

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0018 OF 2017
(Arising from Moyo Chief Magistrate's Court Civil Suit No. 0004 of 2012)

5 **VOLO MICHAEL APPELLANT**

VERSUS

10 **DRATE FRANCIS KENYI RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

15 In the court below, the appellant sued the respondent for recovery of land, a declaration that the respondent is a trespasser on that land, a permanent injunction, general damages and costs. The appellant's claim was that he was born on the land in dispute and subsequently inherited it from his late father Lau Amo upon his death in 1982. The land is situated at Edua village in Moyo
20 Town Council. The respondent's father had during the 1960s forcefully taken possession of the land in dispute and the appellant's father had left him to occupy it. During the year 2001, the respondent's mother began construction of two buildings on the land and she died after she had raised only two walls. Following his mother's death, the respondent attempted to complete the construction, which the appellant prevented him from doing, hence the dispute that culminated in
25 the suit.

In his written statement of defence, the respondent contended that his family has been in possession of the disputed land since 1912 and therefore the appellant has no claim over it. He counterclaimed against the appellant for trespass to land seeking general damages and costs. His
30 claim in the counterclaim was premised on the averment that on basis of their long period of occupancy dating as far back as 1912, the respondent and his family had commenced the process of acquisition of a title seed over the land by application to the District Land Board. The appellant has from time to time interfered with his quiet enjoyment of the land, hence the claim for general damages.

In his reply to the respondent's defence and by way of defence to the counterclaim, the appellant contended that the respondent had already constructed a perimeter wall fence that had encroached onto the appellant's land. The respondent thereafter proceeded to erect a pit latrine and two semi-permanent houses on the land in dispute. The respondent is only entitled to the
5 land within the boundary erected by his late father and has no right to exceed it as he has done. The respondent committed acts of trespass when he constructed his perimeter wall fence beyond the then existing boundary fixed by his late father. The respondent's process of acquisition of a title over the land is irregular in so far as the local authorities were never involved. He sought an order for the destruction of the perimeter wall fence, the pit latrine and the semi-permanent
10 buildings, an award of general damages, and costs.

In his testimony as P.W.1, the appellant stated that the boundaries to the land in dispute were marked by teak trees. His grandfather had acquired the land in the 1920s. In 1948, the respondent's father Maracello Kenyi who lived in the neighbourhood had forcefully taken
15 possession of part of that land, fenced it off and built a house thereon. The appellant's father decided to cede that part to the respondent's father. In 2001, the respondent's mother began encroaching beyond the boundary of the ceded land by constructing a grass-thatched house but the appellant's grandmother stopped her and she abandoned the construction. Following his mother's death, the respondent attempted to resume the construction and the appellant prevented
20 him. The respondent forcefully continued with the construction and has since then occupied the house so constructed.

P.W.2, Sr. Hellen Tabera testified that the land in dispute belonged to their late grandfather, Ceverino Lao who acquired it from the Moipi Clan. Around 2004 when the army had left the
25 area, she returned from Kenya to find that the respondent's mother had begun construction of a semi-permanent structure on the land but had been stopped by the appellant's grandmother before its completion. When she returned later in 2013, she was surprised to find that the semi-permanent structure whose construction had been previously abandoned, had been resumed to completion by the respondent. The respondent had gone ahead to extend the boundaries further
30 beyond the Leddu and Napier trees that marked the boundary, to construct a pit-latrine on the

land. She attempted to fence off the area but the respondent pulled down the fence and reported a criminal case to the police.

P.W.3, Drania Rebecca Jurugo testified that the land in dispute belonged to his late father Severo Lao. She used to cultivate the land until her husband, a magistrate, was transferred to Moroto in 1965. The defendant's father then forcefully took over that part of the land. He fenced it off and the appellant's family decided not to fight over that land. Around 2001, the respondent's mother attempted to construct a house on that part of the appellant's land that soldiers had vacated. She was stopped but years later the respondent came upon that part of the land, completed the construct and put up additional structures, sparking off the current dispute.

In his defence D.W.1 Drate Francis, the respondent, refuted the contention that his father was allowed to occupy land he had forcefully taken over and testified instead that he inherited the land from his late father who as way back as 1968 had commenced the process of obtaining a title deed over the land. His mother had occupied the land in dispute until her death in 2005. In 2010, he roofed the two houses his mother had left unfinished on this land. It is when he brought a surveyor to the land in 2012 that the appellant raised complaints. The survey established that the appellant had encroached on the current plots 1 and 19 by planting teak trees, constructing a latrine and a bathe shelter. He fenced off the land leaving the part occupied by the appellant outside his perimeter fence. Under cross-examination, he stated that his father had fenced off only his homestead and not his entire land. He denied having fenced off part of the appellant's land but stated that it is the appellant who had trespassed onto his land. D.W.2 Aciga Hastings testified that the respondent's father, the late Major Onama Marcelo Kenyi, acquired the land in dispute from Moyo Town Council in 1968 after his retirement from the army.

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The court then inspected the *locus in quo* from where the appellants' witness, P.W.4 Madrama Flamino indicated the boundaries of the disputed land and testified that the area in dispute comprises land which formerly belonged to the Moipi Clan. That clan gave that part of the land to the appellant's grandfather. He further stated that the respondent's father Major Onama Marcelo Kenyi initially had a house on the Eastern side of the disputed wall fence but the respondent had since occupied the area beyond the fence and that had led to the dispute. He

testified that the house located on the disputed portion was constructed during the year 2001 but the respondent's mother was stopped and she left it incomplete by the time she died during the year 2004. This witness was cross-examined by the respondent. The respondent did not adduce evidence of his own at the locus nor demonstrate to court any important features to his case. The court then drew a sketch map of the key features observed on the land in dispute and its neighbourhood.

In his judgment, the trial magistrate found that the land in dispute is what is now comprised in plot 3 on the Town Council Drawings and marked as "C" on the drawing prepared at the locus.

The respondent's evidence showed that the plot had on or about 9th May, 2010 been inspected by the Area Land Committee as part of the land in respect of which the respondent had applied for a leasehold title. The respondent had before that been granted a planning permission in February, 2010 and therefore in the court's view, except for fraud the respondent's claim to that part of the land could not be impeached. The evidence suggested that the appellant's family had been in continuous possession of the land in dispute and the appellant had conveniently waited for the death of the respondent's parents before laying claim to that part of the land. The court took the view that it could not contradict or question documents from a body with the statutory mandate to manage land of this tenure and found that the appellant had failed to prove his case of the balance of probabilities. It hence dismissed the suit with costs to the respondent.

Being dissatisfied with the decision, the appellant appealed to this court on the following ground;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thus came to a wrong decision occasioning a miscarriage of justice.

Submitting on this ground, Counsel for the appellant Mr. Omara Innocent David argued that the trial magistrate totally misconstrued the evidence when she failed to find as a fact that the respondent had replaced the barbed wire fencing installed by his father, with his own fence and in the process had encroached onto the appellant's land by shifting the boundary and creating a new one. This is illustrated by the sketch map prepared at the *locus in quo* which does not distinguish between the previous and new fencing. To the contrary, there was plausible evidence

from the appellant and his witnesses as to the history of occupation of the land in dispute, a demonstration of the boundaries and an explanation of the features found on the land and in the neighbourhood. The history of the land showed that the respondent's father settled in the neighbourhood of the disputed land in 1968 by which time the appellant's father was already settled on the land and the features on the land showed that the developments on the disputed portion were recent. The trial magistrate instead chose to rely on documents relating to the inspection of the land by the Area Land Committee, despite the fact that they clearly indicated the respondent did not involve the appellant when surveying the land, although he knew him to be a neighbour at the time. He prayed that the court finds that the appellant adduced sufficient evidence in support of his case, decides in favour of the appellant and awards him general damages for trespass to land, the costs of the appeal and of the lower court.

In response, Counsel for the respondent Mr. Richard Bundu submitted that the judgment of the trial magistrate shows that her decision was based on the documents presented by the respondent. The trial magistrate compared documents presented by both parties. She also made reference to the proceedings at the *locus in quo* and indicated portion "C" and found that there was evidence of an inspection report by the area land committee. The evidence by the respondent showed that this was land acquired by his parents in 1968. During the locus visit the trial magistrate indicated that portion "C" and the respondent was found in possession of the land, his parents; houses were built thereon in 1995, although the appellant said they were built in 2001. The appellant had claimed to be in possession in court but when the court visited locus he was not on the land. All the exhibits in the matter show that the land the appellant seems to be claiming is plot 17 is where he grew and was living. Exhibit P.E.1 his plot is referred to as being next to the road and that is plot 17 and not 3 which was in dispute. The permanent house is in plot 17. The area that was disputed has nothing on it that belongs to the appellant. The appellant has no trees in plot 3. There is enough evidence to support the decision of the trial magistrate and therefore the appeal should be dismissed with costs.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric*

Tiberaga SCCA 17 of 2000; [2004] KALR 236). 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.

5 The dispute between the parties to the appeal is in essence a boundary dispute whereby the appellant claims that by shifting an existing boundary, the respondent encroached on land that belongs to him. According to the appellant, the encroachment began in 2001 when the respondent's mother left the portion on which her matrimonial home is, on the Eastern side of the disputed wall fence and occupied the area beyond the fence by commencement of the
10 construction of two buildings before she was stopped, only for the respondent to re-ignite the construction nine years later in 2010, sparking off the current dispute.

On his part, the respondent contends that his family has been in continuous occupation of the disputed area from as way back as 1968 as evidenced by documents showing that his father had
15 commenced the process of obtaining a title deed over the land. In 2010, he roofed the two houses his mother had left unfinished on this land. It is when he brought a surveyor to the land in 2012 that the appellant raised complaints. The survey established that the appellant had encroached on the land by planting teak trees, constructing a latrine and a bathe shelter. He fenced off the land leaving the part occupied by the appellant outside his perimeter fence.

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In the determination of a land boundary dispute, courts will ordinarily be guided by the visible physical limits of the parcel of land as can be ascertained on the ground by natural boundaries (e.g. rivers, valleys, cliffs), monumented lines (boundaries marked defining marks, natural or artificial), old occupations, long undisputed abutments (e.g. a natural or artificial feature such as a
25 street or road), statements of length, bearing or direction (metres, feet or other measurements in a described direction), or similar features as observed by court and verified by credible witnesses. For example, under Regulation 21 (1) of *The Land Regulations, 2004* (which were still in force at the time both parties commenced their nearly contemporaneous applications for titles over land in this area, in ascertaining boundaries, the Area Land Committee was authorised to;

30 (n) accept as evidence on the boundaries of the land the subject of the application-

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- (i) a statement on the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land matters in the parish or the urban area;
- (ii) simple or customary forms of identifying or demarcating boundaries using natural features and trees or buildings and other prominent objects;
- (iii) human activities on the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land;
- 10 (iv) maps, plans and diagrams, whether drawn to scale or not, which show by reference to any of the matters referred to in sub-paragraph (ii) or (iii) the boundaries of the land;

15 Instead of analysing evidence of this nature before it, the trial magistrate chose to rely heavily on information contained in a standard application form for a leasehold title made to the District Land Board (exhibit P. Ex. 3 dated 31st May, 1995), another standard application form for a leasehold title (exhibit P. Ex. 6 dated 9th May, 2010), an inspection report of the Area Land Committee (exhibit P. Ex. 1), approval of the application (exhibit P. Ex. 2 dated 13th June, 2011), receipt for payment of the Local Government dues for preparation of a title (exhibit P. Ex. 4

20 dated 7th June, 2013), and a drawing / map of the plots (exhibit P. Ex. 3 dated 31st May, 1995), all presented by the appellant. On the one hand, she considered a standard application form for conversion of customary tenure to freehold (exhibit D. Ex. 3 dated 24th December, 2011), a permission to survey (exhibit D. Ex. 1 dated 17th February, 2010), a survey print (exhibit D. Ex. 2 dated 5th March, 2010), and a request for planning permission (exhibit D. Ex. 5 dated 15th

25 January, 2010) all presented by the respondent.

After drawing a comparison between the two sets of documents, the trial magistrate concluded that by the time the appellant caused the Area Land Committee to inspect the land he had applied for, the respondent's rival application that included the disputed area, had reached an advanced

30 stage and could not be defeated, save for fraud committed in the process, which the appellant should have pleaded specifically and proved to the required standard, but had failed to do. She deduced that the documents presented by the appellant related to the multiple undisputed plots he was occupying and did not include the disputed area. She concluded by stating that "the documentary evidence on court record speaks for itself and court will not want to contradict

those documents from very high sources dealing with public land." With due respect, this was a misdirection.

In the first place, the finding by the trial magistrate that by the time the appellant caused the Area Land Committee to inspect the land he had applied for, the respondent's rival application, which included the disputed area, had reached an advanced stage and could not be defeated, save for fraud committed in the process, is not supported by the evidence on record. According to Regulation 26 (1) of *The Land Regulations, 2004*, which regulations were still in force by 24th December, 2011 when the respondent lodged his application (exhibit D. Ex.3), upon receipt of such application for conversion of customary tenure to freehold tenure or an application for grant of land in freehold, the Area Land Committee was required to give notice in the specified form, of not less than two weeks to the applicant, owners of the adjacent land and other interested parties, fixing the date and time of inspection of the land. In his testimony at page 18 of the record of appeal, while under cross-examination the respondent testified as follows;

.....our neighbours signed the application acknowledging being our neighbours and some of them signed on behalf of the deceased parents / relatives that own land neighbouring us. I have correctly cited all our neighbours. It is true I did not indicate you as our neighbour because at the time of the application, I knew that the land / plot that you now own belonged to the late Ezekiel Kobani Iraku, whom I have known as our neighbour since childhood. When you came, the family members of Ezekiel abandoned the place....Sister Hellen Tebea is your sister and she is the one who built the house in which you live so it is her I know as a neighbour...

That part of the respondent's testimony reveals the fact that at the time he made his application, the respondent knew the appellant to be occupying the adjacent land but simply did not acknowledge or recognise him as his neighbour, because he considered the land the appellant was occupying to belong to the family of the late Ezekiel Kobani Iraku, even though he acknowledged that the family had vacated when the appellant took occupation, and further that the house the appellant occupied was constructed by the appellant's sister. Scrutiny of exhibit D. Ex.3 reveals further that neither the family of the late Ezekiel Kobani Iraku nor Sister Hellen Tebea, whom the respondent recognised as his neighbours by virtue of owning the adjacent land occupied by the appellant, were notified of his application. On the face of it therefore, the

application was processed in violation of the requirements of Regulation 26 (1) of *The Land Regulations, 2004*.

Secondly, the requirement of notification of owners of land adjacent to that applied for and other
5 interested parties, is primarily meant to prevent the inclusion of land that does not belong to an
applicant. It is the reason that Regulation 26 (1) of *The Land Regulations, 2004* required the
Committee to "walk round the land, tracing, ascertaining, verifying, determining and marking the
boundary of the land in the presence of the applicant, neighbours, owners of adjacent land and
other interested parties." Thereafter, Regulation 28 required the Committee to ensure that the
10 customary owner, at least one owner of neighbouring land and at least two adult residents of the
area present at the time of inspection of the land, to certify the correctness of the boundaries by
signing the specified form. The evidence before the trial court, including the minutes of the Area
Land Committee of 17th January, 2012, does not show that these procedures were complied with.
The totality of the evidence instead shows that the respondent deliberately sidelined both the
15 appellant and his sister D.W.2 Sister Hellen Tebea during the entire process, irrespective of the
fact that one was in physical occupation and the other had constructed a house on the adjoining
piece of land. If they did not in his mind qualify to be neighbours or owners of adjacent land,
they at least were "other interested parties," hence entitled to notification. Therefore all maps,
drawings and similar material that was the product of such a flawed process could not provide a
20 sound basis for the determination of a boundary dispute. The trial magistrate misdirected herself
when she relied on it without such careful scrutiny as the circumstances demanded.

Since none of the parties adduced credible evidence of maps, plans and diagrams, whether drawn
to scale or not, capable of showing the true boundary of the disputed land, the trial court was left
25 with the option of considering oral testimony on the boundaries by persons it considers
trustworthy and knowledgeable about land matters in the area, visual identification during the
locus in quo visit of customary forms of identifying or demarcating boundaries using natural
features and trees or buildings and other prominent objects actually seen on the land, or evidence
of human activities on the land such as the use of footpaths and the placing of boundary marks
30 on the land that have existed thereon for a considerable period of time, particularly those that
existed before the dispute flared up.

In this regard, the appellant testified that the boundaries to the land in dispute were marked by teak trees while P.W.2, Sr. Hellen Tabera testified that the boundaries were marked by Leddu and Napier trees. At the *locus in quo*, P.W.4 Madrama Flamino indicated the boundaries of the disputed land and testified that the respondent's father Major Onama Marcelo Kenyi initially had
5 a house on the Eastern side of the disputed wall fence but the respondent had since occupied the area beyond the fence. In his defence the respondent who testified as D.W.1 stated that it is during the year 2012 when he brought a surveyor to the land that the survey established that the appellant had encroached on the current plots 1 and 19 by planting teak trees. It emerges from that evidence that whereas the appellant relied on features he himself and the late Major Onama
10 Marcelo Kenyi had respectively planted to demarcate the boundary between these two adjacent plots of land, the respondent relied on drawings generated by the Town Council as part of its planned plotting of the land within its jurisdiction.

Under section 5 (2) of *The Town and Country Planning Act*, (repealed by *The Physical Planning
15 Act 2010*), the Minister could by statutory order declare an area to be a planning area. It would seem that the drawings relied on by both parties (exhibit P. Ex.3 dated 31st May, 1995 and exhibit D. Ex.2 dated 5th March, 2010) are the products of an approved planning scheme for Moyo Town Council under that law. If that be the case, the scheme demarcated hitherto un-surveyed tracts of land held under customary tenure, into proposed plots to be surveyed
20 following a scheme of organised land use, with provision for roads and other commons. This explains the fact that each of the parties to this appeal ended up with multiple plots carved out of land they had hitherto respectively held as one parcel under customary tenure. The main concerns of Urban Planning are spatial orderliness and aesthetics of urban places. Examination of the drawing that guided the respondent's surveyor (exhibit D. Ex.2 dated 5th March, 2010)
25 reveals that in designing the planning scheme for plots to be surveyed in that area, the Town Council did not necessarily follow existing customary boundaries, hence this boundary dispute over what is now described as plot 3. Reliance on a survey based on the planning scheme could not resolve the boundary dispute since the scheme was not pegged to existing customary boundaries. The more credible evidence then is that of the appellant and his witnesses who relied
30 on and showed court customary forms of identifying or demarcating boundaries using trees as boundary marks on the land, that had existed thereon for a considerable period of time.

That aside, in his defence the respondent testified that his father had fenced off the land leaving the part occupied by the appellant outside his perimeter fence. However, under cross-examination, he stated that his father had fenced off only his homestead and not his entire land, in an apparent justification of his decision to adjust the location of the fence from what his father
5 had planted to a new location that now encloses the area in which the appellant planted teak trees, but excluding that on which the appellant has a pit latrine and bath shelter.

The location of a fence on land which is not that expansive, especially such as that ordinarily found in urban settings where plots are prevalently used for the construction of residential or
10 commercial buildings, is a useful guide in the determination of the true location of the boundary between two adjacent plots of land. It is a common practice by holders of land in an urban setting to enclose the land they own or occupy by fencing, thereby creating visible demarcations between adjoining pieces of land by such fencing. In light of this pervasive practice, the trial court would have been guided by resort to the common law principles relating to ditching and
15 hedges.

As regards fences and hedges, Scrutton L.J. in *Collis v. Amphlett* [1918] 1 Ch. 232 at 259 stated that “there is undoubtedly a popular belief in some parts of the country which has found its way into books that the owner of a hedge is also the owner of a space outside it; sometimes said to be
20 four feet from the base of the bank on which the hedge stands.” Goddard L.J. the added:-

This presumption is very often decisive where there is no evidence at all as to what the boundaries are, but, like any other presumption it is rebuttable, and very often it can easily be rebutted by the production of title deeds.

25 With respect to ditching, in *Vowles v. Miller* [1810] 3 Taunt. 137 Lawrence J. stated: - “the rule of about ditching is this. No man, making a ditch, can cut into his neighbour’s soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on the top of it...”

30 In the case before the trial magistrate, she ought to have applied the presumption regarding the location of hedges or fences. In an urban setting, once the pre-dispute location of a hedge or fence between adjacent plots of land is established, then the owner of that hedge or fence will be

presumed to own the space outside it, of only up to four feet from the base of the bank or foundation on which the hedge or fence stands, as a maximum depending on other circumstances of the case, subject to rebuttal by the production of a title deed. The evidence before the court showed that the respondent, and his mother before him, did not confine their activities within a maximum of four feet outside the fence that was planted by Major Onama Marcelo Kenyi before his death. In the year 2001, the respondent's mother began construction in space outside the fence now occupied by an entire set of two buildings which the respondent completed by roofing years later in 2010 and one of which he currently occupies. The respondent went ahead and adjusted the fence from its previous location, to currently enclose part of the neighbouring land occupied by the appellant and on which the appellant had hitherto planted teak trees.

On examination of the sketch map prepared by the trial magistrate when she visited the *locus in quo*, it is evident that it focuses mainly on the location of homesteads, it is devoid of any estimates of distances and the location of the area in dispute in relation to adjustments in the location of the fence and is generally confusing, such that it is a clear manifestation of the fact that the trial magistrate did not properly direct herself as to the pre-eminence of determining the pre-dispute location of the fence planted by Major Onama Marcelo Kenyi viz-a-viz the current location, in the resolution of this dispute. Had she properly directed herself, she would have found, as I do now, that the respondent's new fence, the two buildings whose construction was commenced by his mother and which in his own admission in his defence he completed by roofing, alongside all his other activities beyond four feet of the pre-dispute location of the fence, constitute acts of 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*, 19th edition (London: Sweet & Maxwell, (1987) 46). Trespass is an unlawful interference with possession of property, in other words an invasion of the interest in the exclusive possession of land, as by entry upon it. The cause of action for trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful interference. Therefore an action for trespass may technically be maintained only by one whose right to possession has been violated.

Founded on acts constituting an invasion affecting an interest in the exclusive possession of land, it is an action for enforcement of possessory rights whereby 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. The gist of a suit for trespass to
5 land is violation of possession, not a challenge to title. 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 in the sense that the defendant should not have had any right to enter onto plaintiff's land. The plaintiff must prove that; he or she was in possession at the time of the defendant's entry; there was an unlawful or
10 unauthorized entry by the defendant; and the entry occasioned damage to the plaintiff.

Actual possession of land signifies an appropriate degree of exclusive physical control over it. As to what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances of each case, in particular the nature of the land and the manner in which land of
15 that nature is commonly used or enjoyed. In general terms, what must be shown as constituting actual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so. Actual possession therefore is established by evidence showing sufficient control demonstrating both an intention to control and an intention to exclude others. The plaintiff proved that he was in
20 possession before the respondent's entry by virtue of having planted teak trees, a latrine and a bath shelter on this part of the land. In his defence, the respondent acknowledged excluding only the area occupied by the latrine and bath shelter.

Having proved that the respondent trespassed on his land, the appellant is entitled to an award of
25 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 need 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
30 the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.

The defendant's conduct is key to the determination of the amount of the damages to be 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 the instant case, the respondent's trespass on the appellant's land constitutes a cynical disregard of the appellant's property rights since he did so deliberately and against the appellant's protestation. The appellant has as a result been wrongfully deprived of the use of this part of his land since the year 2012. The amount in general damages the appellant deserves should reflect the repulsion with which the law countenances the respondent's cynical disregard of the appellant's property rights and afford adequate compensation to the appellant.

The court was not furnished with the pre-trespass value of the undeveloped land that would have formed the basis of determination of its capital value. I determine for purposes of this assessment, the capital value of the land encroached upon to have been shs. 10,000,000/= at the time of the trespass. To-date, the defendant has been in unlawful occupation for six years. Being land in an urban setting, at the annual rate of 40% of the capital value of the land, the plaintiff therefore is entitled to the sum of shs. 4,000,000/= per annum, hence a total of shs. 24,000,000/= as general damages for the period of trespass and it is accordingly awarded.

Consequent to the findings that I have made, the appellant is further entitled to an order of vacant possession. The appellant's offensive developments on the appellant's land are to be removed and the pre-trespass status restored. That part of the land is to be re-surveyed to reflect the boundary as established by the fence the late Major Onama Marcelo Kenyi had planted to demarcate the boundary between these two adjacent plots of land. The trial magistrate is to re-visit the *locus in quo* and guided by the witnesses P.W.2 Sr. Hellen Tabera and P.W.4 Madrama Flamino, plant simple or customary forms of identifying or demarcating the boundary using natural features such as trees or shrubs, to reflect the boundary as established by the fence the late Major Onama Marcelo Kenyi had planted, that will subsequently guide the surveyors. Subsequent processes of acquisition of title deeds over their respective plots of land by either party will then be in accordance with the demarcations so adjusted.

In the circumstances, the trial court came to the wrong conclusion when it decided in the respondent's favour. That being the case, I find merit in the appeal and it is accordingly allowed with orders that the judgment of the court below be set aside and it is hereby set aside.

- 5 It its place, judgment is entered for the appellant against the respondent in the following terms;
- a) shs. 24,000,000/= as general damages for trespass to land.
 - b) An order of vacant possession of the area beyond the location of the fence the late Major Onama Marcelo Kenyi had planted.
 - c) A permanent injunction restraining the defendant, his servants, agents and persons
10 claiming under him from further acts of trespass on the appellant's land.
 - d) An order directing the trial court to re-visit the *locus in quo* and guided by the witnesses P.W.2 Sr. Hellen Tabera and P.W.4 Madrama Flamino, plant simple or customary forms of identifying or demarcating the boundary using natural features such as trees or shrubs, to reflect the boundary as established by the fence the late Major Onama Marcelo Kenyi
15 had planted, that will subsequently guide the surveyors in re-demarcation of the plot. Subsequent processes of acquisition of title deeds over their respective plots of land by either party will then be in accordance with the demarcations so adjusted.
 - e) Interest on the sum in (a) above at the rate of 8% from the date of this judgment until payment in full.
 - 20 f) The costs of the appeal and of the suit.

Dated at Arua this 9th day of April, 2018

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Stephen Mubiru
Judge,
9th April, 2018.

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