IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**COMMONWEALTH OF DOMINICA**

**(CIVIL)**

**Claim No. DOMHCV2010/0128**

BETWEEN:-

**WILLS KELSICK** Claimant

*-and-*

**KENNY DURAND** Defendant

**Appearances:**
**Mr Alick Lawrence for the Claimant**
**Mrs Heather Felix-Evans for the Defendant**

..........................................
**2010: 22 and 23 September**
**2011: 18 February**
.......................................

JUDGMENT

**[1] Brooks J:** By Fixed Date Claim Form filed on the 7th May 2010, the Claimant Mr Wills Kelsick filed an action against Kenny Durand seeking the following reliefs:

I. A declaration that the Defendant is not entitled to enter upon a portion of land at Joe Wesley in the possession of the Claimant;

II. An injunction restraining the Defendant whether by himself, his servants or agents from entering upon the said land and from threatening the Claimant;

III. Damages for trespass;

IV. Costs

[2] On the said 7th May 2010, the Claimant filed his statement of claim fully setting out his claim.

[3] On the 16th June 2010, the Defendant filed his Defence and Counterclaim in the matter

[4] On the 17th July 2010, the Defendant filed an amended Defence to Counterclaim.

[5] On the 29th July 2010, the Claimant filed his Reply to amended Defence and Defence to Counterclaim

**The Claimant's case:**

[6] The Claimant gave his evidence by witness statement and viva voce evidence. The Claimant who is in his early nineties claims that until 1999 he was the owner of some 17.25 acres of land located at Joe, Wesley. That he has been occupying that land continuously since 1952 and over the years he has been planting crops such as coconuts, mangoes, pears, limes, golden apples, sour sop, sugar cane, breadfruit, plantain, bananas, yams, dasheen and tanias on the said land. He also used some 3 acres of the land as pasture for his cattle, goats and sheep.

[7] That in 1999 the Government of Dominica acquired 14 acres of the land located at Joe, Wesley for the construction of an international airport. The Government also at the same time acquired hundreds of other acres of farmland in the Joe, Wesley and Woodford Hill owned by other farmers in the area. Mr Kelsick also told us that he was paid for his land by the Government when they acquired it.

[8] Mr Kelsick says that when the Government acquired his lands he had 14 acres of the land in cultivation and 3 acres as pasture and that he was recognized in 1999 as the biggest plantain producer in the area and a substantial producer of yams and tanias and that he enjoyed this status up until 2008.

[9] In 2000 there was a change of Government in Dominica and the new Government of the day decided to put the plans of building the new international airport in that area on hold and, it is Mr

Kelsick's evidence, that the then Prime Minister Roosevelt Douglas held a meeting with the farmers whose lands had been acquired and told them that they were to continue to occupy their land and plant on it until whenever the Government was ready to use it.

[10] The Claimant told us that after being told this he continued to occupy and cultivate his land as he was before the acquisition by the Government.

[11] That in or about 2004 Shirley Durand who is the mother of the Defendant went to work with the Claimant as a domestic helper and some two years after she started working for Mr Kelsick and his wife, he, Mr Kelsick decided to give her a portion of land to plant to assist her in maintaining herself and children.

[12] Mr Kelsick said that he took her to a portion of land that he occupied at Joe and showed her a section in one of his plantain fields and told her she could cultivate there. He said that the land did not require cleaning and he got one of his labourers to come dig the plantain holes on the land for her and that labourer was paid by Miss Durand.

[13] Mr Kelsick says that on another day he his wife and Miss Durand along with her brother went to the portion of land that he gave her and he along with his wife assisted her to plant the land and he also gave her brother permission to get plantain plants from his other portions of lands. He said that the land that he gave her was about half acre and it was part of the land that the Government had acquired from him.

[14] The Claimant was adamant that the piece of land that he gave to Shirley Durand for her to farm was a "working piece of land"; he called it "a garden within a garden"; this of course was denied by the Defendant. Under cross examination Mr Kelsick told the Court that Miss Durand did not have to clear the land and that he gave her plantain slips out of the very same spot he gave her as well as from other parts of his garden.

[15] The Claimant told the Court that at the time when he gave Miss Durand the garden, her son, the Defendant herein, was living in Roseau and he was a police officer and he would only come to assist his mother at the harvest.

[16] The Claimant went on to tell us that one of his sons subsequently shared an intimate relationship with Shirley Durand and they subsequently lived in a house that he, Mr Kelsick, gave them when his son was in Dominica.

[17] Mr Kelsick also told us that his son also had a farm which Shirley and her son assisted him on.

[18] The Claimant's case is that in January 2010 the Defendant went onto lands owned by the State which he (Mr Kelsick) still occupied and planted and destroyed the crops that he had there and that he, the Defendant, was trespassing on the land that he, Mr Kelsick was occupying and planting.

[19] The Claimant said that when he spoke to the Defendant about putting his cattle on the Claimant's land upon which he, the Claimant, had plantain on he was told by the Defendant that it was Government's land and that he, the Defendant had a right to go on it.

[20] The Claimant said he later observed that the land was further cleared, prepared and crops planted and that he went onto the land and he uprooted the crops that were there.

[21] Mr Kelsick told us that the crops that he pulled up were about 10 yams, 200 tanias, 25 potatoes and 10 plantain plants.

[22] It is Mr Kelsick's evidence that he went to the Lands and Surveys Department to enquire whether Mr Durand was given permission to enter unto the lands and he was told not and that they would investigate the situation, that an officer of the said department did visit but he has heard nothing further from them on the issue.

[23] The Claimant told us that he later visited the said plot and found Mr Durand there planting more crops and he told him that he would uproot the crops again and Mr Durand told him that the next time he, Mr Kelsick, uprooted the crops that he would break his hand.

[24] That as a result of this conversation he was fearful of Mr Durand and to visit the said plot. That he sought to obtain the assistance of the Ministry and Department responsible for lands but to no avail hence he took the legal action currently before this Court.

[25] At the hearing of the matter and with the Court's leave Mr Kelsick amplified his witness statement to say that he had not abandoned his land and he was cultivating his land with plantain, pears, golden apples, sweet sop, sugarcane, mangoes and sometimes potatoes.

[26] Mr Kelsick said that he harvested plantains up to December 2009 and again in July 2010. That he harvested a good crop of pears from the land in 2009 prior to his going to the United States of America for medical attention and upon his return there were no pears on the tree. He further said he harvested cane in December and up to November 2009.

[27] Generally speaking it is Mr Kelsick's case that he continued to occupy and farm the parcel of land which the Defendant sought to expand his cultivation to include. He said that it is usual for the farm to have grass and that every month one would have to weed and that there is no part of his farm that could really be considered as abandoned.

[28] Mr Kelsick said that he was aware that the Government offered the land that they purchased from the farmers in the area for rent but that he never received a letter to this effect and I accept his evidence in this regard.

[29] Mr Kelsick was adamant that he had not abandoned any part of his farm though it may not all be under cultivation and that he goes to his farm once a day once he is not ill and that he employs persons to work on his farm.

[30] The Claimant called two witnesses in support of his claim, Mr Laban Telemaque, his grandson and Mr Vincent Greenaway who is a farmer residing in Wesley. Both witnesses spoke to Mr Kelsick's continued use of the land that was his prior to the Government's acquisition and to the fact that Mr Kelsick had not abandoned the land as alleged by the Defendant. The two witnesses also spoke of the Defendant's mother and the Defendant farming in the area and of the Defendant moving on to the land in question in January 2010.

[31] Mr Telemaque spoke of rehabilitating the field consisting of two to three acres adjoining the Defendant's mother's plot at his grandfather's (the Claimant) request in November to December 2009 and that when he was half way through the exercise he noticed that some cattle were tied and grazing in the section which he had not yet cleaned and that the cattle trampled the plants that were in the area. He also spoke of seeing the area burnt and subsequently that tania and yam were planted there.

[32] Mr Telemaque also spoke of planting plantain plants in the area that he cleared and in May/June 2010 he noticed that grass started growing on the land which he had cleared and not yet planted and noted that the said area was sprayed and the grass cut. That he later planted up the said area and that the plantain plants which he planted were uprooted and that he replanted some of them.

[33] Mr Greenaway could be described as the Claimant's neighbor as he occupies land which bounds the Claimant's land at Joe where he lives and he owns three acres of land on the other side. He told the Court that he goes from his home to his farm every day in the week except Sundays and when he goes by foot he would have to cross the Claimant's land to get there and if he drives to his farm he would drive along the Claimant's land.

[34] Mr Greenaway told the Court of his observations of the goings on, on Mr Kelsick's land over the years and of when Shirley Durand started farming. He also told the Court that the land that Kenny Durand cleared and went onto were not abandoned as claimed by the Defendant.

**The Defendant's Case**

[35] Mr Kenny Durand, who gave his evidence by a witness statement and viva voce evidence, is a member of the Commonwealth of Dominica Police Force and engages in farming part time with his mother, Shirley Durand, contends that the Claimant does not occupy the acreage of land as he claims. Mr Durand says that sometime prior to the Government acquiring land in the Wesley area in 1999 the Claimant cultivated some 17.25 acres of land of which 14 acres were acquired.

[36] That when the plans to relocate the airport to the area of the acquired lands were shelved, the Government gave the former landowners including the Claimant the option to lease the said lands from the Government for $50.00 per acre or in the alternative the farmers were required to vacate the said land.

[37] Mr Durand contends that Mr Kelsick even prior to the land acquisition was cultivating approximately only 8 acres of his farmland and after the Government's acquisition the Claimant abandoned even more of his land and eventually cultivated only about 4 ½ acres of land with plantains and tanias.

[38] Mr Durand contends that at all times all the cultivation which he and his mother started in 2006 was on State lands which were not occupied by the Claimant in part or at all; that he and his mother in joint venture cultivate crops which they sell to a number of persons and in fact he and his mother were named the highest producer of plantains in 2008 and 2009 and that they have employed three persons to work on their cultivation.

[39] Mr Durand states in his evidence that in November/December of 2009 he and his mother cleared about ¾ acres of more unoccupied state lands formerly belonging to the Claimant. That at the time the Claimant had absolutely no tree crops on that portion of land and that the Claimant had in fact abandoned that said land years earlier.

[40] Mr. Durand said that in January 2010 he planted crops on the ¾ acre of land that was cleared earlier including yams, plantains, tanias and sweet potatoes. That the Claimant met him in January 2010 and told him that he had come onto his land. Mr Durand contends that he denied this and told the Claimant that they were both squatting on Government land.

[41] Mr Durand under cross examination admitted that Mr Kelsick was a large farmer and that in 1999 he could not think of anyone who would have been producing more than him and this was as far as producing bananas, yams, tanias, mangoes and coconuts was concerned. Mr Durand also said in cross examination that he knew the Claimant harvested avocadoes, mangoes and he even harvested plantains from land that he (Mr Durand) said the Claimant abandoned.

[42] Mr Durand contends that some time in March of 2010, the Claimant entered unto land that he was occupying and had planted long before November 2009 and wrongfully uprooted the plants there on and that he suffered loss there from. That he replanted what he could salvage on the said land and that sometime after that he was on the lands when the Claimant came and threatened to uproot the plants again.

[43] Mr Durand contends that he told Mr Kelsick that if he did so he will not take it quietly as he did the last time. Mr Durand is adamant that he never threatened Mr Kelsick then or ever as Mr Kelsick claimed.

[44] In essence Mr Durand says that the land which he occupies and cultivates is state lands which were formerly owned by the Claimant and which lands were unoccupied by and abandoned by the Claimant immediately prior to him and his mother entering on same.

[45] I have had the opportunity to observe Mr Durand's demeanor and body language as he gave evidence and I am of the view that he was not being entirely truthful in his evidence and I found that there are some parts of his evidence that was clearly contrived. For instance when commenting on the evidence of Mr Laban Telemaque, Mr Durand contended that Mr Telemaque was not in Wesley as Mr Telemaque said, but he was in Roseau he said "I know for a fact that Laban spent most of his time in Roseau from sometime in 2003 to 2004, I used to see Laban in Roseau almost everyday and night when I was in Roseau"; now clearly that means that Mr Durand was also not in Wesley attending to the farm as he would want me to believe- but he was also in Roseau. I also find that it was convenient for the Defendant to allege that the Claimant had abandoned his land as well as Mr. Greenaway. I find he is saying so in an attempt to advance his case and I do not accept this evidence.

[46] Miss Shirley Durand the mother of the defendant gave evidence in support of the Defence. Essentially she said that worked for the Claimant from 2003 to 2008 as a domestic helper.

[47] Miss Durand spoke of knowing that the Claimant owned 17.25 acres and that the Government purchased 14 acres from him. Miss Durand says that in March 2006 she indicated to the Claimant that she was going to occupy part of the State land which formerly belonged to him and was

abandoned. That the Claimant took her out to the area and pointed out the boundaries which was state land which was available for her to cultivate. She further said in her evidence that the land that was pointed out to her did not include Government land that the Claimant occupied neither was it the Claimant's personal land at Joe.

[48] Miss Durand in her evidence sought to tell this Court that it is she who said to the Claimant that she was going to occupy land and plant it and not him who made the suggestion to her.

[49] Miss Durand said that she and the Defendant cleared a small parcel of land and cultivated it with various crops. That during the following years she and her son occupied and cultivated the lands and they engaged persons to work on the land. That as the years went by her cultivation was expanded and at all times on State lands which were abandoned by the Claimant. Miss Durand in her evidence in chief was quite certain that when she and her son went on to the land, that Mr Kelsick did not put her in possession so to speak she said "it is not true that he invited me to go on the land. He did not give me an already existing garden" . He however did give her 150 plants. Yet later in her cross examination she had this to say "… the next portion he told me that I could plant". I find that the evidence Miss Durand sought to give this Court was not truthful. In fact I reject her evidence as to how she started to plant her cultivation in 2006. I find that the Claimant's version was more probable and accept his version.

[50] Miss Durand in her evidence in chief said that Mr Kelsick asked her for rent after her first harvest and that she refused on the basis that the land she was occupying was Government land. Further she said that "occasionally over the years the Claimant would make mention of whether we were not going to pay him and I consistently asked him what he wanted us to pay him for as the land we had under cultivation have been abandoned Government land. On such occasions he would say that all he wanted to do was to buy back the land he had sold to the Government to leave for his children".

[51] Amazingly during her amplified statement the witness Miss Durand told the Court that she gave very direct answers to Mr Kelsick that were in a different strain … she said "I told him that I would not pay him and that $200 could go towards a child school fee" . Miss Durand then told the Court

that in October 2008 the Claimant told her after he asked to be paid three times "you see what I did to Irene you will find out" and under cross examination she said she told him "Brother you better start marching to Zion". I do not accept this aspect of Miss Durand's evidence, I find she was seeking to embellish her son's case some what and was not being entirely truthful.

[52] I find that both witnesses (Mr Durand and Miss Durand) were given to exaggeration and wish to state that my findings which follow in this judgment represents part acceptance and part rejection of their evidence as well as inference drawn from their words, demeanour in Court and actions. I am unable to accept Mr Durand's evidence in its entirety. More specifically I do not accept the Claimant had abandoned as much of his farmland as Mr Durand wished this Court to find.

[53] The Defendant called Mr Gerald Tavernier to give evidence on his behalf. Mr Tavernier did not assist in taking the matter any further in fact what he said that is pertinent to this case in his evidence in chief was that, "I was on the land being cultivated by Shirley and the Defendant on one occasion in early 2010 when the Claimant, his wife and his son, Weldon came on said land and engaged in uprooting a lot of tania plants and flattening the yam beds I was digging. They then threw the tania plants away from where they had originally been planted …" and later under cross examination he said. "… I was there digging yam and he and his son came and take a spade to flatten the bed. I left and go and I do not know what they uprooted. I was not there when he root out the tania plants. I do not know who pull the plants …" . It is clear to the Court that this witness was not being truthful in his evidence in chief, in fact, the language of the evidence in chief suggests that they were not the words of the witness who appears to be a simple person with the minimum of education. I therefore reject his evidence in this matter as he appears to be a witness of convenience.

**The issues:**

**In my view, the issues for determination by the Court are as follows:**

(i) What is the Claimant's status as it relates to the said land?

(ii) Did the Claimant abandon the land the subject matter in this case as alleged by the Claimant?

(iii) Was there a trespass by the Defendant?

(iv) Is the Claimant liable for the damage to the plants which were uprooted and if so what is the quantum of damages for which he is liable?

**The Claimant's Submissions:**

**The Claimant's status on the land in question:**

[54] There is no dispute that the Claimant was originally the owner of the parcel of land in dispute which parcel was acquired by and paid for by the Government and that the Government did not use the land for the purpose for which it was acquired.

[55] It is the Claimant's contention that he continued in occupation of the said parcel and continued his cultivation on same with the express permission of the Government through the then Prime Minister Roosevelt Douglas. The Defendant claims that this is not so, that the Government offered to rent the parcel back to the Claimant and he refused to accept the terms and therefore his continued occupation of the land was as a squatter.

[56] Learned Counsel for the Claimant submits that the Claimant remained on the land as a tenant at will. That the Claimant's rights are "akin to a vendor who remained in possession with the consent of the purchaser". Counsel Mr Lawrence submits that the letter written by the Director of Surveys offering the land for rent which letter it is contended by the Claimant he never received which sought to describe the occupiers as "squatters" was erroneous on the grounds that the Claimant was on the land two years prior to the issue of the letter and his occupation was not against the will of the new owner and therefore the Claimant was not a squatter or trespasser. Learned Counsel, Mr. Lawrence submitted that the letter could not be construed as or neither was it capable of changing the status of the occupier. Counsel relied on the decision in **Dougadeen –v- Ramsamooj**[1]in this regard. Counsel further submitted that the letter did not give the recipients a date by which to vacate the land and that until a date was given the occupiers of the land was not required to vacate the land and that they remained on the said land with the permission of the new owners the government.

[1] (1959) WIR 293 @ 295 "the parties to an agreement cannot turn a lease into a licence merely by describing it as such"

[57] Counsel Mr Lawrence submitted that the Claimant remained on the parcel of land at all times as a tenant at will and that his occupation of the land met with the characteristics as defined by **Hill and Redman's Law of Landlord and Tenant**[2].

[58] Learned Counsel for the Claimant further cited the decision of the Privy Counsel **in Stanford International Bank –v- Lapps**[3] in support of his submission that the Claimant enjoyed the status of a tenant at will.

[59] Learned Counsel also cited the case of **Winter –v- Richardson**[4] in support of his contention that even if the Claimant was not accorded the rights of a tenant at will since he was in factual possession of the land before the Defendant made his entry that it is no Defence available to the Defendant who is a wrongdoer (being a trespasser) that the Claimant is in unlawful possession of the disputed parcel.

[60] Learned Counsel submitted that the Claimant as a tenant was entitled to exclusive possession of the parcel of land even if he were a licencee[5] or a squatter[6].

[61] Learned Counsel further submitted that even if the Claimant could be said to have abandoned the parcel of land that the law would vest actual possession in him when he re-entered[7] and he could bring an action of trespass against any person who being in possession at the time of his re- entry who wrongfully continues occupation upon the land.

---

[2] Hill and Redman's Law of Landlord and Tenant 14th Ed. Page 24 Para 11(3) " *A tenancy at will is implied when a person is in possession by the consent of the owner and his possession is not that of servant or agent and is not enjoyed by virtue of any freehold estate or of any tenancy for a certain term. It is implied accordingly in cases of mere permissive occupation without payment of rent"*

[3] [2006] UKPC 50 (20 November 2006)

[4] Civil Appeal no 025/2006 (Antigua)

[5] Manchester Airport –v- Dutton [1999] 3 WLR 254 @ 532 G-H, 536 C-D, G 538-539 C, "where it was held that t a licensee may bring a trespass action against a trespasser to protect his right to possession."

[6] Winter –v- Richardosn supra

[7] Lows –v- Telford (1875-76) LR. 1 App Cas. 414, Jones –v- Chapman 154 ER 717

[62] Learned Counsel for the Claimant further submitted that a tenancy cannot be determined by cessation of use of the premises by the tenant. Counsel contends that there must be a proper surrender.[8]

[63] Learned Counsel for the Claimant is contending therefore that even if he stopped using parts of the land he was still a tenant of all of it and was entitled to possession which status is enjoyed even if he were found to be a mere licencee. That the conflict is not one between two trespassers but between the Claimant who has the right to possession and to benefit from the owners title and the Defendant who is an admitted squatter.

**The issue of abandonment:**

[64] Learned Counsel for the Claimant Mr Alick Lawrence, pointed out that the Defendant in his evidence stated that the Claimant was still going onto the land to harvest avocadoes, mangoes and even plantains from the land in question and this is "without more sufficient to destroy the Defence of discontinuance" Counsel cited and relied on the case of **Glen –v- Simpson** [9] in support of his contention and also to say that the onus of proof of abandonment lay with the Defendant and that on the evidence given by the Defendant that the Claimant went onto the land and reaped fruits, the actions of the Claimant in going onto the land and destroying the plants planted by the defendant are all acts that are evidence contrary to abandonment of the land. Counsel also cited a number of authorities in support of his position.[10]

[65] Mr Lawrence also submitted that the Defendant's contention that the Claimant did not cultivate the land is not sufficient to sustain a claim for abandonment or discontinuance of possession and he relied on the case **Wallis Cayton Bay –v- Shell Mix**[11] in support of this contention.

---

[8] Hill and Redman's Land Lord and tenant Supra Page 491 para 384

[9] (1972) 19 WIR 237

[10] Williams Borther –v- Rafferty [1957] 3 All E R 593, Wallis's Cayton Bay –v- Shell Mix [1974] 3 WLR 382, Oceans Estates-v- Pinder [1969] 3 WLR 1360, Fowley Marine –v- Gafford [1968] 1 All E R 979, RB Wuta Ofei-v- Mabel Danquah [1961] 1 WLR 1238.

[11] supra

[66] Learned Counsel Mr Lawrence also cited the case of **Higgs –v- Nassauvia**[12] in support of his submission that the Defendant admits that the Claimant remained in possession of part of the land which was acquired by the Government and this admission is fatal to his case as "acts done on a defined parcel of land is evidence of possession of the whole parcel".

[67] The Claimant's case and submission is, that based on the evidence adduced by the Defendant and on the authorities cited, the Defendant has failed to prove abandonment as claimed and in the circumstances his claim fails.

[68] Learned Counsel for the Claimant is therefore asking this Court to find that the Claimant is not a trespasser and that he never abandoned the land acquired from him by the Government; and that the Defendant is a trespasser as it regards the parcel in question; and that the presence of the Defendant and his mother on other parts of the land has at all times been with the permission of the Claimant.

**The Defendant's Submissions:**

**The status of the Defendant:**

[69] The Defendant contends that the Claimant's status in relation to the land in issue is as a squatter.

[70] Learned Counsel for the Defendant, Mrs Heather Felix-Evans contends that even if the Court were to accept the statement of the Claimant that the Prime Minister of the day Mr Roosevelt Douglas gave the Claimant permission to remain on the land which was acquired by the Government that based on Section 4 and 7 of the State Lands Act[13] he was not the proper authority to deal with the

---

[12] [1975] 1 All E R 101

[13] Chapter 53:01 of the 1990 Revised Laws of Dominica

Section 4 "The President may from time to time grant, sell, exchange or lease any State lands, or any right or easement in or over them or any of them for such price or consideration or rent, and for such estate or term of years and on such condition and with such reservations, if any, as he may think reasonable but all minerals and oil shall be and are hereby reserved to the State."

Section 7 " the Director shall under the direction and control of the President, superintend the settlement, letting and allotment of State lands"

acquired lands and he did not have the authority to grant a licence or lease or any interest in State lands.

[71] Counsel further submitted that the Claimant was required to adduce evidence which showed that his occupation of the land in question was with the affirmative consent and not merely the negative or silent consent of the President or the Director of Surveys and Commissioner of Lands.[14] That based on the evidence presented to the Court the Claimant has failed to show any correspondence with the President or Director who are the only two persons vested with the authority to assent to his occupation or he has failed to show any negotiation that would establish the tenancy. Counsel for the Defendant therefore submits that the Claimant's status is that of a squatter or trespasser.

**Whether the Defendant was in possession of the 14 acres of land as alleged.**

[73] I am afraid that I do not agree with Counsel for the Defendant's submissions in this regard. I find that Mr Kelsick was an "assumed tenant at will" like Mr. Lapp in **Stanford International Bank Ltd –v- Austin Lapps (Supra)** "enjoyed a quality of possession sufficient to sustain a trespass action if his possession were disturbed by someone with no better right of possession than he had."

[74] Counsel for the Defendant submits that the evidence adduced by the Claimant in the matter at bar was inconsistent and unreliable as it regards his occupation of the 14 acres. Counsel spoke to the Claimant saying in his pleadings that he occupied all 14 acres of land and this was not established in his viva voce evidence before the Court or in the evidence of his witnesses. Counsel submits that it is clear from his evidence that the Claimant was not in occupation of the entire 14 acres of the land in January 2010 when this cause of action allegedly arose.

[75] In this regard, I accept the Claimant's evidence that he was doing less farming that he was doing say 10 years ago to quote his own words, he said "regarding my production … when you start getting down you have to cut back"…. I find as a matter of fact that the Claimant in 2010 did not cultivate the entire 14 acres and I would further say that that is not in issue in this matter. Further in his evidence the

[14] Re: Stanford International Bank Ltd –v- Austin Lapps Supra, Andre Winter as PR of Elpert Winter (deceased) & Stephen Winter –v- Charles Richardson HCVap25 OF 2006 (Antigua & Barbuda).

Claimant acknowledged that the Defendant and his mother were occupying part of the lands that were formerly owned by him. However, the question in issue is the ¾ to 1 acre of land that the Defendant has expanded to- the Defendant said he expanded in the latter part of 2009, the Claimant said in January 2010. I have reviewed the evidence of the Claimant and of the Defendant and I find that the Defendant was not entirely a witness of truth and I accept the evidence of the Claimant that as it regards the area of land subject of this matter he the Claimant was still in possession of the land and I will expand later on this issue.

[76]Counsel for the Defendant submitted that the Claimant failed to establish a prima facie claim to possession of the entire 14 acres of State lands. I am of the view that the Claimant is not and did not have to establish that he was in possession of the entire 14 acres of State lands. It is my understanding from the evidence adduced in this matter that the Claimant was concerned with the small parcel of land that the Defendant had expanded his cultivation to include. That is the parcel of land in the vicinity of the golden apple and pear tree.

[77] Counsel for the Defendant in her submissions sought to examine the Defendant's and his mother's acts prior to 2009-2010 as it regards their cultivation on the State lands that were previously owned by the Claimant. I am of the view that this is not a necessary exercise as the issue at hand is, was the Claimant in possession of the ¾ acre of land that the Defendant expanded his cultivation to include in early 2010. In his witness statement the Defendant said very briefly that the Claimant uprooted plants which were planted on lands he was in occupation long before 2009. Under cross examination he admitted that the approx ¾ acre expansion of his cultivation was in the vicinity of the pear tree at the end of the road and in the vicinity of the huge golden apple tree and that that there is a pear tree close to this tree and later he said that "there is a huge pear tree close to where the Claimant uprooted my plants". This suggests to me that the plants which the Claimant uprooted was in fact close to the pear and golden apple tree, which is the area where the Defendant expanded his cultivation. I therefore find as a matter of fact that the Claimant uprooted plants from on the extension and not on any cultivation that existed before 2009 as the Defendant would want us to believe.

**Conclusion :**

[78] Having examined the evidence led by both sides to this matter carefully and with due regard to the quality of evidence given by the Claimant and his witnesses as against the evidence of the Defendant and his witnesses; I find the evidence led by the Claimant to be the most credible. I find that the Defendant's evidence was not reliable and from his demeanor on the stand I did not find him to be an entirely truthful witness and his evidence contained attempts to mislead the Court. I find as a fact that he extended his garden in early 2010 to lands which were occupied by the Claimant.

[79] I agree with the submissions of learned Counsel for the Claimant that the Claimant was in fact a tenant at will similar to Mr Lapps in the **Stanford International Bank Ltd. –v- Lapps**[15] and I also find that the Claimant was in possession of the parcel of land which the defendant expanded his cultivation onto. I agree with Counsel for the Claimant that Defendant in acknowledging that the Claimant went on the land to pick pears and golden apples and even to harvest plantain cannot now maintain that the Claimant abandoned the land.

[80] It is clear from the evidence presented in this matter that the Claimant was in possession of the land prior to 2009 and the case of **Glen –v- Samson** is clear that "where an occupier of land has been dispossessed by a trespasser and there has been no abandonment of possession in law the person dispossessed has a right of re entry and to sue in trespass."[16]. The facts in this case were simple and can be seen as somewhat similar and helpful to the case at bar. The Appellant was in occupation of a parcel of land for some time and left the parcel of land and went elsewhere to return some four years later to find the Respondent in possession of the said plot. The Appellant removed the Respondent's crops from the land and resumed occupation.

[81] The Respondent sued the Appellant for trespass and claimed that he had been put in possession by a third party by way of lease and claimed that the Appellant had vacated his possession of the lot. The Court held that the abandonment of possession is a question of law and fact and the onus of the proof of dispossession of discontinuance of occupation lies on the adverse possesser. In the case at bar I understand it to mean that Mr Durand would have had to prove abandonment by Mr Kelsick. From his

[15] supra

[16] Glen –v- Sampson supra

own evidence of Mr Kelsick coming onto the grounds to pick pears and golden apples and some plantains is sufficient evidence to show that Mr Kelsick did not abandon the land. I am therefore of the view that what occurred was not abandonment of possession by the Claimant but an attempt by the Defendant to dispossess him.

**[82] Megarry and Wade** "Law of Real Property" [17] states "any form of possession, so long as it is clear and exclusive and exercised with the intention to possess is sufficient to support an action of trespass against a wrong doer. It is not necessary in order to maintain trespass that the plaintiffs possession should be lawful, and actual possession is good against all except those who can show a better right to possession in themselves …"

[83] I find that the Defendant has failed to prove that the Claimant abandoned the parcel of land in dispute and accordingly his counterclaim fails and is dismissed.

[84] Having regard to the legal principles stated above I am satisfied that the Claimant through the evidence adduced in this matter has on the balance of probabilities established his continued possession of the parcel of land in dispute and that where the Defendant entered into the said parcel he did so as a trespasser and the Claimant is entitled to judgment in his favour.

[85] I find for the Claimant and therefore order as follows:-

(a) A declaration that the Defendant is not entitled to enter upon a portion of land at Joe, Wesley in the possession of the Claimant.

(b) An injunction to restrain the Defendant whether by himself, his servants and or agents from trespassing on the said parcel of land.

(c) Costs to be prescribed costs.

……………………………………

M E Birnie Stephenson-Brooks

High Court Judge

[17] Law of Real Property – 3 Ed paragraph 1213