

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0166-2002

EDWARD KABUGO SENTONGO PLAINTIFF

VERSUS

BANK OF BARODA (U) LTD. DEFENDANT

BEFORE: HON MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an old case filed on 11th April 2002 whereby, as per amended plaint filed on the 16th August 2007, the plaintiff Edward Kabugo Sentongo claims against the Bank of Baroda, Robert Opio and the Registrar of Titles. The case has had a long history and when it eventually came up for a scheduling conference on the 19th February 2009 Mr. Erison Karuhanga a State Attorney, appearing for Mr. Robert Opio and the Registrar of Titles raised two preliminary objections:-

1. The Registrar of Titles is wrongly sued as a party
2. There is no cause of action disclosed against Mr. Opio and the Registrar of Titles.

In the plaint the 2nd and 3rd Defendants are described as follows:-

“3. The 2nd Defendant is a registrar of titles and the officer in charge of Kampala Mailo Office Land Registration Department Ministry of Water, Lands and Environment working under the control of the 3rd Defendant. At all the material time herein mentioned he was acting in the course of his powers and duties.

4. The 3rd Defendant is in charge and control of the Office of Titles responsible to exercise all powers and perform all duties conferred or imposed upon the Registrar of Titles by the Registration of Titles Act”

Mr. Karuhanga argued that the plaintiff should have proceeded under section 182 of the Registration of Titles Act and if he had suffered any damage then he should have proceeded against the government under section 185 of the Act by instituting a suit against the Attorney General.

Section 182 of the Act provides:

“(I) If upon the application of any owner or proprietor to have land bought under the operation of this Act, or to have any dealing registered, recorded or to have any certificate of title or other document issued or to have any act or duty done or performed which by this Act is required to be done or performed by the registrar, the registrar refused so to do , or if the owner or proprietor is dissatisfied with any decision of the registrar upon his or her application , the owner or proprietor may require the registrar to set forth in writing under his or her hand the grounds of his or her refusal or decision and the owner or proprietor may if he or she thinks fit, at his or her own cost summon the registrar to appear before the High Court to substantiate and uphold those grounds.

- (2) The summons under subsection (I) shall be served upon the registrar six clear days at least before the day appointed for hearing the complaint of the owner or proprietor.
- (3) Upon such hearing the registrar shall have the right of reply and the High Court may if any question of fact is invoked direct an issue to be tried to decide the fact, and thereafter the High Court shall make such order in the premises as the circumstances of the case require and such order as to payment of costs and fees as to it shall seem fit and the registrar shall obey that order.”

The second leg of the defendant’s objection is that the Registrar of Titles was wrongly sued as a party. Counsel pointed out that in paragraph 19 of the plaint, the plaintiff claims that by reason of the matters mentioned in the plaint the plaintiff has suffered loss and damage. The plaintiff prays, inter alia, for damages for the market value of the suit property and other damages. He relied on Section 185 of the Act and argued that the plaintiff who was seeking to recover damages should have brought his action against the Government. He submitted that pursuant to the provisions of Article 250 (2) of the Constitution and Section 10 of the Government Proceedings Act this suit should have been instituted against the Attorney General. Section 185 of the Act provides :

“(I) any persons who has sustained or hereafter sustained any loss or damage in or by the exercise or supposed exercise by the registrar of any of the powers or duties conferred or imposed on him or her by this Act, and who has not been party or privy to the application or dealing in connection with which the power was exercised, may notwithstanding sections 178 and 183, and without prejudice to the rights, if any of that person under those sections in the first instance and without any obligation to pursue the remedies provided by those sections, bring an action against the Government for recovery of damages.

- (2) Where the person referred to in subsection (I) has been party or privy to the application or dealing referred to in that subsection, he or she shall be at liberty to join the Government as codefendant in any action brought by him or her in respect of such loss or damage against any other person or persons who has or have been party or privy to that application or dealing.”

Section 183 of the Act also authorises any person sustaining loss through any omission, mistake or misfeasance of the registrar or any other officer or clerk in the execution of their respective duties under the Act or by any error, omission or misdescription in any Certificate of title or any entry or memorial in the Register Book or by the registration of any other person as proprietor, who is barred by the Act from bringing an action for ejectment or other action for the recovery of the land, estate or interest, in any case in which the remedy by action for recovery of damages as provided by the Act is inapplicable, to bring an action against the Government for recovery of damages. While section 178 authorises any person deprived of land or of any estate or interest in land in consequence of fraud or through the bringing of the land under the operation of the Act, or by the registration of any other person as proprietor of the land, estate or interest or in consequence of any error or misdescription in any registered certificate of title or in any entry or memorial in the Register Book to bring and prosecute an action for recovery of damages from the person upon whose application the land was brought under the operation of the Act, or the erroneous registration was made, or who acquired title to the estate or interest through the fraud, error or misdescription.

Counsel also cited section 175 of the Act, which provides:-

“Neither the registrar nor any person acting under his or her authority shall be liable to any action or proceeding for or in respect of any act or matter bona fide done or omitted to be done in the exercise or supposed exercise of any power or duty given or imposed by this Act.”

He also cited Charles Harry Twagira Vs Attorney General, Director of Public Prosecutions and another CACA No 61 of 2002 and argued that the Registrar of Titles is not a corporate entity and as such cannot be sued. In the above case the Appellant had filed an application against the Attorney General, the DPP and Kyomukama Sam (a police officer) challenging his arrest and prosecution. Justice Twinomujuni, JA cited article 250 (2) of the Constitution and stated:-

“--- I hold the view that --- the appellant should have proceeded only against the Attorney General and the third respondent only. The Director of Public Prosecutions is a government department but is not a body corporated with powers to sued or be sued.

Therefore a Civil Suit against the Director of Public Prosecutions cannot be sustained and it is incompetent. The same equally applies to the case against the 3rd Respondent. He is the Police Officer who was sent to London to re-arrest the appellant and escort him to Uganda. He is the one who made the investigations and applications under the law that led to the detention and freezing of the appellant's accounts. He was at all times acting as an employee of the government. Not only is he protected against personal law suits arising from his official functions by the laws of Uganda but he is also covered by section 48 of the Judicature Act. I am of course aware that he could be sued in his personal capacity if there is a possibility that he acted beyond the scope of his duties or maliciously but that does not arise in this case. Nevertheless the appellant could at his own risk maintain an action against the 3rd Respondent.”

In reply Mr. Erias Lukwago, for the plaintiff, argued and I agree that section 175 of the Act is not an absolute bar to suits against the Registrar or any person acting under his or her authority. The section only limits its protection to where the Registrar or such other officer acts bonafide. In the

instant case the 2nd and 3rd defendants are claimed to have acted malafidely and fraudulently. It is so pleaded in paragraph 17 and the plaintiff states the particulars of bad faith and fraud attributed to the 2nd and 3rd defendants. Whether any of the parties acted bonafide or malafide cannot be adequately dealt with and resolved at a preliminary stage. See Sanyu Lwanga Musoke Vs Yakobo Mayanja Ntate SCCA No 59 of 1995. As regards corporate capacity Mr. Lukwago argued that the intention of the framers of the Act was to create the office of the Registrar of Titles with the capacity to sue and be sued.

Counsel particularly cited IGG Vs Kikonda Butema Farm Ltd & AG. Constitutional Application No 13 of 2006. The issue in that case was whether the IGG has legal capacity to sue or be sued. Their Lordships the Justices of Appeal were referred to eight cases where the IGG had been a party. They considered the cases and the provisions of the Constitution and of the Inspectorate of Government Act which provide for the functions of the IGG and stated.

“---the Inspectorate and the Inspector General of Government in particular must own its/her decisions and have the capacity to defend those decisions in any fora including Courts of Law if necessary. The Inspector General of Government can be likened to the Registrar of Titles under the Registrar of Titles Act. Although the post is held by a traditional Civil Servant, the holder has been dragged to Court from time to time to defend and explain decisions he/she takes in the performance of his/her duties.”

Court held that the IGG has the capacity to sue and be sued.

Counsel also cited the Commissioner General URA Vs Investments Ltd SCCA No 22 of 2007. One of the issues in that the case was whether the Commissioner General URA was a proper party to the suit. Hon Justice Kanyeihamba JSC, cited provisions of the law which empowers the Commissioner General to sue for the taxes due and unpaid and held:

“--- he or she who is empowered to sue is also made liable by necessary implication to be sued.”

Hon Justice Tsekoko, JSC stated:-

“--- I cannot find any legal basis in support of the view that the Commissioner General who can sue and maintain a suit in his/her official name cannot be sued in the same name in any competent court.”

Mr. Lukwago referred this court to a number of cases where the Registrar of Titles had been sued:-

1. *Andrea Lwanga Vs Registrar of Titles (1980) HCB 24.*
2. *Oliva Amelia Kawalya Kagwa Vs Registrar of Titles (1974) HCT 239*
3. *Elia Kitiza Vs Registrar of Titles (1978) HCB 39*
4. *Uganda Blanket Manufactures Ltd Vs Chief Registrar of Titles HC Misc. App No 55 of 1993.*

I have looked at some of the above cases. In *Elia Kitinza case* it was an application for reinstatement of a Certificate of Title brought against the Registrar of Titles under section 190 (now section 182) of the Registration of Titles Act. The application was entertained. In *Andrea Lwanga case* the application was by notice of motion under section 190 (now section 182) of the RTA calling upon the Registrar to appear and substantiate his grounds for refusing to register land in the late Yusufu Galiwango, father of the Applicant therein. The application was entertained and court held that the proper procedure for bringing an application under the section was by an originating summons under Order 34 (now 37) of the Civil Procedure Rules. In *Kawalya Kagwa Vs Registrar of Titles (1974) EA 481* the appellant had applied to the Registrar of Titles to be registered as proprietor of the land of her late husband and his father as executrix under Section 143 (now 134) of the RTA. The Registrar refused registration. The appellant took out an originating summons under Order 34 (now 37) CPR calling on the Registrar under Section

190 (now 182) of the RTA to substantiate and uphold the grounds of his refusal. The application was entertained at both the High Court and the Court of Appeal levels.

Under Section 3 of the Act a registrar is appointed to have charge and control of the office of titles and to exercise the powers and perform the duties conferred or imposed upon the registrar by the Act. The Registrar may delegate all or any of his or her powers or duties under the Act. As was held, in respect to the IGG in the Kikonda Butema Farm case (supra) the Registrar of Titles must own his/her decisions and actions and have the capacity to defend them. It is in that spirit that under section 182 of the Act proceedings can be brought against the registrar to substantiate and uphold the grounds of his /her refusal to either:

- (i) bring the land under the operations of the Act ,
- (ii) have any dealing registered or recorded
- (iii) have any certificate or document issued or
- (iv) have any act or duty done or performed.

Under section 174 of the Act the Registrar of Titles can state a case for the High Court on matters regarding the performance of his/her duties or exercise of his/her functions. The Registrar is thereby empowered to take out proceedings for courts determination. As was held by Hon Justice Kanyeihamba in Commissioner General URA Vs Meera Investments (supra) the Registrar of Titles is thereby made liable to be sued. The position of the Registrar of Titles is distinguishable from the position of the DPP which was the subject of Justice Twinomujuni's holding in Twagira Vs A/G and DPP (supra). The functions of the DPP are laid out in Article 120 (3) of the Constitution. The DPP is not clothed with any powers to take out civil proceedings. Such powers by or against the Government are only vested in the Attorney General. By implication section 175 of the Act shows that the Registrar or any person under him can be liable for action or proceeding where he acts malafidely. Sections 183 and 185 provide for circumstances under which an aggrieved person may proceed against the Government for damages under the Act but the sections do not limit proceedings for damages to the Government only.

In the instant case, in addition to damages, the plaintiff is seeking for declarations and orders which required Court to pronounce itself on the Registrar's or his or her staff's performance and exercise of his/her duties and functions. In the premises I find that the Registrar of Titles can be sued. I therefore find that the Registrar of Titles was rightly sued.

Generally every suit is commenced by plaint and the instant suit was so commenced. The plaintiff who claims that he is the proprietor of the suit land, in paragraph 16 of the plaint states:-

“The plaintiff sought information and documents from the 2nd defendant and informed him (the 2nd Defendant) that he wanted to lodge a caveat on the land and to file Court proceedings to protect his interests but the 2nd defendant concealed the documents and misinformed him verbally and in writing of the true status of the records (See Annex K7(a) K7 (b), K7 (c) K7 (d) K7(e), K7(f) K7(g),”

In paragraph 3 of the plaint the suit is brought against the 2nd defendant for acts or omissions committed by him while a registrar of titles in charge of Kampala Mailo Office Land Registration Department and while acting in the course of his powers and duties. Paragraph 4 shows that the 3rd defendant is sued in her official capacity as the in charge and controller of the office of Titles with powers to perform all duties conferred upon the Registrar of Titles under the Act.

The above pleadings would bring the plaintiff's claim within the ambit of section 182 of the Act. Under the section proceedings are specifically provided to be by summons. I have already hereabove, outlined the cases cited to me by Mr. Lukwago as suits filed against the Registrar of Titles and entertained by Court. All these cases were commenced by applications and in Andrea Lwanga case it was particularly held that the proper procedure for bringing an application under the section is by an originating summons. Sub section (3) provides that after hearing, as may be directed by the High Court, the Court shall make such order in the premises as the circumstances for the case require.

Going by the provisions of section 182 of the Act and the above authorities, which happen to have been cited by Mr. Lukwago, where the Registrar is required to substantiate and defend his or her actions proceedings should be commenced by way of Originating Summons. However the plaintiff's case is beyond the scope of Section 182 of the Act. The section is permissive not mandatory. It cannot be constrained as divesting any aggrieved party from proceeding otherwise than under the section.

In the instant case the plaintiff alleges bad faith and fraud against the 2nd and 3rd Defendants. I have already stated that the Registrar of Titles and officers under her don't enjoy the protection of section 175 of the Act where their acts or omissions are not bonafide. Further the plaintiff is claiming damages for the market value of the suit property and other remedies. In the premises I find that the procedure adopted was the most appropriate in the circumstances.

As to whether there is a cause of action disclosed against the 2nd and 3rd defendants I have already held that the 3rd Defendant, as Registrar of Titles, and the 2nd Defendant as an officer of the Office of the Titles can be sued where their actions or omissions are not bonafide. In the instant case the plaintiff's claim that the said defendants in exercise of their powers and duties were not bonafide and were fraudulent. The plaintiff further claims that as a result of the defendant's conduct a caveat was improperly removed, a mortgage unlawfully registered on his certificate of title and that as a result the plaintiff has suffered loss and damage.

A cause of action is disclosed if the plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable. See Auto Garage & Other Vs Motokov (No 3) (1971) EA 514. The pleadings disclose all the above. I accordingly find that the plaint discloses a cause of action against the 2nd and 3rd Defendants

The preliminary objections raised are accordingly rejected and dismissed with costs. The suit shall proceed on merit.

Hon. Mr. Justice Lameck N. Mukasa

JUDGE

16th June 2009