

- 30 2. *That the learned trial magistrate erred in law and in fact in holding that the Appellant was not the registered proprietor of the suit land.*
3. *That the learned trial magistrate erred in law and in fact in purporting to impeach the Appellant's title in the suit land as she exceeded her jurisdiction by doing so.*
4. *That the learned trial magistrate erred in law and in fact when she held that the*
35 *Appellant trespassed in the suit land.*
5. *That the learned trial magistrate erred in law and in fact when she awarded damages to the Respondent.*
6. *That the learned trial magistrate did not exhaustively evaluate and weigh the evidence before her in reaching the decision.*

40 ***Brief facts:***

In 2003, the Respondent who is the Administration of his father's estate the late Christopher Kasule sued the Appellant for trespass to land comprised in Bulemezi Block 26 Plot 19. She claimed that the land belonged to her late father. She contended that her late father bought the suit land from one Mivule in 1945 and the Kasule family had since then utilized the same. She
45 further contended that the Appellant only came to the suit land in 2003 and started cultivating and cutting trees.

The Appellant totally denied the Respondent's allegations. He also filed a counterclaim premised in the tort of trespass against the Respondent. He averred that the suit land belonged to him having got registered as proprietor in 2000. Further, that he inherited the suit land from his father
50 late father Yokana Gitta who also got it from one Zakaliya Banasajja his father.

The trial court held that the suit land belonged to the estate of the late Zakaliya Banasajja grandfather to the Appellant, but that the Respondent owned a Kibanja on the suit land and

therefore could not be evicted. The trial court also awarded general damages for trespass and costs of the suit against the Appellant. Being dissatisfied with the judgment and orders of the trial court the Appellant filed this appeal.

Mr. Serwadda of *M/s. Serwadda & Co. Advocates* represented the Appellant, while Mr. Sebanja Abubakar of *M/s. Sebanja & Co. Advocates* represented the Respondent. Both counsel filed written submissions to argue the appeal, which I have taken into account in reaching the decision in the case. It is noted that the counsel for the Appellant abandoned ground 2 and 3, and argued ground 1, 4 and 6 together and ground 5 separately. Counsel for the Respondent also replied following the same order.

Duty of the first appellate court:

In the cases of *Selle vs. Associated Motor Board Co. [1968] EA 123*; *Bogere Moses & O'rs vs. Uganda, SC.Crim. Appeal No. 01 of 1997*; and *Kifamunte Henri vs. Uganda, S.C.Crim.Appeal No.10 of 1992*; it was held that the duty of the first appellate court is to subject the evidence to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make allowance in that respect. With that duty in mind, I proceed to consider the grounds in the order they were argued by counsel for the parties.

Ground 1: The learned trial magistrate erred in law and in fact in holding that the Respondent was a bona fide legal occupant of the suit land who enjoyed a legal interest in the land.

Ground 4: The learned trial magistrate erred in law and in fact when she held that the appellant trespassed in the suit land.

75 ***Ground 6: The learned trial magistrate did not exhaustively evaluate and weigh the evidence before her in reaching her decision.***

The plaint, at page 15-19 of the record of appeal, shows that the Respondent's cause of action was based on trespassed to land. She claimed that her late father Christopher Kasule bought the suit land from one Asuman Mivule on 25/08/1945 as per *Exhibit P2*, at page 73 of the record of
80 appeal. The Respondent and her witnesses further adduced evidence, at page 20 – 40 of the record of appeal, to prove that the suit land belongs to her father as the Administrator of her late father's estate.

On the other hand the Appellant (DW1) also adduced evidence, at page 41 line 32 of the record of appeal, and stated that the suit land belonged to his grandfather Zakaliya Banasajja from
85 whom Yokana Gitta the late father of the Appellant got it and the Appellant also inherited it from his late father. At page 79 of the record of appeal, the Appellant adduced in evidence *Exhibit D1*, copy of a certificate of title for the suit land showing the ownership. PW2, the Registrar of Titles at Bukalasa then, one Isaac Jombwe, at page 47 line 26 of the record of appeal, corroborated the evidence of the Appellant as regards ownership of the suit land. To that extent, the trial court was
90 right in finding that the suit land belongs to the late Zakaliya Banasajja the grandfather of the Appellant.

The trial court then addressed the issue as to whether plaintiff had a Kibanja interest on the suit land and as such qualifies as a bona fide occupant of the suit. I wish to observe that from the record of the pleadings, the Respondent's claim at trial was solely premised on legal ownership
95 of the suit land. It was never a claim for a Kibanja. This is quite apparent in paragraph 4(a) of the plaint the in facts constituting the cause of action where she averred as follows;

“(a) The plaintiff is an Administrator of the said estate of late Block No.26 plot 19 at Kalalgala Nabitete Kanamunungu village Bulemezi vide Administration Cause No.69/03 Luwero.”

100 There is no issue which was at any time during the trial framed concerning a Kibanja or bonafide occupancy, and neither was it captured in any of the parties’ pleadings. The record plainly shows that the issues framed by the court, at page 8 lines 5-10 of the record of appeal, were;

- *Whether the plaintiff is the owner of the land comprised in block 26 plot 19.*
- *If so, whether the defendant trespassed on her land.*
- 105 - *Whether the defendant fraudulently registered himself on the title of block 26 plot 19.*
- *What remedies are available to the parties?*

It is thus not clear where the trial court got the issues concerning Kibanja and bonafide occupancy on the suit land by the Respondent. Order 6 r.7 of the Civil Procedure Rules prohibits departure from pleadings by the parties and the court. For ease of following I quote it below;

110 ***“7. Departure from previous pleadings.***

No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.”

The position in the above provision was re- affirmed in the cases of ***Jani Properties Ltd. vs. Dar***
115 ***es Salaam City Council [1966] EA 281; and Struggle Ltd vs. Pan African Insurance Co. Ltd. (1990) ALR 46 – 47,*** that the parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record and moreover, the court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings.

120 In the case at hand, it is quite clear that the Respondent in her pleadings did not have an alternative prayer for a Kibanja interest. She also never amended her pleadings to incorporate issues to do with Kibanja or bonafide occupancy; which would have given rise to the same issues and corresponding prayers. She only sought for a permanent injunction to restrain the Appellant from further trespassing on the suit land in which she claimed legal ownership. Therefore, trial
125 court had no basis; and erred in holding that the Respondent had a Kibanja on the suit land. This in any case was a new claim inconsistent with her pleadings.

Besides the above, it is noted that Appellant's defence was based on the Respondent's pleadings. Since the Respondent never pleaded facts as a *bonafide* occupant on the suit land, issues to do with a Kibanja or *bona fide* occupancy could not arise. At the risk of repetition, the pleadings
130 were specifically restricted to the legal ownership of the suit land and not otherwise. The trial court therefore erred in law and fact to have decreed to the Respondent a Kibanja which she had not even prayed for in her pleadings.

It is now well established that a party cannot be granted a relief which it has not claimed in the pleadings. In the case of *Ms. Fang Min vs. Belex Tours & Travel Ltd. SCCA No. 6 of 2013 consolidated with SCCA No. 1 of 2014 Crane Bank Ltd. vs. Belex Tours & Travel Ltd*, the
135 Supreme Court, at page 27, underscored the importance of the pleadings to describe precisely the respective cases of the parties and to define the issue in dispute for resolution by the court. Quoting an earlier decision in *Interfreight Forwarders (U) Ltd. vs. East African Development Bank, SCCA No. 33 of 1992*, the Court held that;

140 ***“The system of pleading is necessary in litigating. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which court will be called***

upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the opposite party and which will govern the interlocutory proceedings before the trial and what the court will have to determine at the trial. See *Bullen & Leake and Jacobs Precedents of Pleadings*, 12th Edition page 3. Thus, issues are framed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be not allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by the way of amendment of the pleadings.”

Applying these principles to facts of the instant appeal, clearly the trial court erred in fact and in law in holding that the Respondent had a Kibanja on the suit land; when the Respondent had in her own pleadings not claimed for a Kibanja but the legal ownership of suit land; which she could not prove.

It is premised on the above findings that again that this court finds that the trial court did not properly and exhaustively evaluate and weigh the evidence in accordance with the parties’ pleadings and hence erred in arriving at its decision about a Kibanja and *bona fide* occupancy.

To that extent, *Ground 1, 4, and 6* of the appeal must succeed.

Ground 5: The learned trial magistrate erred in law and in fact when she awarded damages to the Respondent.

This ground is the ultimate culmination of the earlier considered grounds of appeal. The trial court having found in its judgment, at page 13 of the record of appeal, that the land belongs to

165 the Appellant's grandfather Zakaliya Banasajja, and that the Appellant was not a trespasser on the suit land, it had no basis for awarding damages and costs of the suit against the Appellant.

In the case of *Placid Weli vs. Hippo Tours & 2 Others HCCS No. 939 of 1996* quoting *Halsbury's Law of England, 3rd Edition, Vol. 38 paragraph 1222*, it was held that trespass is actionable *par se* even if no damage is done to land. That a plaintiff is entitled to recover
170 damages even though he has suffered no actual loss, but if trespass has occasioned the loss, the plaintiff is entitled to receive such an amount as will compensate him or her for the loss.

At page 13 of the record of appeal in its judgment, the trial court held that;

“The defendant also (sic) to pay the plaintiff shs.200, 000/= as general damages for the inconvenience caused and loss of use of their Kibanja plus costs of the suit.”

175 A closer scrutiny of the record, however, does not reveal any evidence that the Appellant was a trespasser. Therefore there was no basis for the trial court to award general damages for the trespass.

The net effect is that the appeal succeeds in its entirety and it is allowed. The judgment and orders of the trial court are set aside. The Respondent is declared a trespasser on the suit land.

180 The Appellant is awarded costs of the appeal and in the trial court.

**BASHAIJA K. ANDREW.
JUDGE
27/04/2017**

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Mr. Serwadda Angozosi Counsel for the Appellant present.

Mr. Sebanja Abubakar Counsel for the Respondent present.

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Both parties present.

Mr. Godfrey Tumwikirize Court Clerk present.

195 Court: Judgment read in open Court.

BASHAIJA K. ANDREW.
JUDGE
27/04/2017

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