

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL SUIT NO. 220 OF 2008

1. BUKENYA MUHAMOOD

2. FATUMA NALUKWAGO :::PLAINTIFFS

VERSUS

1. KIRUMIRA GODFREY

2. REV. FATHER JOSEPH FISCERKORTORUM

3. FRED MUKWAYA:::DEFENDANTS

BEFORE HOM. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiffs sued the defendants severally and jointly. The gist of the Plaintiff's case is that Plaintiff is the registered proprietors of the suit land comprised on Kyadondo Block 182 plot 347 at Bulindo. The Defendants conned and convinced the 1st Plaintiff to surrender his title to the 2nd Defendant as security for a loan, which the 2nd Defendant was to obtain from the 1st Defendant; a money lender.

Following representatives from the 3rd Defendant, the 1st Plaintiff allowed the 1st Plaintiff, 2nd and 3rd Defendants to inspect the suit property where after there was an exchange documents in lieu of the said transactions. The Plaintiffs' case is that he was given to sign two sets of documents including a blank transfer forms which he signed believing that he was executing them as security. These documents were not translated to him as an illiterate person. He was also not given copies. It however later transpired that the 1st Defendant had caused a transfer of the suit property into his names on the basis of the said documents, which he claimed were documents which he claimed were documents executed by consent of all of them as an agreement of sale of the land to him. He denied any liability and, counter claimed for vacant possession as against the Plaintiff.

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The 2nd and 3rd Defendants did not file any defence- though served and they did not contest the suit.

During the scheduling, the following issues were agreed on for the Courts' determination.

1. Whether the transactions was a sale or a mortgage.
2. Whether the transaction was void for illegality.
3. Whether there was any fraud committed against the Plaintiff by the Defendants.
4. What remedies are available for the parties?

The Plaintiffs, in a bid to prove the case called evidence as here below.

PW1- Bukenya Mohamood who stated that around September 2007, the 2nd Defendant (Fisher) and the 3rd Defendant; (Mukwaya) went to him that the 2nd Defendant was interested in a loan from 1st Defendant but needed security. They therefore requested him (Plaintiff) to offer his title as a guarantor for the loan obligation of D2 to D1.

The Plaintiffs consulted his lawyer-Matovu who then prepared special Powers of Attorney (PE1). The Plaintiff left the tile with his lawyer Matovu. Later on 2nd September 2007, the official from the bank (giving the loan to D2) came to the Plaintiffs' home to ascertain the property, together with D2 and D3. The alleged bank official was D1-Godfrey Kirumira. After the inspection, D1 invited the Plaintiffs and his wife to his office at the Old Taxi Park. When they went at the office, Mr. Kirumira gave them an already prepared document and requested him to sign. He signed an agreement and the blank paper (transfer forms), (EP2). They then signed a memorandum of understanding allowing D2 to use the title as a guarantee for a good will of shs. 4,000,000/- (*four millions*) exhibited (EP3).

On 4th September 2007 after signing the documents before Kirumira, some people from Kirumira's office took Fisher (D2) and gave him money from a Forex, and they left when he was getting his money. The Plaintiffs received nothing. It later transpired that his lawyer Matovu had given the title to D2 (Fisher) who later connived with D1, and had the same transferred in the names of Kirumira. He tendered in EP4 and EP5 to prove the said dealings by Kirumira on his title.

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During cross examinations, he confirmed receipt of cheques (D1) both as security for his title from D2. He also revealed that he was not dealing with D2 as a partner in business but was only helping him because he was also going to help to build a chicken house and also to make bricks.

PW2 Nalukwago Fatuma said she is the wife to PW1. She confirmed that Defendants had gone to their home and requested for the Plaintiff. When the Plaintiff came, he told her that D2 wanted to borrow money using their land title. They proceeded to Mr. Kirumira's office with Bukenya and gave her documents to sign. She did not read the documents because she did not know the language. Afterwards, they went with Kirumira to the bank, and he gave money to D2-(Fisher) but Plaintiff No.1 and herself got no money. D2 also told them that he would sell a house, pay off the loan and then return their title. She confirmed further in examination in chief that this land is their matrimonial home on which she had lived with her children.

PW3 Alex Wejo said that on 2nd July 2007 at 3.00 pm while digging with the Plaintiff, he saw 3 men including an Asian/ European. The Plaintiff then left with them.

In defense, DW1 Kirumira Godfrey stated that a one Mukwaya (D3) told him that the Plaintiff was selling land. They then went to his office where they concluded a sale transaction. Earlier on D2 and D3 had taken him to the Plaintiff's home to view the land. After viewing, they settled at a price of shs 60 million only (*sixty million*). Amina; a lawyer handled the documentation, where after he paid shs. 60, 000,000/- million cash to the Plaintiff who took the money.

Bukenya signed a blank transfer form, and the witness kept the title and transfer forms. It was then agreed that the Plaintiffs hands over possessions after 30 days. Bukenya (Plaintiff) however failed to give vacant possession and he instead sued him. The title is now in the names of the witness.

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In cross examinations, he said that though the wife of Bukenya signed the agreement, they did not discuss the fact that the spousal consent was needed. He also confirmed that Mrs. Bukenya signed only on the sale agreement.

D2: Anna Namboze stated that she drafted the said agreement in her chambers of M/s. Sekabanja & Co. Advocates, and she was then taken by Kirumira (D1)'s agents from her office to Mr. Kirumira's office at Royal Complex and she found the Plaintiff (PW1), Mrs. Bukenya (PW2) and about 4 other people. She then read out the contents of the agreement in Luganda.

All the parties confirmed that they had understood after which they all signed. After signing the agreement, Mr. Kirumira handed over cash of shs. 60.000.000/- (*sixty million*) to the Plaintiff; who in turn handed over the title and the transfer forms.

During cross examination, she insisted that she did not know about the **Illiterate's Protection Act**. She also confirmed that she never did a certificate of translation. That being the evidence on record, I now determine the issues as here below. The Plaintiff in submission chose to argue issue 2 and 3 together. These are;

1. Whether the transaction was *void* for illegality.
2. Whether there was fraud committed by the Defendants.

Counsel for Plaintiffs reviewed the evidence of PW1 and DW1 and points out that by time of purchase, the Defendant (D1) knew that the Plaintiff is in occupation, which evidence is corroborated by PW3, DW1 and DW2.

He further argues that the evidence of possession was not controverted and he goes ahead to argue that the money paid by D1 was received by D2 and not by the Plaintiff. Counsel argues that though the Plaintiff handed over transfer forms which were blank, D1 went ahead to fraudulently make false entries thereon including under valuation; all contrary to **Section 190 of the Registration of Titles Act**. Counsel argues that this conduct was illegal and renders the transaction *void*.

He, (Counsel) further points at the fact that there was lack of spousal consent contrary to *Sec 39(1) of the Land Act* as amended by *Act 2004*; and *Regulation 6(ii) of the Land Regulations 2004*.

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He again points out that the argument by defence that the lawyer read the agreement to the Plaintiffs in Luganda, is contradicted by the Plaintiff who testified that he studied up to P5, and PW2 who said she studied up to P2. These were illiterates who are protected by Section 3 of the Illiterates Protection Act. Counsel concluded his submission that the purported sale or mortgage loan was illegal *abinitio*, *null* and *void* and was of no legal effect.

Counsel for 1st Defendant on the other hand referred to the evidence adduced through DW1 and DW2 as evidence in proof through DW1 and DW2 as evidence in proof of the fact that Plaintiffs signed the sale agreement selling their land to the 1st Defendant. He argues that there is no evidence adduced by the Plaintiffs to show that this was a mortgage. Counsel faulted PEX3 which is a memorandum of understanding for being executed in January 2008, yet the sale took place in September 2007. His argument is that since the Plaintiffs admit signing the sale agreement and the transfer forms then their intention was to sell.

Regarding illegality, Counsel for Defence argued that EXP2 was admitted by PW1 and PW2 as a valid document and argued that DW2's signing the document, implied that she gave consent. He further argues that PW1 and PW2 were not illiterate persons, since they never testified so in evidence. Counsel relied on EXP1 and EXP2 signed by PW1 as proof that he is not an illiterate person. It was further Counsel's argument that, PW1 and PW2's allegations of illiteracy are merely an afterthought and should be rejected.

Regarding fraud, Counsel for Defendant argued that the Plaintiff failed to satisfy the standard of proof for such cases of fraud. He reiterated that the Defendant did not defraud the Plaintiffs but bought the land legally from them. In rejoinder the Plaintiff's Counsel reiterated his submissions.

The findings of this Court regarding this matter are that, the Plaintiff has the burden under Sec 101.102 and 103 to prove the case on the balance of probability. However, the standard of proof in cases based on fraud is a standard higher than the balance of probability though not beyond reasonable doubt.

See *J W R Kazoora Vs Mrs. Rukuba CA 13of (1992) (1993) UG SC 2 (11January 1993)* where Court held that;

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“Fraud cannot merely be inferred from the facts, it must be distinctively proved”

Having that standard of proof in mind, I note from the facts of this case that the complaint by the Plaintiffs, is against a transaction which began running from the actions of DW3 who introduced D2 to the Plaintiffs and later D1. The chain of causation is therefore intertwined between the activities of D1, D2 and D3. It is however on record that D2 and D3 did not enter any defence and hence did not offer any rebuttals to the claims as against them by the Plaintiffs. I however note that DW1 in his Defence mentions that he was introduced to the Plaintiffs by DW3, who told him that the Plaintiffs were selling land. DW1 further confirmed that he went to the Plaintiff’s home to inspect the land in the company of D2 and D3 (Mukwaya).

The importance of these facts is that they lend credence to the testimony by PW1 and PW2 that the transaction they entered was master minded by D3 and D2 who intimated to the Plaintiff that they wanted to use his title as security for D2’s loan from D1. The missing link of the evidence from D2 and D3 is taken as an admission of the facts as presented by the Plaintiffs since they chose not to defend the claim. This therefore means that, D2 and D3 have admitted that indeed when they dealt with the Plaintiffs, they were dealing with them for purposes of using their title to secure D2’s loan from D1 (Kirumira).

The element of illegality and fraud therefore comes in the light when instead of using the security (Title) to secure a loan, D2 (Fisher) and D3 (Fred Mukwaya) connived with D1 (Kirumira) and went to D2 Nina (Kirumira’s lawyer) to draft an agreement of sale in which they purported that PW1 (Bukenya) was selling the land.

This fact clearly brought out in the evidence on record, in that even DW1 and DW2 both confirm in evidence that this agreement was concluded in the chambers of Sekabanja and Co. Advocates. It was then taken to Plaintiffs to sign, yet they were not with their lawyer, and they were illiterates.

I agree therefore with Counsel for the Plaintiffs that the facts and evidence above points at a deliberate scheme by all the Defendants to defraud the Plaintiffs of their property.

The evidence by DW2 was very evasive. This was glaringly exhibited in Court where though she is a trained lawyer, she denied knowledge of basic legal practices, like the need for ensuring spousal consent before a sale of matrimonial property. She also feigned ignorance of the legal practice regarding illiterates Protection under the Illiterates Protection Act; which fact was a blatant lie aimed at covering up the legal blunder during cross examination. Perhaps from the evidence on record of PW1, PW2, PW3, DW1 and DW2, the Plaintiffs have successfully shown that the Defendant's actions were fraudulent, illegal, *null*, and *void* as argued by Counsel for the Plaintiffs. I uphold the said arguments for the following reasons;

Through the Defendants relied on the sale agreement EXP2as evidence of sale, the said agreement's authenticity is questionable. This agreement has been shown in evidence though PW1 and PW2 to be flawed in that they claimed that they signed 'a document' which they were told was to help D2 obtain a loan. In her testimony, PW2 who is PW1's wife stated in evidence that "*Bukenya told me that the white man that I had seen wanted to borrow money using the land title. (See page 25 of the record). She further said on page 26 that "I later came to Kirumira's office with Mr. Bukenya, they gave me documents to sign, and I did not read the document I did not know the language in the document. Kirumira was present with the man that showed me where to sign. The white man was present..... After signing, we went to the bank with Kirumira and the white man. Kirumira handed over the money to the white man myself and my husband did not get any money....."*.

This evidence collaborated that of PW1 who said that on 2nd September 2007, when D1 and others went to look at the land, he was aware. He testified on page 12 that:

"I went to the old taxi park from there, where we found they had prepared a document for borrowing money for Fisher (D2). We found Mr. Kirumira there. Mr. Kirumira showed me where to sign. My wife as also told to sign. I was given two papers and I signed on two documents".

The evidence above when taken alongside that of DW1 and DW2 collaborates itself. Actually the evidence of DW2 confirms the fact that a prepared agreement was taken to

Plaintiffs who were asked to sign it. This document which is PE1 (*sale agreement*) prepared by D2; a lawyer has no provision for a Jurat. This was a critical omission in view of the provisions of Section 2 and 4 of the Illiterate Protection Act.

In *Ngoma Ngime versus Electoral Commission & Hon. Byanyima; Election Petition No. 11/2002*, the Court of Appeal noted that the above law was intended to protect the Illiterate persons and that the provision is couched in mandatory terms, whereby failure to comply with it can render the documents inadmissible.

I need to observe and take judicial notice of the fact that it is not uncommon today to find so called ‘money lenders’, fleecing unsuspecting poor illiterate people of their property by disguising and converting “*security provided*” into outright sale by trickery which includes making them sign the sale agreements and blank transfer forms. This makes it crucial and necessary for the writers of such documents to comply with Section 3 of the Act. Section 4 makes it a criminal offence to fail to comply. DW2- confessed in Court that she did not do so. I do agree therefore with the Counsel for Plaintiff that the above failure rendered the agreement illegal.

The second problem with PE1 (*the sale agreement*) is that the sale was in respect of matrimonial property (see evidence of PW1, PW2 and PW3). A sale of such property under Section 39 (1) of the Land Act requires spousal consent. Various cases including the case of *Alice Okiror and Anor versus Global Capital Save and Anor Civil Suit No. 149/2010*, state that the Land Act provides for security of occupancy of the family land which means land where the residence of the family is situate. Before such land is sold or mortgaged, there must be clear spousal consent. From the evidence so far reviewed, it is clear from PW1 and PW2’s testimonies that they did not offer the land for sale. PW2 never gave spousal consent.

DW1 in cross examination conceded that spousal consent was never discussed, and that Mr. Bukenya only signed the agreement.

DW2 in her testimony revealed that she did not consider spousal consent and only obtained the signature of Mrs. Bukenya as a wife. She was very vague and evasive at this point in cross examination. The obvious conclusion from her testimony is that she drafted an

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agreement on which she merely asked PW1 and PW2 to append their signatures. This is not the spousal consent envisaged under section 39 (4) of the Act, and I do find that there was no spousal consent. This failure to obtain spousal consent, therefore rendered PE1 (sale agreement) *null and void*.

Thirdly, regarding the transfer forms tendered as EXP5, the evidence from PW1 and PW2 is that they signed them when they were blank and not filled in.

These documents therefore were falsified by D1 when he went ahead to insert therein figures for the consideration price shown to be shs. 60,000,000/- only (*sixty million*). The 1st Defendant therefore made false declarations to the Registrar of Titles which is an offence under **Section 190 Registration of Titles Act**.

This behavior is criminal. It is unethical for anybody to utilize the transfer forms given as security and deliberately left blank- to go ahead to fill them in and submit them to the Registrar to obtain a transfer to themselves. This is fraudulent and criminal as it is an Act contrary to **Section 190 Registration of Titles Act** which *inter alia* provides that;

“if any person willfully makes any false statement or declaration in any application to bring land under the operation of this Act or any application under part (v) of this Act..... commits an offence and liable on conviction to imprisonment for a period not exceeding three years or to a fine or to both such imprisonment and fine and any certificates of title entry etc.... so procured or made by fraud shall be void as against all parties or privies to the fraud”.

Arising from the evidence, facts and law as discussed, I do find that there is no justifiable excuse for the behavior of D1. In his own testimony he said at page 34 of the proceedings that *“Mr. Bukenya took the money, he signed the transfer forms, I had not decided in whose names to transfer the land so Bukenya gave me the title and transfer of the title”.*

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The above is the testimony that there was no transfer concluded at that time since the form was only signed by Bukenya. However, PW1 and PW2 have a different testimony to show that they were duped to sign the forms believing it is a loan security they were guaranteeing.

Their evidence is more credible. The evidence of DW2 was not credible at this point since she was evasive and did not explain sufficiently why as a lawyer she did not get interested in ensuring that the transfer forms were signed yet, according to her, this was a sale transaction of titled land. The Defendant's evidence is not hence credible at this point.

Having observed all the above flaws regarding the evidence from the defence as against that of the Plaintiff, I am satisfied that the Plaintiff has proved that there was no sale of land; and the transaction was shrouded in fraud and was *void* for illegality. The issues above therefore terminates in the positive. The findings above answer issues 1, 2 and 3.

Issues 4 Remedies

- a) General damages aim at putting the party to a position that he would have been, had not the injury occurred.

In this case the Defendants cunningly deprived the Plaintiffs of their title since 2007; a period of 10 years. The Plaintiff has been shown to be a farmer/business man who would have utilised his title perhaps to expand his business. He has also suffered mental anguish and pain. This Court will assume a lost benefit of shs. 2,000,000/- only (*two million*) per year from his title had it been availed to him for commercial use.

This means that for 10 years, this amounts to shs. 2,000,000/- (*two million*) x 10 years, which is a total of shs. 20,000,000/- (*twenty million only*). The Court will also grant him a nominal damage rate of shs. 1,000,000/- per annum for the 10 years of litigation to cater for the pain and suffering. This is shs. (1,000,000/- per year x 10 years) = (10,000,000/-) (*ten millions*). Hence in all the total damages allowed is;

Shs. (20,000,000) + (10,000,000/-) = 30,000,000/-

Shs. 30,000,000/- (*thirty million only*).

- b) Permanent injunction is aimed at restraining the Defendant and his agents from further interfering with the Plaintiff's land. I do grant the same as prayed.

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c) The Court grants the Plaintiffs costs of the suit.

d) Interest is granted on costs at Court rate from the date of Judgment till payment in full.

Judgment is entered for the Plaintiffs as above.

Counter claim

The Defendant set up a counter claim in their written statement of defence. I have reviewed the evidence and I do find that the counterclaim is not proved on the evidence as it stands. It is my finding that the evidence shows that there was no valid sale of land by the Plaintiff/Counter Respondents to the Defendants/Counter claimants. The evidence shows that this transaction was fraudulent, *null* and *void* as per evidence of PW1, PW2, PW3 and DW1 and DW2. The counter claim is not proved and is dismissed with costs to the counter Respondents/Plaintiffs.

I so order.

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Henry I. Kawesa

JUDGE

11/4/2018

Right of Appeal explained.

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Opio Moses for the 1st Defendant (Godfrey Kirumira)

Odokel for Plaintiff absent.

Bukenya Mohamood present.

Opio: Matter is for Judgment.

Court: Judgment delivered to the parties above

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Henry I. Kawesa

JUDGE

11/4/2018