

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 269 OF 2014

DANIEL SAJJABI NAKIWAFU}PLAINTIFF

VERSUS

- 1. STANBIC BANK (U) LTD}**
- 2. IBRAHIM KITAKA}**
- 3. DR. NASSAKA FRIDA SAYFA. K}DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against all the Defendants jointly and severally is for recovery of more than 300,000,000/= Uganda shillings being the value of land and developments comprised in land he alleges was unlawfully and fraudulently transferred, general damages and costs of the suit.

The Plaintiff was at all times the registered proprietor of 0.24 ha or 0.59 acres of land and developments in Kyadondo block 206 Plot 607 at Mpererwe by the 2nd July, 2009 when it was transferred to the third Defendant. The Plaintiff alleges that on 2nd of September 1989, he authorised Messieurs Ascort Restaurant Ltd to use the land as security for a loan/mortgage in favour of the first Defendant formerly the Uganda Commercial Bank. Sometime in 2012 the Plaintiff inquired from the first Defendant about the status of the loan obtained by Ascort Restaurant Ltd on the basis of his title and whether there was any balance to settle. He was advised to pay Uganda shillings 2,497,457/= to redeem his title. He was also given an account number in the first Defendant on which payment for recovery of debts is made. On 24th September 2012 the Plaintiff gave the sum to the directors of Ascort restaurant Ltd and they accordingly paid the said sum of Uganda shillings 2,497,457/= in the named account. On the same day the Plaintiff made a formal request for the first Defendant to release of his duplicate certificate of title. Subsequently after several other efforts which proved futile, the first Defendant on 19th June, 2013 wrote that the title deed had been released to the second Defendant in his capacity as administrator of the Plaintiff's estate. Following investigations the Plaintiff established that on the 21st of April 2009, the second Defendant with the knowledge of the third Defendant applied for letters of administration in respect of the Plaintiff's estate and letters were granted on the 28th of May 2009. The Plaintiff accordingly challenged the release of the duplicate certificate of title to the second Defendant and the subsequent transfer to the third Defendant.

The suit is for declarations that the Defendants jointly perpetuated fraud in releasing the certificate of title and subsequent transfer of ownership. Secondly the suit is for a declaration that the release of the certificate of title to the second Defendant was unlawful and irregular. Thirdly it is for an order that all the Defendants jointly and severally should pay the Plaintiff Uganda shillings 300,000,000/= as compensation for the land and developments thereon. The Plaintiff also prays for general damages and punitive damages for fraud. Lastly the Plaintiff seeks interest on the above claims at the rate of 25% per annum from the date of filing the suit until payment in full and costs of the suit.

The first Defendant filed a defence to the action denying the claims of the Plaintiff. The first Defendant sometime in 2002 became a successor of Uganda Commercial Bank and upon the succession some rights and liabilities of Uganda commercial bank devolved on the first Defendant. The first Defendant also found in its possession a certificate of title of the suit property registered in the names of the Plaintiff. The land had been deposited as security for a loan. By June, 2009 the outstanding loan amount was Uganda shillings 2,497,457/=. On 1st June, 2009 the first Defendant was approached by one Ibrahim Kitaka, the second Defendant as administrator of the estate of the Plaintiff with a proposal to pay the outstanding sums on behalf of Ascort Restaurant Ltd. The second Defendant furnished the first Defendant with a certified copy of letters of administration sealed by a judge of the High Court in Administration Cause Number 592 of 2009. On 4th June, 2009 the first Defendant accepted payment of the outstanding sums from the second Defendant. The first Defendant subsequently released the certificate of title of the suit property to the second Defendant. The first Defendant contends that it has no duty to look beyond the letters of administration issued by a court of competent jurisdiction and as a result it acted in compliance with acceptable banking procedures and law. The first Defendant denies that any of its officials advised the Plaintiff to pay the outstanding sum of Uganda shillings 2,497,457 in 2012 to redeem the certificate of title in issue.

The second and third Defendants were served by substituted service but never filed a defence. The matter proceeded between the Plaintiff and the first Defendant. The Plaintiff is represented by Kato Sekabanja assisted by Opio Moses of Messrs Sekabanja & Company Advocates while the Defendant was represented by Brian Kalule of Messrs AF Mpanga Advocates.

Issues

At the Scheduling Conference, the following issues were framed for trial;

1. Whether the 1st Defendant unlawfully and fraudulently released the Certificate of Title to the 2nd Defendant.
2. Whether the 2nd Defendant unlawfully transferred the suit land to the 3rd Defendant.
3. What remedies are available to the Parties?

Submissions

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

Issue 1: **Whether the 1st Defendant unlawfully and fraudulently released the Certificate of Title to the 2nd Defendant?**

In the written submissions, Counsel for the Plaintiff contended that the 2nd Defendant authored the Plaintiff's death and fraudulently applied for letters of administration, which he used to obtain the Certificate of Title from the 1st Defendant.

Counsel for the Plaintiff submitted that the mortgage was a tripartite mortgage and the Plaintiff as owner of the suit property signed the agreement. Furthermore, that whereas DW1 testified that the practice of the 1st Defendant in case of default in loan repayment is that, notice is sent to the borrower and the registered proprietor, in this case, she could not confirm whether notice was sent to the Plaintiff or whether a meeting was held with the Plaintiff before the release of the Certificate of Title. Counsel submitted that the 1st Defendant owed a duty to Ascort Restaurant Ltd the principal borrower, to diligently deal with the security deposited, but this duty was not exercised by the 1st Defendant. Furthermore, the relationship of a banker/customer is a contractual one, with the Bank having a duty in relation to carrying out the customer's payment instructions, dealing with securities deposited with the Bank and the way the Bank handles information concerning the affairs of the customer (Grace Patrick Tumwiine Mukubwa, "Essays in African Banking Law and Practice, cited in the case of **Kakooza vs. Eco Bank Uganda Ltd HCCS No. 44 of 2014**). Counsel submitted that the 1st Defendant did not take the necessary steps of notifying the Principal Borrower (Ascort Restaurant Ltd) and inquiring from the 2nd Defendant about the whereabouts of the Principal Borrower, since the 2nd Defendant was paying on behalf of the Principal Borrower, before releasing the Certificate of Title. He submitted that no evidence was adduced to show that any attempts were made to notify the Principal Borrower, despite the fact that DW1 testified that the Bank had knowledge of the Principal Borrowers' address. He referred to the case of **Garsinzi & Anor vs. Lwanga H.C.C.S. No. 690 of 2004**, for the position that where there is failure or omission to take an essential step, fraud may be inferred.

Counsel for the Plaintiff also submitted that although the 1st Defendant issued a receipt (Exhibit D2) and released the Certificate of Title, there was no official release of the mortgage and Certificate of Title, the debt was not cleared out of the 1st Defendant's system and the Plaintiff was told by the 1st Defendant to pay a sum of UGX 2,497,457/= in 2012. He further submitted that, the receipt (Exhibit D2) appears to have been out of the normal banking practice of reference to account numbers. Furthermore, whereas DW1 seemed to suggest that the system was not updated while maintaining that there was an account on which the said money was deposited, Counsel submitted that if indeed the 2nd Defendant had paid the loan and the Bank received the money as evidenced by the receipt (Exhibit D2), the 1st Defendant failed to reconcile its books for 3 years and as a result, failed to realise that Ascort Restaurant was not a debtor.

Counsel for the Plaintiff submitted that the 1st Defendant's legal department seems to have half-heartedly verified the letters of administration. He noted that whereas DW1 testified that the

normal practice would be to contact the Court to confirm whether it issued the Letters of Administration, in this case, DW1 admitted that there was no evidence that this had been done. Counsel concluded that whereas this may not have pointed or showed fraud per se, it would have enabled the 1st Defendant realise significant gaps in the application, such as the Administrator General's certificate of no objection which was not part of the petition (Exhibit P4), contrary to the provisions of S. 5 (1) of the Administrator General's Act Cap 157.

Counsel referred the Court to the definition of the term fraud in Black's Law 6th Edition at page 660, reproduced in the case of **Fredrick Zaabwe vs. Orient Bank SCCA No. 4 of 2006** and the case of **Kampala Bottlers Ltd vs. Damanico (U) Ltd (SCCA No. 22 of 1992)** for the position that, fraud must be proved strictly and the burden of proof is heavier than that on the balance of probabilities generally accepted in civil matters. He submitted that the 1st Defendant ought to have exercised a duty of due diligence and care in releasing the certificate of title to the 2nd Defendant which was not done; hence the fraud was not detected and avoided by the 1st Defendant.

He further noted that no notice of default was served on the Plaintiff or Ascort Restaurant and referred the Court to the case of **Alice Norah Mukasa vs. Centenary Bank & Anor (HCCS No. 77 of 2010)**, in which the Court held that the Bank had a duty to communicate to the guarantor the default in repayment of the loan in accordance with S.117 of the Registration of Titles Act, to demand the guarantor to pay the outstanding loan and to notify the guarantor of the intention to foreclose within a specified period before advertising the property.

Counsel for the Plaintiff concluded that the 1st Defendant did not carry out due diligence, unlawfully and fraudulently released the Certificate of Title to the 2nd Defendant who was a stranger to the mortgage transaction and there was no evidence to suggest that the 1st Defendant acted bona fide when it did not take caution, or follow procedure before releasing the title. Furthermore, that the employees of the 1st Defendant who handled the process did not seem to protect their customer's interests when they released the Certificate of Title without even clearing the loan.

On the other hand, Counsel for the 1st Defendant submitted that, according to Section 179 of the Succession Act Cap 162, the Administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. He also referred to Section 3 of the Succession Act and the case of **Dharamsy Moraji & Sons Ltd vs. Suman Kara (SCCA No. 41 of 1995)**, which defines a personal representative as the person appointed by law to administer the estate or any part thereof of a deceased person. Counsel submitted that there was nothing unlawful in the Bank releasing the Certificate of Title to the administrator of the estate of a deceased mortgagor once the mortgage was paid, and the Plaintiff did not refer to any law that was contravened. He further submitted that under Section 102 of the Evidence Act cap 6, the burden of proof in a suit or proceedings lies on that person who would fail if no

evidence at all were given on their side and the Plaintiff had failed to show the law contravened by the release of the Certificate of Title.

Counsel for the 1st Defendant further submitted that fraud must be strictly proved and the burden of proof is heavier than one on a balance of probabilities generally applied in civil matters (**Kampala Bottlers vs. Damanico (U) Ltd (SCCA No. 22 of 1992)**). Furthermore, findings of fraud should be made on evidence and not conjecture and attractive reasoning (**Crane Bank vs. Belex Tours and Travel Ltd (SCCA No. 1 of 2014)**). Counsel for the 1st Defendant further referred to the case of **David Sejjaaka vs. Rebecca Musoke (SCCA No. 12 of 1985)** for the proposition that fraud must be attributable to the transferee, either directly or by necessary implication and the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and participated in it or taken advantage of it. He further submitted that fraud must be specifically pleaded and strictly proved and cannot be inferred from the facts (See **JW Kazzora vs. M.L.S Rukuba (SCCA No. 13 of 1992)**). Counsel submitted that the Plaintiff did not lead any direct evidence whatsoever, to show that the 1st Defendant was part of the fraud to deprive the Plaintiff of the Certificate of Title, and that what the Plaintiff relied on is mere conjecture, speculation and attractive reasoning. He further submitted that the acts of fraud relied on were acts that occurred long after the action complained of (the release of the Certificate of Titles) had occurred.

Counsel for the 1st Defendant submitted that at the time the loan was taken over by the 1st Defendant from Uganda Commercial Bank in 2002, it was written off and therefore, to suggest that a demand should have been issued on a written off loan would be incongruous. Furthermore, where a legal representative of a third party intended to discharge the debt and take its title, there was neither need for a demand nor a legal requirement for the same and failure to issue a demand is not evidence of fraud.

Counsel for the 1st Defendant further submitted that the lack of either a letter accepting the offer of Ibrahim Kitaka or, of evidence of a meeting held with the Client is not fraud, considering the fact that DW2 testified that it is not the practice of the Bank to minute meetings held with clients. He also submitted that the failure by the 1st Defendant to clear the debt out of the system does not prove fraud, and that from the evidence of PW1, it was as a result of the confusion among the different officials of the 1st Defendant who had been contacted to clarify the loan status. He submitted that the conduct of the 1st Defendant can be said to have been disorganised, inefficient or incompetent but does not in any way point to fraud as there is no indication of dishonesty on the 1st Defendant's officials and the said conduct occurred almost three years after the Certificate of Title had been released.

Counsel for the 1st Defendant submitted that the Plaintiff's submission that there was no release of mortgage is misconceived because DW1 testified that after Ibrahim Kitaka paid the

outstanding sums, the mortgage was released and the release (Annexure E) was not challenged by the Plaintiff.

With regard to the verification of the letters of admission, Counsel for the 1st Defendant submitted that there is no evidence to suggest that the same were not issued by Court and the Bank could not second guess a document issued by the Court.

Counsel for the 1st Defendant submitted that facts of the cases referred to by the Plaintiff's Counsel in the submissions i.e. Fredrick J.K Zaabwe vs. Orient Bank Ltd, National Bank of Commerce vs. Saad Trading (HCCS No. 496 of 2003) and Alice Norah Mukasa vs. Centenary Bank & Anor (HCCS No. 77 of 2010 are distinguishable from the present case and should not be regarded by the Court.

Issue 2: Whether the 2nd Defendant unlawfully transferred the suit land to the 3rd Defendant

Counsel for the Plaintiff's in the written submissions, withdrew the Plaintiff's claim against the 3rd Defendant and made no submissions on the issue.

Issue 3: What remedies are available to the Parties?

Counsel for the Plaintiff, having submitted that the release of the Plaintiff's Certificate of Title by the 1st Defendant and the subsequent transfer by the 2nd Defendant to the 3rd Defendant was fraudulent, prayed that judgment be entered against the Defendants for the sum of UGX 245,000,000/=, as compensation for the market value of the Plaintiff's land according to Exhibit P.11, a valuation conducted in 2013. Counsel referred the Court to the case of **Ferdinand Mugisha vs. Steven Banya & 2 Ors (HCCS No. 833 of 2005)**, for the principle that, damages for which a party is to be compensated must be pleaded and proved with cogent evidence by the party claiming them as being the direct result of the Defendant's actions.

Counsel for the Plaintiff also prayed for general damages for the physical and mental suffering as a result of the deprivation of his property by the 1st Defendant, the several visits made by the Plaintiff to the 1st Defendant in search of his Certificate of Title and the loss occasioned by the 1st Defendant when it requested the Plaintiff to pay a sum of UGX 2,495,475/=. He cited the case of **Gentex Enterprises Ltd vs. M & B Engineers Ltd (HCCS No. 74 of 2013)**, for the position that general damages are awarded to restore the Plaintiff as nearly as possible and as money can do to a position he or she would have been in, had the breach complained of not occurred.

On the other hand, Counsel for the Defendant submitted that the Plaintiff had failed to prove fraud on the part of the 1st Defendant and invited the Court to dismiss the suit against the 1st Defendant with costs. Furthermore, that the loss of UGX 245,000,000/= was not proved.

Counsel for the Defendant further submitted that the Plaintiff's cause of action was the unlawful transfer of his Certificate of Title to the 2nd and 3rd Defendants, but the Plaintiff neither pleaded the fact that he lost possession of the property nor that he was deprived of the physical property. He referred the Court to the case of **Crane Bank Ltd vs. Belex Tours And Travel (SCCA No. 1 of 2004)**, in which the Court found that a party is bound by the case as alleged in his pleadings and the evidence at trial should be directed to prove the case alleged and that the court cannot grant a relief which is not claimed in the Plaint. Counsel submitted that PW3 (the Valuer) in his evidence testified that the values in the report were for the land and developments and not for the Certificate of Title.

With regard to the general damages, Counsel for the Defendant submitted that the sum of UGX 30,000,000 sought by the Plaintiff was too high and was not commensurate to the loss suffered or the inconvenience occasioned by the loss of a Certificate of Title and the several visits to the Bank. He however submitted that since no case had been proved against the 1st Defendant, the claim for general damages would not arise.

Judgment

I have carefully considered the written submissions of Counsel. There is very little factual controversy in this matter though very many issues have been raised some of which require resolution of matters of fact.

It is an admitted fact that the Plaintiff's property, the subject matter of the suit, had been mortgaged as security for a loan by a company known as Ascort Restaurant Ltd. The factual matter in controversy is whether the Plaintiff paid off the outstanding amount or whether it is the second Defendant who paid the outstanding amount of Uganda shillings 2,497,457/= in final settlement of the loan obligations. It is an admitted fact that the title deed of the Plaintiff was handed over to one Ibrahim Kitaka in his capacity as an administrator of the estate of Mr Sajjabi Nakiwafu Daniel, the Plaintiff herein. This was pursuant to letters of administration granted by the High Court on the 28th of May 2009 by Honourable Mr Justice FMS Egonda-Ntende.

In other words there is no outstanding loan amount at the time when the title deed comprised in the Kyadondo Block 206 Plot 607 at Mpererwe was handed over to the purported administrator of the Plaintiff's estate. It follows that the several documents relating to the release of mortgage and grant of letters of administration are not in contention. It is also not in contention that the Plaintiff is still alive and letters of administration to his estate were erroneously granted to one Ibrahim Kitaka on the ground that the Plaintiff was a deceased person. The central controversy therefore revolves around when the outstanding amount owed to the first respondent was paid and by whom.

In the joint scheduling memorandum endorsed by Counsels of the Plaintiff and the first Defendant, the following facts are agreed namely:

- The suit property was mortgaged to the first Defendant through its predecessor company, Uganda Commercial Bank.
- The registered proprietor of the suit property was Daniel Sajjabi Nakiwafu. The said Plaintiff authorised Ascort Restaurant Ltd to use the suit property as security for a loan/mortgage in favour of Uganda Commercial Bank Ltd.
- The certificate of title for the land was released to a one Ibrahim Kitaka after he presented letters of administration to the first Defendant.
- Ibrahim Kitaka produced to the first Defendant letters of administration issued by the High Court of Uganda vide HCT – 00 – CV – 592 of 2009.
- The first Defendant was satisfied with the status of Ibrahim Kitaka and accepted his repayment proposal of the outstanding loan amount on behalf of Messieurs Ascort Restaurant Ltd.
- Upon payment of the sums outstanding on the mortgage, the first Defendant duly executed an instrument releasing the mortgage of the suit property and later handed over the certificate of title to Ibrahim Kitaka.
- The first Defendant has never advised the Plaintiff to pay off the outstanding loan amount in 2012 or at any time thereafter.

Accordingly the first issue is whether the first Defendant unlawfully and fraudulently released the certificate of title to the second Defendant.

The Plaintiff's case according to the testimony of PW1 as far as it relates to the controversy for trial confirms the agreed facts. His case is that he was contacted by Betty Kirenga, a director of Ascort Restaurant who informed him that the entire loan had been cleared and she was waiting to pay the outstanding sum remaining in the sum of Uganda shillings 2,497,457/= before the security could be released. He gave her the money to take to the Bank. In September 2012 he personally went to the Bank to find out whether the land title was still with the bank and to establish how much was still outstanding. He met Mrs Walusimbi who informed him of the balance from the information in the computer. On 24th September, 2012, he went back with the outstanding balance of Uganda shillings 2,497,457 and he was given account number 0150500219900 in which to deposit the money. This account was where all bad debts were paid in the first defendant bank. After making the payment, he took the payments receipt to one Mrs Walusimbi for verification who then took a photocopy and retained the original copy. The deposit slip was admitted as exhibit P5. The deposit slip is dated 24th of September 2012 and there is a stamp showing that it was received by Stanbic Bank Uganda Ltd Corporate Branch on 24th September, 2012. The depositor is described as Betty Kirenga, Ascort Restaurant Ltd. The amount deposited is Uganda shillings 2,497,457/=.

The Plaintiff also relies on a letter by Messieurs Stanbic Bank Uganda Ltd addressed to the Commissioner Land Registration admitted in evidence as exhibit P6. The letter is a request to search the records for the property in dispute and further indicates that it was pursuant to the request of the registered proprietor, who is the Plaintiff. It is dated 9th November, 2012. PW1 testified that he went several times to follow up his land title. The Plaintiff later obtained a search document from the Commissioner for Land Registration dated 16th April, 2013 and admitted in evidence as exhibit P8. The document shows that the suit property was registered in the names of Dr. Nassaka Sayfa K on 2nd July, 2009.

The inference is that these facts occurred before the Plaintiff attempted to redeem his property. The Plaintiff made his moves in the year 2012 but a transfer had been effected on proprietorship on the title deed on 2nd July, 2009. For the moment the Plaintiff's testimony is corroborated by PW2 Betty Kirenga. She testified that sometime in 2012 the Plaintiff reappeared after having disappeared for some years. She took him to Mrs Walusimbi of Stanbic Bank Uganda Ltd and they were advised about the outstanding amount which they paid on 24th September, 2012. She was advised to make a formal application requesting for the title deed. The document was not received in evidence because it does not demonstrate that it had been received by the first Defendant.

I have carefully considered the above evidence and the issue is what the evidence of the Defendant is. DW1 Hilda Kamugisha worked with the first Defendant Company as a legal officer since 2012. She testified that since 2002 the first Defendant became a successor company to Uganda Commercial Bank Ltd and upon succession some rights and liabilities of Uganda Commercial Bank, including mortgages devolved to Stanbic Bank Uganda Ltd. Her testimony confirms that the property, the subject matter of the suit had been mortgaged and by June 2009, the loan which remained outstanding and due from Ascort Restaurant was Uganda shillings 2,497,457/=. She added that at the same time the whereabouts of the registered proprietor were unknown and they made no effort to contact the bank to follow up his loan obligation and security. The bank was approached on 1st June, 2009 by Mr Ibrahim Kitaka, the second Defendant. He was represented as an administrator of the estate of the Plaintiff. Most importantly she testified that the bank was satisfied about the legal status of the second Defendant and they accepted payment of the outstanding loan amount. The mortgage was released and certificate of title handed over to the second Defendant. The rest of the testimony advances grounds and arguments about how the bank is not a party to whatever the second Defendant did. DW1 was cross examined about a receipt number 123 dated 4th of June 2009 wherein the first Defendant bank received from Ascort Restaurant Uganda shillings 2,497,457/= as loan recovery. The question of whether such money was received is a question of fact.

Finally I have considered the submissions of Counsels. The Plaintiff's Counsel submitted that the fact that the second Defendant was fraudulent is not in doubt. He represented that the Plaintiff was dead and fraudulently applied for letters of administration which he used to go to the first

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

Defendant to claim the title of the Plaintiff's property. He submitted that the role of the first Defendant bank in the fraud is what was material for determination of the suit. He based his submission on a tripartite mortgage agreement and contended that there is no evidence that any notice was ever sent to the borrower and the third-party registered proprietor. Secondly he referred to the anomaly of there being an outstanding debt, when the second Defendant had already paid according to the testimony. He contended that the receipt relied on by the first Defendant seems to be out of normal banking practice of reference to account numbers. The Plaintiff paid the same amount to a particular account. This is contrasted to the Defendant's document.

I have carefully considered the submissions of the Plaintiff's Counsel and the reply of the Defendant which submissions have been set out at the beginning of this judgment. It is indeed a hard fact that the property was transferred pursuant to a release of mortgage which was made in June 2009. Mr Ibrahim Kitaka who claimed to be a grandson and customary heir of the Plaintiff received the document by signing for it on the 5th of June, 2009.

In the absence of any evidence that the first Defendant was party to the obtaining of letters of administration to the Plaintiffs estate, it is hard to fault the Defendant. The second Defendant presented to the first Defendant letters of administration duly issued by the High Court of Uganda. The fact that the second Defendant went to redeem the property does not require Ascort Restaurant Ltd to consent to the redemption. The second Defendant in law represented the mortgagor who is the registered proprietor. He was entitled in law, on the face of it, to redeem the property from the mortgage and to obtain a clean title. The subsequent actions of the Defendant through Mrs Walusimbi to give the Plaintiff and PW2 information about the loan and purporting to establish that there was an outstanding amount, cannot take out the fact that the mortgage was released showing that there was no encumbrance. The property would therefore be dealt in without any encumbrances by the time it was released to the second Defendant. The inconsistent actions of Mrs Walusimbi and the deposit of the Plaintiff of a purported outstanding amount do not amount to fraud. The property was released by the Defendant (Messieurs Stanbic bank Ltd) and therefore the mortgage was not reflected on the title deed by the time the Plaintiff attempted to redeem the property. Moreover the deposited certificate of title had been released to Ibrahim Kitaka who signed for it. The Plaintiff was simply misled as to the true facts. This is confirmed by the search document admitted in evidence which clearly indicates that there were no encumbrances on the suit property. The Plaintiff's interest was the redemption of the property and nothing else. The property had been redeemed, albeit by a fraudster.

The release of mortgage is dated 4th June, 2009. It was duly issued by the Manager Securities of Stanbic Bank who admittedly released a mortgage registered on 24th January, 1991 in consideration of all monies due for principal and interest on the mortgage. Accordingly the registered proprietor's property was discharged. The letter of the Commissioner Land Registration is dated 16th April, 2013 and marked as exhibit P8. It clearly indicates that there

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maximum728securityx 2016 style*

were no encumbrances on the title deed. Secondly, Dr. Nassaka Frida Sayfa K, the 3rd Defendant was registered on 2nd July, 2009.

By the time the Plaintiff attempted to redeem the property, there was no mortgage in force and the title was free of all encumbrances. Secondly, the property had been transferred to a third party, namely the third Defendant.

The Plaintiff's action against the first Defendant does not fall in the category of an action for impeachment of title as prescribed by section 176 of the Registration of Titles Act. Yet an action for impeachment of title must be against the transferee in title. The Plaintiff abandoned the suit against the third Defendant. The fraud sought to be proved could have been fraud in relation to acquiring title by the transferee in title with the participation of the other parties. This is therefore an action for compensation/damages. It is conceded by the first Defendant and I agree with the conclusion of the Plaintiff's Counsel that fraud has been proved against the second Defendant Mr. Ibrahim Kitaka against whom the suit proceeded in default of a defence.

In **Kampala Bottlers Ltd vs. Damanico (U) Ltd Civil Appeal No. 22 of 1992** the Supreme Court held that fraud must be attributable to the transferee in title. Fraud is attributable either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. Furthermore, actual dishonesty on the part of the transferee in title with intention to defraud must be proved. The definition of fraud in **Assets Company Limited versus Mere Roiri and Others (1905) AC 176** was cited with approval. In **Assets Company Limited versus Mere Roiri and Others (1905) AC 176** it was held that by fraud it is meant actual fraud that is dishonesty of some sort, not what is called constructive or equitable fraud.

“The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make is not of itself proof of fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him...”

The standard to prove fraud is higher than in ordinary civil suits according to **Ronald Kayara vs. Hassan Ali Ahmed SCCA No.1 of 90.**

I have duly considered the law and the public interest which is latent in the issue before the court. The duty is not on the first Defendant bank to establish how letters of administration were granted or obtained. It should be sufficient for a financial institution or any authority to ascertain that letters of administration were duly granted by a court of competent jurisdiction. The duty is on the Administrator General as well as the High Court to conduct the necessary enquiry as to the applicant for letters of administration. The grant of letters of administration is preceded by a public notice indicating the intention of the applicant to obtain letters of administration. Similarly

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

the grant of probate by a court of law is preceded by public notice inviting interested persons to lodge their claim of interest. The High Court in this case is presumed to have examined the applicant and to have given opportunity to any person objecting to the grant of letters of administration to contest the application for letters of administration.

Once the letters of administration or probate are sealed, the duty of anybody to whom it is presented is to ascertain whether it was sealed by a court of competent jurisdiction and where necessary to ask for a certified copy of it. It is not up to the financial institution to find out whether the person purporting to be the grantee of letters of administration duly applied for it. In the premises, I will consider a few pertinent statutory provisions relating to the grant of letters of administration in cases of intestacy.

The Succession Act, cap 162 Laws of Uganda gives the character of letters of administration in section 180 and provides that:

“180. Character and property of executor or administrator.

The executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such.”

The property of the deceased person vests in the executor or administrator of the deceased as the case may be. Secondly, all rights belonging to the intestate effectually pass on to the administrator. Section 192 of the Succession Act provides as follows:

“192. Effect of letters of administration.

Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death.”

Last but not least letters of administration are conclusive as to its effect over the intestate’s property and the rights of the administrator. Section 242 of the Succession Act is pertinent and provides as follows:

“242. Conclusiveness of probate or letters of administration.

(1) Probate or letters of administration shall have effect over all the property and estate, movable or immovable, of the deceased, throughout Uganda, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him or her.

(2) Probate or letters of administration shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom the probate or letters of administration shall have been granted.”

The recognition of letters of administration by the first Defendant is commanded by the law. Last but not least I have considered exhibit P1 which is the mortgage deed in question. The Plaintiff is a party to the mortgage deed and is also the mortgagor. In paragraph 1 the Plaintiff undertook to pay back the loan advanced to Ascort Restaurant Ltd. It followed that when the second Defendant produced letters of administration and proposed to pay the outstanding balance, the bank was within its mandate to recover its money and release documents of title to the registered proprietor or representative in title. This occurred in 2009 before the Plaintiff resurfaced in 2012.

It was not unlawful or fraudulent for the first Defendant to release the certificate of title to the purported administrator of the estate of the Plaintiff. I have found no evidence that the first Defendant's officials knew or ought to have known that the Plaintiff was alive and that the second Defendant was fraudulent. In the premises issue number 1 on whether the first Defendant unlawfully and/or fraudulently released the certificate of title to the second Defendant is answered in the negative.

Whether the second Defendant unlawfully transferred the suit land to the third Defendant?

The submissions of The Plaintiff's Counsel are clear on the second issue and the Plaintiff withdrew the claim against the third Defendant and made no submissions on the issue.

Remedies

The first issue was answered in the negative as far as the first Plaintiff is concerned.

The Plaintiff's Counsel submitted that the release of the Plaintiff's certificate of title to the second Defendant by the first Defendant and the subsequent transfer by the second Defendant to the third Defendant is fraudulent and prayed that judgment is entered against the Defendants to pay Uganda shillings 245,000,000/= as compensation for the value of the Plaintiffs land and developments thereon. As far as the value is concerned, the Plaintiff relies on the testimony of PW3 Mr Solomon Alinaitwe who produced exhibit PE 11 which is a valuation report.

In reply to the Plaintiff's submissions, the Defendants Counsel submitted that the Plaintiff failed to prove fraud against the first Defendant and he invited the court to dismiss the suit against the first Defendant with costs.

I have carefully considered the evidence and the submissions. The evidence clearly demonstrates that the second Defendant fraudulently obtained letters of administration to the estate of the Plaintiff and went ahead to present those letters of administration to the first Defendant. The Plaintiff had been out of the country residing in Kenya and his whereabouts were unknown. Secondly, PW2 confirmed that the Plaintiff was nowhere to be seen at the material time. That notwithstanding, Ibrahim Kitaka in his petition to the High Court lied and represented in paragraph 4 thereof that the Plaintiff died intestate on the 28th of May 2002. He further gave the

same information to the Registrar General by filling a form of declaration of death on 20th April, 2009. The Plaintiff subsequently appeared in the year 2012 and very much alive. The information was false because it gave a definite date of the death of the Plaintiff. It was not based on presumption of death of a missing person. Upon presentation of this false information to the High Court, the second Defendant was granted letters of administration to the Plaintiff's estate in May 2009. Immediately thereafter he presented the information to the first Defendant and managed to obtain a release of mortgage. He subsequently transferred the property to a third party on 2nd July 2009.

As far as the first Defendant is concerned, it did not give the Plaintiff proper information about his title. The Plaintiff paid Uganda shillings 2,497,457/= to the first Defendant. The Plaintiff moved to and fro to retrieve his title from the first Defendant in vain and was subsequently informed that the property had been transferred after a search had been conducted with the Commissioner for land registration. The Plaintiff ought to have been given this information which was within the records of the first Defendant. I therefore find that the Plaintiff was put to unnecessary expense and suffering by not being informed of the transaction which was within the records of the first Defendant. The Plaintiff has proved that the first Defendant caused him financial loss of Uganda shillings 2,497,457/= which is hereby awarded to the Plaintiff against the first Defendant. Secondly, the Plaintiff's expectations were raised falsely by one Mrs. Walusimbi when in actual fact his property had already been sold. The Plaintiff followed up this matter from September 2012 up to April 2013, a period of about six months until when he was informed by the Commissioner land registration who wrote a letter admitted in evidence and addressed to the first Defendant that the property had been transferred way back on 2nd July, 2009 to the 3rd Defendant. There were several other letters written to establish the fact by the Plaintiff's lawyers. The first Defendant also wrote a letter to the Commissioner for Land Registration dated 9th November 2012 to establish what happened to the Plaintiff's title. The Plaintiff instructed Counsel and I have considered the several letters written to the first Defendant bank about the matter.

In the premises, I find that the first Defendant was negligent and due to the acts of the first Defendant's officials, the Plaintiff was subjected to suffering. While the first Defendant cannot be faulted for the release of title to the purported administrator of the Plaintiff's estate, they are liable for what happened after the Plaintiff appeared and followed up his title. In the premises I award the Plaintiff a sum of Uganda shillings 10,000,000/= as general damages for pain and suffering for what he was put through. The first Defendant had a duty to give the Plaintiff, who was now known to be alive, proper information and to help him follow up the title with the fraudster. The Plaintiff was not assisted with the information deemed to be in the possession of the first Defendant.

Last but not least, the second Defendant is liable to compensate the Plaintiff in the amount claimed of Uganda shillings 245,000,000/=. The Plaintiff is therefore awarded a sum of Uganda shillings 245,000,000/= against the second Defendant.

Interest is awarded on the sum of Uganda shillings 245,000,000/= awarded against the second Defendant and Uganda shillings 2,495,475/= awarded against the first Defendant from 24th of September 2012 when the money was deposited with the first Defendant until date of judgment at the rate of 20% per annum.

The Plaintiff is further awarded interest at 19% per annum on the above sums against each Defendant as is due from the date of judgment till payment in full.

The suit against the third Defendant was withdrawn and hereby stands withdrawn with no order as to costs.

The rest of the suit succeeds with costs against the first and second Defendant respectively.

Judgment delivered in open Court on the 19th of December 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Opio Moses Counsel for the Plaintiff

Plaintiff is present in court

Brian Kalule Counsel for the first Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19th December 2016