

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CIVIL SUIT NO. 003 OF 2009

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AMIRALI KARMALI PLAINTIFF

VERSUS

10

CHARLES WASSWA LUGALI SEMAKULA.....DEFENDANT

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

15

JUDGMENT

This case arises out of a claim by the Plaintiff wherein the following reliefs are sought:

- Vacant possession/Eviction order
- Permanent Injunction on trespass or interfering with Plaintiff's interest.
- 20 - General damages and interest from Judgment
- Costs.

Summary of Plaintiff's case:

- Plaintiff is registered proprietor of suit property – Magala Estate.
- 25 - Defendant without any claim of right or ownership entered onto the sit land in 2000 and has cultivated trees and sugar cane thereon.
- The suit land was developed with workers' Estates and plantations which the Defendant has vandalized.
- Detinue and trespass – conversion.

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Defence:

- Defendant claims ownership by virtue of succession from his father – YakoboLugali who died in 1992.

- Said deceased was known to the Waljees who were Plaintiff's predecessors in Title and never tried to evict him.
- Defendant succeeded his father in 1992 and occupied the land in 1993.
- In 2007 the Defendant learnt that the land was being sold without notice to him. He lodged a Caveat on the Title.
- In June 2007, the Defendant received a Notice to show Cause Why the Caveat should not be removed.
- The said Caveat was removed the same day the Notice was issued to him.

10 **Agreed facts at Scheduling:**

- Plaintiff is the registered proprietor of the suit land.
- Plaintiff purchased the land from the Waljees (U) Ltd on 12/5/07 and registered on 5/9/07.
- Waljees became registered proprietors in 1960.
- Repossession Certificate issued in 1992 after expulsion in 1972.
- Defendant has eucalyptus and sugarcane on land.
- On 14/01/2003 Defendant lodged Caveat forbidding dealings on the land till his interest was ascertained – registered on 21/02/07 and removed on 6/6/07.

20 **Issues agreed upon at Scheduling:**

1. Whether the Defendant is a trespasser on the suit land. What are his interests if any?
2. Whether the Caveat entered on 21/2/2007 was properly removed by the registered proprietor. Was Plaintiff properly registered in view of a subsisting Caveat?
3. Whether Plaintiff has suffered any loss or damage. When did the cause of action start?
4. Remedies/Reliefs

At the hearing the parties called/produced their relevant evidence.

Evidence of Plaintiff:

STEVEN MUKAMA (PW1) was a Machine Operator and now he is a neighbour to Magala Estate. He was an employee before the Asians were expelled. There used to be a Tea Factory and sugarcane factory, labour lines (workers' quarters and residences). He does
5 not know how Defendant came onto the Estate but he appeared around 1990.

On cross-examination he states that he has been seeing Defendant hiring out parts of the land to people.

10 ALEX OCHIENG (PW2) former employee of Magala Estate. The same was owned by Asians and the boss was one Kamulu. There used to be factories, Tea and Sugarcane plantations and vehicles.

After the Asians were expelled one Kayanja became the Boss and then one Patrick
15 Sembera thereafter. It is only recently that he has seen Defendant claiming the land is his. He uprooted the Tea plants and has grown sugarcane thereon. He does not know how Wasswa comes to claim ownership.

FRANCIS XAVIER BUKENYA (PW3) grew up on the Estate where his father was an
20 employee. Kamulu was the owner. He also became an employee in 1986 with one Kayanja as the employer. The management changed hands several times with Managers coming and going.

In 2004, the tea plantation was uprooted on orders of Wasswa and sugarcane planted all
25 over. He does not know how Wasswa became Manager.

On cross-examination he states he knows the plantation belongs to Asians. Wasswa only came on the land in 2004.

KENNETH KATARIKAWA (PW4) handled the transaction on behalf of Plaintiff. He found a Caveat lodged which he applied to have removed. The land was freehold with title registered in the names of Waljees (U) Ltd lodged Notice to Caveator which was posted by registered mail. He waited for 60 days and had Plaintiff registered in September 2007.

5 He then gave Notice to Defendant to vacate the land. The Estate had been appropriated in 1972 by government but repossessed in the 1900s by the owners. There was no encroachment then as there was a caretaker until 2002 when Defendant moved in.

On cross-examination he admits the Caveat was not removed after 60 days. He applied for
10 Notice to be given to the Caveator to remove the Caveat.

The Defendant was invited for negotiations but refused. He further stated that when the Asians went, a caretaker was appointed to make sure that the property is not looted.

15 **Defence evidence:**

WASSWA LUGALI CHARLES (DW1) – The land belonged to him. It belonged to his father Yakobo Lugali and his father before that. He died in 1992 and Defendant succeeded him as his heir. The land used to belong to his father Dominko Mukiibi who also got it from his father Gumba Musega. He started using the land in 1990, he never met Kayanja.
20 Sembera was a tenant of Defendant's father.

He says there is no Instrument of repossession on the Title that it is forged. He went to the Lands office to transfer the Title and found that the land had been transferred to other people in the absence of the Waljees. He lodged a Caveat after getting Letters of
25 Administration. He says he never received any Notice of removal of Caveat. The Notice is issued on 6/6/2007 but the Caveat was removed on 7/6/2007. That it is the Waljees who should have sued the Defendant not Karmali who got the land through forgery.

The Defendant seeks the following reliefs from Court:

30 - A declaration that the Defendant is a lawful occupant.

- A permanent Injunction to ensure occupancy.
- General damages.
- Costs.

5 On cross-examination he stated that his grandfather should have been the registered owner. He does not know why he never challenged the registration of Muhammad Jarmal. Muhammad Jarmal and the Waljees had a factory on the suit land. He used to see them when he was young. That Mukama Steven, Alex Ochiengand Francis Xavier Bukenya all used to work at the factory. That he did not know that the government appropriated the
10 land in 1972/73 and that it gave it back in 1990. That his father was the one in charge after the Asians left and he used to run a Jaggery operated by a tractor. He agrees that Plaintiff was registered in September, 2007, 90 days after the issue of the Notice to remove the Caveat. He admitted that he did not challenge the letter of repossession that is why he caveated the land. He says he claims interest as a bona fide
15 occupant.

After listening and recording the evidence for both parties the Court made the following as some of the factual findings:

1. Plaintiff is registered proprietor.
- 20 2. Plaintiff bought from the Waljees who repossessed the same after the coming into force of the Expropriated properties Act. But had been owners since 1960 and before that Muhammad Jarmal since 1940.
3. Former workers on the Tea Estate have confirmed that the Estate belonged to Asians especially one Kamulu who went away on being expelled by Government.
- 25 4. Defendant only came into the picture much later and uprooted tea trees, hired out parts of the land and has planted sugarcane.

Against this documented history, the Defendant claims:

1. Interest as his father's heir and beneficiary of his father's Estate for which he has Letters of Administration.
 2. Claims his father was in occupation since 1973 when the Asians left. And that his father got the land from his ancestors. No documentary or oral evidence to support these claims has been brought forward.
- 5
- What is his interest if any?
 - Does he have any right to challenge the Title of Karmali and his predecessors in Title?
 - Does he have any registerable interest to enable him claim any rights under the Caveat he lodged on the suit land?
- 10

Resolution of issues agreed upon by both parties:

Issue No.1- Whether the Defendant is a trespasser:

15 The case of **EMN Lutaya Vrs. Sterling Civil Engineering Co. Ltd – SCCA 11/2002** has been cited by both parties as defining what trespass entails.

According to Mulenga JSC **“Trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes, or portends to interfere with another person's lawful possession of that land.”**

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A holder of a Title would be in legal possession of the suit land.

As I have already pointed out, the Defendant's claim that he derives Title from his father and grandfather before that is not supported by any evidence. They neither held
25 Certificates of Title neither is there any evidence adduced that they were in occupation of the suit land, in view of the Title by the Plaintiff with a history of documentation by his predecessors in Title since 1940.

There is no evidence that the Defendant and his predecessors ever challenged the Title held by the Plaintiff and or his predecessors.

5 Further from the Defendant's pleadings, he claims to be a lawful/Bonafide occupant/kibanja holder. At the same time his evidence challenges the title which has been unchallenged from first registration to date.

The Defendant submits that he has been in occupation and made developments on the land since 2000 much earlier than 2007 when the Plaintiff became registered owner.

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He further argues that the Defendant and the Plaintiff's predecessors in Title co-existed in a relationship of landlord and tenant with no challenge to each other's interests.

15 I have failed to see evidence of such a relationship in either the Plaintiff's pleadings or evidence or Defendant's pleadings and evidence. He has tried to point out inconsistencies and contradictions in the evidence given by PW1 Steven Mukama, PW2 Alex Ochieng and Francis Xavier Bukenya.

20 The Defendant himself agrees that these witnesses all confirm that the Defendant's occupation started from around 2003 to 2004 when he purported to give permission to people to use the land.

25 One thing is clear to this Court, the Defendant's interest is not clearly articulated. He cannot for example show that he is protected by Article 237 of the Constitution and Section 29 (1) of the Land Act that protects a lawful occupant. This according to the Section is a person who entered the land with the consent of the registered owner or who had occupied the land as a customary tenant, but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring Title.

No such consent is established since the land was appropriated by Government when Asians were expelled in 1972. Between the time the land was repossessed under the Expropriated Act, there is no evidence that if at all he or his father occupied the land, it was with the knowledge or consent/authority from the controlling authority at the time.

5 Neither is any provided from the time the land was reposed by the Walyees up to acquisition/registration by the Plaintiff.

Section 29 (2) of the Land Act does not protect the Defendant either. He has no evidence to support a claim that he is a bonafide occupant. This according to the section, is a person
10 who before the coming into force of the Constitution had occupied or utilised or developed the land unchallenged by the registered owner or his agent for 12 years or more, or a person who had been settled on the land by Government or its agent.

On his own admission and the evidence of the witnesses PW1 to PW3, he effectively
15 asserted his presence on the suit land around 2003-2004 when he uprooted the tea plants, hired out the land and also planted sugarcane thereon.

The Defendant comes out as a person who took advantage of the lack of physical presence by the registered owners and thought he would manipulate the law to suit his agenda.
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On the authority of Section 176 of the Registration of Titles Act, the Plaintiff's Title to the property cannot be impeached at this moment when it is indeed the Plaintiff who has gone to Court to enforce his interest, and not the Defendant.

25 For all intents and purposes, the Plaintiff found a stranger on the suit property with no proof of any legal or equitable interest and sought to gain vacant possession.

It is my finding that the Defendant is a trespasser on the land by his continued refusal to vacate the suit land.

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Issue No.2 – Whether the Caveat was properly removed:

Having resolved the question of whether the Defendant had any interest in the suit land recognised by law, it would have followed that there was no caveatable interest by the Defendant so to speak.

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However the fact is that there was a Caveat lodged by the Defendant on January 2003. The said caveat was registered on 21/2/2007 and removed on 7/6/2007.

The Plaintiff's interest/transfer was registered on 5/9/2007. The Defendant has cited the
10 Supreme Court decision **Horizon Coaches Ltd. Vrs. Edward Rurangaranga & Another Civil Appeal 14/2009**, where it was held that the procurement of registration of Title in order to defeat an unregistered interest amounts to fraud.

That a tenant in possession for a long time with developments thereof could not be
15 automatically extinguished, rather, he is deemed to be a bona fide occupant of the registered owner.

It is also argued that since the Notice of removal was posted but the caveat removed at the same time, the 60 days notice was of no consequence. That the caveat was fraudulently
20 removed.

The Plaintiff has submitted that even if that were the case, the registration of the Plaintiff took place on 5/9/2007 91 days after the Notice and 28 days after the 60 days should have lapsed.

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It is noteworthy that the entries into the Register are done by the Registrar. All the plaintiff did was to lodge an application for removal of the Caveat. He waited for beyond the required 60 days to elapse before pursuing the Registration into his names. Reference is made to the decision in **Civil Appeal 12/1985 – David Sajjaka Nalima Vrs.**

Rehema Musoke where it was held that production of a Title in every court shall be an absolute bar to any action against the person named in the Title.

5 If the Registrar's office made faulty entries, should they be visited upon the Plaintiff who acted within the time limits? Ref: **Nyangire Karumu Vrs. DFCU Leasing Co. Civil suit 106/2007**. Furthermore, my understanding of Section 139 RTA which gives rise to the right to lodge caveats refers to those with an **'interest'** in the land.

10 The said interest must be ascertainable and I have already held that no such interest has been established by the Defendant. He cannot therefore seek solace in the authority cited as he is neither a bona fide occupant or kibanja holder.

The question of the removal of the Caveat accordingly is more academic than real.

15 It is my finding that at the time of registration of the Plaintiff's interest in September 2007, there was no Caveat in existence that could be challenged as the Defendant now tries to do.

Issue No.3 – Has the Plaintiff suffered damage?

20 I have looked at the evidence and submissions on this point. Neither party made a substantive submission thereon.

25 Court has been invited by the Plaintiff's counsel to take Judicial Notice that the Plaintiff's **Mukwano Group of Companies** would have expanded his investment in Tea growing on the suit land since 2007 to-date. Unfortunately I take this to be mere speculation which the Court will not indulge in.

I have however looked at the transfer documents.

30 Annexure "B" to the Defendant's defence states that it is a piece of land where the vendor transferred his interests therein to the purchaser.

In the application for consent to transfer, the details reveal that what was sought to be transferred was “**an abandoned Tea Estate taken over by squatters cultivating sugarcane.**”

5 Most importantly, when did the Plaintiff’s cause of action commence?

I am not persuaded by arguments that the loss or damage accrued from the time of entry of the Defendant on the suit land around the year 2000 and that the Plaintiff inherited the said loss or damage.

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If there is any ascertainable damage then it should be from the time of transfer/registration when the Plaintiff attempted to gain vacant possession.

15 I would accordingly find that the reliefs available are those laid out in the Plaintiff’s prayers.

Prayer 3 of the Plaint would only stand in so far as the Plaintiff would have to incur the inconvenience of removing the crops the Defendant has grown on the suit land which he claims are worth Shs.5 Billion in favour of his own developments. Ref: **OnegiObel Vrs. Attorney General – HCCS No. 66/2002.**

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The Plaintiffs have submitted that an award of Shs. 1,500,000,000/- is appropriate in view of the Defendant’s own claim that his developments are worth Shs.5,000,000,000/-.

25 I take this to be speculative. An award of Shs.500,000,000/- is more appropriate to cover the inconvenience of removing the Defendants and gaining vacant possession.

Judgment is accordingly entered in favour of the plaintiff against the Defendant.

The Defendant's Counter-claim is dismissed for having failed to establish any claim of right or interest to the suit property.

The following orders are made accordingly:

- 5 1. An Order for vacant possession of the suit property in favour of the plaintiff or eviction Order.
2. Permanent Injunction restraining the Defendant or his servants/agents from trespassing and or interfering with the Plaintiffs' interest and or developments in the suit property.
- 10 3. General damages assessed at Shs.500,000,000/- and interest thereon from the date of Judgment until payment in full.
4. Costs of the suit.

15 **Godfrey Namundi**

Judge

14/02/14

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14/02/2014:

Tony Arinaitwe for Plaintiff

Tebusweke for Defendant

Defendant in Court

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Court: Judgment read in open Court.

Godfrey Namundi

30 **Judge**

14/02/14

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