THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 18/90

DAUDI C. MANYINDO::PLAINTIFF

VERSUS

1. DEPARTED ASIANS PROPERTY CUSTODIAN BOARD } **::::::::DEFENDANT**
2. MARY HALL

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

JUDGMENT

The plaintiff as the Registered Proprietor of land comprised in Burahya freehold Register Block 31 plot 2 land at Bulyambuzi Burahya brought this action against the defendants seeking for the following remedies:-

(a) A declaration that the lease of the suit property never passes to the first defendant.

(b) A declaration that the allocation of the suit property to the second defendant was unlawful and ineffectual.

c) A declaration that the plaintiff was entitled to re-entry.

(d) And an order directing the Registrar to remove the lease encumbrance from the title to Burahya Block 31 plot 2.

(e) Costs of the suit.

According to the plaint the first defendant is a statutory corporation whereas the second defendant is an individual of sound mind. By a lease dated 20th November 1964 the plaintiff's father leased the said land to Jeraj Sons limited and Kalmal Rashid limited companies

incorporated in Uganda and ran by Asians. The lease was to run for 99 years commencing on the 20th day of November 1964. The lessees paid the rents for the first twenty five years of the lease. Following the expulsion of the Asians by the Amin's Government and their subsequent exodus, the lessees abandoned the property. Under the Departed Asian property decree 1973, the then government purported to take over the lease and allocated the land to the second defendant.

The plaintiff averred and contended that in the circumstances the lease between the plaintiffs father and Jeraj Sons limited and Kalmali Rashid limited was unconscionable and unenforceable as against the plaintiff, that the land did not pass on to the departed Asians property custodian Board since the land lord was an indigenous Ugandan and he was entitled to re-entry when the lessees left the country but was prevented from so doing by the unlawful allocation of the land to the second defendant. That even if the lease passed on to the first defendant the plaintiff was entitled to exercise his right of re-entry for breach of the various covenants contained in the lease to wit.

(i) Failure to pay rent as stipulated in the lease.

(ii) Failure to use the demised premises for agricultural or other purposes as stipulated in the lease.

(iii) And abandonment of the demised premises.

That the plaintiff had since exercised his right of re-entry upon the premises.

In their written statement of defence the defendants denied each and every allegation contained in the plaint as though the same were there in forth and traversed seriatim. They admitted paragraphs 1,2 & *3* of the plaint in that the plaintiff was an adult and of sound mind and that the first defendant was a statutory corporation whereas the second defendant was an individual. That it was illegal for the plaintiff to exercise his right of re-entry. At the commencement of the hearing of this suit nine issues were framed to wit:—

(i) Whether the plaintiff was the registered proprietor of the land registered in the free hold registers Burahya Block 31 plot 2.

(ii) On the pleadings whether the said land was leased to Jeraj & Sons ltd and Karmal Rashid ltd for 99 years from November 1964.

(iii) Whether the rents for the first period of 25 years of that lease was paid for.

(iv) Whether the lessees abandoned the property (the lease property)

(v) Whether under the 1973 Assets of Departed Asians decree the property was taken over by the Government and then allocated to the second defendant.

(vi) Whether the contract or the lease between the plaintiff's father and the two companies was unconscionable.

(vii) Whether the land was legally assed over to the first defendant and if not whether the plaintiff is entitled to exercise his right of re-entry.

(viii) Whether the plaintiff is entitled to re-entry because of non payment of rent, failure to use the land and because of abandonment.

(ix) Whether the plaintiff has rightly exercised his right of re-entry.

I now proceed to consider the issues. The learned counsels seem not to have dealt with each issue specifically but merely generalized on the same. I intend to deal with the issues in their numerical order and perhaps comment upon the counsels submissions whenever such an occasion arises.

As regards the first issue, whether the plaintiff was the registered proprietor of the suit property. Evidence from PW1 showed that he succeeded his father when he passed away in 1967 and the title to the said suit property was registered in his names. In fact PW4 confirmed that the certificate of title belonged to the plaintiff. PW4 works in the land and survey Department. His duty is to register free hold titles of Toro and Bunyoro. He was positive that the certificate exhibit P1 belonged to the plaintiff and registered on the same on 27th January, 1967. In their written statement of defence the defendants denied that the plaintiff was the registered proprietor of the suit property. A certificate of title is conclusive evidence that the person named in it as the proprietor. See section 56 of the Registration of titles Act Cap 205 unless it could be shown that

such certificate was obtained by fraud. See **Ndagire vs. Leo Kasujja (1974) HCB P.134.** And it has been held in **Figuerido vs. Nanji [1962] EA p.756** that in the absence of fraud the court cannot go beyond the fact of registration. See also **Okello vs. Uganda National Board Civil App. No.12 of 1987 Supreme court of Uganda unreported.**

As I stated earlier the defendants in their written statement of defence denied that the plaintiff had title over the suit premises. This court is of the view that there was evidence to prove that the plaintiff was the registered proprietor of the premises.

In the WSD of defence the defendants did not allege that the plaintiff obtained the certificate of title to the suit premise by fraud. In the premises the first issue is in the affirmative.

On the second issue, whether the said land was leased to Jeraj & Sons ltd and Karmal Rashid ltd for 99 years.

There is evidence here to show that the suit land was leased to the two companies as per the testimony of PW1 the plaintiff and that of PW4. After registering PW1 as the owner of the suit property on 27th January, 1967 PW4 observed that the suit premises had some encumbrances registered on 5th February, 1965. The lessees were Jeraj and Sons ltd and Karmal Rashid limited. The lease agreement between the father of the plaintiff and the lessees was exhibited in court as exhibit P2. In their written statement of defence the defendant merely denied the existence of such a lease but the court was of the Opinion that the evidence to show that such lease existed was to say the least watertight. This issue like the first one is in the affirmative.

The third issue was whether the rents for the first period of 25 years were paid for. According to the Plaint the lease was to run for 99 years commencing on the 20th day of November 1964 and the lease agreement exhibit P2 shows that the lessees paid rents to the father of the plaintiff for a period of 2 year from 20th day of November 1964 as stated in the plaint up to 21st November 1989. The third issue therefore was in the affirmative

The fourth issue is whether the lessees abandoned the property. There was evidence from PW1 to show that the lease agreement between his father and the lessees who were Asian that is to say Jeraj and Karmal Rashid directors of Jeraj Sons ltd and Karmal Rashid Ltd respectively was to

run for 99 years from 20th November 1964 and the rents were paid in advance for a period of 25 years up to 21st November, 1989. The land was for Agricultural purposes to plant there in coffee, tea and sugarcanes. When Amin expelled the Asians the lessees who were Asians left the country in 1973. Evidence further went on to show that sugar and tea was planted in the said Estate but because of the departure of the lessees the estate was not attended to. It was overgrown by the bush, sugarcanes and tea was no longer there .All the structures on the suit premises were dilapidated. The electric generator and electric pump pumping water for the jaggery factory was no longer there. Most of the buildings were pulled down. Iron sheets, doors and windows were taken away. There was no body to maintain whatever remained there.

The defendants denied that the suit premises had been abandoned. The evidence of DW1 was to the effect that when the Asians left this country after their expulsion by the Amin Regime one Onah then Minister of Commerce used to look after the suit property from the year 1973 up to 1976. Thereafter the premises were allocated to DW1 by the Custodian Board as per the allocation certificate exhibit Ex Dl. DWI wanted to plant sugar and cut the tea slabs but the place was bushy and there were some disused machineries on the site like boilers, jaggery plant and generator. The sugar plantation was in a bad shape and the tea plantation had turned into wild forest. An effort was made to rehabilitate the place but there were problems. In 1985 DW1 left the place. When she returned she tried to plant maize and wheat but because of the logistics she could not start on the work. She planted some sugarcane and got some molasses but there was no market for it. Also there were transport problems. DWI does not stay at the estate. She has some goats at the site and has some men to guard the place.

Judging from the evidence of PW1 and DW1 there is no doubt in my mind that the suit premises were abandoned by the lessees and that DW1 who was allocated the premises had failed to look after the estate leave alone to rehabilitate it. I would in the premises find the forth issue is in the affirmative.

The fifth issue was whether under the 1973 assets of Departed Asians decree the property was taken over by the government and then allocated to the second defendant.

Mr. Musana the counsel representing the plaintiff submitted that the land belonged to an indigenous Ugandan and therefore the land could not vest in the Custodian Board and that the latter's claim that the land vested in the board was erroneous. That the Board were not successors to the title and could not pass title. I was referred to a number of authorities.

Mr. Mugamba on the other hand submitted that the lessees were among the people expelled in 1972 and legislation was promulgated vesting certain properties in the custodian Board. The learned counsel was implying that the suit premises/business vested in the government after the departure of the lessees.

Before Decree 27 of 1973 (section 4) was promulgated vesting asset and liabilities in the government left by departing Asians there were other decrees pronounced before it. Like the Declaration of Assets (not citizen Asians decree No 27 of 1972. The purpose of this decree was to transfer the properties or business of departing non citizen Asian to the Ugandan citizen. Then the only property or business of departing Asian to vest in the Government was that in which no information and documents had been submitted to the Minister under section 2 of the said decree. Decree 29 of 1972 which amended decree 27 of 1972 extended the category of property or business that could vest in the abandoned board by including that abandoned by a departing Asian or that for which no adequate arrangement have been provided. See **Lutaya vs. Gandesha 1966 HCB 46.**

It is pertinent at this stage to note some of the decisions in connection with assets left by the departed Asians. The crucial question being, whether the demised premises in the instant case vested in Government when the Asians left the country and whether the custodian Board Government had title which it could pass over to the second defendant.

In the case of **Ndaula vs Mubiru and the DAPC Board 1977 Page 246.** The plaintiff sought a declaration against the first and second defendant that he was the owner of the suit premises. The plaintiff was an indigenous Ugandan and had leased the property to the Asian who had subsequently left the country. It was held that the Custodian Boards' purported claim to be successor in title to the property was erroneous and as the Board had no interest and were not successor in title to the property they could not pass a legal title. And in **Lutaya vs. Gandesha**

Supra it was held that the property of a Ugandan citizen never vested in the Government or the Departed Asian Property Custodian Board. And in **Diamond trust properties limited vs. Valley Grocers ltd (1976) HCB Page 56.** It was held interlia that the rights of disposed Ugandan still existed and could still exercise his right as he had before the allocation of such business.

Applying the principles as expounded in the above cases plaintiff was the registered proprietor of the demised property and a Ugandan. He had title over the demised premises. The allocation therefore by the Custodian Board of the property to Mary Hall Kisembo the 2nd defendant was erroneous since the first defendant (The DAPCB) had no title to pass over. Also since the demised property belonged to the plaintiff who was a Ugandan the same never vested in the Government the first defendant. In the premises the demised properties never vested in the Government under S. 4 of the Assets of Departed Asian Decree 1973 (Decree 22 of 1973).

In a similar way it is my considered view that Decrees 27 of 1972 and Decree 29 of 1972 which amended the former were not applicable to the instant case since the plaintiff as lessor had a lease agreement with the lessees the Asians before their exodus. The 1st defendant was not a party to the lease agreement and as such had no title to pass over to the second defendant. In the light of what has been explained above the demised property never vested in the first defendant and the latter had no title to transfer to the second defendant. This issue is therefore in the negative.

The sixth issue was whether the contract or the lease between the plaintiff's father and the two companies was unconscionable. The **Oxford Concise Dictionary** defines the word unconscionable as

"Having no conscience, contrary to the dictates of conscience, not righter reasonable; unreasonab1e excessive. The learned counsel appearing for the parties were of no assistance to the court over this issue. They did not submit anything on this issue albeit the fact that they had agreed on the framing of the same. Nonetheless I had the occasion to peruse the lease agreement. It was not contrary to the dictates of conscience and it was a reasonable one. This issue is therefore in the negative".

The seventh issue is whether the land was legally passed over to the first defendant and if not whether the plaintiff was entitled to exercise his right of re-entry.

In order to answer this issue satisfactorily, it is befitting to review the evidence on record and in so acting I could not avoid making some repetitions about the issues and evidence I have already dealt with.

According to PW1 he became the proprietor of the suit premise after the demise of his father in 1967. There was an agreement between his father and the Asian/lessees which was to run for 99 years. The lease agreement was tendered in court and marked as exhibit P2. The 1essees had to pay rent for 25 years at once. They paid the rents and the premium after which they had to pay the rents annually commencing with November 1989. Since then the annual rent had never been met.

The land was for Agricultural purposes, Sugarcanes had been planted there. It was no longer there. No body maintains whatever remained there. Most of the buildings were pulled down. Iron sheets, doors and even windows were taken away. Also taken away were the electric machineries and generators. The land was no longer being used. It had been abandoned. The evidence further showed that PW1 made efforts to re-enter the demised land but his efforts to do so were frustrated. He was stopped by the RC I of the area who was of the view that the land belonged to the defendants.

Through his lawyers PW1 made further effort to re-enter the demised land but all these efforts were thwarted as per the exhibit P6 a letter from the Chief Registrar of titles to PW1's lawyer Rubale and Company Advocates reference No, FRV 25/23 of 10th July 1981 stopping his re-entry. There were other correspondences like exhibits P4, P5 and P3. Having failed to enter re-entry to the said premises he waited for 25 years period to expire and then filed in the instant case (in July 1990). There was further evidence from PW3 to show that PW1 attempted to re-enter the lease property and that the demises premises were in a mess. PW3 was the chains man in the department of lands and surveys and his duties were to open up the boundaries, he was taken by PW1 to the site in order to open up the boundaries. He embarked on the work. He found there a factory. It was not working. It had collapsed. It was in the elephant grass and was in dilapidated buildings otherwise he could only see stamps. The sugarcanes had been burnt and eaten by aunts. He spent, eight days opening up boundaries and was then stopped.

The testimony of PW4 was only to the effect that he dealt with the registration of freehold titles of Toro and Bunyoro and that exhibit P1 the certificate of title belonged to PW1.The latter was registered as the owner on 22/1/1967 after obtaining the certificate of succession. The land had some encumbrances. The lessee encumbrances were registered on 5/2/1965.

When DW1 started having interest in the land in question, she applied for allocation of the demised premises to the Minister of Commerce in the year 1976. She was allocated the land in 1977. When she went to the sugar plantation it was in bad shape. The tea plantation had turned into wild forest. Her business in molasses collapsed and she stopped producing molasses. The Obote soldiers as they ran away set fire on the banana plantation and sugarcane. She left the area for a short time. She planted maize and was contemplating of planting wheat. She lamented that the estate was in bad state. She had workers there. She could not begin the jaggery because the machineries are gone.

DW2 the Regional Manager Custodian Board for Toro, Bunyoro, Kasese, Bundibugyo, Hoima and Masindi conceded surprisingly that P.W.1 was the owner of the land at Bulyambuzi. I use the word surprisingly because in their written statement of defence the defendants denied that the plaintiff was the proprietor of the suit premises. His testimony however was to the effect that the actual owner of the land at Bulyambuzi was the plaintiff. The latter succeeded his father who passed away. The Custodian Board could continue paying the ground rent whenever claimed. They did not pay the grounds rents to PW1 because he had never requested for it. If PW1 asked for it they would still pay him. DW2 had never seen an application by the plaintiff. If he received one he would recommend him to the headquarters of the Custodian Board in Kampala. Cases like the instant one where a Ugandan leases properties to Asians such case goes to the verification and negotiation committee. DW3 was quoted by him PW.2 as having had a similar situation like that obtaining of the plaintiff.

Turning to the issue I have already found that P.W.1 was the registered proprietor of the demised land and there was a lease agreement between him and the lessees the Asians.

The learned counsel appearing for the defence submitted that the lessees were among the many people who were expelled in 1972 and legislation was promulgated vesting certain properties

into the custody of the board. That DW3 had continued to earn his living through rents. After 1989 the plaintiff has not persuaded the court that he had tried to ask for the rents from the Custodian Board nor had he shown that his application for rent had at any one stage been rejected outright. The board could not have considered what was not tendered before it. That explained why Mr. Manyindo had not been paid rents but Musisi (DW2) assured court that it is not too late in the premises. The learned counsel continued that the property was turned to the owner on 3/6/1991 under certificate No. 0572 and the certificate was signed by the Minister of Finance. And that if the plaintiff applied he would be considered under section 4 & 5 of the expropriated property Act 1982 but as the case stood the plaintiff had no relief and if he had any the proper person to proceed against were not the defendants.

Mr. Musana counsel appearing for the plaintiff submitted that the land never vested in the first defendant and Act 9 of 1982 was not applicable to the instant case. I seem to agree with the learned counsel over this matter. In Evaristo Mugabi vs. Ag. H.C.C.S No.136 of 1984. There the owner of the land was Ugandan and he leased his land to various Asians when those people left the Minister purported to repossess the land. It was held that the Custodian Board should not have taken over because the properties belonged to a Ugandan and so the certificate signed by the Minister, of Finance did not affect the land.

Turning to the instant case P.W.1 was a Ugandan and the registered proprietor of the demised property which he had leased to the departed Asians. Since the land belonged to an indigenous Ugandan it was not affected by the Assets of Departed Asians decree, Decree 27 of 1973. The properties therefore never vested in the first defendant and also the same properties were not affected by the Expropriated properties Act 1982 since they never vested in the government and were never transferred to the Custodian Board. See section 1(i)(a) of the said Act. In the premises the certificate signed by the Minister returning the demised land to Jeraj & Karmal the leases was to say the 1east of no effect as regards the rights of P.W.1 over the suit land.

I am of the view that PW.1 could exercise his rights of re-entry because of the following reasons. No rents have been paid to since November 1989. It is inconceivable that the plaintiff had to run after the Custodian Board in order to have the rents paid. That would make him look like a beggar. On the contrary the Custodian Board had to look for him. It is now a period of almost

three years when the plaintiff had not received his rents. Under S. 102 of the Registration of Titles Act it is implied in the lease that if the lessor does not receive the rents for a period of thirty days even without demanding for the same the lessor could re-enter upon and take possession of the leased property.

Another reason why I feel PW.1 could re-enter and take possession of the demised land the lease clearly provides that the demised land shall be used for Agricultural purposes. Since 1972 this covenant has not been followed. There was evidence from both PW.1 & DW1 that the land has grown bushy and that DW1 had failed to maintain it and was trying to borrow money and rehabilitate the land. DW1 had introduced a lot of new things on this land. In Victor Namanyanja vs. D.A.P.C.B. HCB (1986) P.4 the Asians were leased the property for residential purposes by the plaintiff and when they left the D.A.P.C.B. took over and the property was used as a school and the rents were in arrears. It was held that the defendant had disobeyed and was guilty of the fundamental breach of the contract and the plaintiff was entitled to re-entry. I am of the view that PW.1 was entitled to the remedy he is seeking but of course the court should not lose sight of the fact that the instant case was not governed by Decree 27 of 1973 and Act 9 of 1982.

The sum total of all this is that, the seventh issue in the affirmative.

As regards the eighth issue, whether the plaintiff was entitled to re-entry because of non payment of rent failure to use the land and because of abandonment. This issue has been covered when considering the seventh issue and I do not think have got anything useful to add.

And as regards the ninth issue, whether the plaintiff had rightly exercised his right of re-entry. On the available evidence this issue is also in the affirmative.

In the end I find that the plaintiff has proved his claim on a balance of probabilities and I give this judgment in his favour and make the following orders.

1. A declaration that the lease of the suit property never passed on the first defendant.

2. A declaration that the allocation of the suit property to the second defendant was unlawful and ineffectual.

3. A declaration that the plaintiff was entitled to re-entry.

Under section 113 of the Registration of Titles Act Cap 200 the Chief Registrar of Titles is enjoined to remove the lease encumbrances from the title to Burahya a Free hold Register Block 31 Plot 2 land at Bulyambuzi and enter the same in the Register Books.

(b) The Plaintiff is awarded costs of this 5uit,

However before I leave this case 1 have got one comment to make Mr. Musana the learned counsel representing the plaintiff was at one time called as a witness by the late Nyakabwa (from M/S Nyakabwa & Co Advocates) counsel then appearing for the plaintiff. Mr. Musana (PW.2) was the legal assistant in the said firm and was called to identify and tender in evidence a document he drafted and signed on behalf of the firm. When Mr. Nyakabwa passed away before completing the case Mr. Musana ok over. (Mr. Nyakabwa had closed the plaintiff's case). There was no objection from the defence. I am aware of the rule of practice that an advocate should not act as a counsel and witness in the same case See **Jaferali & Another vs. Borrison and another [1971] EA P.165.** I have also read other cases on the same subject like Gandesha vs Killing Coffee Estate Ltd & Another [1969] EA p.299 and I am of the view that no injustice was caused in the circumstances. Mr. Musana merely tendered in a document on the part of the parties he was representing.

I. MUKANZA

JUDGE

21/1/1992