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Simon Kato Bugoba V Samuel Kigozi -HCT-00-CC-CS-0543-2004 [2007] UGCommC 12 (6 February 2007)

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0543-2004

Simon Kato Bugoba Plaintiff
Versus
1. Samuel Kigozi
2. Muyanja Mbabali Defendant

6th February 2007

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's case against the defendants is that he borrowed Shs.26m from the 1st defendant and as security therefore pledged land comprised in Kyaggwe Block 110 Plots 1526 and 2282 at Seeta. Without giving to him notice of foreclosure, the 1st defendant transferred the said land into his names. The 2nd defendant bought the suit land from the 1st defendant.

At the scheduling conference, the parties agreed that the plaintiff borrowed from the 1st defendant a sum of Shs.20,000,000- and pledged his land comprised in Kyaggwe Block 110 Plots 1526 and 2282 Land at Seeta. Parties executed an agreement for Shs.26m and as further security plaintiff deposited with 1st defendant the certificates of title and duly signed transfer forms and a cheque in the sum of Shs.26m. When the cheque was presented for payment, it bounced. On 13/9/2002, the 1st defendant transferred plot 1526 into his own names. On 30/9/2002 the 1st defendant did like wise for plot 2282. On 17/2/2004, the land was transferred from the 1st defendant to the 2nd defendant and according to the transfer documents the consideration was Shs.20m. The plaintiff got an evaluation of the property and at the time of the transfers the property was worth Shs.125m.

Issues:

1. Whether the 1st defendant was entitled to transfer the land into his own names.
2. Whether the 2nd defendant was a bonafide purchaser.
3. Whether the plaintiff is entitled to the remedies sought.

Counsel:
Mr. Ronald Ngobi for the plaintiff.
Mr. Gideon Balinda for the 2nd defendant.

Before I delve into the issues for determination herein, I find it necessary to comment on two

important aspects of this case. The first one is that the 1st defendant did not participate in the proceedings. He is said to have disappeared after transferring the land to the 2nd defendant. The second one is that the facts disclose issues of Land and commercial justice. In August 2004, the learned Registrar of this Court referred the case to the Civil Division of the High Court. On 28/10/2004, a Judge of the Civil Division sent it back to the Commercial Division after observing:

> "I have reviewed the pleadings and facts and consider this to be a commercial transaction involving a hybrid mortgage dealing and the consequences thereof. As such it is a commercial dispute to be dealt with in that Court. I direct file to be sent there for disposal."

I'm not sure that sending it back to the Commercial Division as if the Civil Division does not at all handle matters of Commercial financial nature was the best course to take in the circumstances of this case. Be that as it may, I will do the best I can.

To appreciate what happened between the plaintiff and the 1st defendant, I consider it necessary to reproduce the Loan Agreement between them. It goes as follows:

> "MONEY LENDING AGREEMENT
>
> This agreement coming this 8th day of July 2002 between KIGOZI SAMUEL of P. O. Box 30220 Kampala ..... and Simon Kato Bugoba .....
> WITNESSETH AS FOLLOWS:-
> 1. The lender hereby lends to the borrower at the borrower's own request who hereby receives the sum of Shs.26,000,000- to be paid back to the lender within a period of 30 days from the date of signing of this agreement.
> 2. That the borrower guarantees as security for the repayment land and houses thereon comprised in Block 110 Plot 1526 and Block 110 Plot 2282 respectively, land at Seeta East Buganda Kyaggwe registered proprietor Simon Kato Bugoba and a post dated cheque No. 071747 of 26,000,000- (words) drawn on Nile Bank, Parliament Avenue Branch, Kampala and dated the 6th day of August 2002.
> 3. The borrower has surrendered to the lender two duplicate certificates of titles for the above security and has signed transfer and consent forms in favour of the lender at the signing of this agreement.
> 4. That if the borrower defaults, the lender is free to apply for and transfer the property into his names and takeover ownership thereof and or sell it to recover his outstanding amount plus costs and other related charges.
>
> In witness whereof the above parties have hereto set their respective Lands the month and year first above mentioned.
>
> Signed by the said .....
> KIGOZI SAMUEL LENDER
>
> Signed by the said .....
> SIMON KATO BUGOBA BORROWER
>
> All in the presence of .....
> EDISON RUYONDO ADVOCATE"

Other witnesses included one Kiwanuka and one Mulindwa.

In his testimony, the plaintiff narrated how in 2002 he was looking for someone to lend him money. Someone took him to the 1st defendant. He lent him Shs.20m and they made an agreement to that effect, P. Exhibit. 1. The agreement talks of Shs.26m. The difference was interest. He was to pay it back in a period on one month. He provided the aforementioned security and he was made to sign a transfer form, P. Exhibit. 111 but they did not date it. The transfer was in favour of Kigozi. There were houses on the two properties. Each plot had 3. He admits that he failed to raise Kigozi's money in time. On failing to pay, Kigozi went straight to the Land Office and transferred the two titles into his names. When he went to the Land Office one and half months later, he found that the transfer had already been effected. Kigozi did not notify him that he was going to transfer. On realizing that he had transferred, he put a caveat. But after the transfer, he, Kigozi, did not evict him from the land.

It is his evidence further that on failing to raise the money, he contacted Kigozi and they agreed that he, the plaintiff, sells one plot with 3 houses on it. One broker called Mulindwa took him to Conference Centre where Mbabali's offices were. Mbabali offered Shs.40m. The plaintiff wanted Shs.100m. In the course of time, he had problems with Wembley people and went into hiding. By the time he came back, Mbabali had already bought the land.

Learned counsel for the plaintiff has submitted that in view of the facts above, the relationship of the plaintiff and the 1st defendant was that of an equitable mortgagor and mortgagee as no legal mortgage was executed by the parties. The law provides that an equitable mortgage of land may be made by the registered proprietor of his/her certificate of title with intent to create security thereon whether accompanied or not by a note or memorandum of deposit. Every equitable mortgage as aforesaid shall be deemed to create an interest inland. From the pleadings and evidence of the plaintiff, I accept counsel's argument that the plaintiff and the defendant duly satisfied the provisions of the law as to creation of an equitable mortgage. Was the 1st defendant then entitled to transfer the land into his names?

I have addressed my mind to the above issue. The absence of the 1st defendant both as a party and a witness has not made my work any easier. But as pointed out already, the loan agreement purported to grant power to the 1st defendant to transfer the land into his own names and to this end the plaintiff signed transfer forms. During his testimony, the plaintiff said that he needed money urgently to grade some land, which he hoped to sell and pay off the loan. He also testified that the document was drawn by the 1st defendant's lawyers and that the acquisition of the loan was conditioned on the plaintiff's signature on the loan agreement in the words it was couched. Mr. Ruyondo who drafted the agreement for the parties did not appear as a witness to challenge the plaintiff on that point. I'm inclined to the view espoused by counsel for the plaintiff that clause 4 of the agreement did not entitle the 1st defendant to transfer the land into his names and gain ownership thereof. The lawyer who drafted the agreement on behalf of the parties ought to have been aware of the existence of S. 129 (2) of the Registration of Titles Act which clearly states that an equitable mortgage shall be deemed to create an interest in land. By implication, after creation of the equitable mortgage the 1st defendant had an interest in the land to the extent of the sum loaned to the plaintiff. Upon default by the plaintiff, the remedies open to the 1st defendant were the ones set out in the Mortgage Act. He could appoint a receiver; take possession of the mortgaged land; and/or foreclose. He did not do any of the above. He did not follow any of the provisions of the law relating to realization of an equitable mortgage. It is immaterial that the plaintiff expressly gave power to the 1st defendant to transfer the land into his names. I say so because an equitable mortgagor has an equitable right to redeem his property. Any provision in the mortgage purporting to oust that right would be invalid. The case cited to me by counsel, ***Samuel –Vs- Jarrah Timber of***

Wood Paving Corporation [1904] A.C. 323, is in my view relevant to the facts herein. In that case, Lord Lindley explained:

> The doctrine "once a mortgage always a mortgage" means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the transaction or in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage.

I agree. I would only add that the plaintiff had secured his land as a mortgage. He was entitled to redeem it on payment of the debt in full at any time even after expiry of the repayment date. The remedy available to Kigozi was not to go straight to the Land Office and transfer the land into his names but to apply to Court to exercise the powers available to a mortgagee.
I would answer the first issue in the negative and I do so.

As to whether the 2nd defendant was a bonafide purchaser, I have already stated that according to the plaintiff, on failing to raise the 1st defendant's money, he contacted Kigozi and they agreed that he, the plaintiff, sells one plot with 3 houses on it. From the plaintiff's own evidence, therefore, he intended to sell one of the plots to pay off Kigozi. He claims that one Mulindwa took him to Conference Centre and introduced him to the 2nd defendant who went and inspected the houses. He claims that Mbabali wanted to buy both. I take the 'both' in his testimony to refer to the plots. He asked for Shs.100m but Mbabali offered Shs.40m. They failed to agree and in the process of looking for other buyers, he had problems with Wembley people and went into hiding. The 2nd defendant denied knowledge of the plaintiff prior to the purchase by him of the suit property. Mulindwa who would have thrown more light on the matter did not appear as a witness. He was said to be ill.

I have considered the plaintiff's evidence that on learning about the transfer to Kigozi he went to the Land Office and lodged a caveat to stop any further deals on the land until his dispute with Kigozi was resolved. There is ample evidence that he did so. A person with no more interest in the land would not have done so. He testified that he was not notified about the removal of the caveats. The second defendant has produced a notice to him to remove a caveat, D. Exhibit. V, but there is nothing on it to show that the plaintiff ever received it. From the evidence, however, upon the caveats being removed, the 2nd defendant became the registered owner of both plots. The plaintiff is not happy about it. He claims that he lost property worth Shs.125m for a mere Shs.40m paid by the 2nd defendant to Kigozi and yet he could have obtained a buyer and paid the proceeds to Kigozi. I noted the demeanour of the plaintiff as he testified. I was of the view that he was a truthful witness for his side. I accept his evidence that upon failing to pay, himself and Kigozi agreed that one plot be sold so that Kigozi is paid his Shs.26m. I also accept the plaintiff's evidence that the 2nd defendant was contacted as a potential buyer and he showed interest in the property. However, because of the problem he had with Wembley people, and because of the gap in the figures, the plaintiff did not complete the deal with the 2nd defendant. It would appear to me that Kigozi took advantage of the plaintiff's absence not only to conclude the deal with the 2nd defendant but also to pay himself Shs.40m instead of the Shs.26m the plaintiff owed him. From the above evidence, I reject the 2nd defendant's evidence that he did not know the plaintiff prior to purchasing the suit property. I also accept the plaintiff's evidence that while the property he had wanted sold comprised one plot, No. 1526, the 2nd defendant ended up buying Plot No. 2282 as well. In law, a bonafide purchaser is one without notice of fraud and without intent to wrongfully acquire. A bona fide

purchaser acquires good title irrespective of the vendor's defective title. From the evidence presented to Court, the 2nd defendant knew or had cause to know that Kigozi was not the right person to sell the land in view of the plaintiff's interest in it. He did in my view act dishonestly towards the plaintiff. He took undue advantage of the plaintiff's absence after he had had problems with Wembley people.

His dishonesty is further reflected in his subsequent acts. Whereas he claims that he inspected the suit property and found there houses with tenants in them, DW3 Okolong Charles who valued the property for purposes of stamp duty and testified that he inspected the suit property in the company of the 2nd defendant said that the property shown to him had incomplete houses at window level. DW3's evidence is clearly in sharp contrast with that of the 2nd defendant on the question of developments on the land. Learned counsel for the plaintiff has submitted that in view of the evidence of the plaintiff, DW1 Kyeyune Mbabali and DW2 Muyanja Mbabali regarding the description of the suit property, it is clear that DW3 Okolong was shown different property. I accept that submission. It appears to me that it is not only DW3 Okolong who was shown different property but one Bwiragura as well. The irreconcilable evidence of DW2 and DW3 on the issue of developments on the suit property leads one to no other conclusion but that the two were not talking about the same property. In my view, the 2nd defendant's act of showing different property to the valuers smirks of dishonesty. I would answer the 2nd issue in the negative and I do so.

I now turn to the issue of reliefs.

The plaintiff's head prayers, are for declarations that the transfers of the land into the names of the 1st defendant were illegal and orders that they be cancelled.

The big problem lies here. It is the plaintiff's own evidence that upon failing to pay Kigozi in time, they agreed that one Plot be sold off. I have already accepted this piece of evidence in favour of the plaintiff. I have also already accepted the evidence that the person contacted by the plaintiff and Kigozi for purposes of buying that one Plot was the 2nd defendant. They did not pursue the matter to completion due to the stated supervening event of the Wembley people causing the plaintiff to go into hiding.

From the evidence, the second defendant paid Shs.40m for the two Plots but took the valuers to land whose developments thereon were in the region of Shs.26m. I accept the plaintiff's evidence that the land in dispute comprises six houses, three on each certificate of title. However, in the application for transfer, the defendants indicated the land as undeveloped. The 2nd defendant sought to shift the blame for this to his lawyers. I'm unable to accept that. The lawyers must have acted on his instructions. He has been shown to have after all personally taken the valuers to Seeta where he showed them different land. He cannot attribute that to his lawyers as well. After all, the principal who does something through his agent must be deemed to have done it himself. Court is of the opinion that all this was done to conceal from the valuers the fair market value of the suit property, a fact that cannot be over looked completely. I have addressed my mind to all the above, including the fact that the interests of justice require that litigation between the same parties ought to indeed come to an end, particularly so after the disappearance of the 1st defendant on pocketing the sale proceeds. I have considered the fact that the plaintiff had personally accepted to sell off Plot 1526 and personally looked for the buyers. He failed to get a buyer that would give him what he wanted. In my view, it matters less, all factors considered, that the eventual buyer was the 2nd defendant. The plaintiff himself sought his involvement. Subject to what I'm about to say in respect of Plot 2282, am of the considered view that the commercial justice of the case requires that the plaintiff's

interest in Plot 1526 be foreclosed in the 1st defendant's favour for the loan amount from him to clothe him with power to transfer it to the 2nd defendant. For this reason, I have seen found no sufficient cause to interfere with the 2nd defendant's title in respect of that Plot. I would therefore confirm the transfer in the 2nd defendant's favour together with the rent proceeds realised there from since 2004 to-date in full and final settlement of the plaintiff's indebtedness to Kigozi in respect of the loan amount and interest to-date. I do so.

As for Plot 2282, Court considers the falsification of the amounts paid by the 2nd defendant to the 1st defendant, and the 2nd defendant's act of showing the valuers different property to impute knowledge on the part of the 2nd defendant that the combined value of the two Plots far exceeded the loan amount and/or the Shs.40m paid by the 2nd defendant to the first defendant. The transfer to the 2nd defendant in respect of this Plot cannot therefore be upheld. I take cognizance of the fact that it is on Plot 2282 that the plaintiff's family resides. The wife appears not to have been consulted before the mortgaging of he matrimonial holding. The evidence of the plaintiff and that of the 2nd defendant is inconclusive on this point, information that she filed a suit in Jinja Court notwithstanding. For the reasons stated above, I'm inclined to cancel the transfer in the 2nd defendant's favour in respect of Plot 2282 and restore it to the plaintiff. I do so. He shall be at liberty to seek restoration of his name in the Register Book as by law established.

The above two orders do in my view dispose of prayers (c) and (d), in the plaint and (a) and (b), in the defendant's counterclaim. Prayer (c) in the counter claim is allowed in as far as it relates to Plot 1526. Prayers (d) and (e) in the counterclaim are disallowed.

The plaintiff has prayed for general damages and costs. Given the role played by each in the entire saga, especially the plaintiff's ill-advised signing of the transfer forms in favour of the 1st defendant as if the loan was a matter of life or death; and the 2nd defendant's afore said dishonest acts, I do not consider this case to be a proper one for the award of general damages and/or costs to either party. There will be no order as to general damages and each party shall bear its own costs. I order so.

Yorokamu Bamwine
J U D G E
Order: This judgment shall be delivered on my behalf by the Registrar of this Court on the due date.
Yorokamu Bamwine
J U D G E
6/2/2007