



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MADAN & POTTER JJ A, KNELLER Ag JA)

CIVIL APPEAL NO 46 OF 1982

KIUNGANI FAMERS CO LTD.....APPELLANT

VERSUS

MBUGUA.....RESPONDENT

JUDGMENT

(Appeal from a judgment of the High Court at Eldoret, (Mbaya Ag J) in Civil Case No 51 of 1976 dated 7th May 1982)

October 2, 1982, the following Judgments were delivered.

JUDGMENT

Madan JA The appellant company is the owner of agricultural land LR No 5706 in Trans-Nzoia District. In 1970 the respondent acquired Kshs 1000 shares in the capital of the company in consequence of which, like the other shareholders of the company, he was allocated 2½ acres to cultivate and live thereon with his family. In 1972 the respondent purchased a further 1,000 shares from another shareholder, and he was allocated a second piece of land by the company also to cultivate it and live thereon. The respondent built 3 houses on the first piece, ploughed and planted both portions and cut trees for charcoal. The wood was arranged and stacked. On July 5, 1972 the company's servants and agents took away the wood to the company's dairy and used it to boil water. For reasons not intelligibly stated at the trial the company decided to remove the respondent from the land. He was prosecuted for trespass contrary to section 3(1) of the Trespass Act (cap 294), convicted, sentenced and ordered to:

“remove himself, his family, parents, stock and other property (from the company's land) within three months from November 13, 1972”

the stay being later extended up till December 31, 1973. On September 1, 1972 the respondent was physically chased away from the land by the company's agents. His houses were burnt down and crops destroyed. The respondent ran away to go and live at Kitale. On May 16, 1973 his family, including his aged mother, was forced to leave, they also went to Kitale. The respondent lost all his property such as maize, beans, potatoes, chickens, tables, chairs, cupboards, and other household effects and eats. He itemised his loss and provided details and their value, including the houses, which totalled upto Kshs 29,320 at the trial of the suit which he instituted against the company in the High Court at Eldoret claiming (1) a declaration that he was entitled to reside on and cultivate the two parcels (2) two cows or

their value (3) Kshs 30,620 special damages (4) general damages (5) costs and interest. The respondent claimed the two cows as a shareholder saying that the company gave a cow to every shareholder in respect of each parcel of land held by the shareholder. The learned trial judge held that the respondent was the holder of 1,000 shares in the company but the acquisition of the second lot of 1,000 shares had not been proved. The respondent was living on the land as a licensee only and he could not claim ownership of any portion of the company's land. He was unlawfully evicted from the land without any eviction warrant being issued by the court either in September, 1972 or on May 16, 1973. The court order allowed him to stay thereon until December 31, 1973. The judge also held that as a result of the unlawful eviction by the company's agents the respondent suffered Kshs 29,320 special damages which he awarded the respondent plus a further Kshs 6,000 general damages for harassment and personal suffering. The judge did not allow the claim in respect of the two cows.

The company has appealed on the grounds, first that the lower court erred in not holding that the respondent's eviction in September, 1972 or on May 16, 1973 was lawful as there was no stay of the court order for his eviction; he was lawfully evicted, therefore not entitled to any special or general damages which were also not proved. Secondly, the court erred in awarding damages because the respondent was in contempt of court, thirdly, in not dismissing the plaint because the respondent never joined the persons who destroyed his property and he never proved that they were acting in the course of their employment with the company; fourthly, in not holding that the respondent's claim was time barred for the tort was alleged to have taken place in 1972 and the respondent filed his claim in court more than three years later in 1976; fifthly, damages were awarded contrary to the provisions of the Land Control Act, (cap 302). It is clear that the 1,000 shares allotted by the company to the respondent was a dealing in agricultural land contrary to section 6 of the Act because consent of the land control board was not obtained. The transaction was void for all purposes. Also, therefore, under the provisions of section 7 of the Act the respondent could only recover the consideration paid by him to the company for the shares.

The respondent's cause of action against the company was in no way connected with the void transaction concerning agricultural land, nor was it ousted because he was convicted of trespass. Indeed the judge did not grant him the declaration he had asked for that he was entitled to reside and cultivate the two parcels. That was right. The allotment of shares being void he could not claim any interest in the land. His cause of action arose out of the trespass to his person and property, the wanton destruction thereof, as had a case of trespass as one can imagine by a seemingly powerful company against one of its puny, defenceless shareholders. The respondent was entitled to move out taking his property with him including the moveable building materials for the houses. The company made it impossible for him to do so by burning them down. The respondent's eviction by force before December 31, 1973 was unlawful, and the court having granted a stay of execution until then he was in no way in contempt of court. Even if he was it did not entitle the company to wield the hammer like the Incredible Hulk and destroy his property by what appears as an act of arson. Having taken his money, the chairman of the company who was the only witness for the company brazenly told the court "we chased the plaintiff (respondent) for trespass", and it was decided "to send him out."

The respondent was not obliged to join in the proceedings the servants and agents of the company who destroyed his property, and about whose employment with the company the judge was satisfied, amply justified as it was by the evidence of the chairman of the company. The judge was also satisfied about special damages. He found them proved. For what the company did to the respondent the general damages were mild. The company cannot be allowed to rely upon limitation because it did not specifically plead it as required by O VI r 4 of the Civil Procedure Rules; in addition the plaintiff's cause of action accrued when it became crystallised on May 16, 1973; his suit was instituted on March 31, 1976 well within the limitation period of three years prescribed by section 4(2) of the Limitation Act, (cap 22). In my opinion *Iga v Makerere University* [1972] EA 65 referred to us by Mr Wafula being based upon an express provision of Uganda legislation has no application in Kenya. I would dismiss the appeal. As the respondent or his advocate did not appear at the hearing of the appeal the costs to the respondent will be restricted up to and including the record of appeal.

As Potter JA and Kneller Ag JA agree it is so ordered.

Potter JA. I have had the advantage of reading in the draft the judgment herein of Madan JA. I agree with it and the order proposed and have nothing to add.

Kneller Ag JA. I read the draft of Madan JA and I agree with it and the orders proposed in it.

Dated and Delivered at Nakuru this 2nd day of October 1982.

C.B.MADAN

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

AG. A.A.KNELLER

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JUDGE OF APPEAL

I Certify that this is a true
copy of the original.

DEPUTY REGISTRAR