

HOLDEN AT KAMPALA.

CIVIL SUIT NO. 611 OF 1981.

MARGRET KIWANA.....PLAINTIFF.

VERSUS

EDWARD KIBALAMA.....DEFENDANT.

ELIAZALI NENDE.....DEFENDANT.

BEFORE- THE HONOURABLE MR. JUSTICE S.T. MANYINDO.

JUDGMENT.

The plaintiff brought this suit against the defendants inter alia for general damages for trespass and for an order evicting them from her land.

When the suit came up for hearing learned counsel for the defendants made a preliminary objection; that this court had no jurisdiction to try the suit which concerned customary holding of land which under section 219 (2) (a) of the Magistrates' Courts Act must be filed in a Grade 11 Magistrates' Court, that is, in the lowest Magistrates' Court.

I over ruled that objection for reasons to be given in my judgment. I will now give them. Under section 3 of the Judicature Act the jurisdiction of this court in civil matters is unlimited. I agree with the decision of Saied, J. (as he then was) in the case of Munyagwa - Nsibirwa v. Lucy Kamujanduzi HCCS NO. 594 of 1971 that the institution in a court of a higher grade of a suit which should have been filed in a lower court is only an irregularity in procedure and it does not affect the jurisdiction of the court.

Obviously the party filing such a suit would, if successful, normally get costs on the scale of the lower court.

Learned defence counsel did not cite any authorities in support of his proposition. Perhaps he could have cited the case of Peter Oweka v. Dominiko Achaye High Court Civil Appeal No. 70 of 1975.

In that case the plaintiff filed his suit which was governed by Civil customary law in the Chief Magistrate's Court.

The Chief Magistrate dismissed the suit on the ground that it

should have been filed in the lowest Magistrate's Court. On appeal to this court his decision was upheld by Lubogo J. (as he then was). With respect, I prefer the decision in Munyagwa Nsibirwa (supra). It should also be noted that under section 219 (2) (a) of the M.C.A. in cases governed by civil customary law the jurisdiction of the Chief Magistrate and a Magistrate Grade 1 or 11 is unlimited. It seems clear to me that the Chief Magistrate was competent to try that case.

Clearly the Chief Magistrate also erred in dismissing the suit. He should have acted under section 229 M.C.A. and moved this court to transfer the suit to another court.

It was for these reasons that the preliminary objection failed. I will now go on to consider the case on its merits.

Four issues were framed for determination. They are-

- (i) whether the defendants are trespassers on the plaintiff's land;
- (ii) ~~whether they are~~ ~~subfeudal~~ customary tenants;
- (iii) whether the plaintiff is entitled to vacant possession of the land now occupied by the defendants and
- (iv) whether, if the defendants must be evicted, they are entitled to compensation,

That the land in question belongs to the plaintiff's late husband, Aristaliko Kiwana, is not disputed. The plaintiff is the legal representative of the estate of her late husband, she having taken out letters of administration of the late Kiwana's estate from this court on 2/16/73.

The land in question is comprised in mailo register Kyadondo Block 254 plot 5 situate at Nabutiti and Kasanga villages in Gaba near Kampala. The plaintiff has since sub-divided that land into several plots (plot Nos. 341 to 348) and she has separate titles in respect of each plot. The first defendant (Kibalama) lives on plot No. 345 while the second defendant (Nende) lives on plot No. 348. These facts are not disputed.

According to the plaintiff the defendants put up their residential houses on the respective plots in 1979, between September and December. She immediately told them, through her lawyers, to stop

Under cross-examination he said "Yes, in 1977 the defendants were still living in my house. That is when I gave each of them a plot of land. I never made them independent tenants. I can throw them away if I like. They would have to pull down their houses. They are my tenants. They are not tenants of the plaintiff." And in re-examination he said "I allowed the defendants to build their houses on my Kibanja but the Kibanja remained my property."

The defendants called two more witnesses, Emanuel Kayemba (DW4) and Lukwago (DW5). This smart elegant and eloquent 74 year old Kayemba was, to use an old jargon intoxicated by the exuberance of his own verbosity. He took time to spell out his qualifications which he obtained from here and abroad. He also outlined his long and quite impressive career in public life.

He claimed to be an expert on Kiganda customary land tenure. It was his evidence that when a tenant gives part of his Kibanja to his son or sons he must introduce the child or children to the landowner who would then recognise them not as tenants but as members of a tenant's family. If the children or sons are not formally introduced to the land lord they remain under the wings of their father. After introduction the son could (before payment of busulu or rates was abolished by Decree No. 3 of 1978) pay busulu and become an independent tenant. This fact was confirmed by 72 year old Jamada Lukwago (DW5). This witness stated that a person cannot acquire a Kibanja without the authority of the land owner.

DW5 contradicted Wilson Lule (DW3) and DW4 in that he stated that once a father has assigned land to his son he cannot evict the son from that land and that even the land lord cannot do so without payment of compensation. However, he agreed that it is essential for the father to introduce his son to the land lord before the son can be accorded recognition. He did add also that the son would become a tenant only after payment of busulu to the landlord.


On the above evidence I find that the defendants occupy the plaintiff's land without her authority. They are there under the

wings of their father. Since they now live independently of their father, their act of separate establishment on the plaintiff's land amounted to trespass on the plaintiff's land. The first issue is therefore answered in the affirmative.

Since the defendants have never been introduced to the plaintiff's land, they are not her customary tenants. This disposes of the second issue.

As the defendants are trespassers the plaintiff is entitled to have vacant possession of the land they now illegally occupy. Clearly the defendants are not entitled to any compensation. Accordingly I give judgment to the plaintiff. It is ordered that the defendants shall give vacant possession of the said plots 345 and 348 within thirty days from the date of this judgment - that is to say by 15/6/82

They will also pay her the costs of this suit.


S.T. Manyindo,

Judge.

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14/5/82.