

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ; Egonda-Ntende & Tuhaise, JJA]

Civil Appeal No. 185 of 2018

(Arising from High Court (Land Division) Civil Suit No. 166 of 2010)

BETWEEN

The Registered Trustees of the Hindu Union _____ Appellant

AND

1 Kagoro Epimac
2 The Registrar of Titles
3 Flugensia Tumwesigye } _____ Respondents

(On appeal from the judgment of the High Court (Land Division) (Bashaija, J.) delivered on the 22nd September 2017)

Judgment of Fredrick Egonda-Ntende, JA

Introduction

- [1] The appellant, prior to the Asian Expulsion of 1972 / 1973, was the registered proprietor of a parcel of land in Kampala, FRV 62 Folio 1 measuring 2.02 acres of land. The land was expropriated by the Government. Later the Government of Uganda returned some of that land (0.081 hectares) back to the appellant in 2006. Part of that original piece of land, prior to the repossession, had been excised from FRV 62/1, sold and transferred to the respondent no.3. This portion was now FRV 318 Folio 18, (0.405 hectares). The appellant, interested in re acquiring the whole, entered into negotiations with the respondent no.3 for her to relinquish her interest and transfer it the appellant. They signed a memorandum of understanding to that effect.
- [2] Unknown to the appellant that parcel of land, which we may now refer to as the suit land, had been transferred to J K Vision Club Ltd and later to the respondent no.1. On learning of this state of affairs the appellant brought an

action in the High Court against the 3 respondents in which it contended that the transfer to the respondent no.1 had been fraudulently done and sought to have it cancelled and the suit land transferred to itself.

- [3] The respondent no.1 opposed the appellant's claim. Firstly that the plaint did not disclose a cause of action against the respondent no.1. Secondly that the respondent no.1 was a bona fide purchaser for value without notice of any fraud, and had purchased the suit property free from all encumbrances from J K Vision Club Ltd. He denied the allegations of fraud implied against him and putting the appellant to strict proof.
- [4] The respondent no.3 admitted that she was the registered proprietor of the suit property having purchased the same from the Government. It was transferred to her. She contended that she lost her certificate of title and had entered into an agreement to transfer the land to the plaintiff. She further contended that she had never signed any transfer to the J K Vision Club Ltd and that her signature on the transfer form to the J K Vision Club Ltd must be a forgery.
- [5] The learned trial judge who tried the case dismissed the claim basically on 2 grounds. Firstly that the appellant had failed to disclose a cause of action against the respondent no.1. Secondly that when the evidence adduced was evaluated there was no evidence of fraud attributable to the respondent no. 3 to warrant cancellation of the respondent's registration as the registered proprietor of the suit land.
- [6] The appellant was dissatisfied with that decision hence this appeal. It sets forth the following grounds of appeal:

'(1) The Learned Trial Judge misdirected himself on the law and facts when he found that the appellant didn't have a cause of action against the respondents.

(2) The Learned Trial Judge misdirected himself on the law and the facts when he found that the 3rd Respondent executed a transfer of the property comprised in FRV 318 Folio 8 Plot No. 1B Lugogo Bypass in favour of M/s J. K. Vision Club Ltd when she denied ever doing so.

(3) The Learned Trial Judge misdirected himself on the law and the facts when he failed to properly evaluate the evidence adduced at the trial thereby arriving at a wrong conclusion that the property comprised in FRV 318 Folio 8 Plot No. 1B Lugogo Bypass was not curved out of FRV 62 Folio 1.'

- [7] The respondents' no. 1 and no.3 opposed the appeal for different reasons. Respondent No.2 did not take part in the proceedings in the court below and on appeal.

Submissions of Counsel

- [8] In their written submissions the appellant's counsel cited the authority of Auto Garage and Others v Motokov [1971] E A 514 and contended with regard to ground 1 that the cause of action is set out in paragraphs 7, 8 and 9 of the plaint. That the said paragraphs are sufficient to disclose an allegation of fraud against the respondent no.1. And that therefore the learned trial judge erred to hold that no cause of action was established in the plaint. Secondly that the evidence of the respondent no.3 demonstrated that the signature of respondent no.3 on the transfer form to J K Vision Club Ltd was a forgery. The respondent was a shareholder in J K Vision Ltd and ought to be deemed to have aware of the fraud.
- [9] Thirdly the appellant's counsel contended that if there was no cause of action against the respondent no.1 there was a cause of action against the respondent no.3 in contract by virtue of the memorandum of understanding.
- [10] With regard to ground 2 the appellant's counsel contends that the respondent no.3 in her statement of defence stated that she had never signed a transfer to J K Vision Club Ltd and that her purported signature on that the transfer form for J K Vision Club Ltd was a forgery. She followed this up in her testimony. Much as she had stated in her evidence that she had returned the title deeds to Custodian Board in 1990 she found in 2006 that she was still the registered proprietor and therefore she had a legal interest in the suit land. She could only divest herself of the suit land by signing a transfer form as per section 92 of the Registration of Titles Act.
- [11] The appellant's counsel further contended that the respondent no.1 had never subjected signature of the respondent no.3 on the transfer form to hand writing expert to prove that it was her signature in order to prove that the transfer was genuine. Having failed to do so the respondent no.1 had failed to prove that there was a lawful transfer to the J K Vision Club Ltd.
- [12] At the same time the respondent no. 1 had tried in his testimony to distance himself from J K Vision Club Ltd when in fact he was a shareholder in the company on the evidence of DW2. This was evidence of fraudulent conduct.
- [13] The respondent no.1's counsel, with regard to ground 1, submitted that the appellant had no right to the suit property. It was not the registered proprietor

of the same. It had no legal interest in the same and therefore it had no cause of action against the registered proprietor. Secondly there are no particulars of fraud attributed to the respondent no.1 in the plaint. It was therefore contended that there was no cause of action against the respondent no.1.

- [14] With regard to ground 2 the respondent no.1's counsel submits that DW2 gave detailed testimony as to how J K Vision Club Ltd got registered as the proprietor of the suit land. His evidence was credible in light of the evidence of the respondent no.3 who had admitted to giving up ownership of the suit land and returning the title deeds to Custodian Board in 1990. The claim by the respondent no.3 that she had not signed a transfer to J K Vision Club Ltd would not hold as she had signed a blank transfer form that she returned with the title deeds to the land and obtained another property on Luthuli Avenue in Bugolobi.
- [15] The respondent no.1's counsel prayed that ground 2 should fail.
- [16] With regard to ground 3 the respondent no.1's counsel contends that it is meaningless as the learned trial judge did not hold that the suit property was not carved out of FRV 62/1. On the contrary he found that the suit property was excised from FRV 62/1 and then transferred to the respondent no. 3.
- [17] The respondent no.1's counsel prayed that this appeal should be dismissed with costs.
- [18] The respondent no. 3's counsel submitted, with regard to ground 1 of the appeal, that according to the evidence on record no liability was proved against the respondent no.3.
- [19] With regard to ground 2 the respondent no.3's counsel submitted that there was no lawful transfer of the suit land to J K Vision Club Ltd as on the evidence available it was clear that the respondent no. 3 never dealt with J K Vision Club Ltd including the fact that she did not sign a transfer form in their favour. DW2 who acted for J K Vision Club Ltd in the transfer of land had never met the respondent no.3 and the respondent no.3 had never met the advocate who purported to witness her signature on the transfer form. The respondent no.3's counsel therefore contended the transfer of land to the J K Vision Club Ltd was not lawful. Neither did the respondent no. 1 receive a lawful transfer.

Analysis

[20] This is a first appeal. This court is required to re-evaluate the evidence and the law and come up with its own findings pursuant to Rule 30 (1) of the Rules of this Court. See Fr. Narcensio Bemugisa & Ors vs Eric Tibebaaga Supreme Court Civil Appeal No. 17 of 2002, [2004] UGSC 18. I shall proceed to do so.

Ground 1

[21] Ground 1 has nothing to do with the evidence in the case. The matter to be determined here is a question of law and it is whether or not the learned trial judge was right in holding that the plaint did not disclose a cause of action against the respondent no. 1. I shall bring the relevant part of the plaint in view.

5. The plaintiff's cause of action against the defendants jointly and severally is for fraudulent transfer of the property formerly known and comprised in FRV 62 Folio 1 appx 0.81 Hectares and presently known and comprised in FRV 318 Folio 18 Plot No. 1B Lugogo Bypass and also a permanent injunction against the 1st defendant from trespassing on the above described property (hereinafter referred to as the suit property) and as against the 2nd and 3rd defendant an injunction restraining them from further dealing in the suit land.

6. The plaintiff will aver that it acquired the suit land sometime in 1944 but was abandoned during the regime of dictator Idi Amin Dada until the same property was transferred back to the plaintiff under a repossession certificate No. 5228 dated 16/03/06. Photocopies of the certificate of title and repossession certificate are attached as Annx. "A" and "B" respectively.

7. The plaintiff will further aver that of recent the 1st defendant has purported to obtain another title deed for the suit property and transferred the same in his name without the knowledge of the plaintiff. A photocopy of this title Deed is attached as Annx. "C".

8. The plaintiff has further learnt through the office of the 2nd defendant that the 1st defendant has written a letter claiming to be the owner of the suit property. A photocopy of the said letter dated 16/04/2010 is attached as "D".

9. The plaintiff will aver further that the purported transfer of the suit property in the name of the 1st defendant was done fraudulently.

Particulars of Fraud

- (a) The plaintiff has since repossession been known as the registered owner of the suit property and has since been in possession of the same.
- (b) On the 10.12.08 the suit property without the consent or knowledge of the plaintiff was transferred in the name of the 1st defendant by the 2nd defendant as per annexure "C".
- (c) All the documentation leading to such transfer in (b) above have gone missing from the record of the 2nd defendant mysteriously and cannot be traced.
- (d) The 3rd defendant represented to the plaintiff through a memorandum of understanding dated 18/05/2006 attached hereto as "E" that she had surrendered by transfer to the plaintiff all her interest in the suit property at a consideration of Shs: 12,000,000= receipt of which she duly acknowledged on execution of the Memorandum of Understanding.
- (e) The 3rd defendant further represented to the plaintiff a representation which was dated upon the plaintiff that the original certificate of title FRV 318 Folio 18 in her possession was misplaced and she undertook to follow up the acquisition of a special certificate of title and thereafter to execute a transfer in favour of the plaintiff, by clause 6 of the Memorandum of Understanding.
- (f) The 3rd defendant as a follow up of the lost title Deeds she instructed the plaintiff's then lawyers, M/s. Rubumba & Co. Advocates to apply for a special certificate of title for the lost Deeds and made a declaration before a Commissioner for oaths to the effect. A photocopy of letter to the lawyers dated 17/05/2006 and the Statutory Declaration are attached as "F" and "G" hereto.
- (g) The application for the special certificate of title was lodged with the Commissioner Land Registration and Notice was issued in the Gazette of 2nd June, 2006. A photocopy is attached as "H" hereto.
- (h) It was therefore strange for the 1st defendant ending up being registered as the transferee of the suit property without the consent and knowledge of the plaintiff.
10. As a consequence of the above mentioned fraud the plaintiff has suffered loss of its asset to which now the 1st defendant lays claim and wants possession of.

- [22] In order for a plaint to disclose a cause of action it is now generally accepted that it must firstly disclose that the plaintiff enjoyed a right. Secondly that that right was violated. Thirdly that the defendant is liable to the plaintiff for that violation of its right. See Auto Garage and others v Motokov [1971] E A 514.
- [23] In determining whether or not the plaint discloses a cause of action one need not look beyond the plaint itself. It is the only document and its annexures that you examine to determine whether or not a cause of action has been made out or not.
- [24] Lastly where the cause of action is fraud or a fraudulent transfer of land the plaint must disclose particulars of fraud and the person who has committed those particulars of fraud. See Kampala Bottlers Ltd v Damaniko (U) Ltd [1993] UGSC 1.
- [25] This is a mandatory requirement under Order 6 Rules 3 of the Civil Procedure Rules. It states,

‘(3) Particulars to be given where necessary.

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, **the particulars with dates shall be stated in the pleadings.**’

- [26] If a plaint fails to disclose particulars of fraud against the defendants or any one or more of them then a cause of action will not have been made out against such defendant or defendants against whom no particulars of fraud are alleged.
- [27] The learned trial judge discussed the aforesaid principles and applied them to the amended plaint of the appellant. He concluded that that the plaint did not disclose any particulars of fraud against the respondent no.1. He decided to strike out the plaint in accordance with Order 7 rule 11 (a) of the Civil Procedure Rules. The learned trial judge stated in part,

‘The plaintiff’s lack of a cause of action against the 1st defendant is made even more poignant by the pleaded particulars of fraud, in paragraph 9 of the plaint. It is does not show in the least that the 1st defendant in particular violated the plaintiff’s right. The particulars set are as follows:

.....

Item (h) the one to mention the 1st defendant merely faults him for having ended up being registered as the transferee of

the suit land. There are no facts as pleaded in the particulars upon which the alleged fraud can be imputed against the 1st defendant in the process of having ended up being so registered on title.'

- [28] The plaintiff in the plaint asserts 2 different sources of its right to FRV 313, Folio 18. Firstly that it was part of the land that was returned to it as FRV 62 Folio 1. Secondly and rather inconsistently to the first root of title that FRV 313/18 which is the suit land had been relinquished to it by the registered proprietor, at the time, the respondent no.3, who, however, had not executed a transfer to it, on account of the absence of the certificate of title. I suppose it would be at the trial to establish which right, (whether the legal right or the equitable right or both of them to the suit land) the appellant ultimately sought to enforce. For purposes of this ground it can be said that the appellant had established on the plaint that it claimed rights to the suit land.
- [29] It was the contention of the appellant's counsel that the 1st defendant had fraudulently registered himself as the registered proprietor of FRV 318/18 and it then set out the particulars of fraud in paragraph 9 of the plaint. As the learned trial judge observed save for the last particular (h), there are no particulars in the plaint that detail how the respondent no.1 fraudulently caused the transfer of the suit land to his names. Only particular (h) mentions the respondent no.1 but it contains no allegation of a single fraudulent act by the respondent no.1. It only states that it was strange that the respondent no.1 was registered as proprietor of the suit land.
- [30] I am unable to fault the learned trial judge for concluding that the plaint did not disclose a cause of action in fraud against the respondent no.1. Clearly once one examines the particulars of fraud set out in the plaint it is clear that no single particular of fraud is alleged against all the respondents, but most certainly against the respondent no.1.
- [31] The purpose of setting out particulars of fraud is for the adverse party to know the case he or she is to meet and be able to efficiently and effectively defend the case. The case cannot be built up as it progresses. It must be correctly stated at the commencement so that the parties are clear as to what is in issue. That is the purpose of pleadings. Where the plaint fails to establish a cause of action it must be rejected as no trial can proceed on it. In my view, neither the original plaint, nor the amended plaint disclosed a cause of action against the respondent no.1. It was rightly rejected by the trial court.
- [32] There was no claim in the alternative in contract against the respondent no.3. All the appellant sought against the respondent no.3 was for a transfer of the

suit land to the appellant. The trial judge was in no position even it was possible that an action in contract would lie against the respondent no.3 to frame a claim in those terms. That was for the appellant to do so. He did not do so. The learned trial judge is wrongly faulted for not finding a cause of action in contract against the respondent no.3.

[33] I would reject ground 1 of the appeal.

Ground 2

- [34] The learned trial judge reached the conclusion that on the evidence before him respondent no. 3 had indeed signed a blank transfer form and surrendered the certificate of title to the suit land to either KCC or Departed Asians Property Custodian Board long before she signed a memorandum of understanding with the appellant. The learned trial judge believed the evidence of DW2 as to how the land came to be transferred to J K Vision Club Ltd which was on the basis of a certificate of title and signed blank transfer form that the KCC provided to J K Vision Club Ltd. I have examined the record of evidence and in particular the testimony of DW2 and the respondent no. 3.
- [35] It is clear that soon after the initial acquisition of the suit property the respondent no.1 decided to relinquish it in favour of obtaining another piece of land. While the respondent is not clear as to who she relinquished the certificate of title to it is clear that she did relinquish the same and obtained another piece of property. Whether she left the papers at the Departed Asians Property Board and not at Kampala City Council she had surrendered her interest. She was in fact surprised when again much later she was approached and told that she was still the registered proprietor and can negotiate with the appellant for the return of the suit land to the appellant.
- [36] While the respondent no.3 could technically claim that she had not transferred that land to J K Vision Ltd the claim that the signature on the transfer form is not her signature is not correct in light of her own testimony that she had surrendered the certificate of title to the Departed Asians Property Custodian Board. It is more probable than not that the surrender of the certificate of title included a blank transfer form which she had signed as evidence of her surrender of that land.
- [37] The respondent no.3 applied for a special certificate of title and stated on oath that she had lost the duplicate certificate of title. This was false. She had handed over the duplicate of certificate of title to either Departed Asians Property Custodian Board or Kampala City Council at some point in 1990 when she had surrendered the suit property.

[38] The claim by the respondent no.3 that she had not signed a transfer form on which the transfer to J K Vision Ltd was made is not credible given that she had signed a blank transfer form and left the same together with the certificate of title with the Departed Asians Property Custodian Board. I have no reason to doubt that it is this form that was used in the transfer of the suit land in light of the testimony of DW2. I am inclined to believe that it is this form that formed the basis for the transfer to J K Vision Club Ltd and that this form bore her signature in spite of her denials.

[39] I find no merit in ground 2.

Ground 3

[40] The learned trial judge in this ground is assailed for allegedly having found that the suit property was not excised out of FRV 62/1. I have examined the judgment of the learned trial judge. He stated in part as follows:

'On the basis of the pleaded facts in the plaint and the respective defences and attachments thereto, it is quite clear that the plaintiff was not and has never been registered as proprietor of FRV 318 Folio 18 Plot No. 1B Lugogo Bypass as that was carved out of FRV 62 Folio 1 and registered separately in the name of the 3rd defendant. As correctly submitted by Mr Kibuuka Musoke, ownership of land under the Torrens system, such as the one in Uganda, is principally by registration. FRV 318 Folio 18 Plot No. 1B Lugogo Bypass was transferred to the 3rd defendant and registered in her names under Certificate of Purchase issued by the Minister of Finance. The plaintiff is not and has never been the registered as proprietor of land of that description.'

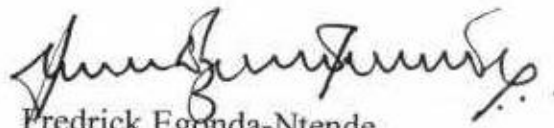
[41] I have been unable to find any holding by the learned trial judge that FRV 318/18, the suit property, was not subdivided from FRV 62/1. The foregoing remarks by the learned trial acknowledge that position. He only makes the point that since the suit land was subdivided from FRV 62/1 the appellant has never been registered as owner of FRV 318/18.

[42] I find no merit in ground 3.

Decision

[43] I would dismiss this appeal with costs.

Dated, signed and delivered at Kampala this 26th day of June, 2019



Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Owiny-Dollo, DCJ; Egonda-Ntende & Tuhaise, JJA*]

Civil Appeal No. 185 of 2018

(Arising from High Court (Land Division) Civil Suit No. 166 of 2010)

BETWEEN

The Registered Trustees of the Hindu Union ===== Appellant

AND

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2 The Registrar of Titles
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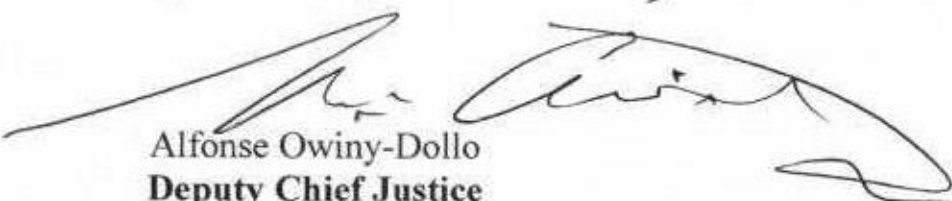
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Judgment of Alfonse Owiny-Dollo, DCJ

Introduction

- [1] I have had the opportunity to read in draft the judgment of my brother, Egonda-Ntende, JA. I agree that this appeal has no merit.
- [2] As Tuhaise, JA, agrees, this appeal is dismissed with costs.

Dated, signed and delivered at Kampala this ^{26th} day of June, 2019


Alfonse Owiny-Dollo
Deputy Chief Justice

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[Coram: Owiny-Dollo, DCJ; Egonda-Ntende & Tuhaise, JJA]

Civil Appeal No. 185 of 2018
(Arising from High Court (Land Division) Civil Suit No. 166 of 2010)

THE REGISTERED TRUSTEES OF THE HINDU UNIONAPPELLANT
Versus

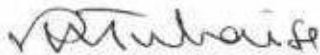
1. KAGORO EPIMAC
2. THE REGISTRAR OF TITLES RESPONDENTS
3. FLUGENSIA TUMWESIGYE

*[On appeal from the judgment of the High Court (Land Division)
(Bashaija, J.) delivered on the 22nd September 2017]*

Judgment of Percy Night Tuhaise, JA

I have had the benefit of reading in draft the judgment of Hon. Mr. Justice Fredrick Egonda-Ntende, JA. I agree with his analysis of evidence, decision and conclusion that this appeal has no merit and should be dismissed with costs.

Signed and dated at Kampala this 26th day of June 2019.


Percy Night Tuhaise
Justice of Appeal