IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 950 OF 1988

BANK OF UGANDA .... PLAINTIFF

Versus

MALUKU INTER GLOBAL TRADE .... DEFENDANT

Before: The Honourable Mr. Justice C.M. Kato

JUDGMENT

The plaintiff in this suit is the Bank of Uganda and the defendant is a company known as Maluku Inter Global Trade Agency Ltd. hereinafter to be referred to as the plaintiff and defendant respectively. The suit was originally filed under summary procedure but the defendant successfully applied for leave to defend it. By his claim the plaintiff is praying this court to award him 580,000/= (old currency) being rent due from the defendant and vacant possession of the suit property known as Plot 30 Obote Avenue or Republic Street situate at Mbale Municipality, the Plot is also referred to as Leasehold Register Volume 1286 Folio 16 Plot 30. The defendant made a counterclaim which he prayed for a declaration that the sale of the premises to the plaintiff was void due to fraud, and undue influence, an order for cancellation of plaintiff's certificate of title and general damages under section 186 of the Registration of Titles Act.

The brief facts of this case as may be gathered from the pleadings and the evidence as adduced in court are that sometime in 1973 the suit premises were leased to the defendant by Mbale Municipal Council for a period of one year on yearly renewal basis until termination of the tenancy by either party giving one month's notice of such termination (see Exh.P3). The tenancy agreement between the defendant and the Municipal council eventually came to an end and the defendant applied for renewal of his tenancy which was not granted instead the premises were allocated or leased, to the plaintiff as from 1/11/82, this initial lease was for 5 years (see Exh.P1); when the 5 years lease expired the plaintiff obtained an extension of 3 years.

C.M. KATO J

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It is the plaintiff's case that when the premises were leased to him he became entitled to receive rent from the defendant and he was also entitled to vacant possession but the defendant has neither given vacant possession nor paid rent to the plaintiff. On his part the defendant says that he has been unable to give vacant possession and pay rent to the plaintiff because of the wrongful manner in which the defendant alleges the plaintiff obtained the premises and because of the confusion created by Mbale Municipal council in relation to the suit property.

At the hearing of this case 4 issues were framed and agreed upon by both sides. The four issues are:-

1. Whether the plaintiff is the lawful leasee of plot 30 Obote Avenue or Republic Street at Mbale.
2. If the answer in No.1 is in the negative, why not?
3. If the answer in No.1 is in the affirmative, what remedies are available to the plaintiff?
4. What remedies, if any, are available to the defendant in respect of the counterclaim?

I propose to deal with these 4 issues in the order in which they are listed starting with the first issue. It is the case for the plaintiff that he (plaintiff) was lawfully granted the lease in respect of the plot now under dispute, the first lease was for five years and when it expired it was renewed for a period of 3 years. On the other hand the case for the defence is that the plot was leased to the plaintiff through some fraudulent practices, therefore the whole transaction is null and void.

It is not in dispute that this same plot was leased to the defendant on yearly tenancy from 26/1/73 as per Exh.P3 and that when the defendant's tenancy expired the same plot was leased to the plaintiff for a period of 5 years from 1/11/82 as per Exh.P1 and when that lease expired in October 1987 it was extended for another 3 years as per Exh.P2. There is also the evidence of David John Kabagyema Behena PW1 and that of Eriabu Mutago. (DW2) which is clearly in support of the above facts. It is my finding of fact that plot No.30 Obote Avenue (also known as Republic Street) at Mbale was leased to the plaintiff as per Exh.P1 (certificate of title for 5 years) and Exh.P2 (extension of lease for 3 years).

There is, however, a pertinent question which must be answered and that question is whether the plaintiff obtained the lease lawfully; another way of putting the same question across is whether the plaintiff is the lawful lessee of the plot in question. Mr. Nkambo Mugerwa counsel for the plaintiff maintained in his submission that the plaintiff was the lawful lessee of the property under dispute; but Mr. Odimba who appeared for the defendant was quite adamant that the plaintiff had obtained the property through fraudulent means and as such he (plaintiff) could not be treated as a lawful lessee. Among the grounds advanced by the defense in support of their assertion that the property was fraudulently leased to the plaintiff are that the defendant as a sitting tenant was entitled to priority over any other applicant including the plaintiff; that the defendant's application was never considered when the lease was being granted to the plaintiff; that the defendant was never informed of the fate of his application for the same plot; that the plaintiff applied for the property before it was advertised and that when the property was advertised he (plaintiff) never replied and finally that the property was leased to the plaintiff by one member of the Municipal Council on tribal grounds. I will deal with these points briefly one after the other, but before I do that I would like to refer to the established principles of the law governing acquisition of property by fraudulent means. It is trite law that any transaction which is tainted with fraud is void and null ab nitio: John Katalikawe v William Katwiremu and Oneziforo Bakampata (1977) HCB 189 at page 191, and Marko Matovu and 2 others v Mohamedi Seviri and another (1979) HCB 174 at page 177. The other principle of the law which concerns fraud is the aspect of onus and standard of proof. It is the general principle of our law of evidence in civil matters that he who alleges must proceed to prove his allegation in order to establish his case: (See section 100-102 of the Evidence Act). Regarding the standard of proof, it is now a settled law of this land that in cases of fraud there must be strict proof although such proof may be inferred from surrounding circumstances of each individual case:

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Ratilal Gordhanbhai Patel v Lalji Makanki, (1957) EACA 314 at page 317, B.E.A. Timber Co. v Inder Singh Gill (1959) EACA 463 at page 469 and The Uganda Native Trading Company Ltd. v Auguste Muwumba (1956) 23 EACA 62 at page 64.

Having stated the law thus, I must now turn to the points raised by the defence in a bid to establish fraud on the part of the plaintiff or those who leased the property to him (plaintiff). The first of these points is that of the defendant having been a sitting tenant. Mr. George Maluku the managing director of the defendant company testified that as a sitting tenant the defendant company ought to have been given priority over any other applicant and that when he petitioned the president on behalf of the defendant over the same issue the president had agreed with him and had directed that the defendant company should have been given priority but that directive was not carried out by Mbale Municipal Council. His witness Mr. Eriabu Mutago (DW2) who is a senior staff surveyor, however, while under cross-examination stated that when there is a Government Project such project takes priority over any individual project when considering leasing of land. In my view the fact that the defendant was occupying the property at the material time did not give him an absolute right to have his application for a lease to be granted to him, there must have been some other matters to be taken into account before his application could be granted or refused; Mr. Mutago was clear in his statement when he said that Government Projects take priority over private undertakings, I consider that to be a good public policy. The Bank of Uganda is a government body and when it applied for the same plot with the defendant which is a private company the Bank had to be given priority. I do not see any element of fraud in the plaintiff's application having been preferred to that of the defendant. The position would possibly have been different if the defendant had made some material development on the property, but there was no evidence to that effect.

Another point raised by defence complaining about the fraudulent way the plot is alleged to have been leased to the plaintiff is that the defendant's application was never considered when the lease was being

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granted to the plaintiff, I find no merit in this argument as there is no evidence to support it since the defendant's representative was never at the meeting which decided on the matter his allegation that defendant's application was never considered is a matter of speculation.

There was also a complaint by defence that the defendant was never informed of the fate of his application. There is annexture "C" to the plaint which is a letter written to the defendant's Managing director informing him that the plot in dispute had been leased to the plaintiff with effect from 1/11/82, this letter is dated 6/1/84. Although the letter did not expressly tell the defendant that his application for the plot was unsuccessful but by all the necessary implications the defendant as a prudent person should have known from that letter as to what the fate of his application was because in that same letter the defendant was being advised to negotiate with the plaintiff bank if he (defendant) wished to continue his tenancy on that plot. It is true that the Municipal Council took unreasonably long time to communicate with the defendant about the matter but that is not the same as saying that the defendant was not informed about the fate of his application nor can such a delay without more be treated as conclusive evidence of fraud on part of the plaintiff who was not supposed to inform the defendant as to the fate of his application. I find defendant's complaint on this point baseless.

The next ground of contention with respect to the alleged fraud is that the plaintiff applied for the plot before it was advertised and that when it was advertised the plaintiff did not re-apply. This point would have taken me quite some time to deal with but Mr. Mutago (DW2) made my tas a bit light, when he stated in answer to a question '

by Mr. Nkambo Mugerwa that the Municipal Council had discretion to consider even those applications which were submitted before the advertisement was made. I see no harm in that practice so long as it is not carried out to the prejudice of any body, in the present case I do not think the procedure was in any was prejudicial

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to the interests of the defendant since he in fact applied after the advertisement was made and it would seem that his application failed just because it was competing with a Government Organisation but not because the plaintiff had applied before the plot was advertised. The fact that the Municipal Council used its discretion to handle an application which it received before the property was advertised does not per se prove that there was fraud on the part of the plaintiff.

The last major point raised by defence in connection with this issue of fraud is that the lease was granted to the plaintiff by one member of the council on tribal grounds. This allegation took me by surprise because I cannot see how an institution like the Bank of Uganda could be favoured on tribal ground when this bank has no tribe at all. Be that as it may, there was no evidence adduced to prove that any employee of the bank directly or indirectly used his tribal influence to have the property leased to the plaintiff bank. In paragraph 3 of written statement of defence it was alleged that the decision to have the plot leased to the plaintiff was made by one councillor who was by then the deputy Mayor on tribal grounds under shroud of secrecy as per annexture "G" to the written statement of defence. I have looked at the annexture which is a letter written to the Town Clerk of Mbale Municipal Council by DW1 confirming telephone conversation which had taken place between the two men that morning (24/7/84). The substance of that letter as far as this particular point is concerned is that the Town Clerk had told DW1 on telephone that one councillor had on tribal discremination "manoeuvered to arrogate to himself all council powers and had prevented the Town Clerk from informing DW1 of the offer." The Town Clerk was not called by defence to confirm that what is contained in annexture "G" to the written statement of defence is in fact what they had discussed on telephone, that annexture cannot therefore be taken as conclusive evidence of what was said between the Town Clerk and DW1.

At the hearing of this case minutes of the meeting which approved the plaintiff's application to have the plot allocated to him were produced, although not tendered as an exhibit, I looked at the minutes and it was quite clear that that meeting was attended by several people but not by one councillor as the defence is suggesting in their pleadings and in court. I dismiss this claim by the defence that the plaintiff's application was granted by one councillor on tribal grounds as groundless.

Having said all that, I must say in the end that the claim by defence that the property under dispute was allocated to the plaintiff fraudulently cannot be sustained, The defendant has, in my opinion, failed to establish fraud on part of the plaintiff or any other person to the standard required by law; in coming to this conclusion I have been greatly assisted by the decision of this court in the case of: Francis Butagira v Deborah Namukasa High Court Civil Suit No. 1357 of 1986 (unreported) and the law as stated on page 657 paragraph 1268 in 3rd Ed. of Halsbury's Laws of England Volume 17.

That takes me back to the question of whether the plaintiff is the lawful lease of the suit property; as stated earlier in this judgment, case for defence in attacking the plaintiff's title is based on fraud. Having held that the defence has failed to establish fraud and in view of the fact that the plaintiff was issued with a lease title for 5 years (Ex.P1) which was renewed for further 3 years (Ex.P2) and in view of the provisions of section 56 of the Registration of Titles Act, I hold that the plaintiff is the lawful leasee of plot 30 Obote Avenue also known as Republic Street situate in Mbale Municipality. That finding disposes of the first issue in this case and leads me to the second issue.

There is not much to be said in respect of issue No.2 because that issue was framed in a way that it anticipated a situation where issue No.1 would be answered in the negative but since

issue No.1 has been answered in the affirmative then issue No.2 does not arise. Even if issue No.1 had been answered in the negative as the question in issue No.2 had presupposed, still there would have been no difficulty in answering that question because the reasons for the negative answer in issue No.1 would have been given in the course of dealing with that issue (No.1) as indeed has been the case.

Regarding issue No.3 I feel a number of points must be considered in determining what remedies are available to the plaintiff. In the plaint the plaintiff prayed for 3 items viz:

(a) Rent due amounting to 580,000/= (Old currency)

(b) Vacant possession of suit property.

(c) Costs of this suit.

When making his submission, however, Mr. Nkambo Mugerwa introduced the issue of mesne profits which he felt should be paid to the plaintiff at the rate of 30,000/= per month starting from July 1985 which he calculated to amount to 1,290,000/= (new currency) for a period of 43 months.

Both advocates, Mr. Nkambo Mugerwa and Mr. Odimbe, who appeared before me in this case addressed me to a considerable length on this particular issue of remedies which the plaintiff may be entitled to get in this case. Mr. Nkambo Mugerwa maintained that the plaintiff was entitled to vacant possession of the premises plus rent as claimed in the plaint and mesne profits of 1,290,000/=. He argued that the defendant is not a trespasser but the plaintiff's tenant and since the defendant was still on the premises he should pay the rent still owing.

On his part Mr. Odimbe strongly argued that no evidence was called to prove that the defendant owed 580,000/= to the plaintiff and no evidence was adduced to indicate as to how the plaintiff came to that figure. He further argued that there was no evidence establishing the landlord/tenant relationship, between the plaintiff and the defendant as there was never any agreement

between them spelling out the amount of rent, and that the Municipal Council continued to collect rent even after the property had been leased to the plaintiff. In Mr. Odimbe's view the proper remedy for the plaintiff would have been permanent injunction restraining the defendant from occupying the premises and the action should have been founded in trespass, and that the plaintiff's action for rent and eviction should not be maintained; he supported this argument with the authority of the cases of: Mayo Drifti Farm Ltd. v Theuri (1973) EA 114 and Uganda Posts and Telecommunication v East African General Insurance (1983) HCB 36. In the alternative he argued that there was no cause of action as the claim had been overtaken by events after the expiration of the original lease on 30/10/87. On the issue of mesne profits Mr. Odimbe submitted that such claim should not be granted as it was not pleaded in the plaint.

I will start with the question of 580,000/= (old currency) which was claimed as rent. I must express my agreement with Mr. Odimbe's contention that no evidence was ever adduced to prove this amount or how it was reached. John Behena (PW1) who was the only witness to testify on behalf of the plaintiff did not in his evidence make any reference to the defendant owing to the plaintiff 580,000/= as rent. It is not enough for the plaintiff to allege in the plaint that the defendant owes him so much, that claim must be supported by evidence and there must be some explanation as to how the plaintiff came to that figure. It is cardinal principle of our law of evidence that the plaintiff must fail if he does not discharge the burden placed upon him to prove what he claims (see sections 100-102) of the Evidence Act). The only basis upon which the plaintiff is claiming rent from the defendant is that when the plaintiff had the premises leased to him the defendant automatically became liable to pay rent to him. In my opinion that assumption cannot be sustained here because it is not known whether the defendant's yearly tenancy agreement with the Municipal Council

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was still running when the property was leased to the plaintiff, if that tenancy was still operative then the plaintiff would either have been entitled to get the rent which the defendant was paying to his old landlord or negotiate new rent. The matter has been made worse by the absence of any piece of evidence by the plaintiff as how much the defendant was paying to the Municipal Council at the time the plaintiff had the property leased to him. On his part the defendant says that he could not pay the plaintiff any rent because he was confused as to whom he was to pay the rent as the Municipal Council was also demanding rent from him, this partial admission for none payment in itself does not help to prove that the plaintiff is entitled to get what he is claiming. It is my holding that the plaintiff has failed to prove to the satisfaction of this court that the defendant owes him a sum of 580,000/= as claimed in the plaint.

I now turn to the issue of eviction of the defendant or giving of vacant possession to the plaintiff. As I earlier pointed out in this judgment, Mr. Odimbe was of the view that the remedy of eviction was not available to the plaintiff and he relied on the two authorities which I have already mentioned but which I shall have to refer to later. Before the issue of this remedy can properly be resolved it is important to resolve the question of whether the defendant is a trespasser on the plaintiff's property. According to the evidence of PW1 after the bank had been allocated the suit premises, he (PW1) went and informed the defendant about the matter and wanted to have the defendant evicted but the defendant's agent refused to leave although the other tenant Matilda Lubanga left. There is also annexture "C" to the plaint by which the defendant was specifically told that if he wished to remain on the premises he had to negotiate with the plaintiff bank but no such negotiation ever took place. It is my considered opinion that the defendant company's refusal to leave the premises coupled with failure to pay any rent and his continued stay on the premises amounted to an act of trespass this view was shared by Mr. Odimbe when he suggested that as the

defendant was a trespasser the plaintiff's remedy should be for an injunction.

After holding that the plaintiff is a lawful lease of the suit property and that the defendant company is a trespasser upon that property, I must now proceed to consider whether the plaintiff is entitled to the remedy of eviction of the defendant from suit premises and vacant possession. According to the argument of Mr. Odimbe the plaintiff cannot maintain an action for eviction when the tort is essentially that of trespas he placed much reliance on the cases of: Moya Drift Farm Lts. v Theuri (1973) EA 114 and Uganda Posts and Telecommunications Corporation v East African General Insurance 1983 HCB 36, where he said that the court had held that where a person has refused to leave premises the lease cannot obtain an order for eviction but he can only be granted an injunction. I have carefully read the two cases and I must say with all due respect to the learned counsel that he did not read those two cases properly. In Moya's case an order of eviction was granted and injunction was only granted as an inciliary remedy, spry (V.P. as he then was) and Sir William Duffus (P. as then was) at pages 116 and 117 respectively emphasised that where a tenant refuses to leave premises the landlord is left with no alternative but to seek for an order of eviction or repossession. In that case an injunction was only granted due to the plaintiff's fear that if it was not so granted the defendant might continue to disturb him even after the eviction order had been granted. In the case of: Uganda Posts and Telecommunications Corporation (supra) this is what the Court of Appeal for Uganda at page 37 had to say: "Where the tenant refuses to quit premises after receiving a notice terminating the tenancy, the landlord has no aption except to bring a suit to recover possession from the tenant. The landlord cannot obtain judgment for ejectment of the tenant on a notice of motion as this would be a wrong procedure." No where in these two cases has it been mentioned that eviction from or repossession of

premises cannot be obtained in trespass. In the latter case the court only ruled out the procedure of obtaining such a remedy by a notice of motion, but in the present case the remedy is being sought by means of a suit. Mr. Odimbe's insitence that the plaintiff should have sued in trespass for injunqtion is not certainly supported by the authorities which he cited, if anything those x authorities are only speaking in favour of the plaintiff getting the remedy of vacant possession which he pleaded and prayed for in the plaint.

Considering the decisions in the two above quoted cases and the evidence on record I feel that the plaintiff is entitled to vacant possession of the suit premises known as plot 30 Obote Avenue/ Republic Street situate at Mbale municipality. An order for immediate eviction of the defendant, his agents or servants from the said premises is accordingly made. That takes me to the claim for mesne profits amounting to 1,290,000/= I do not intend to waste much time on this particular point as it was something of an after thought. The plaintiff did not include this claim in his pleadings it just came up during the course of the hearing of this case. I do not see how that claim can be intertained without seriously offending the provisions of order 6 rule 6 of Civil Procedure Rules which require a party to stick to his pleadings. I entirely agree with Mr. Odimbe when he says, in his reply to Mr. Mugerwa's submission, that mesne profits should be pleaded; a similar agument was upheld by this court in a recent case of: Madatali Bagarali Mulji Hudo and 4 others v The Attorney General (high Court Miscellaneous Application No.46 of 1987 unreported). The claim for mesne profits is accordingly rejected and that puts to an end issue No.3 and leads me to issue No.4 in these proceedings.

Before I advance towards the counterclaim which was filed by the defendant I find it necessary to dispose of Mr. Odimbe's alternative submission which was that the plaintiff's suit should be dismissed, because there is no cause of action as the whole

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matter has been overtaken by events in that when the plaintiff's lease expired on 30/10/87 he lost interest in the subject matter of this case. This suit was filed on 13/6/85 according to the record on the file and the original lease expired on 30/10/87 which means by the time the suit was filed the plaintiff was in fact entitled to a cause of action. According to Exh.P2 when the original lease expired it was renewed effective from 1/11/87 which means that the plaintiff has been continously the lawful leasee of the property from 1/11/82 and that entitled him to maintain an action in respect of that property. Mr. Odimbe's alternative submission in this case must fail, it is accordingly rejected.

I find this to be an appropriate moment to deal with the defendant's counter-claim, which is issue No.4 in these proceedings, The defendant in this counterclaim is substantially seeking for 3 main remedies namely:-

(a) A declaration that the plaintiff's acquisition of the property under dispute was null and void due to fraud and undue influence.

(b) An order directing the Registrar of titles to cancel the certificate of title issued to the plaintiff. This claim was however abandoned by Mr. Odimbe during the course of his submission.

(c) General damages under the provisions of section 186 of the Registration of Titles Act.

There is no doubt that the claim for all those remedies was grounded on the defendant's contention that the plaintiff obtained the lease by fraud and undue influence. I have dealt with the issue of undue influence and fraud at a great length when considering issue No.1 and having found on that issue that there was no fraud on the part of the plaintiff or any other person I find no legal basis upon which the defendant can be awarded the remedies prayed for in the counterclaim.

Apart from the remedies prayed for in the counterclaim the Managing Director of the defendant company while in court stated that the company had lost a deal of supplying 2000 boxes of cigarettes papers to B.A.T. and these papers were supposed to earn the defendant a commission of 5% which

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came up to 75,000 dollars per year, but because the premises were under dispute a licence could not be issued to him to operate any business in the same premises. According to him (D.W1) the agency was given to the defendant company in 1983. According to annextures "B", "C" and "E" to the written statement of defence which are letters dated 2/1/81, 11/6/81 and 8/6/82 respectively, it is quite clear that by 11/1/83 when the company accepted the order of 2000 boxes the same defendant company was fully aware that the premises were a subject of sale at any time to anybody. The defendant company was wholly to blame for having accepted such an offer without ascertaining the availability of premises. It was quite wrong for the defendant's Managing Director to assume, as he did, that the premises would automatically be leased or sold to the defendant company. At any rate I do not see any piece of evidence showing that at the time the plaintiff applied to have the property leased to him it was within his contemplation that the defendant company was involved in such type of business, I consider such a claim too remote as far as the plaintiff in this case is concerned, in fact by the time the property was leased to the plaintiff on 1/1/82 the defendant company had not even embarked on that sort of business. It is not known why the defendant did not cancel the order immediately he received the quit notice from the plaintiff dated 30/3/84 (annexture "H" to the written statement of defence). The claim for 75,000 dollars cannot succeed it is accordingly rejected as being too remote.

The final outcome of this suit is that judgment is entered in favour of the plaintiff to the extent that the defendant must give immediate vacant possession to the plaintiff in respect of plot 30 Obote Avenue also known as Republic Street at Mbale Municipal Council an order for the defendant's immediate eviction is accordingly made forthwith. The plaintiff's claims for rent and mesne profits are rejected for reasons given in this judgment. The defendant's counterclaim is dismissed. The defendant is to pay the plaintiff's costs of this suit and counterclaim.

C.M. Kato
Judge.
23/2/89.