

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

HCT - 00 - CC - CS - 697 - 2006

ALENYO GEORGE WILLIAM ::: PLAINTIFF

VERSUS

<p>1. D.F.C.U. BANK</p> <p>2. MASEMBE, MAKUBUYA, ADRIKO, KARUGABA, SEKATAWA T/A MMAKS ADV.</p> <p>3. BENJAMIN WAMAMBE</p> <p>4. ROSETTE MUGIDDE WAMAMBE</p> <p>5. FESTUS KATEREGA</p>	<p>}</p> <p>.....</p> <p>}</p>	<p>DEFENDANT</p>
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Civil law and procedure – execution – attachment and sale
Land transactions – whether the sale of the property was fraudulent

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T:

Plaintiff Alenyo George William sued the defendants jointly and severally for orders to nullify the sale of property comprised in LRV 3474 Folio 25 Plot 7 Wabigalo Road (hereinafter referred to as the “*suit property*”) to the third and fourth defendants and to restore him as proprietor on the grounds of fraud. The plaintiff owed UShs. 38,076,666/= as a debtor from a previous suit HCCS No 23 of 2005 **Stanley V Alenyo** (hereinafter called the “*2005 case*”), in which he was the defendant. It is the case of the

defendant in a bid to resolve this debt he gave one David Mulumba an Advocate with the second defendant and Counsel to the plaintiffs in the 2005 case to hold as security his original title to the suit property. However Mr. Mulumba fraudulently, unethically and unprofessionally released the said title of the suit property to the third and fourth defendants before they paid for it. It is also the case of the plaintiff that the fifth defendant procured his forged signature on the transfer form void of any consideration. It is also the case of the plaintiff that the execution process against his suit property did not follow the laid out procedure in the Civil Procedure Rules (CPR).

The defendants deny the claim and aver that the suit property was sold in accordance with a valid warrant of attachment to the third and fourth defendants in accordance with a sale agreement dated 26th September 2006. The defendants furthermore deny any fraud or improper behaviour on their part.

The parties agreed to the following issues for trial

1. Whether the sale of the plaintiff's property was tainted with fraud and or illegality
2. Remedies

Mr. Arthur Katongole appeared for the Plaintiff while Dr. Joseph Byamugisha appeared for the defendants. The plaintiff Mr. Alenyo testified on his behalf. The defendants called four witnesses namely the fifth defendant Mr. Festus Katerega (DW1); Mr. Alfred Nasaba (DW2); Mr. David Mulumba (DW3) and Mr. Benjamin Wamambe the third defendant (DW4).

Issue No. 1: Whether the sale of the plaintiff's property was tainted with fraud and or illegality.

The case for the plaintiff is that his house was sold on the 15th September 2006 by the bailiff Mr. Katerega after the warrant of attachment issued by this Court had expired. It is also the case for the plaintiff that even on the day of the sale no return was filed or money was deposited in Court as provided for in the Civil Procedure Rules (CRP). The plaintiff therefore testified that his property was therefore sold illegally as the said warrant of attachment had expired. The plaintiff also takes issue with the fact that instead of paying all the required money of the sale the second and third defendants who are husband and wife instead were given the land title to the suit property to obtain a mortgage from DFCU Bank to pay the sale price which in the view of the plaintiff was not regular. Counsel for the plaintiff submitted that while a Court Bailiff enjoys immunity under section 46 of The judicature Act in the performance of an execution such immunity shall not extend to a Bailiff where he acts unlawfully. In this regard I was referred to the case of

Registrar, Trustees Kampala Archdiocese & Anor V Harriet Namakula M.A. 1024 of 1996

Counsel further submitted that where as in this case a party connives or colludes with the Bailiff resulting in unlawful execution then neither the Bailiff nor the party can escape liability. In this regard I was referred to the case of

Hannington Wasswa & Anor V Maria Onyango & Anor SCCA 22 of 1999 (unreported)

The plaintiff testified that the Bailiff connived with one Mr. Nasaba a lawyer and father of the Mr. Wamambe who negotiated the transaction on behalf of the third and fourth defendants.

The plaintiff's counsel submitted that the mortgage to the DFCU Bank should be cancelled as the suit property still belonged to the plaintiff at the time of the mortgage.

Counsel for the defendants on the other hand dismisses the plaintiff's submissions on fraud and illegality. Counsel for the defendants submits that the evidence shows that the plaintiff participated in the sale of his house and that he worked closely with the bailiff in this regard. Counsel for the defendants further submitted that the plaintiff signed all the necessary documents and tracked the process at the Court as well.

As to his participation in the sale Counsel for the defendant pointed out that it was the plaintiff who handed over his certificate of title willingly to the lawyers of the judgment creditors; that he had direct communication with Mr. Nasaba during the purchase and asked him for Money (Exh D. 11); that under exhibit D5 the Memorandum of Understanding (MOU) the plaintiff received Shs. 6,000,000/= and that he was aware of the intended mortgage to DFCU Bank and consented to it. Counsel for the defendant therefore submitted that there was no evidence of fraud here.

As to the illegality of the warrant counsel for the defendant referring to the evidence of the Bailiff submitted that the sale did not take place on an expired warrant because the said warrant was renewed on the 15th September, 2006 as evidenced by exhibit D 4.

I have read the submissions of both counsel and perused the evidence on record. The legal position relating to fraud was well discussed by Wambuzi CJ (as he then was) in the case of

Kampala V Damanico (U) Ltd SCCA No 22 of 1992

In that case he held that fraud must be strictly proved and that the burden is heavier than that of a

balance of probabilities generally applied in civil matters.

The onus of proving that fraud will lie with the party who alleges that fraud. In this case it is the plaintiff who alleges fraud. The plaintiff and his counsel during submissions raised many issues regarding the sale of the suit property. Paragraph 5 of the plaint however shows the particulars of fraud alleged. To my mind the particulars in (i) and (ii) of para 5 to plaint are the clearest of the lot. In (i) the plaint avers that the second defendant law firm through its agent David Mulumba acted fraudulently, unethically, and unprofessionally in releasing the original title to the buyers before full payment. Secondly in (ii) it states that the Bailiff procured a forged signature onto the transfer form void of consideration.

The particulars in (i) are a bit mixed up and omnibus which does not make for good pleadings. That notwithstanding the plaintiff does not discharge the test of strict proof of how the release of the titles to the buyers before payment was an act of fraud. In my view the whole sale agreement including para 4 therein which the plaintiff refers to (where the title was to be released on full payment) has to be read together with para 3 as well which provides that a mortgage was to be obtained from DFCU Bank to pay the balance of the consideration. I am unable to appreciate how you can expect a mortgage to clear the balance without giving the vendors and the bank the title to the property that would not make any commercial sense at all. In any event the plaintiff like counsel for the defendant submitted was well aware of this. He gave the title to the said defendant law firm. Secondly the plaintiff wrote to the Bailiff in exhibit D 8 that he wanted his money urgently or he would withdraw his consent and notify DFCU Bank. He wrote this in his own handwriting stating that he had pressing problems and needed the money. That in view is not evidence of fraud.

As to his signature being forged apart from alleging as such no evidence was adduced at all as to the forgery itself and once again the plaint falls short of the required test. Instead what I see is the plaintiff receiving proceeds from the sale and signing for them in exhibits D 5 and 10. I find the testimonies of

Mr. Nasaba, Mr. Wamambe and Mr. Katerega who appeared for the defence to be credible that they worked with the plaintiff to effect the sale which he now calls fraudulent whereas not. If there was any fraud which I am unable to see, then the plaintiff played a central role in it and cannot now be seen to deny it. He who seeks equity must do so with clean hands.

As to the warrant it is clear from the evidence that the warrant was renewed on the 15th September 2006. Indeed there is evidence to show that the renewal was done to facilitate the sale to the third and fourth defendants after the original warrant had received less than the reserve price. But I am unable to agree with the plaintiff that without more this amounts to an illegality or fraud. Why then did the plaintiff take the proceeds if he felt so strongly about the execution process? To my mind the plaintiff actually in many ways controlled the execution process in such a manner that he could be paid the excess receipt from the sale. It is too late in my view to allege that the sale could have fetched a higher price in any event there is a valuation report on file.

In the above circumstances I am unable to reverse the mortgage to DFCU Bank as prayed by the plaintiff. Furthermore in answer to the issue whether the sale of the plaintiff's property was tainted with fraud and or illegality I answer this in the negative.

Issue No 2: Remedies

Having found as I have in issue no 1 I find that the plaintiff's case must fail and I hereby dismiss it with costs

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Geoffrey Kiryabwire
JUDGE

Date: 11-01-11