

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CV-CS-0051-2002

FLORENCE KAHWA ::: PLAINTIFF

- VERSUS -

THE OMUKAMA OF BUNYORO KITARA KINGDOM :: DEFENDANT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT:-

Florence Kahwa and Emmanuel Rwahweire herein after called the plaintiffs had sued Bunyoro Kitara Kingdom herein after called the defendant; independently vide HCCS No. 51 of 2002 and HCCS No. 53 of 2002 claiming recovery of their timber and other property.

When the matter came up for hearing both parties agreed and were allowed by court to have the two suits consolidated by dint of order 10 A rule 1 of the Civil Procedure Rules on the grounds that the facts, issues and claims were similar.

The plaintiff's case were that sometime between March – April 2001, they respectively applied and were authorized by the defendant to cut timber in the Defendant's Forest Reserve at Wampanga in Hoima District. The plaintiffs paid the necessary dues to the defendant which was acknowledged by the issue of receipts and started the work. However, between 6th and 13th October, servants of the defendant in the course of their employment led by one Mugenyi Francis and armed with guns, pangas and sticks, attacked the plaintiff's workers in the forest and confiscated the plaintiffs' timber, saws, pangas, axes, food etc.

In the process the plaintiffs lost goods and property. Florence Kahwa lost goods worth shs.8,240,000/= while Emmanuel Rwahwere lost goods worth shs.4,578,500/=.

In its defence and counterclaim, the defendant contended that the plaintiffs goods were lawfully impounded because the plaintiffs did not pay their required dues, did not have license and that they had cut timber in an area which had not been authorized in that they had cut fresh timber instead of burnt trees as per their agreement.

Agreed issues:-

- (1) Whether there was a contract/agreement between the plaintiff and the defendant to saw timber in Wampanga Forest.
- (2) Whether the plaintiffs complied with the terms of the said contract.
- (3) Whether the plaintiffs' activities were lawful.
- (4) Whether the plaintiffs owe any dues to the defendant.
- (5) Whether the plaintiffs' timber and equipments/tools were impounded by the defendant's servants in the course of their employment.

To resolve the above issues, the plaintiffs testified in court and called other two witnesses in support of their claims. The defendant led evidence from four witnesses.

Resolution of issues:-

- (1) Whether there was a contract between the plaintiffs and the defendant.

It is clear from the evidence by the plaintiffs and defence witnesses that the plaintiffs were authorized to cut tress from Wampanga Forest Reserve.

The plaintiffs applied and were authorized to cut timber in the area where trees had been burnt. The procedure was that the plaintiffs would cut the burnt trees that would be followed by the defendant issuing Forest Produce Demand Note demanding forest royalty fees for the trees cut. After payment the plaintiffs would be issued with receipts. Therefore, the applications, the Forest Produce Demand Notes and the receipts for payment, did constitute the contract between the plaintiffs and the defendant.

The existence of the contract was confirmed unequivocally by the defence witnesses, especially Yoram Nsamba DW1 who the Principal Private Secretary of the Omukama (King of Bunyoro Kitara). He testified that the plaintiffs went to the King and made a cultural report to be allowed to harvest burnt trees from the Forest Reserve, which request was accepted the above evidence was buttressed by that of Twegonza Joseph DW4 who was the Kingdom Forest Officer. He testified that under a temporary arrangement, the plaintiffs were authorized to cut timber in the area where trees had been burnt. The plaintiffs paid the relevant dues whereupon he personally took them into the forest. There was therefore overwhelming

evidence to prove that there was a contract between the plaintiffs and the defendant to saw timber in Wampanga Forest Reserve.

(2) Whether the plaintiffs complied with the terms of the said contract.

The plaintiffs and their witnesses testified that they applied to cut burnt trees. They were duly authorized and shown where to cut the trees from. As they were busy cutting the trees, they heard a radio announcement calling them for a meeting with the defendant's officials.

In that meeting they were told to saw all the trees already cut within 14 days. The said deadline necessitated more workers and tools. As they were complying with the deadline, the defendant's officers went and confiscated their tools and timber.

The defendant's witnesses on the other hand testified that the plaintiff's timber and equipments were confiscated because they had cut unburnt trees contrary to their agreement.

Yoram Nsamba DW1 testified that the plaintiffs started harvesting unburnt trees instead of sticking to the burnt trees which they had applied for. That encroachment necessitated them having licenses which they did not have.

The District Forest Officer learnt of the encroachment and complained and told the Kingdom to stop the exercise. That was why the Kingdom moved in and confiscated the tools and fresh wood cut by the plaintiffs. Thereafter the plaintiffs complained to the police which went ahead to impound the plaintiffs' timber.

Yovan Bigirwa DW2, testified that he was employed as Administrator with Bunyoro Kitara Cultural Trust. His evidence was that he received Florence Kahwa's application to pit saw Cyprus trees which were burnt during the dry season. A report to that effect reached His Majesty the Omukama who directed his enforcement Officers to evict her and others. Francis Mugenyi DW3 testified that he was the one who transported the enforcement officers to the site where they evicted the encroachers and impounded their tools. He concluded that it was the police who impounded the timber.

Twegonza Joseph DW4 testified that he was the Defendant's Forest Officer who authorized the plaintiffs to cut burnt trees. He stated that he took the plaintiffs and showed them the area where to operate from where there were burnt trees. Later they got a report from the Assistant Forest Officer that the plaintiffs were cutting fresh trees outside the area they had been shown to cut burnt trees. Enforcement Officers were sent whereupon it was found that the timber which were cut were fresh.

From the above evidence, I do find that the plaintiffs did not comply with the conditions and terms of the contract which was that they were to cut burnt trees and not live trees. According to DW4 the plaintiffs were supposed to use saws by eight men only. He testified that the fresh trees which the plaintiffs had cut were reserved for saw millers who had licenses unlike the plaintiffs who did not have. The cultural favour to cut burnt trees were meant to clear the forest so that fresh trees could be planted in the burnt area. The plaintiffs abused that favour by encroaching on fresh trees.

DW4 testified that he saw the timber and found that they were fresh and not burnt. He testified that he was able to distinguish between fresh and burnt timber because of his experience and qualifications. It was his

conclusion that a burnt timber is of low quality because of loss of water due to the fire.

For the above reasons the second issue is answered in the negative.

Issue No. 3 whether the plaintiffs' activities were illegal.

The answer to this issue is found in the testimony of the plaintiffs and that of DW1, DW2 and DW4.

Wampanga Forest Reserve also known as Mikihani Forest Reserve is being held by the Omukama in trust for his subjects. The forest is beneficial to the environment because it is a catchment area for rainfall for the country. According to DW1 the reserve managed in a two tier system by the Bunyoro Kitara Cultural trust which handles policy issues and the Central Government.

The evidence on record is to the effect that when the Forest Reserve got burnt during the dry season the defendant had a problem of disposing of the burnt trees. The King approached the Central Government for advise.

His Majesty the King was advised to remove the burnt trees to be replaced by fresh planting. Accordingly some local people were contacted so that they could remove the burnt trees which had lost values. The plaintiffs were among those who allowed to harvest the burnt trees upon the burnt trees upon certain fees. Therefore, the act of allowing the plaintiffs to remove the burnt timber from the Forest Reserve to pave way for fresh planting was glared towards sustainable use of the forest. It was not an illegal act under the Forest Act.

It was the plaintiffs' act of encroaching on fresh trees from the Forest Reserve which became illegal and contrary to section 13 of the Forest Act.

Issue No. 4

Whether the plaintiffs owe any dues to the defendant.

It is clear from the available evidence that at the time the plaintiffs' tools and timber were impounded the plaintiffs owed nothing to the defendant in terms of payments for the trees. Jovan Bigirwa DW2 the defendant's Administrator testified that the plaintiffs did not owe anything to the defendants. He stated that it was Florence Kahwa who owed them small money of shs.3,700/= which she later cleared. It is sad to observe that the

defendant did not care to prove the alleged sums owed by the plaintiffs as claimed in the counterclaim. The law has since been that special damages must be strictly proved. See: **John Nagenda Vs Sabena Belgian Airlines Civil Suit No. 1148/1988** (unreported). In conclusion therefore, I find that the plaintiffs did not owe any dues to the defendants.

Issue No. 5 where the plaintiffs' timber and equipments/tools were impounded by the defendant's servants in the course of their employment.

During scheduling conference, the only agreed fact was that the plaintiff's timber were impounded. The plaintiffs and their witnesses testified that their tools and timber were impounded by the defendant's servants. Yoram Nsamba DW1 confirmed that the plaintiffs' tools and timber were confiscated and taken to the palace. Francis Mugenyi DW3 confirmed that he transported the defendant's enforcement officers to the Forest Reserve where they confiscated the plaintiff's tools and timber which were later taken to the police. There was therefore overwhelming evidence to prove that tools and timber were confiscated from the plaintiffs for the reasons that they were cut from the Forest Reserve without authority. Those who

impounded the tools and timber were clearly in the course of their employment.

Issue No.6. Remedies available.

In the instant case, the plaintiffs' presence in the Forest Reserve was partly legal and partly illegal when they encroached on the area where they were not allowed to pitsaw. It was therefore proper under the Forest Act to have their timber and tools impounded under section 26 of the Forests Act. Under that section a Forest Officer or Police Officer may seize and detain any forest produce, livestock, tools, boats, vehicles, machinery, or other implements which he or she reasonably suspects are liable to be forfeited under the Act. The plaintiffs' tools and timber were therefore impounded lawfully. However since their presence was partly lawful, the plaintiffs would be liable to recover back their tools of trade – handsaws, axes and pangas.

The timber which were illegally harvested by the plaintiffs should be sold by public auction by the Forest Authority.

In conclusion, I find that the plaintiffs and the defendant have failed to prove their respective cases and counterclaim on the balance of probabilities. Both claims are accordingly dismissed. Parties are to bear their own costs in this matter.

RUBBY AWERI OPIO

JUDGE

9/12/2005.

M/S Rebecca Kizono present for plaintiff.

RUBBY AWERI OPIO

JUDGE

12/12/2005.