

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVI SUIT NO. 505 OF 2018

FRANCIS NNAGENDA ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

DOROTHY WALUSIMBI ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

JUDGMENT

29/10/21
The Plaintiff's claim against the Defendant is for a declaration that the Defendant's actions of continuously antagonizing the Plaintiff regarding the suit land are illegal and in violation of the Plaintiff's constitutional right to peaceful enjoyment of his property comprised in Busiro block 401 plot 1538 situate at Kikusa and Malanyi : an Order for permanent injunction restraining the Defendant and/or her agents/ servants/ employees from any actions in any manner whatsoever regarding the suit land; Declaration that the Plaintiff is entitled to general damages for stress, strain and inconvenience and exemplary damages as a result of the Defendant's actions ; interest and cost of the suit.

The Plaintiff is the Registered Proprietor of the land comprised in Busiro Block 401 Plot 60 situate at Kikuusa and Mawanyi (herein after referred to as the suit land). The Plaintiff bought 19.7 hectares of land in 1978 from the Late princess Mary

Nakalema who was the Registered Proprietor and the Plaintiff got registered on the Title of the Suit land in 1979.

In her defence, the Defendant averred that the Plaintiff only purchased a total of 9.71 acres of land from the Late Princess out of which 3.5 acres were plot 25 while the 6.2 acres were parceled out of Plot 60. The Defendant discovered in 2009 that the transfer of the 19.7 hectares were done fraudulently.

In a counter claim, the Defendant brought an action of fraud against the Plaintiff and outlined the particulars of the fraud as forging the signature of the Vendor ,princess Mary Nakalema on the transfer instrument No. KLA 90682 dated 30th January 1979 and during this forged transfer instrument to register the whole of plot 60 into his names; purporting to have purchased 19.71 hectares of land from the Late Princess Mary Nakalema on 11/01/1979 whereas he only purchased 9.71 acres and forcefully taking possession of the whole plot 60 while it was occupied by princess Mary Nakalema's bibanja holders (lawful occupants)

She prayed for the cancellation of the Plaintiff's residue of Busiro Block 60 (now plot 1538) and register the Defendant as proprietor thereto; the Plaintiff be ordered to pay to the Defendant the open market value of the part of the Plot 60 which is no longer registered in the Plaintiff's names according to the valuation report ; Plaintiff be ordered to pay mesne profits for 39.9 acres of land since 1979 when the fraud occurred till payment in full; general damages; interest from the date of judgement and costs of the suit and counterclaim.

During scheduling, the parties' raised three issues for resolution;

1. Whether that Plaintiff fraudulently acquired the suit land

2. Whether the Defendant's actions amount to trespass and denial of quiet possession
3. Remedies available to the parties.

Representation

The Plaintiff was represented by M/s Kwesigabo, Bamwine & Walubiri Advocates.

The Defendant was represented by M/s Katende Ssempebwa & Co Advocates.

Issue one: Whether that Plaintiff fraudulently acquired the suit land.

In Kampala Bottlers Ltd vs. Damanico (U) Ltd, SCCA No.22 of 1992, it was also held that fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters. It was held further held that;

"The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."

This court will be guided by principles enunciated in these decisions in the evaluation of the evidence in this case.

The Plaintiff relied on Section 176 (c) and (d) which state that;

"No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases—

a)

b)

- c) *the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;*
- d) *the case of a person deprived of or claiming any land included in any certificate of title of other land by mis-description of the other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide for value;*
- e)

Counsel relied on the case of Kampala **Bottlers Limited Vs Damanico (U) Limited** **SCCA No. 22/92** where court stated that;

"The spring board of the 1st issue is to get the meaning of fraud."

The Plaintiffs relied on the case of **Waimiha saw Milling Co. Ltd vs Waione Timber Co. Ltd (1926) AC 101 p.106;** Lord Bushmaster said: -

"Now fraud implies some act of dishonesty,"

Lord Lindley in **Assets Co. Vs Mere Roihi (1905) AC 176** states: -

"Fraud in these actions (i.e.; actions seeking to effect (sic) a registered title means actual fraud, dishonesty of some sort not what is called constructive fraud unfortunate expression and one may opt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud."

Counsel for the Plaintiff submitted that the Plaintiff in his witness statement stated that the testimony of DW1, DW2 and DW3 corroborate the evidence of PW1,

Nnaggenda Francis who informed court on pages 3, 4,5,6,7, 8, 9 and 10 of his witness statements that in 1973, he purchased 3 acres of land on top of Hill described as Busiro Block 401 Plot 25 land at Kikusa-Mawanyi at a consideration of UGX. 6,000/= and that in 1979 he purchased 8.71 acres of land on Busiro Block 401 Plot 56 and it was on a blue page.

That he further purchased 40 acres of land in 1979 at a consideration of UGX. 40,000/=. The said 8.71 acres of land was added to the 40 acres of land to form Plot 60 measuring approximately 48.71 acres. PW1 confirmed to this honorable court on cross examination that he purchased the suit land for valuable consideration from the Omumbejja Mary Nakalema.

He also submitted that all Defendant witnesses confirmed that they did not know about the dealings between Omumbejja Mary Nakalema and the Plaintiff and could not challenge his purchase.

Counsel further submitted that PW2, Robert Mugabe, a Private Investigator and a Police officer who was hired by the Defendant to investigate the fraudulent acts of the Plaintiff. PW2 informed this honorable court that in the course of his investigation he discovered that the Plaintiff was not at all fraudulent and that he purchased his land bona fide. That PW2 also stated that he discovered that the fraudster was the Defendant's agent Mr. Mugerwa who wanted to grab the Plaintiff's land.

That PW3, the area L.C 1 Chairman stated that he was born and raised on the suit land and who assured this honorable court that since he started understanding the suit land has been the property of the Plaintiff. PW3 knew the Late Omumbejja Mary Nakalema and just like all Defense witnesses confirmed to this honorable court that the Late Omumbejja Mary Nakalema died when the Plaintiff was in possession and

use of the entire suit land but she did not at any time during her lifetime challenge the Plaintiff's ownership or occupation of the suit land.

Counsel concluded that the Plaintiff was not in any way fraudulent in his dealings on the Suit land, and the Plaintiff adduced evidence to confirm his bonafide ownership of the Suitland, bonafide purchase of the suit land from Omumbejja Mary Nakalema and his title to the suit land is not tainted by any fraud. On the contrary the Defendant/Counterclaimant failed to adduce any evidence to prove that the Plaintiff's certificate of title was obtained fraudulently. All the evidence adduced was based on hearsay and wishful thinking.

Turning to the Defendant's claim of the ownership of the suit land under the counter claim, the Plaintiff's counsel submitted that the Defendant's claim for ownership of the suit land is time barred. Counsel relied on **Section 5 of the Limitation Act Cap 80** which provides that: -

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."

They also submitted that Section 20 of the Limitation Act Cap 80 provides that: -

"Subject to section 19(1), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy or damages in respect of those arrears shall be brought after the expiration of six years from the date on which the interest became due."

The Late Princess died in 1980 and that the Defendant obtained Letters of Administration to the Estate of the Late Princess in 1984. Either the late Princess therefore could have filed a suit against the Plaintiff from 1979 to 1992 or the Defendant between 1984 to 1996 but none ever file any such suits till 2014

In reply, the Defendants submitted that Plaintiff's submissions, an issue not framed of Limitation is argued contrary to the rule which requires that Court frames the issues and parties lead evidence on them without ambush. Without prejudice, the forgery was unknown to the late Nakalema and her administrator [the Defendant] until it was discovered in 2009 as pleaded in paragraph 4 of the Witten Statement of Defence.

I find that the plea of Limitation as raised by the Plaintiff cannot be sustained. **Section 25** of the **Limitation Act** is to the effect that in actions founded on fraud, as in the instant case, the period of limitation shall not begin to run until the plaintiff has discovered, or could with reasonable diligence have discovered the fraud. It is also the settled position that in determining the period of limitation, court looks at the pleadings only, and no evidence is needed. In the present case the pleadings of the Defendant indicate that she discovered the fraud in 2009.

CVS
29/12/2014

Counsel for the Defendant submitted by laying out the law governing fraud of land. Counsel relied **Fredrick Zaabwe Vs. Orient Bank & Ors, Civil Appeal No.4 of 2006** and defined fraud as, "intentional.....calculated to deceive.....resorted to by one individual to get advantage over another. The person accused of fraud must be guilty of dishonesty [See Katureebe JSC (as he then was)].

He also relied on Kampala Bottlers Ltd Vs. Damanico (U) Ltd, Civil Appeal No. 2 of 1992, Wambuzi CJ at page 4(as he then was), Supreme Court fraud must be particularly pleaded i.e. particulars of fraud must be pleaded and page 7 of the same judgement that “fraud must be attributable to the transferee either directly or by necessary implication.”

He added that at pg.11 of Kazoora Vs. Rakuba, Civil Appeal No. 13 of 1992, Supreme Court “*stated that fraud must be strictly proved, the burden being heavier than on a balance of probabilities generally applied in other civil cases.*” In submitting on the fraud committed by the Plaintiff with reference to the particulars of fraud set out in paragraph 7 of the Counterclaim. The defence counsel laid down the particulars of fraud as follows; -

Counsel submitted that Plaintiff was registered on 30.1.1979 according to the Certificate of Title, Exhibit PE.1 and that the signature on Exhibit PE.7 which is Transfer Instrument No. KLA 90682 under which Plot 60 was transferred to the Plaintiff is a forgery. it is dated 11th January, 1979. When the late Princess is supposed to have signed it which presupposes that as of that date, Plot 60 had been created by a survey out of the mother Plot No. 56. However, the Mutation Form, Exhibit DE.3 showing the sub-division of Plot 56 to create plot 60, shows that: -

- a) the balance of survey fees was paid on 20.1.1979 (See Hand written as per the notes on left margin of form).
- b) Field surveyor signed form on 15.1.1979.
- c) The survey was checked on 23.1.1979 [See part (c) of the form].
- d) The survey was approved and sent to the Registrar of titles on 23.1.1979 [See paragraph (d) of the form].

e) The form at the reverse side shows that the mutation was lodged for registration (creation of new plot 60) on 30.1.1979 at 8.00 am.

That in view of the above chronology, it is not possible that the Vendor ever signed the transfer of plot 60 on 11th January, 1979, which had not been created. Indeed, the survey fees receipts tendered by the Plaintiff, namely Exhibit PE. 5 and PE.6 are dated 24.1.1979 and 20.1.1979 respectively after the transfer was executed.

He further submitted that though the Plaintiff was registered on 30.1.1979 according to the Certificate of Title, Exhibit PE.1, during cross examination on the 29.11.2019, the Plaintiff conceded that at the time of the purchase, he never saw any Certificate of title. That he then contradicted himself and said that there was a Certificate of Title contrary to paragraph 6 of his witness statement. That in paragraph 7 of his witness statement the Plaintiff claimed that in 1979, the late princess sold him 8.71 acres out of plot 56. At that time the land had no Certificate of Title and was still on a blue page. On 29.11.2019, the Plaintiff during cross examination contradicted himself by stating that the land in paragraph 7 was sold to him by Ruth Kyamulabi.

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29/11/2019*
That in paragraph 8 of the Plaintiff's witness statement, he claims that "after a few weeks", another 40 acres were sold to him. If the first purchase was in 1979, and the second purchase was after a few weeks, the purported transfer instrument dated 11.1.1979 cannot be authentic. The earliest the first sale under paragraph 7 (in 1979) could have been 1st January, 1979. A few weeks after 1.1.1979, cannot be 11.1.1979.

The handwriting expert, DW.4 Sebuwufu Erisa who examined the questioned transfer instrument alongside the late Nakalema's genuine signature [attached to exhibit DE.10] and concluded that the transfer was forged. He insisted that

professionally what mattered is not spellings of names or words but the style of letter construction. He was clear, based on this standard, that the transfer instrument was not signed by Princess Nakalema. During cross examination, he conceded that neither his relatives nor those of Princess Nakalema attended the sale transactions.

It is noted that the Defendant's claim of fraud against the Plaintiff is the belief/assertion that the Plaintiff purports to have purchased 19.71 Hectares of land from the late Princess Mary Nakalema on 11.1.1979 whereas he only purchased 9.71 Acres. The Defendant seems to be implying that the Plaintiff played around with the acreage amount in figures of 19.7 and 9.7. However, the court has noted from PW1 (Plaintiff) testimony that he initially purchased 8.71 acres and subsequently purchased 40 acres (total of 48.7 acres). It is clear that the Plaintiff purchased the suit land in two installments and the total acreage purchased of 48.71 acres when converted to hectares in 19.71 hectares. This debunks the Defendants theory of the 6.2 acres and 3.5 acres purchased by the Plaintiff.

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The assertion by the Defendant that the Plaintiff forcefully took over possession of the whole of Plot 60 while it was occupied by Princess Mary Nakalema's bibanja holders (lawful occupants) is not founded on any evidence adduced in court. The evidence of the Bibanja occupants DW.2 (Paul Mukasa Mbigo) and DW.3 (Olivia Nabisubi Kasumba) who the Plaintiff prosecuted for malicious damage to property does not go to the root of the ownership of the ownership of the disputed land. In any case there was no evidence adduced by the Defendant that late Princess Nakalema during her lifetime had ever challenged the possession or purchase by the Plaintiff. The counter submission by counsel for the Defendant that the Plaintiff adduced no evidence that the Vendor "signed in the presence of the Registrar of Titles" is a weak attempt to shift the burden of proof to the Plaintiff.

The Defendant asserts that the late Princess Nakalema's handwritten note dated 12.10.1980 [attached to exhibit DE.10 at page 13 of the Defendant's Supplementary Trial Bundle] and addressed to one Kasule (paragraphs 1, 2, 3, 4, 5 and 7 of DW.2 Paul Mukasa Mbigo's witness statement) shows that the Plaintiff only purchased 9.71 acres. This note was written to enable the heir Peter Kapere to survey off 19.5 acres neighboring the 9.71 acres that the Plaintiff had bought. However, the Defendant does not challenge the similar handwritten note by the said Princess Nakalema's to Ssekitto the Surveyor (PEXh. IV) which the Plaintiff used to process the Certificate of Title. More importantly the handwriting/signature of the said Princess Nakalema on the transfer form has not been challenged.

After a careful consideration of the evidence on record and the submissions made by the parties, this court finds that there has not been any sufficient evidence adduced to prove the required standard for fraud. The errors in dates cited by the Defendant on the registration and mutation process cannot be attributable to the Plaintiff in order for this court to conclude that the Plaintiff obtained the suit land illegally. As correctly pointed out by counsel for the Plaintiff, the Mutation forms are technical survey documents from the Registry Department and cannot be used to impute fraud on the Plaintiff who fulfilled his duty when he and the vendor signed and submitted the documents to the Lands Registry on 11th January 1979.

The Defendant has not proven that the Plaintiff's registration was done fraudulently. The plaintiff adduced cogent documentary and oral evidence on the circumstances surrounding his purchase of the suit land given that these events transpired 42 years ago. After carefully evaluating the evidence as a whole on this issue and the law applicable, the inevitable logical inference drawn is that the plaintiff properly obtained the suit land and lawfully acquired registration on it.

Issue No. 1 is resolved in the negative.

Issue two

Whether the Defendant's actions amount to trespass and denial of quiet possession

In *Sheikh Muhammed Lubowa versus Kitara Enterprises Ltd CACA No. 4 of 1987*

the court stated that to succeed in a matter of trespass to land, one must prove the following;

1. That the suit land belonged to him;
2. That the Defendant had entered upon it, and
3. That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the suit land.

Both parties relied on *Justine E.M.N Limited Vs Sterling Company Limited SCCA No. 11 of 2002* where the court held that: -

"trespass occurs when a person makes an unauthorized entry upon land, and thereby interest, or pretends to interfere, with another person's lawful possession of the that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is an actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass."

The Plaintiff has proved legal possession of the suit land and in his testimony states the Defendant and her agents trespassed on the Plaintiff's land, disturbed his quiet possession and demanded that he vacates the land or surrenders part of it to them. This was followed by reports to Police and in the Media for the Plaintiff to answer to various charges of fraud. This was evidenced by letters and a Newspaper clip

admitted on court record as PExh. II and PExh. III. The Defendant made a general denial to these allegations.

The above acts of the Defendant and or her agents amount to acts of intrusion/trespass thus entitle the Plaintiff to the reliefs specified in the plaint owing to the trespass onto the suit land.

Issue No. 2 is resolved in the affirmative.

Issue 3: Remedies

Counsel for the Defendant invited Court to grant declaratory orders and also prayed for an order of cancellation of the Plaintiff's names from the certificate of title to the suit land and reinstatement of the Plaintiff's names, full compensation for the economic market value of the land, general damages, interest and costs of the suit and counterclaim. Given the findings above, all the prayers of the Defendant in the Counter-claim are hereby denied and the counterclaim is dismissed with costs.

29/10/2021
The Plaintiff had prayed for an award of general and punitive damages. General damages are damages which directly arise from the natural or probable consequence of the act complained of (See *Stroms Vs. Hutchinson* (1905) AC 515) while Exemplary damages also referred to as punitive damages represent a sum of money of a penal nature in addition to the compensatory damages given for the pecuniary and mental suffering. They are deterrent in nature and aimed at curbing the repeat of the offending act. (See *Butterworth v. Butterworth* (1920) P.126).

Given the circumstances of this case, I will allow the Plaintiff the sum of UGX. 30,000,000 only as general damages. Given the fact that in spite of all the technical advice to the Defendant by PW2 the Investigator she had hired that the Plaintiff had

acquired the suit land legally and brought this to her attention but the Defendant was adamant, I will allow plaintiff UGX. 40,000,000/= as punitive damages.

Accordingly, Judgment is entered in favor of the Plaintiff and the following orders are hereby made-.

1. A Declaration that the Defendant's actions of continuously antagonizing the Plaintiff regarding the suit land are illegal and in violation of the Plaintiff's constitutional right to peaceful enjoyment of his property comprised in Busiro block 401 plot 1538 situate at Kikusa and Malanyi.
2. An Order for permanent injunction restraining the Defendant and/or her agents/ servants/ employees from any actions in any manner whatsoever regarding the suit land.
3. A Declaration that the Plaintiff is entitled to general damages of UGX. 30,000,000/= (thirty million only)
4. A Declaration that the Plaintiff is entitled to punitive damages of UGX. 40,000,000/= (forty million only)
5. Interest is awarded on the general damages in (3) at the rate of 15% per annum.
6. The Plaintiff is awarded the costs of the suit and counter claim.

It is so ordered



CORNELIA KAKOOZA SABIITI

JUDGE

Date: 29th October 2021