

**THE REPUBLIC OF UGANDA**

IN THE HIGH COURT OF UGANDA AT MASAKA

**Civil Suit No. 0028 of 2008**

**GODFREY BWANIKA        ::::::::::::::::::::**  
**PLAINTIFF**

**VERSUS**

**SSEMPIJJA EDWARD        ::::::::::::::::::::**  
**DEFENDANT**

**BEFORE: HON JUSTICE MUSOKE-KIBUUKA**

**JUDGEMENT**

This suit was first filed before the then Masaka District Land Tribunal. The relevant number was 011/2004. It was taken over by the Chief Magistrate's Court when the land tribunals were phased out.

On 05/06/2007, the suit was dismissed by His Worship Kaweesa G. then a Grade 1 Magistrate at the Chief Magistrate's court at Masaka. He dismissed the suit upon the ground that the suit was res judicata.

The plaintiff successfully appealed to this court against the dismissal. Court found that what was

res judicata were the issues of compensation and ownerships which had been settled by the LC11 court of Kisojo Parish on appeal from the decision of LC1 court of Kikaaya. The cause of action based upon trespass was new and was quite distinct from the issues decided by the LC1 and LC11 courts earlier.

The High Court decided to hear and determine this case instead of transmitting it back to the lower court to be determined by a different Magistrate.

The background to the suit was that the late Kiribata Michael, who died in 1994 and the late Polinali Kibanda, who died in 1996, were villagemates at Kikaaya village, Kisojo Parish, Butenga Sub-County. Kiribata Michael was the father of the plaintiff while Kibanda Polinali was the father of the defendant.

The two parties and the members of the family of the late Kiribata agreed that during the 1980's Kiribata had sold a part of his Kibanja to Kibanda for a sum of Shs. 10,000/=. They agreed that that sum of money be refunded to the defendant who would then leave the part of Kiribata's kibanja

alleged sold to the defendant's late father. Later the matter went before the LC1 court of Kikaaya which decided in favour of the plaintiff ordering him to pay to the defendant Shs. 50,000/= so that the defendant vacates the area in dispute. The defendant appealed to the LC11 court of Kisojo Parish. He lost the appeal. The LC11 court ordered the plaintiff to pay a total of Shs. 60,000/= in that court which he did. The court ordered the defendant to vacate the part of the Kibanja in dispute. He did not. The plaintiff then filed the present suit based upon trespass.

The plaintiff gave evidence as PW1. He called two witnesses. PW2 was Kato James while PW3 was Joseph Bwanika. The defendant also gave evidence as DW1. He too called two witnesses. DW2 was Agrikola Kizza, who was LC1 chairperson of Kikaaya village. DW3 was Joseph Bbaale Ssajja, who stated that he was the head of the Yombo Ssiga in the Mutima clan.

The case for the plaintiff, in summary as it appears on the record is that after he had redeemed the piece of the kibanja in dispute the plaintiff refused to vacate it in spite of the LC11 court of Kisojo's

order. The defendant became a trespasser, by the fact of his refusal. In addition, when the plaintiff cut some eucalyptus trees from the part in dispute, the defendant caused his arrest and torture by the police and an LDU called Ssekitto.

The plaintiff was kept in police custody at different places including Butenga and Kyabakuza for several days and beyond the periods permitted by the Constitution for the police to keep a person in police custody.

Later upon duress, the plaintiff was made to sign a written apology to the defendant purporting to concede that he had cut the trees from an area owned by the defendant.

The defendant's case was that his late father, Kibanda Polinali purchased 2.5 acres from the Kibanja of the late Kiribata Michael who was neighbour and brother in law of the Kiribata. Kibanda planted eucalyptus in that area. Later, about two years before his death, the late Kiribata sold another adjacent part to his kibanja for shs.

10,000/= . To the defendant, it was the second part of the late Kiribata's kibanja that was sold by him to Kibanda that was in dispute and had been redeemed by the plaintiff.

Court assessed the evidence of both plaintiffs in this case. It could not help concluding that the plaintiff was a truthful witness while the defendant was not. The two witnesses for the plaintiff were equally very truthful and relevant witnesses. Those of the defendant were clearly untruthful and totally irrelevant. Those were Joseph Bbaale and Kizza. The record shows how irrelevant their testimonies were.

The defendant could not produce any agreement between his father and the father of the plaintiff to prove that there had been one or two distinctive parts of the late Kiribata's kibanja sold to the late Kibanda. The defendant could not lead any oral evidence to that effect either.

Court visited the locus on 10<sup>th</sup> July, 2008, for the purpose of verifying the defendant's claim that his late father had purchased two distinctive parts of Kiribata's kibanja but court saw only one part with very aging eucalyptus tree stumps or scattered old

trees. The defendant could not show court the two pieces purportedly purchased by his late father from Kiribata.

Court believes the evidence of PW3, in particular. He was a senior citizen of 74 years. He was a man who had seen it all. He appeared to be very calm and truthful. Court believes his evidence on two important points. First that there was only one part of Kiribata's kibanja that was sold by him to the defendant's late father and that the area had been planted with eucalyptus trees. That is what court also observed at the locus. The tree may not entirely have belonged or planted by Kibannda because in his Will the late Kiribata bequeathed "**Ekibira kya kalituusi w'enimiro ey'ekisenyi ebyo bya musika**". The will was made on 31.01.1992, just about two years before his death. Thus, the claim that the eucalyptus trees were planted by the defendant's father appears also to be incorrect.

Secondly, court accepted PW3's evidence that the so called "**Endagaano y'okwetonda**" exhibit PW3, was written and signed by the plaintiff out of

duress by the defendant who prior to it's being written had kept the plaintiff under police custody and torture. This point was also testified to by PW2. Both PW2 and PW3 were witnesses to that so called agreement. Needless to say, it is the position of the law that any document executed by a person under duress cannot be held against such person on account of the document's having been executed involuntarily.

In answer to the first issue, therefore, court finds that the evidence of the plaintiff and his witnesses proves that the defendant trespassed upon the area which the plaintiff had redeemed. Although the defendant claims to have been in possession, he agreed upon compensation. Later he changed his mind because compensation had delayed. The matter went to the LC courts and compensation was paid in court. Court ordered the defendant to vacate the area in dispute. His stay against court's orders placed him in the position of a trespasser. He never appealed against the LC11 court's order.

It is the position of the law that in a case for the recovery of land of which the plaintiff is out of

possession and he or she claims immediate, possession, the plaintiff must recover only upon the strength of his or her own title or claim and not by the weakness of the defendant. **Martin Vs. Strachan (1744) TR 107.** The plaintiff must prove the links of his own title or claim to the suit property. **Philips vs. Philips (1878) 4 GBD 127.** Court has no doubt at all that the plaintiffs in the instant case has fulfilled that requirement of the law.

In court's view, the plaintiff deserves the award of general damages for trespass as well as far all the inconveniences caused to him by the defendant. The plaintiff has lost a lot of usage time while the defendant has been deriving benefits including extraction of sand and the harvesting of almost all the eucalyptus trees. The defendant also destroyed the plaintiff's house and scattered his family. Court would in light of the above award Shs. 3,600,000/= to the plaintiff.

In the result, court enters judgment in favour of the plaintiff. It makes the following orders.

- a) an eviction order against the defendant in respect of the area in dispute;



- b) a permanent injunction restraining the defendant from or his agents, trespassing upon the area of the late kiribata's kibanja, the subject matter of this suit;
- c) an order awarding Shs. 3,600,000/= to the plaintiff as general damages;
- d) an order awarding the costs of this suit to the plaintiff.

**V.F. Musoke-Kibuuka**

**(JUDGE)**

**26.03.2013**

**Order:** The Ag. Asst. Registrar is required to deliver this judgment on my behalf a day and time fixed by him.

**V.F. Musoke-Kibuuka**

**(JUDGE)**

**26.03.2013**

