Awongo Close, measuring 55 metres by 40.6 metres equivalent to 0.223 acres, was allocated to him on 14<sup>th</sup> August 1996 by Arua Municipal Council as a replacement of a plot 28 Awudele Close measuring 55 metres by 40.6 metres which the Council had allocated to someone else in error. Plot 11 Ahmed Awongo Close (later renamed Chawda Close) is adjacent to plot 16 Weatherhead Park Lane. The latter of allocation did not specify the measurements of Plot 11 Ahmed Awongo Close, but being a replacement, he inferred that its size should be equivalent to that of plot 16 Weatherhead Park Lane. He began putting up a construction on the plot during 2004 and later in 2008 constructed a perimeter wall. In the same year, he purchased a small house comprised in plot 16 Weatherhead Park Lane measuring about 0.147 hectares from one Ahmed Awongo. In her defence, the first respondent, who is wife of the second respondent, re-stated more or less the testimony of the second respondent. The respondents then closed their case.

Thereafter, the court visited the *locus in quo* on 14<sup>th</sup> October 2015 with a surveyor named Ayikobua Cephas who testified that in May 2015 he undertook an exercise of boundary re-opening of both plots plot 11 Ahmed Awongo Close and plot 18 Weatherhead Park Lane in the presence of representatives of the appellant and the respondents, guided by survey data obtained from the Department of Survey and Mapping in Entebbe. He established the location of plot 18 Weatherhead Park Lane. An existing wall fence crossed over plot 16 into plot 18. Plot 11 Ahmed Awongo Close existed only in the layout plan of Arua Municipality but not with the Department of Survey and Mapping in Entebbe since it was un-surveyed land. The layout map with Arua Municipality indicated Plot 11 Ahmed Awongo Close but without an acreage. He found a storied building on Plot 11 Ahmed Awongo Close, a smaller structure and a wall fence which were entirely in plot 18 Weatherhead Park Lane.

In his judgment, the learned trial magistrate found that plot 11 Ahmed Awongo Close does not exist in fact since it is comprised in un-surveyed land. Evidence had established that it is only plot 18 Weatherhead Park Lane that existed as a surveyed plot. Although the letter of allocation issued by Arua Municipal Council to the respondents did not specify the size of Plot 11 Ahmed Awongo Close (Chawda Close), being a replacement for plot 28 Awudele Close which measured 55 metres by 40.6 metres, it was reasonable to assume that Plot 11 Ahmed Awongo Close bore the same measurements. On the Municipal Council plan, although un-surveyed, its rectangular shape covered an area of approximately 21 meters by 46.5 metres. Both surveyors had established that a portion of plot 18 Weatherhead Park Lane, measuring approximately 0.041 hectares, had been enclosed in Plot 11 Ahmed Awongo Close and comprised a perimeter wall fence and a small house. The respondents having acquired Plot 11 Ahmed Awongo Close on 14<sup>th</sup> August 1996, by the time the appellant bought a plot from Jackson Ariko on 16<sup>th</sup> November 2007 and later acquired a lease title thereto on 22<sup>nd</sup> August 2011, the respondents were already in possession of the land now in dispute and therefore plot 18 Weatherhead Park Lane was not available for leasing. The respondents were consequently not trespassers on the land. Plot 18 Weatherhead Park Lane was established on paper without doing so on the ground, hence the overlaps established by the surveyors. The court hence dismissed the suit with costs to the respondents.

Being dissatisfied with the decision the appellant appealed on the following grounds, namely;

1. The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thus came to a wrong conclusion that the respondents did not trespass on the suit land.
2. The learned trial Chief Magistrate erred in law and fact when he held that by the time of acquisition of plot 18 Weatherhead Park Lane by the plaintiff in 2007, the said plot was not readily available for sale to the plaintiff as it had been allocated to the defendants earlier.
3. The learned trial Chief Magistrate erred in law and fact when he held that the respondents did not depart from their pleadings when they introduced evidence that they purchased the suit land from Ahmed Awongo who is the registered proprietor of plot 16 Weatherhead Park Lane.
4. The learned trial Chief Magistrate erred in law and fact when he held that part of the suit land forms part of plot 16 Weatherhead Park Lane and is owned by the respondents in the absence of any evidence to support that claim.
5. The learned trial Chief Magistrate erred in law and fact when he held that the appellant did not prove that the respondent trespassed on the suit land.
6. The learned trial Chief Magistrate erred in law and fact when he awarded costs of two advocates without any justification.

In her submissions, counsel for the appellant Ms. Daisy Patience Bandaru argued that the trial magistrate erred in not finding that the respondents had trespassed on the appellant's land yet evidence by the surveyors established that there was a perimeter wall fence and a small house belonging to the respondents which was located on his land. At the time both structures were constructed, the appellant had taken possession of plot 18 Weatherhead Park Lane, of which he is the registered proprietor, by depositing sand and other construction material. She prayed that the appeal be allowed. In response, counsel for the respondents, Mr. Ben Ikilai submitted that the court erred in trying the suit which had been reinstated after it was withdrawn, when the proper procedure should have been to file the suit afresh. Furthermore, the appellant's title had a number of irregularities and the plot existed only on paper. The findings of the trial court were supported by the evidence on record and therefore the appeal should be dismissed.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the court below to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000*; [2004] KALR 236 thus;

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Counsel for the respondent raised an issue that is better handled as a preliminary point. His contention was that the appellant withdrew the suit on 20<sup>th</sup> April 2012 only to be reinstated by court on 8<sup>th</sup> May 2013 without furnishing any reason. In his view, the proper procedure should have been to file a fresh suit and since this was not done, the entire trial proceeded on an illegality and was thus a nullity. I have perused the relevant part of the record of proceedings of the trial court and it reads as follows;

20/04/2012

Both parties in court.

Henry Odama for the applicant.

Ikilai Ben for the respondent.

Court Clerk Bada.

Odama: Matter for hearing.  
Ikilai: The matter is bad in law. The respondent has nothing to show.  
Court: The pleadings show that the respondent is not the owner of this land and cannot say anything. The case has to be withdrawn in the interest of justice and plaintiff / applicant advised to file a fresh case.  
Ikilai: I pray for costs so far incurred, I need shs. 5,500,000/=  
Odama: That is excessive.  
Court: Go and agree on an amicable sum outside court and report to me.  
Adjourned.

The record is equivocal as to whether the suit was withdrawn at all or not. Nowhere is it indicated that counsel for the plaintiff applied for its withdrawal on that day. Instead the record reveals that it is court which opined that “the case has to be withdrawn in the interests of justice.” The record does not indicate any order of re-instatement made on 8<sup>th</sup> May 2013 as submitted by counsel for the applicant. What appears instead is that there were dates fixed for taxation of costs on 3<sup>rd</sup> May 2012 and 29<sup>th</sup> May 2012. The next time the matter came up was on 6<sup>th</sup> November 2013 and the record reads as follows;

6/11/2013  
Parties absent  
Odama Henry holding brief for Paul Manzi.  
Ben Ikilai for defendants.  
Nancy Masendi is in attendance.  
Court Clerk Bada.

Odama: Matter for hearing. It is not likely to take off because;- counsel Ben Ikilai is in High Court for criminal session. No memo of scheduling. I pray that this time can be used to draft and file inter-party scheduling memo.  
Court: Matter adjourned to 30/1/14. Parties to file interparty scheduling memo before that time of hearing.

The next time the suit came up was on 16<sup>th</sup> April 2014. On that day the appellant was in court but the respondents were not. Counsel for both parties were present in court. Counsel Ben Ikilai objected to the appearance of Mr. Samuel Ondoma on grounds of conflict of interest. The court advised counsel to step down and directed a surveyor to open the boundaries of the land.

The law as to withdrawal of suits is contained in Order 25 of *The Civil Procedure Rules*, which may be generally stated in three parts; (a) a plaintiff can withdraw a suit or a part of his or her claim as a matter of right without the permission of the Court at any time after closure of pleadings but before taking any further step in the prosecution of the suit, by filing of the notice of discontinuance / withdrawal; or (b) after it is set down for hearing but prior to the hearing it may be withdrawn by either the plaintiff or the defendant upon filing a consent signed by all the parties; and (c) in any other situation the plaintiff must seek leave of court, which may be granted upon such terms as to costs as the court deems fit. It is the duty of the Court to feel satisfied that there exists proper grounds / reasons for granting permission for withdrawal of the suit and the permission must be expressly granted. Save with the consent of the defendant, the plaintiff is not entitled to withdraw the suit as a matter of course at any time after it is fixed for hearing. Thereafter, withdrawal may be permitted by court if no vested or substantive right of any party to the litigation is adversely affected. The rule presupposes an unequivocal voluntary act or intimation of the need to withdraw the suit, coming from the plaintiff, considered by the court.

The purported withdrawal in the instant case having come after the suit was fixed for hearing, I have not found a distinctive prayer made by counsel for the appellant for withdrawal of the suit and a corresponding permission to do so, given by the Court. Instead I have found expressions regarding the impropriety of the appellant's claim made by counsel for the respondents followed by a concurring opinion of court. An opinion expressed by court towards the desirability of the suit being withdrawn cannot be a substitute for the requirements of Order 25 of *The Civil Procedure Rules*. A suit is instituted only with the physical act of filing a plaint. No suit can come into existence merely on a party deciding in his or her mind to institute it. In the same way a physical act is essential in order to withdraw a suit, merely deciding mentally or discussing to withdraw is of no consequence. There must be an unequivocal overt act. The usual or normal overt act is that of informing the Court that the suit has been withdrawn. A withdrawal should be made expressly on record rather than be inferred from the conduct of parties or court. Nowhere on the record does the Court appear to have considered the relevant aspects of this matter.

What is equivocal about this record is that the Court's order awarding costs against the appellant, which is ordinarily a consequence of the withdrawal, would mean that the withdrawal should by

that time be already complete and effective since the order for costs is not an element of the withdrawal and is not required to complete or effectuate it. However, there is no express prayer to withdraw and corresponding grant of leave, and direction that the suit stands withdrawn. The court's subsequent approach as well appears to have been that the interests of the parties would be better safeguarded by giving them permission to proceed with the suit such that the controversy is determined on merit rather than on the state of the pleadings. I cannot find any other explanation for the respondents' counsel's subsequent participation in the trial up to its completion, only for him to raise this point on appeal, in what appears to be an afterthought. The pleadings themselves do not support the opinion of court as to disclosure of a plausible claim. I therefore do not find any merit in the argument that the suit was withdrawn and reinstated.

Grounds 1 to 5 of the appeal assail the trial court's evaluation of the evidence as having been erroneous. An appellate court will interfere with the findings made and conclusions arrived at by the trial court if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings, may be reversed (See *Peters v Sunday Post Ltd [1958] E.A. 429*).

At the trial, the burden of proof lay with the appellant. To decide in favour of the appellant, the court had to be satisfied that the appellant had furnished evidence whose level of probity was not just of equal degree of probability with that adduced by the respondents such that the choice between his version and that of the appellant would be a matter of mere conjecture, but rather of a quality which a reasonable man, after comparing it with that adduced by the respondents, might hold that the more probable conclusion was that for which the appellant contended. That in essence is the balance of probability / preponderance of evidence standard applied in civil trials.

The respondents' evidence before the trial court was that they acquired an interest in land described as Plot 11 Ahmed Awongo Close (Chawda Close), as a replacement for plot 28 Awudele Close which measured 55 metres by 40.6 metres allocated to them before, which the

Municipal Council had inadvertently allocated to another person who had taken possession thereof. The letter of allocation is dated 14<sup>th</sup> August 1996. The letter was issued supposedly as an offer of a lease since in its paragraph d) it reads; “No lease extension will be granted unless 75% of the building covenant is fulfilled, i.e. ¾ of the intended development on the plot is carried out.” If that be the case, then the Municipal Council misdirected itself.

Before the promulgation of *The Constitution of the Republic of Uganda, 1995*, all land in Uganda had been declared by section 1 of *The Land Reform Decree, 1975* as public land, vested in the Uganda Land Commission for its management. Land was to be administered by the Uganda Land Commission in accordance with *The Public Lands Act* of 1969, subject to such modifications as were necessary to bring the Act into conformity with the Decree. Section 23 (2) of *The Public Lands Act, 1969* provided that the Uganda Land Commission had authority to grant to the Urban Authorities of designated areas, leases on such terms and conditions as the Minister would direct and any lease so granted would be deemed to be a statutory lease. A controlling authority then would have the capacity to lease out the land entrusted to it under the statutory lease, to individuals. Under both *The Public Lands Act* and *The Land Reform decree, 1975*, occupants, including customary tenants, on public land, were only tenants at sufferance and controlling authorities had power to lease such land to any person.

Under that legal regime, for an Urban Authority to be constituted into a controlling authority, and hence acquire capacity to lease land or confer similar interests in land, there had to be proof of prior grant of a statutory lease to such an Urban Authority by the Uganda Land Commission. For example in *Nyumba ya Chuma Ltd v. Uganda Land Commission and another, Const. Petition No. 13 of 2010*, where the Constitutional Court found no evidence whatsoever to show that the then Kampala City Council, now Kampala Capital City Authority, had ever had a statutory lease over the suit property from which it could have legally granted a lease to the petitioner or its alleged predecessor in title, it decided that Kampala Capital City Authority did not have any authority to grant a lease over the land.

In the instant case, there was no evidence adduced before the trial magistrate to the effect that Arua Municipal Council was at the time designated as a Controlling Authority in respect of the

land in issue. Its capacity to offer the respondents Plot 11 Ahmed Awongo Close (Chawda Close) was not proved as a fact and cannot be assumed. The respondent could not have acquired any interest in that land from an institution not proved to have had any form of title over that land vested in it. Nevertheless, even assuming that Arua Municipal Council was a Controlling Authority in respect to the disputed land, Rule 10 of *The Public Lands Rules S.I 201-1* (revoked in March 2001 by rule 98 of *The Land Regulations, S.1. 16 of 2001*) then in force at the time of the claimed grant stated that:

Any occupation or use by a grantee or lessee of land which the controlling authority has agreed to alienate shall until registration of the grant or lease be on sufferance only and at the sole risk of such grantee or lessee.

The expression “shall ..... be on sufferance only” as used in that rule is not defined. *Halsbury’s Laws of England* (4th Edition) says this of Tenancy in Sufferance;

A person who enters on land by a lawful title and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance.

At common law therefore, a tenancy at sufferance arises where a tenant, having entered upon the land under a valid tenancy, holds over without the landlord’s assent or dissent (See *Remon v. City of London Real Property Company Limited [1921] 1 KB 49 at 58*). Within the context of the rule, until registration of the lease, a person receiving an offer of a lease from a Controlling Authority was in a position akin to that of a tenant holding over demised premises at the end of a lease without the landlord’s assent and whose occupancy therefore could be terminated at will. The implication of Rule 10 of *The Public Lands Rules* therefore was that an offerree of a lease by a Controlling Authority did not acquire an interest in the land so offered until actual registration of that lease. In the instant case, giving the respondents the benefit of the doubt, they were at best tenants at sufferance on Plot 11 Ahmed Awongo Close (Chawda Close), the understanding being that their occupation could be terminated at any time at the will of either party. Technically, they could be ejected by the Municipal Council at any time without notice.

With the promulgation of *The Constitution of the Republic of Uganda, 1995*, article 241 (1) (a) thereof and section 59 (1) of *The Land Act*, conferred the power to hold and allocate land in the

district “which is not owned by any person or authority,” unto District Land Boards, in this case, Arua District Land Board. When Arua Municipal Council issued the letter of allocation dated 14<sup>th</sup> August 1996, it had no capacity to do so since those powers had by operation of law been transmitted to Aua District Land Board. The respondents therefore did not acquire an interest in the land by virtue of D. Ex 1 or D. Ex. 2, the former being only an offer of a lease and the latter being a letter by the Town Clerk to the Municipal Chief Planner forwarding the respondents’ proposed site plan for the development of Plot 11 Ahmed Awongo Close (Chawda Close) as a replacement for plot 28 Awudele Close. According to the testimony of the second respondent, they nevertheless went ahead and began construction of a storied building on the land during the year 2004 (although exhibit D. Ex. 2. suggests the approved plans, if any were passed, must have been obtained after 1<sup>st</sup> August 2011, the date appearing on that letter).

The respondents further adduced evidence that they subsequently during the year 2008 purchased an additional approximately 0.147 hectares, forming part of the adjacent plot 16 on which there was a small house, from a one Ahmed Awongo. They constructed a perimeter wall on that side of the plot, enclosing the 0.147 hectares with the small house on it, now to be consolidated and amalgamated with and form part of Plot 11 Ahmed Awongo Close (Chawda Close). In ground three of the memorandum of appeal, Counsel for the appellant contends that this part of the respondents’ evidence ought not to have been admitted by the trial court as it constituted a departure from the respondent’s pleadings.

The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his or her evidence to the issue disclosed by them (see *Esso Petroleum Company Limited v. Southport Corporation [1956] AC 218*). In the case of *Boake Allen Ltd. v. Revenue and Customs Commissioners [2006] EWCA Civ 25*, Mummery LJ stated (para 131):

While it is good sense not to be picky about pleadings, the basic requirement that material facts should be pleaded is there for a good reason - so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious

to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action. If the pleading has to be amended, it is reasonable that the party, who has not complied with well known pleading requirements, should suffer the consequences with regard to such matters as limitation.

Similar views were expressed in *Loveridge and Loveridge v. Healey* [2004] EWCA Civ 173, where it was held by Lord Phillips MR, thus;

It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.

The rules on pleadings require the parties to set out fully the nature of the question to be decided by stating the facts upon which the parties rely and the orders which they seek, otherwise the courts risk embarking on a roving enquiry. The function of the court in a civil trial is to decide the dispute as formulated between the parties, rather than undertaking a roving inquiry. For that reason, when a departure from the pleadings occurs, the party not in breach has the remedy of applying for an order to strike out the offending pleading before or during the hearing and failure to do so is not a bar to bringing up matter in submissions (see *Kahigiriza James v. Busasi Sezi* [1982] HCB 148).

Where departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that such evidence is not permitted unless the pleading is appropriately amended. Therefore, in the event of an inconsistency between the written statement of defence and evidence adduced in court, such that the inconsistency is revealed in the course of hearing of evidence, the offending part of the evidence may be rejected or the offending part of

the pleading may be struck out on application (see *Opika-Opoka v. Munno Newspapers and Another* [1988-90] HCB 91 and *Lukyamuzi Eriab v. House and Tenant Agencies Limited* [1983] HCB 74).

However, where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, is likely to give permission to amend the pleading, the other party may be sensible not to raise the point since not every departure will be fatal to the proceedings. For example, in *Uganda Breweries Ltd v. Uganda Railways Corporation* [2002] 2 EA 634, the respondent's evidence concerning the occurrence of an accident constituted a departure from its pleadings as stated in the written statement of defence and counterclaim. The Supreme Court though held that the departure from the pleadings did not cause a failure of justice to the appellant as the appellant had a fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the respondent, whose evidence departed from its pleadings.

On the other hand, not every inconsistency between the pleadings and evidence adduced during the trial constitutes a departure. When an inconsistency is a mere variation that is in essence only a modification or development of what is averred, then it is not a departure but if it introduces something new, separate and distinct, then it is a departure. In *Waghorn v. Wimpey (George) and Co.* [1969] 1 WLR 1764, the court considered the two modes of variations, thus;

In the present case Mr. Archer contends that the true version of the facts is just a variation, modification or development of what is averred, and is not something new, separate and distinct. The only similarities, however, between the plaintiff's allegations in his pleadings, the way his case was presented, and what in fact took place were these: first of all, the plaintiff slipped; secondly, he slipped at his place of work; and thirdly, he slipped somewhere near a caravan, when it is alleged that he did slip somewhere near a caravan. But the whole burden of the claim put forward by the plaintiff, and the whole burden of the defence to that claim prepared by the defendants and put forward on their behalf by Mr. Machin, has been the safety or otherwise of the bank, and not the safety or otherwise of the path at the right-hand side of the caravan, where it runs alongside the dip. In my judgment, this is not a case which is just a variation, modification or development of what is averred. It is a case which is new, separate and distinct, and not merely a technicality. Let me hasten to add that if matters emerge, particularly matters of technicality which, perhaps,

could not be foreseen by those responsible for pleading cases, and those things emerge during a case, then it would be quite wrong to dismiss a plaintiff's claim because his pleadings have not measured up to the technical facts which have emerged. One often listens sympathetically to applications to amend in those circumstances. Here, however, there is nothing technical at all. A man is said to have slipped. There is nothing technical about that. One must test the plaintiff's submissions in this way: if these allegations had been made upon the pleadings in the first place, namely allegations based upon the facts as they have now emerged, would the defendant's preparation of the case, and conduct of the trial, have been any different? The answer to that is undoubtedly 'Yes.' Evidence would have been sought as to the safety of the pathway alongside the caravan; as to the frequency with which it was used; as to the position of the valve under the caravan. I say that because there was a dispute as to its precise position. Mr. Younger, the charge-hand, said it was on the left-hand side of the caravan. Mr. Frost said it was on the right-hand side. If the plaintiff's case had been pleaded to the effect that it was whilst he was on his way to that valve that he had slipped, then the preparation of the case would have been entirely different and its presentation would have been different. There was no application here for leave to amend. Indeed, Mr. Archer may have been very wise not to make any such application, but the upshot of this matter is that this was clearly so radical a departure from the case as pleaded as to disentitle the plaintiff to succeed.

I test the submissions put forward by counsel for the appellant against the *Waghorn v. Wimpey (George) and Co.* test and ask whether the appellant's conduct of the case would have been any different had the respondent's pleaded this aspect of their defence. The question is if these allegations had been made in the respondents' written statement of defence in the first place, namely allegations based upon the facts as they eventually emerged in evidence, would the appellant's preparation of the case, and conduct of the trial, have been any different?

In paragraph 4 (a) of the Amended Pleint, the appellant averred that by constructing a perimeter wall, the respondents had encroached on his land comprised in plot 18 Weatherhead Park Lane. In paragraph 4 (c), the appellant averred that the respondents were doing all this on basis of their claimed ownership of a neighbouring plot 11. In their joint written statement of defence, the respondents in paragraphs 5 to 9 refuted the allegation and contended instead that their developments were restricted to plot 11 Awongo Close which was allocated to them by Arua Municipal Council. That part of the said plot comprised an additional approximately 0.147

hectares, forming part of the adjacent plot 16 on which there was a small house, which they had purchased from a one Ahmed Awongo during the year 2008, was never pleaded, yet the construction complained of by the appellant was specifically on this additional portion of land and not on the original 55 metres by 40.6 metres allocated to them as a replacement for plot 28 Awudele Close. This prompted the appellant in his reply to the written statement of defence to aver that he had caused a re-opening of the boundaries of plot 28 Awudele Close and established that it was not part of plot 11 Ahmed Awongo Close. In doing all this, the appellant seemed to have been oblivious of the existence of plot 16 Weatherhead Park Lane or that the respondents had acquired any interest in that plot at all.

If the respondent's case had been pleaded to the effect that the construction of the perimeter wall complained of was being undertaken on land they had acquired in 2008 by way of purchase of an additional approximately 0.147 hectares, forming part of the adjacent plot 16 from Ahmed Awongo, then the appellant's preparation of the case would have been entirely different and its presentation would have been different. In that case the focus would not have been on the existence or otherwise of the original 55 metres by 40.6 metres known as plot 11 Ahmed Awongo Close (Chawda Close) allocated to the respondents as a replacement for plot 28 Awudele Close and its boundaries, but rather the existence or otherwise of the adjacent plot 16 Weatherhead Park Lane, and the circumstances surrounding the respondent's acquisition of the approximately 0.147 hectares of it, which they claimed to have bought from Ahmed Awongo. Had the respondents' pleaded facts to that effect, then the appellant's preparation of the case would have been entirely different and its presentation would have been different. The appellant would not have prepared to meet the respondent's case of land acquired by allocation but instead of land acquired by purchase. This was not merely a technicality, variation, modification or development of what was averred in the written statement of defence, it was a new, separate and distinct aspect. It is therefore my considered view that when during the course of the trial the respondents introduced evidence of that subsequent acquisition by purchase; it constituted a material and radical departure from the case they pleaded in their defence.

What is left to be determined is whether this departure occasioned unfairness in the trial. It is apparent from the pleadings on record that the appellant was prepared to meet a case of

acquisition by way of allocation revealed by the respondents' pleadings only to be surprised during the trial by their defence of acquisition by purchase. This version first emerged during the cross-examination of the appellant when under cross-examination at page 13 of the record of appeal he replied "...I did not even encroach on plot 16 Weatherhead Park Lane which was already developed." In his testimony, P.W.2 at page 14 of the record of appeal stated that when directed by court to re-open the boundaries of plot 18 Weatherhead Park Lane, he discovered that a small portion of that plot had been enclosed by a perimeter wall on plot 16 Weatherhead Park Lane. This survey report dated 16<sup>th</sup> May 2014 was tendered in evidence by counsel for the appellant and marked as exhibit P.E. 2 (see page 15 of the record of appeal). The appellant then closed his case. It was never suggested to him during his case that the respondents had at any time acquired part of plot 16 Weatherhead Park Lane by purchase from Ahmed Awongo. In that respect, it was not advanced as the theory of the respondents' case and the appellant consequently never had the opportunity to meet that version of the respondents' case. At the *locus in quo*, it was established by Locus Witness No. 1 at pages 27 – 28 of the record of appeal that when he reopened the boundaries of plot 18 Weatherhead Park Lane, "the location of plot 18 in relation to the neighbouring plots i.e. plot 16, there was cross-over of an existing fence. It crossed over plot 16 to 18... there were already structures in existence, i.e. building and a fence on plot 18 Weatherhead Park Lane and plot 11 Ahmed Awongo Close. On plot 11, there was a storied building and plot 18, there was a small structure and all were in one fence..... I never touched plot 16 Weatherhead Park Lane."

It was during the cross-examination of the second respondent at page 23 of the record of appeal that the purchase of part of plot 16 Weatherhead Park Lane from Ahmed Awongo came to light, when he answered;

I have not put a wall fence on the suit land. I have a small home thereon on plot 16 Weatherhead Park Lane which I purchased from Ahmed Awongo. This was in 2008. I am not aware that part of that house forms part of the complainant (sic) in this case. An agreement for plot 16 is available and the plot is 0.147 ha. The agreement is available. I paid 20 million for plot 16 Weatherhead Park Lane and it was witnessed by my wife (1<sup>st</sup> defendant) and Awongo's wife. Awongo owned plot 14 and 16 and purchased plot 16 Weatherhead Park Lane.

Although his counsel undertook to avail court a copy of the agreement of purchase together with the approved plan for plot No. 11 (see page 23 of the record of appeal), he never did so until conclusion of the trial. Counsel for the appellant cross-examined the first respondent on the same subject matter at page 25 of the record of appeal and her response was, “A smaller house on our land was constructed by my husband but I can’t remember the year. I have forgotten. It is on plot 16 Weatherhead Park Lane. It was purchased from Ahmed Awongo. There is a perimeter wall and it was put up by my husband (2<sup>nd</sup> defendant).”

It emerges from the record of proceedings at trial that introduction of facts relating to the respondent’s purchase of the additional approximately 0.147 hectares, forming part of the adjacent plot 16 on which there was a small house, from a one Ahmed Awongo during the year 2008, was not at the volition of the respondents but was extracted by counsel for the appellant’s cross-examination. Technically speaking, this evidence was offered at the solicitation of the appellant’s counsel and it is more or less the appellant’s evidence. Offering evidence is an inclusive term expressing the ways in which the party conducting an examination can elicit evidence. It includes not only evidence given in examination in chief and re-examination by a party’s witnesses, but also evidence obtained by cross-examining another party or such party’s witness which the questioning was designed to elicit. A party who through cross-examination elicits evidence unfavourable to his or her case, even where that evidence constitutes a departure from the opponent’s pleadings, cannot be heard to complain that such evidence is unfair. Therefore in the instant case, although this evidence constituted a departure from the respondents’ pleadings, I find that it did not cause a failure of justice to the appellant as it is the appellant’s counsel who extracted it by way of cross-examination. The trial magistrate therefore did not err in admitting that evidence without causing the respondents first to amend their defence.

The result of that evidence is that the matters in controversy between the parties were then narrowed down from the original 55 metres by 40.6 metres plot 11 Ahmed Awongo Close (Chawda Close) to the approximately 0.147 hectares, forming part of plot 16 Weatherhead Park Lane, in respect of which both P.W.2 and Locus Witness No. 1 found there was a cross-over of an existing fence. The fence not only crossed over plot 16 to 18 but also “there were already

structures in existence, i.e. a building and a fence on plot 18 Weatherhead Park Lane.” The question then is whether this perimeter fence and building constituted a trespass on the appellant’s land.

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*, 19<sup>th</sup> edition (London: Sweet & Maxwell, (1987) 46). It is a possessory action where if remedies are to be awarded, the plaintiff must prove a possessory interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff’s land must be unauthorised. The defendant should not have had any right to enter into plaintiff’s land. In order to succeed, the plaintiff must prove that; he or she was in possession at the time of trespass; there was an unlawful or unauthorized entry by the defendant; and the entry occasioned damage to the plaintiff.

Although an action in trespass to land does not require proof of ownership of the land in question and the right to possess is sufficient, the appellant in this case premised his claim, both on his ownership of plot 18 Weatherhead Park Lane and the subsequent possession he took. It was his testimony at pages 10 – 13 of the record of appeal that on 16<sup>th</sup> November 2007, he purchased the plot in dispute from a one Jackson Ariko and later that year acquired a lease over it comprised in L.R.V. 4244 Folio 6, plot 18 Weatherhead Park Lane, Arua Municipality in Arua District. The land was vacant at the time and he immediately fenced it with barbed wire fencing.

Upon the promulgation of *The Constitution of the Republic of Uganda, 1995*, article 241 (1) (a) thereof and section 59 (1) of *The Land Act*, conferred the power to hold and allocate land in the district “which is not owned by any person or authority,” unto District Land Boards, in this case, Arua District Land Board. The District Land Board by operation of law as well became successor in title to any Controlling Authority or Urban Council in respect of public land within the District, which had been granted or alienated to any person or authority by such Controlling Authority or Urban Council.

In the instant case, the appellant presented a title deed (exhibit P.E. 1, see page 11 of the record of appeal) as proof of grant of a lease over the land in dispute by Arua District Land Board. It is a title deed to L.R.V 4244 Folio 6 plot 18 Weatherhead Park Lane measuring 0.046 Hectares, he having become registered proprietor thereof at 8.55 am on 9<sup>th</sup> August 2011. The corresponding lease agreement was executed on 25<sup>th</sup> July 2011 and the title deed was issued on 22<sup>nd</sup> August 2011, for a five year initial term lease running from 1<sup>st</sup> November 2008. Therefore, by the time the appellant filed the suit on 22<sup>nd</sup> June 2013, the title was left with barely two months to expire. Nevertheless, under section 59 of *The Registration of Titles Act*, a title deed is conclusive evidence of ownership. The respondents did not plead any fraud regarding the appellant's acquisition of that title and attempted unsuccessfully and half-heartedly to impeach the title during cross-examination of the appellant. In any event, in cases involving questions of title to land, the question is never; "who is the true owner of the land?" As Lord Diplock pointed out in *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*:

Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land.

That being the case, the appellant proved on the balance of probabilities that at the time he filed the suit, he was the rightful owner of plot 18 Weatherhead Park Lane. The trial magistrate erred in ignoring this part of the evidence and in failing to make a finding of fact to that effect, particularly since it was one of the agreed facts at the scheduling conference.

The trial court then had to consider whether on the evidence available, there was an entry in fact by the respondents on land comprised in plot 18 Weatherhead Park Lane. At pages 14 - 15 of the record of appeal, P.W.2 testified that according to "the print of the area dated 12<sup>th</sup> August 2010 (supposedly a cartographical map of the area) it is only plot 18 indicated as surveyed. Neither Plot 16 Weatherhead Park Lane nor 11 Ahmed Awongo Close has ever been surveyed. The dimensions of the latter were available though on drawings kept by the Arua Municipal Council. At pages 26 – 28 of the record of appeal, Locus Witness No. 1 testified that he relied on data from the Department of Mapping and Surveys in Entebbe. His findings were that plot 11 Ahmed Awongo Close existed in the data layout at the Arua Land Office but has never been surveyed

and hence not reflected in the data at Entebbe while plot 18 Weatherhead Park Lane existed there. He found a building and a fence already located on plot 18 Weatherhead Park Lane.

In his report though submitted to court as exhibit P. Exh. 3 (signed by P.W.2), the last bullet reads as follows;

The developer of plot No. 11 has also enclosed her properties with an all-round wall fence, and the enclosed area is found to take up portions of plot 9 Awongo Close and plot 16 Weatherhead Park Lane as shown in the herewith attached copy of drawing.

Although that bullet point is silent as regards the existence of any encroachment on plot 18 Weatherhead Park Lane, in addition to enclosing parts of plot 9 Awongo Close and plot 16 Weatherhead Park Lane so indicated, the drawing itself attached to the report clearly indicates that save for a small triangular shaped corner to the left on the side nearest to the road known as Weatherhead Park Lane, almost the entire plot 18 Weatherhead Park Lane is enclosed in the respondent's perimeter wall fence. A small house sits right at the corner of the perimeter wall fence, located entirely on plot 18 Weatherhead Park Lane. In comparative terms, only approximately one tenth of plot 18 Weatherhead Park Lane lies outside the respondent's perimeter wall fence, the rest has been enclosed to form part of and serve as an extension of their 55 metres by 40.6 metres allocated to them as Plot 11 Ahmed Awongo Close (Chawda Close), in replacement of plot 28 Awudele Close.

It is not in doubt from the evidence of both parties that as from 9<sup>th</sup> August 2011, the day the appellant was registered as proprietor of plot 18 Weatherhead Park Lane and the title deed issued on 22<sup>nd</sup> August 2011 up to the time the court visited the *locus in quo* on 14<sup>th</sup> October 2015, the respondent's developments complained of were on the appellant's land. The evidence before the trial court established as a matter of fact that the part of the respondent's perimeter wall fence and a small house near the road are indeed intrusions onto plot 18 Weatherhead Park Lane. The trial magistrate therefore erred when he failed to properly evaluate this part of the evidence and in failing to make a finding of fact to that effect.

The trial court should then have considered whether on the evidence available, this was an unlawful or unauthorized entry by the respondents. The respondents explained the presence of

that part of their perimeter wall and small house on plot 18 Weatherhead Park Lane; first in their pleadings as being part of the 55 metres by 40.6 metres comprising plot 11 Ahmed Awongo Close (Chawda Close) and subsequently during the cross-examination of the second respondent, as being consequent upon their purchase of 0.147 hectares out of plot 16 Weatherhead Park Lane from a one Ahmed Awongo. As indicated on the drawing attached to the report submitted by Locus Witness No. 1, plot 16 Weatherhead Park Lane is not part of plot 11 Ahmed Awongo Close (Chawda Close) and exists as a distinctly independent from, though adjacent to, plot 18 Weatherhead Park Lane. The area said to measure approximately 0.147 hectares, forming part of plot 16 Weatherhead Park Lane is triangular in shape and on the drawing visibly lies outside both plot 18 Weatherhead Park Lane and plot 11 Ahmed Awongo Close (Chawda Close). That means that the presence of the respondents' developments on plot 18 Weatherhead Park Lane was not accounted for in their defence yet the appellant stated he did not authorise them to undertake those developments on his land. An involuntary entry onto another's property is not a trespass. Trespass is committed by entering, intruding, or encroaching on personal property, and no tortious intent, i.e., intent to trespass, is required in order for one to be a trespasser. What is required, however, is volition, i.e., a conscious intent to do the act that constitutes the entry upon someone else's real property.

What the respondents' defence boils down to is that they may have constructed the wall under an honest but mistaken belief that the land they enclosed was comprised in the approximately 0.147 hectares, forming part of plot 16 Weatherhead Park Lane which they purchased from Ahmed Awongo in 2008. Unfortunately for them, trespass may be committed even when a trespasser makes a mistake regarding the title or boundaries of his land and undertakes activities on an adjoining neighbour's property thinking he or she is on his or her own property (see *Atlantic Coal Co. v. Maryland Coal Co. (1884)*, 62 Md. 135 at 143; *Gore v. Jarrett (1949)*, 192 Md. at 516, 64 A.2d at 551 and *Barton Coal Co. v. Cox (1873)*, 39 Md. 24 at 29-30). A suit for trespass to land may be maintained whether the defendant committed the entry unwittingly or wilfully and wantonly. Since there is nothing the respondents' defence to suggest that this intrusion was involuntary, for all intents and purposes therefore, the appellant proved on the balance of probabilities that the respondents made an unlawful and unauthorised entry onto his plot 18 Weatherhead Park Lane.

What emerges from the totality of this evidence is that the respondents set about their development of the land more or less oblivious to the fact that Arua Municipality is a planning area pursuant to the *Town and Country Planning Ordinance, Cap. 105*. Although repealed on 13<sup>th</sup> September 1951, section 32 of the *Town and Country Planning Act, Cap 246*, saved all declarations of planning areas made under the repealed Ordinance which for that reason remained in force. Moreover, under section 5 (2) of *The Town and Country Planning Act*, (repealed by *The Physical Planning Act 2010*), the Minister could by statutory order declare an area to be a planning area. The latest scheme approved in respect of Arua Municipality by the Minister responsible for housing and urban development is *The Town and Country Planning (Declaration of Schemes) (No. 1) Instrument, S.I 246 – 6*. According to regulation 3 (a) and (c) thereof, the scheme for Arua was from the date of publication of that instrument (as S.I. 29 of 1988), available for inspection at the municipal offices of Arua, and at the offices of the resident managers of the Reconstruction and Development Corporation at Arua, among other places. According to regulation 2 (4) of *The Town and Country Planning Regulations S1 146-1*, any person who thereafter erected any building or developed any land in a planning area, after the area has been declared to be a planning area, anyone who carries out developments on land within the planning area without first obtaining from the Planning Committee permission so to do, commits an offence. The respondents' developments on the land, if not approved by the Municipal Council, run the danger of violating that law.

It was at one point insinuated (by the production of exhibit P.E. 2), subsequently suggested (by counsel for the respondent when he undertook to produce the approved plans), but though not proved during the trial, that the respondents secured approved plans for their developments on the land. If this is the case, then it suggests that the Municipal Authorities in the instant case failed to enforce the Municipality planning scheme approved by the Minister responsible for housing and urban development by way of *The Town and Country Planning (Declaration of Schemes) (No. 1) Instrument, S.I 246 – 6*. This explains why the respondent's developments were permitted on plot 11 Ahmed Awongo Close (Chawda Close), a plot which according to P.W.2 exists only in the Municipality layout, probably made under that scheme, which plot to-date remains un-surveyed and is yet to be reflected in the national cartographic records of the Department of Mapping and Surveys in Entebbe. This laxity in supervising developments on

land not only encourages encroachments, inadvertent or otherwise, as revealed in this case, thus fuelling boundary disputes over land, but also is a recipe for conflicting demarcations of land as between the Municipal Council and the District Land Board if developments are permitted on un-surveyed and untitled plots of land. As matters stand now, plot 18 Weatherhead Park Lane exists only on paper and is almost entirely enclosed as part of land physically occupied by the respondents.

Be that as it may, the trial court was required to determine whether at the time of that unlawful and unauthorised entry by the respondents onto the land leased to the appellant, the appellant was in actual possession of the disputed land. In his testimony at page 11 of the record of appeal, he stated that he secured possession of the land during 2008 but fenced it “on receipt of this title.” Although the appellant claimed to have acquired the land on 16<sup>th</sup> November 2007, when he purchased it from a one Jackson Ariko, it would seem that he never took actual possession until sometime after 22<sup>nd</sup> August 2011 when the title deed was issued to him. It is then that he fenced it. Furthermore, since he did not disclose the nature of interest in the land which he acquired from Jackson Ariko (exhibit D. Exh. 3 at page 25 of the record of appeal), there is no evidence on basis of which the trial court could find that the transaction he alluded to conferred upon him any lawful interest in the land or physical occupation then. The agreement of sale dated 16<sup>th</sup> November 2007 in its preamble simply states that “the seller with the consent of all persons concerned... is desirous of selling and hereby sells to the buyer the piece of land described herein above.” It is not known whether Jackson Ariko was a mere temporary occupant, licensee, customary tenant, or holder of any possessory or proprietary interest in the land since the agreement is silent and no evidence was led on this. The plot itself appears to have come into existence following a survey undertaken in December 2008 by M/s Geotechnico Enterprise Limited (see annexure “E” to the reply to the written statement of defence) and the demarcations ratified after 7<sup>th</sup> May 2010, the day the Commissioner of Surveys and Mapping issued instructions for its official survey. The agreement of 16<sup>th</sup> November 2007 therefore could not confer possession over a plot that had not been surveyed yet. The appellant went on further to say that the respondents removed his barbed wire fencing “three years ago.” He did not specify the actual date when this occurred. This would imply that the unlawful entry onto this land

complained of, occurred sometime during the year 2012 (considering that he testified on 16<sup>th</sup> June 2015).

On their part, the respondents claimed to have erected the perimeter wall fence complained of during the year 2008 (see page 23 of the record of proceedings). This evidence came through cross-examination of the second respondent by counsel for the appellant. It then had to be decided on the balance of probabilities whether the construction of the offending perimeter wall occurred sometime in 2012 as claimed by the appellant or in 2008 as claimed by the respondents, a period four years apart. It was his word against that of the respondents. If the court determined it was the former, then the appellant was in possession at the material time. If the court determined it was the latter, then the appellant was not in possession at the material time. It is trite law that proof in civil matters which is sufficient to justify a finding of fact is proof on the balance of probabilities (see *Lancaster v. Blackwell Colliery Co. Ltd (1918) WC Rep 345*).

Proof on the balance of probabilities is satisfied if upon considering the evidence adduced by the plaintiff, alongside all the other evidence before it, the court believes that the existence of the facts sought to be proved is so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they exist. Where a reasonable man might hold that the more probable conclusion is that, for which the plaintiff contends, then the court is justified in making a finding in the plaintiff's favour. At page 11 of the record of appeal, the appellant testified as follows;

On receipt of the title, I fenced the plot and put thereon building materials to wit, bricks, sand and murrum. The fence was of barbed wire. The defendants nevertheless removed the fence three years ago. The materials disappeared when I ceased occupation of the plot as a result of threats from the defendants.

In cross-examination, this part of the appellant's evidence was never tested. Counsel for the respondents instead dwelt on the circumstances of the appellant's acquisition and survey of the plot in his cross-examination of the appellant. It is only the first appellant who at page 25 of the record of appeal while under cross-examination stated; "I am not aware of the existence of a barbed wire fence that was on the suit land. I am not aware of the existence of any of his materials." The respondents chose to deny evidence of activities undertaken by the appellant on the land introduced to establish the fact of possession. It is trite that an omission or neglect to

challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to it being assailed as inherently incredible or possibly untrue (see *James Sawoabiri and another v. Uganda, S. C. Criminal Appeal No. 5 of 1990* and *Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008*). The fact of possession for purposes of an action in trespass to land is proved by evidence establishing physical control over the land by way of sufficient steps taken to deny others from accessing the land. I find that the uncontested evidence of the appellant to the effect that he fenced off the land and placed building materials thereon was not only an expression of intention to control the land but also established his physical control over the land. The trial court therefore erred when it failed to find as a fact that the appellant had proved on the balance of probabilities that he had taken possession of the land at the time of the acts complained of.

According to paragraphs 4 (h) and (i) of the plaint, the appellant not only reported a case of criminal trespass to the police on 17<sup>th</sup> April 2012 against the respondents but also issued a notice to them to vacate the land on 8<sup>th</sup> February 2012, to no avail. Since the respondents did not furnish proof of authorisation by the appellant to remain on the land thereafter, and they did not furnish any other lawful excuse for doing so, their continued occupation of plot 18 Weatherhead Park Lane from 8<sup>th</sup> February 2012 until expiry of the appellant's five year initial term lease (which ran from 1<sup>st</sup> November 2008 to 1<sup>st</sup> November 2013) constituted trespass on his land. Trespass to land being a continuing tort, the reckonable period ran from 8<sup>th</sup> February 2012, when he issued them with notice to vacate, to 1<sup>st</sup> November 2013 when his lease expired, a period of 21 months. The trial magistrate therefore misdirected himself when he found that the appellant did not prove trespass to his land by the respondents.

The last element of the tort required the trial court to determine whether the appellant had proved entitlement to the reliefs sought. In the plaint, the appellant sought an eviction / demolition order, a permanent injunction, general damages and costs. As regards the order of eviction / demolition and permanent injunction, I find myself unable to grant those reliefs. Those are reliefs granted to a successful party upon recovery of land whom the court finds was unlawfully deprived of the land yet he or she is at the time of judgment entitled to exclusive possession or an immediate right to possession of the land in question. In the instant case, the appellant's lease expired on 1<sup>st</sup>

November 2013. There is no evidence that it was renewed or any to the effect that a fresh one was issued to the appellant in respect of plot 18 Weatherhead Park Lane. Once a lease expires and is not renewed, the land automatically reverts to the owner (see *Dr. Adeodanta Kekitiinwa and three others v. Edward Maudu Wakida, C.A. Civil Appeal No 3 of 2007*). In this case, it reverted to Arua District Land Board and therefore the appellant is not entitled to exclusive possession or an immediate right to possession of the land. The prayer for those reliefs is rejected.

As regards the claim for general damages, trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. That no damage must be shown before an action will lie is an important hallmark of trespass to land as contrasted with other torts. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. *Halsbury’s Laws of England*, 4<sup>th</sup> edition, vol. 45, at para 1403, explains five different levels of damages in an action of trespass to land, thus;

1. If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
2. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
3. Where the defendant has made use of the plaintiff’s land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.
4. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
5. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

The defendant’s conduct is thus key to the amount of the damages awarded. 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.

In his testimony during the trial at pages 10 – 13 and 20 of the record of appeal, the appellant stated that he purchased the plot at the price of shs. 16,000,000/= (see exhibit D.Exh. 3). He paid shs. 1,290,000/= to Arua District Land Board as the premium for the lease. Upon fencing off the land, he deposited construction material on the land in preparation for putting up a residential house. He did not quantify the material nor adduce evidence of its value. He was unable to put up the residential house he had planned and was forced to continue renting. I have perused Clause 4 of the lease agreement which made the extension to full term conditional upon the appellant complying with the building covenant, contained in clause 2 (b) of the lease agreement, which required him, within the period of the initial term, to construct on the plot a building of a value not less than one hundred million shillings.

I have considered the fact that the appellant's testimony to the effect that he abandoned the plot and the construction material he had deposited thereon as a result of threats from the respondents was not contested in cross-examination. Despite measures the appellant took to cause the respondents to vacate the land on their own volition, they were adamant. The trespass on the plaintiff's land might have begun as an accidental or inadvertent occurrence but it subsequently degenerated to a level of negligence and indifference that came close to a cynical disregard of the appellant's property rights. Their conduct inflicted actual loss and damage to the appellant who as a result was wrongfully deprived of the use of his land and lost an opportunity to have his lease extended to full term as the respondents continued to make unlawful use of almost his entire plot. For those reasons, I find the respondents' conduct in the instant case to be in the in-between area: more than accidental or inadvertent but less than arbitrary.

The land whose use they denied the appellant measured approximately 0.046 Hectares as per the title deed (exhibit P.Exh. 1) and Locus witness No. 1 (at page 27 of the record of appeal) or approximately 0.045 Hectares as per P.W.2 at page 16 of the record of appeal. In my estimation as guided by exhibit D.E. 3, almost 9/10 of it was enclosed by the respondents. On his part, the second respondent testified that during 2008, which is more or less the same year in which the appellant purchased plot 18 Weatherhead at shs. 16,000,000/=, he purchased a portion of plot 16 Weatherhead Park Lane measuring about 0.147 hectares with a small house on it at the price of shs. 20,000,000/=. I therefore estimate the value of the plot in dispute at the latter sum.

In the circumstances, the amount in general damages the appellant deserves should enable him to recoup the money he spent on acquisition of title to the plot and preparation for the construction thereon, the lost opportunity of constructing a house of his own and thereby ceasing to be a tenant, expenditure on renting for the period of 21 months (from 8<sup>th</sup> February 2012, when he issued them with notice to vacate, to 1<sup>st</sup> November 2013 when his lease expired), it should reflect the repulsion with which the law countenances the respondents' 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 until the lease expired, but at the same time take into account the appellant's duty to mitigate his loss. Bearing all the above factors in mind, I consider an award of shs. 30,000,000/= as general damages for trespass to land to be adequate compensation to the appellant in this case.

On basis of the conclusion I have come to in respect of grounds one through to five of the appeal, it is unnecessary to consider in detail ground 6 of the appeal. In the circumstances, the certificate of two counsel was erroneously given by the trial court since judgment should not have been entered in favour of the respondents had the court properly directed itself on the law and evidence. In the final result, the appeal is allowed.

The judgment and orders of the trial court are hereby set aside and in their place judgment is entered for the appellant against the respondents jointly and severally for shs. 30,000,000/= as general damages for trespass to land. The appellant is as well awarded the costs of both the appeal and of the trial.

Dated at Arua this 10<sup>th</sup> day of March 2017.

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Stephen Mubiru  
Judge