

IN THE SUPREME COURT OF BELIZE, A.D. 2008

ACTION NO. 509 OF 2002

KEVIN CASTILLO

Claimant

BETWEEN AND

MURLI MAHITANI

Defendant

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Derek Courtenay SC for the claimant.
Mr. Wilfred Elrington SC for the defendant.

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JUDGMENT

It is a matter of some regret that this judgment is only being given now. The press on the Court's time caused by increasing litigation in Belize and the complexity of certain of these cases and the evident lack of sufficient judges to meet the increasing workload of the Court, combined as well to delay judgment in this case. The progress and conduct of the case itself with the unavailability of the defendant because of medical reasons also did not conduce to help matters. However, the delay is much regretted.

2. The case itself arose out of the tenancy of the defendant of some property in Orange Walk Town, which the claimant later acquired. I have advisedly used the neutral word "property" instead of land or buildings because one of the critical issues as it emerged at trial between the parties was whether

it was only land that was rented by the defendant as was vigorously contended for him by Mr. Wilfred Elrington SC, his attorney; or buildings and land and that the defendant later replaced those buildings with others and built on the land. This was again, vigorously contended for the claimant by his attorney, Mr. Derek Courtenay SC.

3. It was originally agreed by the attorneys for the parties that, pursuant to the then Order XXXVI Rule I of the former Supreme Court Rules, they would formulate a Special Case relating to the issues between them for the opinion of the Court. This probably might have expedited the hearing and determination of the issues in this case. But regrettably this was not to be; for even though a Special Case was prepared by the claimant's attorneys and forwarded to the defendant's attorneys, and a copy forwarded to the Court, the defendant's attorney did not sign off on the Special Case. Order XXXVI, Rule II, required the concurrence of the parties to state a Special Case for the Court's opinion. In the event, there was a full blown trial of the case during which both sides offered testimony, including the claimant and the defendant. The trial itself was spread over several months during which other cases were heard and determined by the Court. On 19th April 2005, the Court, accompanied by the claimant Mr. Kevin Castillo together with his attorney, Mr. Courtenay SC and Ms. Lilly Tucker, the second witness for the claimant, as well as Mr. Murli Mahitani, the defendant, together with Mr. Dons Waite who was representing Mr. Elrington SC for the defendant, paid a visit to the **locus** of the claim. That is, the property at the intersection of the Belize-Corozal Road and Yo Creek Road in Orange Walk Town. There the Court was able to view the property in the presence of the parties and their attorneys.

Background to the Case and the Claim and Defence and Counterclaim of the Parties

4. From the pleadings and the evidence, including the documents tendered by the parties, the following can be stated as the background to this case between them.
5. Imogene Ward lived on the property in Orange Walk Town. She occupied a house on it and used two other buildings outside, one as a kitchen and the other was a pit latrine. These three buildings were on the Belize-Corozal Road of the property. There was a fourth building and this was on the corner of the Belize-Corozal Road and Yo Creek Road of the property from which Ms. Ward used to sell plantains and fruits. I got the impression from the description of all these buildings that they were of modest construction and aspect. In fact the house on the property occupied by Ms. Ward as her home was said to be made of pimento and white mall and had a cement flooring with a zinc roof. It was no doubt by today's standards, a very modest abode. But it was nonetheless her castle. Both Ms. Lilly Tucker, a daughter of Imogene Ward, and the claimant himself, testified as to the house occupied by Ms. Ward and the other buildings on the property. Ms. Tucker testified that she lived in the house at sometime and Mr. Castillo said that as a child he used to visit the property.
6. In or about 1973, Mr. Mahitani, the defendant, became a tenant of Ms. Ward. He was involved with a company called Casa Economica in Orange Walk Town that had been granted an agency for the distribution of coca-cola products. The defendant rented the building at the corner of Yo Creek Road and the Belize-Corozal Road. That is the old shop of Ms. Ward. Mr. Mahitani testified that at that time, this building was, in his own words, of *"pimento stick along with in very very dilapidated condition."* As a more sturdy building was needed for his company's warehousing purposes, Mr. Mahitani testified that *"it was just the four walls of this*

premises” that were rented from Ms. Ward, I am satisfied that this building was, with the concurrence of Ms. Ward, replaced with a sturdier structure. This was used for warehousing and later as Mr. Mahitani further testified, let by him to others.

7. Ms. Ward died in December 1978 and her daughter Ms. Lilly Tucker inherited the property. But she lived in Belize City. It would seem that the property was not taken care of. Mr. Mahitani at his own expense, effected certain renovations and improvements to the structure at the corner of Yo Creek road and Belize Corozal Road now let as a shop. He later demolished the dwelling house and kitchen Ms. Ward had occupied, and extended the shop-building along the full length of the Belize-Corozal Road boundary of the property. Ms. Tucker testified that Mr. Mahitani pulled down her mother’s old house and kitchen and extended the construction from the shop, without her knowledge. She only learnt of it afterwards. She however continued to accept rent from Mr. Mahitani which was paid mostly through Mr. Tucker, her husband.
8. On 8th May 2001, Mr. Kevin Castillo, the claimant, was by a transfer certificate of title registered as the proprietor of the whole of the property on which the buildings were situate – see **Exhibit KC 1** representing the transfer certificate of title from Lillian Marie Tucker, to him. He was raised by Ms. Tucker and regarded her as her mother.
9. By a formal notice dated 31st July 2002, Mr. Castillo informed Mr. Mahitani that the property on which the latter was tenant was now vested in him and that all rents due and payable in respect of the premises shall be paid to him or his duly authorized agent – see **Exhibit KC 5**. He later proceeded to determine Mr. Mahitani’s tenancy as from 30th September 2002. On the 1st October 2002 he commenced the present action. By an amended statement of claim filed on 2nd December 2004, Mr. Castillo now

claims from Mr. Mahitani possession of the property together with mesne profits at the rate of \$3,000.00 per month from 1st October 2002 until delivery up of possession by Mr. Mahitani.

10. Mr. Mahitani for his part in his defence and counterclaim dated 29th October 2002, denied that he was a tenant of Mr. Castillo and averred instead that he occupied the premises as a tenant of Lilly Tucker from whom he had received no notice to quit. But more significantly for the issues now joined between the parties, Mr. Mahitani counterclaimed that he is the owner of the buildings on the land at the junction of the Belize-Corozal Road and the Yo Creek – San Antonio Road in Orange walk Town, having constructed them out of his own money. He further avers that the value of the said buildings is \$250,000.00. He further claimed that if, contrary to his defence and counterclaim, it should be found that Mr. Castillo is entitled to possession of the land, he, Mr. Mahitani, seeks to be permitted to remove the said buildings from the land or to sell the same to the claimant or be given whatever relief that may seem fit to the Court.

The Legal Dispute Between the Parties

11. At trial, it was properly conceded by Mr. Elrington SC for the defendant that the notice to quit to his client was valid and that his tenancy should have terminated. But his client's case was that he put up the buildings on the land; and that he rented land not buildings. Therefore, the buildings belong to him. Mr. Elrington argued and submitted that this case falls within section 13 of the Landlord and Tenant Act – Chapter 189 of the Laws of Belize, Revised Edition 2000.
12. Mr. Castillo through his attorney for his part in his reply to Mr. Mahitani's counterclaim says that the buildings do not belong to Mr. Mahitani and that they were erected by him, while a tenant of Ms. Lilly Tucker instead of and

in place of the shop (at the corner of Yo Creek and Corozal – Belize Road) and the dwelling house and kitchen which formerly stood on the land and occupied by the late Ms. Ward, the original landlady of Mr. Mahitani.

13. I should point out here that from the evidence, the renovation to the corner shop and the construction and extension to the space where Ms. Ward's house and kitchen were, took place after her demise. And that Lilly Tucker who succeeded her in title, never occupied or lived on the premises after her mother passed away even after she inherited the property.
14. Before turning to an examination of the legal issues in contention between the parties, I should state that the arrangement between the late Ms. Ward and the defendant Mr. Mahitani, concerning the property, which started sometime in 1973, was, to say the least, very loose. It was however an agreement for a lease. But none of the requirements for a formal lease as stated in section 8 of the Landlord and Tenant Act was observed or complied with. Although made orally, I am satisfied, on the evidence, that Mr. Mahitani entered into possession, at least during the lifetime of Ms. Ward, of the corner shop. Mr. Mahitani testified that after building a wooden one storey structure with the help of his uncle from London, in place of the pimento structure in a very dilapidated condition, this wooden structure at the corner became the victim of crashing vehicles. This caused its demolition and eventual replacement by a cement structure by him.
15. The loose arrangement with regard to the corner shop was somehow extended to other parts of the property. In due course, but during the tenure of Ms. Tucker as successor in title to Ms. Ward, Mr. Mahitani constructed and extended from the corner shop originally let to him, to include Ms. Ward's old house and kitchen. He in turn became a landlord

as he sublet the extra space made available by the extension to other tenants. But the relationship of landlord and tenant continued even during Ms. Tucker's ownership of the property. According to the evidence, Mr. Tucker, Ms. Lilly's husband, was then responsible for collecting the rent from Mr. Mahitani. He stated that the rent was \$500.00 per month and that it had been paid up to April 2009, with a balance of \$200.00 in his favour.

16. I should also state that none of the documents tendered clearly or satisfactorily explained how much rent exactly was paid monthly. Mr. Mahitani in his evidence-in-chief however admitted that he stopped paying rent in 2001 after Mr. Tucker died.
17. I however accept that it is more probable that the defendant stopped paying rent in April 2001 when Mr. Tucker died. And on his own testimony the rent then paid was \$500.00 per month.
18. In the light of the contentions between the parties, the following issues, in my view, arise for determination, viz:
 - i) What did Mr. Mahitani rent – land or buildings and land?
 - ii) Who in law owns the buildings constructed by Mr. Mahitani on the property?
19. Both sides agree that section 13 of the Landlord and Tenant Act is crucial to a determination of the issues between them.
20. Section 13 of the Act provides as follows:

“13. The doctrine of the common law, “quicquid solo plantatur, solo cedit”, shall have no application in Belize to tenant’s fixtures of any kind, and all such fixtures affixed to a tenement by a tenant and any building erected by him thereon for which he is not under any law or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, shall be the property of and be removable by the tenant before or after the termination of the tenancy:

Provided that:

- (a) before the removal of any fixture or building, the tenant shall pay all rent owing by him and shall perform or satisfy all other obligations to the landlord in respect of the tenement;*
- (b) in the removal of any fixture or building, the tenant shall not do any avoidable damage to any other building or any part of the tenement;*
- (c) immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or to any part of the tenement by the removal;*
- (d) the tenant shall not remove any fixture or building without giving one month’s previous notice in writing to the landlord of his intention to remove it;*
- (e) at any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay to the tenant the fair value thereof to an incoming tenant of the tenement, and any difference as to the value shall be settled by the magistrate of the judicial district in which the tenement lies on application made by either the landlord or the tenant.” (Emphasis added. More on this later.)*

Determination

21. Having heard the witnesses in this case, in particular, Ms. Lilly Tucker, the second witness for the claimant, herself the daughter and heiress of Ms. Imogene Ward and the original landlady of Mr. Mahitani, and the testimony of Mr. Mahitani himself, I am convinced and satisfied that it was not **bare** land that he originally rented in 1973 from Ms. Ward, but a building for the purposes of a warehouse.

22. Mr. Mahitani testified that his company was looking for a storage or warehouse facility for coca-cola products of which they had just become distributors in Orange Walk Town. Ms. Ward's property was identified. It is more probable, in my view, that this property, though according to Mr. Mahitani was in "*a very very dilapidated condition*", was nonetheless some physical structure and not just an empty piece of land. It was this structure that, as Mr. Mahitani testified, was, with the help of his uncle from London, replaced with a one-storey wooden building, on the spot where Ms. Ward's old shop once stood. This wooden one-storey building was later replaced by a cement building which was in turn extended to where Ms. Ward's old house and kitchen once stood. This extension was explained by Mr. Mahitani as the result of the vandalization of Ms. Ward's house after her death. The fact remains that the extension certainly involved pulling down whatever remained of that old house and kitchen. In so far as the corner shop is concerned, **Exhibit MM 2**, most certainly belies any suggestion that it was built on empty land. This is a letter dated 26 January 1988 from attorneys for Mr. Mahitani to the Mayor of Orange Walk Town. It clearly states that the work being carried on "*consists simply of the repair of an existing building.*" Mr. Mahitani unconvincingly, in my view, under cross-examination, tried to explain this away by saying it was simply to deceive the authorities about planning provision! I say no more about his credibility on this score. **Exhibit MM1**, a letter dated 21st

January 1988 under the hand of Mr. Mahitani himself to his then attorneys is in much the same vein.

23. Ms. Lilly Tucker testified that the defendant had pulled down her mother's (Ms. Ward's) house and kitchen and that she learnt about this from one of her godson, Philip Mencias, of Orange Walk Town. She testified later than Mr. Mahitani confirmed this to her and that he had extended the corner shop to the spot where the house and kitchen were, so she could get more rent and travel to look after her health. On a visit to the locus Ms. Tucker indicated where her mother's house and kitchen used to stand and pointed out the concrete shop premises now standing in their place.
24. On the totality of the evidence, I am convinced that it was not just land that Mr. Mahitani, the defendant, rented first from Ms. Imogene Ward, but rather a building which she had used as a shop to sell fruits and plantains; and that secondly he continued his tenancy with Ms. Lilly Tucker the daughter and heiress of Ms. Ward. In the course of this tenancy he pulled down the house and kitchen on the property that Ms. Ward had occupied and extended the corner shop by constructing a connecting cement building.
25. I must ineluctably agree with the submission of Mr. Courtenay SC for the claimant that section 13 (reproduced above at para. 20) provides in effect that subject to certain conditions, any building erected by a tenant on his landlord's land shall be the property of the tenant and be removable by the tenant before or after the termination of the tenancy. But section 13 itself states that it is an exception to the common law rule of **quicquid solo plantatur solo cedit**. But within this statutory exception itself there are exceptions as well. These are that exceptions to the common rule **does not in the context of this case apply to any building** erected by the tenant.

- a) *for which the tenant is entitled to compensation under any law or otherwise:*
- b) *which is erected in pursuance of some obligation in that behalf; or*
- c) *which is erected instead of some building belonging to the landlord. (Emphasis added).*

26. From the evidence, though Mr. Mahitani paid for the construction of the present cement structure corner shop and its extension to the spot where Ms. Ward's house and kitchen once stood, I am satisfied that these buildings (that is the corner shop and the cement structure extension) were erected **instead of some building belonging to his landlady,** whether Ms. Ward or later her heiress, Ms. Lilly Tucker.
27. Clearly therefore, in law, the buildings on the property now belong to the claimant in this case. The exception stated in section 13 relating to building built by the tenant **instead or in place of building belonging to the landlord,** clearly would exclude the sturdier cement corner shop and the extensions to where Ms. Ward's house and kitchen stood, from belonging to Mr. Mahitani. I agree with Mr. Elrington SC's submission that the instant case is governed by section 13 of the Landlord and Tenant Act. But in my considered view, on the evidence and facts of this case, the effect of this section is to prevent any of the buildings constructed on the property in place of his landlord's buildings, from belonging to him. All the buildings on the property were constructed by Mr. Mahitani in place of or instead of his landlady's buildings that had pre-existed before his tenancy.

The Buildings and its value

28. It was evident on a visit to the locus that there is on the property a modern reinforced cement concrete structure divided into several shops which were in operation. This is not denied as having been built by Mr. Mahitani and that he sublet the shops in the building. He, in his testimony stated that the value of the buildings was some \$230,000.00 to \$240,000.00. The claimant Mr. Castillo, who is an auctioneer by profession, with some appreciation of the value of real estate however, stated in evidence that the cost of the buildings is in the region of \$30,000.00 with the land costing about \$27,000.00. Mr. Julius Espat, an architect who inspected the building, also gave evidence and was of the opinion that the replacement cost of the building would be about \$70,000.00.

29. It is however my view that in the light of my conclusion on the effect of section 13 of the Landlord and Tenant Act, the value of the building is not germane for the determination of this case. I agree with the submission of Mr. Derek Courtenay SC for the claimant that the section applies or rather its exception of building constructed by the tenant in place of building belonging to his landlord, from being the tenant's, whether or not that building which replaced those which formerly stood on the property is of greater or lesser value.

30. An unstated qualification of the right of a tenant to remove a building he has constructed on the tenement at the end of his tenancy, must in my view, be that the building is of a type of construction that would permit it being moved or relocated. This cannot be said of the building in question here which Mr. Mahitani constructed. It is constructed with reinforced concrete with foundation. I therefore agree with Mr. Courtenay's submission that in the circumstances, it would be impractical to give effect to a major objective of section 13, that is, the removal of the building by

the tenant. But again, this can only be done without avoidable damage to any other building. Therefore even if Mr. Mahitani were to be permitted to remove the concrete cement corner shop, which was within the remit of his original tenancy with Ms. Ward, it is difficult to see how this can be effected without some appreciable damage, which in the circumstances would be unavoidable, to the extension of the building to include the spot where Ms. Ward's house and kitchen stood. There is of course, the option to purchase the building from Mr. Mahitani, which section 13 does allow. But as I have concluded, this is not available in the instant case as Mr. Mahitani built the building in place of buildings belonging to his landlady. I need not pass therefore on the other option canvassed by Mr. Elrington SC for Mr. Mahitani, that he be allowed to demolish or destroy the building. I have found that even though he constructed and extended the building, it does not on the termination of his tenancy, belong to him.

The Claim for Mesne Profits

31. In his amended statement of claim, Mr. Castillo revised upwards from \$500.00 per month to \$3,000.00 per month as his claim for mesne profit, from the 1st October 2002, the date of the termination of Mr. Mahitani's tenancy. The sum of \$500.00 per month was the monthly rent paid by Mr. Mahitani under his tenancy. The sum of \$3,000.00 per month now claimed, is said to be the amount of monthly rent paid by sub-tenants to whom Mr. Mahitani had sublet the several shops in the building.
32. Mr. Castillo testified that the sum of \$3,000.00 per month was what was collected in rental of the shops by Mr. Mahitani. He said that he learnt about this from the tenants in the building.
33. There is no other direct evidence of this \$3,000.00 per month rental but it is not disputed that Mr. Mahitani receives rental for the shops in the building. However, from the evidence, I am satisfied that the rental of the

building under Mr. Mahitani's tenancy was \$500.00 per month. This originally started at \$50.00 per month, then went to \$90.00 per month and finally to \$500.00 per month. It was at this figure that Mr. Castillo, as the new landlord after the devise to him of the property by Ms. Tucker, entered the picture in 2001. He proceeded to terminate Mr. Mahitani's tenancy on 30th September 2002. I am in the circumstances therefore, inclined to accept the sum of \$500.00 per month as the measure of mesne profits since it was the rent he was paying before the claimant became the owner of the property. Mr. Elrington SC for Mr. Mahitani helpfully at trial conceded that his tenancy was validly terminated by Mr. Castillo. Mr. Courtenay SC his attorney drew attention in his written submission to section 12 of the Act which confers a right to an amount of double the yearly rental to the landlord if he is kept out of possession by the tenant after demand and notice in writing to give up possession of the tenancy. This section however is, in my view, applicable to tenants for years or from year to year. The evidence in this case is that Mr. Mahitani paid rent per month and in fact the notice to quite given to him by Mr. Castillo was one for a monthly tenancy, to which I do not think section 12 applies.

Conclusion

34. In the light of my findings in this case, I am unable to uphold the counterclaim of the defendant. Accordingly, I enter judgment for the claimant as follows:
 - i. Possession of the premises is granted to the claimant and the defendant is hereby ordered to deliver up possession of the premises immediately.
 - ii. Mesne profit is awarded to the claimant at the rate of \$500.00 per month from 1st October 2002 until delivery of possession. This sum to bear interest at 3% per annum.

- iii. I have advisedly refrained from awarding any sum for the retention of possession of the premises by Mr. Mahitani given the fact that he must have expended quite some sum in constructing the building. I am mindful that he collected rent from tenants to whom he sublet the shops. But because of my order in (i) above he will now have to hand it over.

- iv. I award the costs of these proceedings to the claimant to be agreed or taxed.

A. O. CONTEH
Chief Justice

DATED: 3rd December 2008.