

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT-00-CV-CS- 1293 OF 1997

ISAAC GOERGE MUNAABI

PLAINTIFF

VERSUS

ALBERT SEBUDDE
RACHEL KAGGWA

DEFENDANTS

BEFORE THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGEMENT

1. The Plaintiff seeks an order for cancellation of the name of Defendant No. 2 from the certificate of title to the suit property, substitution of the name of the Plaintiff therefore, general damages, costs and interest on decretal sum until payment in full. The Plaintiff asserts that he was the registered proprietor of land comprised in leasehold volume 1387 folio 6 plot 74 and situate at Naziba, Mpigi District, herein after referred to as the suit property.
2. Sometime in November 1996 Defendant No. 1 lent to the Plaintiff Shs.2,000,000.00 to be paid back in a month's time together with interest of Shs.600,000.00. As security for this loan the Plaintiff deposited with Defendant No.1 the certificate of title to the suit property, together with executed blank land transfer forms in favour of Defendant No.1. The Plaintiff failed to the said amount with one month as promised but subsequently made part payment of shs.600,000.00.
3. Soon thereafter the Defendant No.1 transferred the suit property into his names and in turn transferred it to the Defendant No.2. The Plaintiff alleges that these transfers were fraudulent, and sets out particulars of fraud in plaint against both Defendants.
4. The Defendant No.1 denies the Plaintiff's claim and asserts that the Plaintiff agreed to a transfer of the suit property to the Defendant No.1 in event that he failed to repay the loan

extended to him. The suit property was transferred to the Defendant No.1 after the Plaintiff failed to pay the loan.

5. Defendant No.2 in her written statement of defence denied the Plaintiff's claim and stated that she was a bona fide purchaser for value and that transfer into her names was lawful.
6. At the commencement of hearing of this case, the parties agreed upon the following facts: In November 1996 the Defendant No.1 lent to the Plaintiff Shs2,000,000.00 (shillings two million) repayable with interest of shs600,000.00 in one month's time. As security for the loan the Plaintiff deposited with Defendant No.1 documents, namely, the certificate of title for the suit property and blank transfer forms duly signed by him. The Plaintiff paid back Shs600,000.00 and defaulted in respect of the balance. The Defendant No.1 using the blank transfer forms transferred the property into his names. And on the same day transferred the suit property into the names of Defendant No.2.
7. The Plaintiff called two witnesses. PW1 was Nicholas Ssali, a valuation surveyor. He testified that he was a fellow with the Institute of Surveyors in Uganda and was registered as valuation surveyor. He initially worked with Kampala City Council from 1976 to 1981. From 1981 to date he was employed by Katuramu and Company. He was instructed by the Plaintiff on 15th December 1998 to value Plot 74, Block 268 at Massajja Naziwa, Lubowa Estate and advise him of the market value. He proceeded to the site, carried out the necessary inspection, including measurements of the buildings, and he produced thereafter a report, Exhibit P1. The market value of the property was Shs112,000,000.00. The forced sale value of the unimproved value of property was about Shs52,000,000.00.
8. PW2 was the Plaintiff. He testified that he was living on the suit property where he had a hatchery and poultry houses for a poultry farm that he has been running since 1986. He borrowed money from Defendant No.1 in the sum of shs2,000,000.00 to pay back within one month together with agreed interest of shs600,000.00. As security for the loan the Plaintiff gave Defendant No.1 a post-dated cheque for Shs2,600,000.00, certificate of title to plot 74, the suit property, and signed blank transfer forms.
9. The Plaintiff managed to pay shs600,000.00 but failed to pay the principal amount. He tried to get in touch with the Defendant No.1 to explain his situation, which he did. He was however subsequently orally notified that the Defendant No.1 had foreclosed and

taken over the land. When he checked in the land registry, he found that the Defendant No.1 had transferred the land to himself and then to the Defendant No.2 on the same day, 5th June 1997. The Plaintiff placed a caveat on the property and then commenced these proceedings.

10. The Plaintiff further testified that he had never agreed to sell the suit property to Defendant No.1 at any time. Defendant No.1 had never paid the Plaintiff any sum of money as consideration for the suit property. Defendant No.1 did not account for the proceeds of the sale. Neither had the Defendant applied to court for foreclosure. When shown Exhibit P2, the transfer form for transfer of the suit property to Defendant No.1, the Plaintiff testified that he sees now a lot of signatures which were not there. He testified that he signed the form in front of the Defendant No.1. Shown Exhibit P3 the application to transfer land consent form, he stated that he never signed this form or made the application. He never filled the form. The form does not mention the buildings on the property. Exhibit P3 states the consideration to be Shs10,000,000.00 which in his view was too low. The Plaintiff never authorised any one to make this application or to sign it on his behalf.
11. The Plaintiff tendered in evidence Exhibits P4 and P5 which were an application to transfer land consent form and a transfer of land form upon which the transfer of land between Defendant No.1 and No.2 was effected. In Exhibit P4 the consideration is stated to be shs10,000,000.00. Exhibit P5 was lodged on 5th June 1997. Exhibit P4 describes the developments on the land as banana plantations and other crops.
12. DW1 was Albert Sebude. He testified that he lent Shs8.600,000.00 to the Plaintiff, and Shs2,000,000.00 remained outstanding. That they eventually agreed with the Plaintiff that part of the land be sold to raise the money. Defendant No.1 sold the land to Defendant No.2 for shs10,000,000.00. He transferred the land into his names and then transferred it to the names of the Defendant No.2. Defendant No.2 was a relative of his wife, and his wife acted for Defendant No.2 in this transaction, including signing the transfer papers. His wife, also known as Rachael Kaggwa, was aware of the agreement between him and the Plaintiff.
13. Defendant No.2 called no witnesses and did not testify.

14. There are three issues that the parties agreed to. These are: 1. whether the transfer of the suit property into the name of Defendant No.1 was proper and lawful; 2. whether the transfer from Defendant No.1 to Defendant No.2 was fraudulent; 3. what are the remedies available if any?
15. I will deal with the issues in the order above. The facts relevant to this issue are not in dispute save as to the authority of transfer of the suit property from the Plaintiff to Defendant No.1. In his written statement of defence, paragraph 4 in particular, Defendant No.1 asserts, "... the duly executed the transfer forms and agreed to execute transfer of the suit lands in the names of the 1st Defendant in the event of his failure to repay the said monies." From this pleading, it is being contended by the Defendant No.1 that it was a term of their agreement with the Plaintiff that in event the Plaintiff failed to pay the money the Plaintiff agreed that the suit property will be transferred to Defendant No.1. This term is not one of the agreed facts.
16. In his testimony the Defendant No.1 stated in part,
"Shs2,000,000.00 remained outstanding from the Plaintiff. The Plaintiff did not repay back the Shs2,000,000.00. I waited for him for quite sometime. I went to his house and left messages several times but he was not responding. Eventually I caught up with him and we agreed that we sell part of the land and raise the money. I sold the land to Rachael Kaggwa. It was about Shs10,000,000.00."
17. In cross examination Defendant No.1 stated that the Plaintiff did not sell the land to him. He further admitted that the Plaintiff did not fill or sign the application to transfer consent form, Exhibit P3. The Plaintiff stated that he never filled in this form and it does not bear his signature.
18. The version of the story put forward by the Plaintiff is that certificate of title and signed transfer forms were to act as security for the loan advanced, and he had not agreed to a sale of land to the Defendant No.1. He admits defaulting on the loan repayments.
19. The Defendant has not supported the term, that the Plaintiff had agreed that in event of default, the suit property would be transferred to the Defendant No.1, which he set out in paragraph 4 of his written statement of defence, with any evidence whatsoever. I conclude that that term is not proven. There was no such term in the agreement between the Plaintiff and Defendant No.1.

20. The Defendant No.1 has claimed in testimony that after default, he met with the Plaintiff and they agreed that part of the land be sold to recover the outstanding monies. This claim runs counter to the pleadings of Defendant No.1, in so far as the claim in the pleadings was that the Plaintiff had agreed to transfer the suit property to the Defendant No.1, in event of default of payment. It was never put to the Plaintiff during his cross examination by counsel for Defendant No.1. The Plaintiff denied ever agreeing to sell the suit land to the Defendant No.1.
21. I accept the version of the story put forward by the Plaintiff that deposit of the certificate of title and signed blank transfer form was as security for the loan advanced to the Plaintiff. There was no agreement to transfer to Defendant No.1 the suit property in event of default. There was no subsequent agreement or arrangement between Defendant No.1 and Plaintiff to sell the suit land to recover the outstanding monies. After default by the Plaintiff, it is clear that the Defendant No.1 proceeded unilaterally with all steps he took with regard to the suit property.
22. The Plaintiff contends that the transfer of land to the Defendant No.1 was fraudulent. Particulars of fraud were set out in the plaint, and further particulars added during the trial.
23. Before I assess the evidence in this case, with regard to the issue of fraud, I should start by discussing the law applicable. First of all the burden of proof for fraud in cases of this nature must be heavier than the ordinary standard of balance of probability available in civil proceedings. It is not, however, as high as in criminal cases, where the standard of proof is beyond reasonable doubt. It is in between those two.
24. Secondly under an action permitted under Section 176 of the Registration of Titles Act, (formerly Section 184), this action for recovery of land must be brought by the person deprived of the land against the transferee. In effect the fraud to be proved is fraud on the part of the transferee to deprive the transferor of the land in question.
25. Section 176 of the Registration of Titles Act provides,
- “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 case---
- (a)
 - (b)
 - (c) the case of a person deprived of any land by fraud as against the person registered 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;”

26. This question was considered in the case of *Kampala Bottlers Ltd v Damanico (U) Ltd*

Supreme Court CA No. 22 of 1992 (unreported). Wambuzi CJ, observed,

“...as already indicated in this judgement, fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean a transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.”

27. On the facts before me it is clear that the Defendant No.1 presented to the Commissioner of Lands an application for consent to transfer the suit property Exhibit P3 in which he made a false representation that it was signed by the applicant or his advocate implying that the application was made by the transferor, when in actual fact Defendant No.1 knew that the transferor, now the Plaintiff, had not authorised such an application to be made, much less sign the same. The Defendant No.1 further represented to the Commissioner of Lands that the transferee had paid to the transferor Shs10,000,000.00 as consideration for the suit property when in fact the transferee, being Defendant No.1 had paid no such consideration, or any money whatsoever, to the transferor.

28. After the Commissioner of Lands granted consent to transfer the suit property, based on false representations made by Defendant No.1, Defendant No.1 presented this consent to the Registrar of Titles, together with the transfer form, knowing fully well, that the consent of the Commissioner of Lands to transfer the suit property had been fraudulently obtained.

29. Defendant No.1 further presented to the Registrar of Titles a transfer of land form on which it was falsely represented that a one Kavuma Kabenge, an advocate, had witnessed the signature of the transferor or vendor as he was referred to, the Plaintiff in this case, when in fact Mr. Kavuma Kabenge had not witnessed such signature. Attestation of instruments under the Registration of Titles Act, Section 147 thereof, is essential for the validity of such instruments. Mr. Kavuma Kabenge’s name is inscribed as the witness on Exhibit P2. It is the unchallenged testimony of the Plaintiff that the blank transfer form he signed and handed to the Defendant No.1 did not bear any other signature other than his own.

30. The result of all these fraudulent acts of the Defendant No.1 was the transfer of the suit property into his names and then the immediate transfer of the land to another party. Defendant No.1 clearly received a benefit from his fraudulent acts.
31. I am satisfied that in this case it has been amply established on the higher standard necessary for proof of fraud that the Defendant No.1 fraudulently got the suit property registered into his names.
32. I now turn to the second issue, whether the transfer from Defendant No.1 to Defendant No.2 was fraudulent. This issue appears to have been wrongly framed. In my view, the issue at this stage is whether or not Defendant No.2 had notice of the fraudulent acts of Defendant No.1. Defendant No.2 did not testify in this case nor did she call any evidence. In her pleadings she set up a defence of being an innocent purchaser for value. In this regard it may be useful to first set out the law with regard to proof of this plea. This was discussed in *Sejjaka Nalima v Rebecca Musoke Supreme Court Civil Appeal No. 12 of 1985* (unreported) in which *Odoki JA*, (as he then was), observed,
- “While the burden of proving the case lies on the Plaintiff, it is well settled that the onus of establishing the plea of a bona fide purchaser lies on the person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving to the Plaintiff to prove notice if he can.”
33. Defendant No.2, if the testimony of Defendant No.1, is to be believed on this account, was represented in this transaction, by the wife of Defendant No.1. In fact it is Defendant No.1’s wife that signed the transfer forms. Defendant No.2, was aware that the suit property was not in the names of the Defendant No.1. As a condition of the sale, the property had to be transferred first into the names of the Defendant No.1. All this is according to the testimony of Defendant No.1. Furthermore the Defendant No.1’s wife, who was the agent for Defendant No.2, was aware of the agreement between Defendant No.1 and the Plaintiff over the suit land. The only agreement that has been established between Defendant No.1 and the Plaintiff is the equitable mortgage over the suit property.
34. In these circumstances it appears to me that the agent for Defendant No.2, who acted for her in this transaction, and the wife of Defendant No.1, was aware of the relationship between the Defendant No.1 and the Plaintiff, if the testimony of Defendant No.1 is to be believed. In answer to a question from the court the Defendant No.1 stated that “*I informed my wife of my agreement with the Plaintiff with respect to this land.*” In Defendant No.1’s testimony in cross examination he stated that the Plaintiff did not sell the land to Defendant No.1.

35. It is, I suppose, then inevitable to conclude that the Defendant No.1's wife, the agent for Defendant No.2, was aware that the Plaintiff had not authorised the sale of the suit property to either Defendant No.1 or Defendant No.2. In those circumstances Defendant No.1's wife could not have been unaware of the fraud her husband perpetrated over the suit property, transferring the land to himself, and then to Defendant No.2.
36. Defendant No.2 has not called any evidence in this case. Not even that of her agent, wife of Defendant No.1, who was present in the court room during the trial, beside her husband, Defendant No.1. Both Defendant No.2 and her agent Defendant No.1's wife, bear the same names, Rachael Kaggwa. It is worth noting when Exhibit P5, the transfer instrument from Defendant No.1 to Defendant No.2 which was signed by Rachael Kaggwa, wife to Defendant No.1, for Rachael Kaggwa, Defendant No.2, bears no indication that the signatory for the purchaser was not the purchaser, but a duly authorised agent for the purchaser, and the evidence of authority indicated. For instance if the authority was derived from a power of attorney, the particulars of the power of attorney and its registration would have to be mentioned. Rachael Kaggwa signed as a purchaser. And her address is given as PO Box 284 Masaka on the application form for consent to transfer, Exhibit P4.
37. Much as Defendant No.1 claimed in his testimony that Defendant No.2 was away in London when the suit property was sold to her, her none appearance wholly raises eyebrows. Does she really exist? We have not seen any papers by which she authorised Defendant No.1's wife, and namesake, Rachael Kaggwa, to act for her in the purchase of the property. The person, who acted for her and signed the transfer papers in Defendant No.2's names, though present, was not called to testify. Defendant No.2 did not testify.
38. Is the existence of another Rachael Kaggwa not a hoax in an attempt to cover up the fraudulent acts of Defendant No.1 with the knowledge of his wife, Rachael Kaggwa? The Rachael Kaggwa who signed the transfer papers and was given the certificate of title by Defendant No.1 is the Rachael Kaggwa the wife of Defendant No.1. In all probability she is the only Rachael Kaggwa in this transaction and the Rachael Kaggwa connected to these proceedings. Even if one only accepted that she was the agent of Defendant No.2, and not the actual Defendant No.2, I am satisfied that she was aware of the fraudulent acts of her husband.

39. In those circumstances can the knowledge of fraud of the agent be imputed into the principal? Dicta from Odoki, JA (as he then was) in *Sejjaka Nalima v Rebecca Musoke*, *Supreme Court Civil Appeal No. 12 of 1985*(unreported) would seem to answer this question.

“It seems to me that where a purchaser employs an agent, such as an advocate, to act on his behalf the notice he receives, actual or constructive, is imputed on the purchaser. And similarly where the advocate acts for both parties any notice he acquires is ordinarily imputed on both parties.”

40. The evidential burden that lay on the Defendant No.2 on account of the plea of bona fide purchaser for value without notice has not been discharged in the circumstances by Defendant No.2. Given the totality of evidence before me, I find that Defendant No.2 had notice of the fraud in this case, through her agent in this transaction, Rachel Kaggwa, the wife of Defendant No.1.

41. Accordingly, I direct the Registrar of Titles, in accordance with Section 177 of the Registration of Titles Act, to cancel the registration of Rachael Kaggwa, as the registered proprietor of the land comprised in Leasehold Register Volume 1387 Folio 6 Block 268 Plot 74 and reinstate Isaac George Munabi as registered proprietor thereof.

42. The Plaintiff claimed general damages. On the evidence he remained in possession of the suit property and to this day continues to remain in possession. He has been able to carry on his usual business of a poultry farm. There is no evidence that this business suffered any significant damage. In any case it appears to have been in trouble before and the purpose of the loans was to bring the poultry business back to life. On account of his business I am not able to find damages due to him.

43. The Plaintiff must, however, have been inconvenienced greatly by these actions of the Defendant No.1. He had to move up and down. He went to the Registrar of Titles to find out what was happening to his property. A sum of Shs3,000,000.00 will be adequate to compensate him as general damages for inconvenience.

44. The Plaintiff has indicated that he has always been willing to pay back Shs2,000,000.00 that was owing to the Defendant No.1 under the equitable mortgage. Much as the Defendant No.1 has not counterclaimed the same, it is just and equitable in the circumstances to direct the Plaintiff to pay back the said sum of shs2,000,000.00. It may be offset from the money I have ordered the Defendant No.1 to pay the Plaintiff as

general damages. In which event only Shs1,000,000.00 would remain due to the Plaintiff on that account.

45. Defendant No.2 is directed within 30 days from the date hereof to return the duplicate of certificate of title to the suit property to this court for delivery to the Registrar of Titles.
46. The Plaintiff is awarded costs of the suit together with interest at court rate on the decretal amount from date of judgment until payment in full against both Defendants.

Dated at Kampala this 2nd day of May 2005

FMS Egonda-Ntende
Judge