

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISC.APPLICATION NO. 1115 OF 2016
ARISING FROM CIVIL SUIT NO. 708 OF 2013

OPIO GEORGE:.....APPLICANT

VERSUS

1. BWANIKA DEOGRACIOUS

2. SOLOMON TURYAHEBWA

3. OTIENO CLEMENT OCHENG

4. HAJI ISHAQ KAYANJA:.....RESPONDENTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

In this Application the Applicant Opio George seeks a Consequential order against BwanikaDegracious, Solomon Turyahebwa, Othieno Clement Ocheng and Haji IshaqKayanja herein after referred to as the 1st, 2nd 3rd and 4th Respondents respectively.

The Consequential Order is intended to set aside the attachment of property comprised in Kyandondo Block 257 Plot 917 subject of execution of a decree in Civil Suit No.708 of 2013. Furthermore, to cancel a special certificate of title issued in respect thereof and all entries made

thereon and reinstate the duplicate certificate of title for the said land and the proprietorship of the Applicant thereon.

The Application is grounded on the following;

- 1) That the property belongs to the Applicant having purchased it from one Daniel KibuukaKyobe on 19th September 2008.
- 2) That the Applicant is in possession of the property and the duplicate certificate.
- 3) That the Applicant has never sold the Property to anyone or at any time entered into an agreement of sale dated 10th July 2012 with any of the Respondents or any other person.
- 4) That when the suit HCCS No. 708 of 2013 was filed he was not served with any court process leading to an exparte judgment in default against him.
- 5) That following that Judgment the said Property was attached in execution of decree in HCCS No. 708 of 2013.
- 6) That since then the default judgment and attendant decree have been set aside.

The history of the matter is interesting and I may say informs much about the parties to the suit.

It begins with a Complaint in Summary Suit filed by a person who called himself BwanikaDeogracious, the Plaintiff against Opio George the Applicant herein.

In that suit 708 of 2013 the Plaintiff claimed that on the 10th July 2012 he bought a piece of land comprised in Kyandondo Block 257 Plot 917 at Munyonyo at a purchase price of UGX. 135,000,000/= which he paid in full and the Applicant handed to him a duplicate certificate and signed transfer documents.

The Plaintiff alleged that when he went to the land office to process a transfer, the Registrar of Titles confiscated them claiming they were forged documents.

That he made several attempts to take the Applicant to the Registrar but failed. He sued for recovery of the UGX. 135,000,000/=.

He filed the suit on 25th November 2013 and through one Kobusingye Benedict purportedly served the Applicant on 27th November 2013.

On the 10th December 2013 the Plaintiff applied for a judgment in default because the Applicant had not filed an Application seeking leave to defend. On the 3rd of February 2014 Judgment was entered in his favour against the Applicant in the sum of UGX 135,000,000/=.

A bill of costs was taxed exparte and allowed at UGX 9,211,500/= which together with a decretal sum totaled UGX 144,211,500/=.

The Plaintiff then sought recovery of the sum by attachment and sale of the very property he had allegedly paid for. The warrant issued on 10th March 2014 was executed by Solomon Turyahebwa trading as Lala Auctioneers & Court Bailiffs who advertised and sold the Property to Otieno Clement Ocheng the 3rd Respondent who in turn sold the same to the 4th Respondent.

The Applicant claiming that he only got to know of the case after attachment of his land filed an Application to set aside the sale.

He contended that he was never served with summons. That he had never sold any land and that he did not know the Plaintiff.

Considering the issue of service upon the Applicant court looked at the Affidavit of service. The Affidavit itself failed the test. It had never been commissioned. The Registrar had therefore entered Judgment without proof of service. This on its own was sufficient to set aside the Judgment.

There were however more serious issues pointing to criminality in the whole transaction of sale of property and court process. When the Application to set aside the exparte judgment was filed, the Plaintiff went underground. Instead, one Lutaaya Godfrey Bulagulwa whose photo was on the identity card bearing the names BwanikaDeogracious denied ever filing any suit against Opio. In paragraph 5 of the affidavit he said this;

“That the purported identity card annexed on the application bearing my photograph is not mine, it is a forgery and my photo should have been accessed by unscrupulous persons and affixed on the same and I wish to state categorically that I have never signed for any money from this court or from any court or any bailiff as recovered decretal sums or costs on account of the main suit.”

From the very start, it becomes clear that the person whose picture was in the documents in respect of the purchase of the land and subsequent transfer was non-existent because the owner of the photograph denied being called BwanikaDeogracious and said he was Lutaaya Godfrey Bulagulwa.

The other pointer at criminality was brought out by an advocate Francis Xavier Ogwado.

First the agreement of sale between the Applicant and the 1st Respondent was allegedly made at the Chambers of F.X. Ogwado and Co. Advocates. Secondly, the Complaint in HCCS 708 of 2013 was allegedly drawn and filed by the same law firm. When the matter came up, Advocate Francis Xavier Ogwado denied ever playing any part. He said BwanikaDeogracious had never been his client and had never received any instructions from him. Denying ever filing the Complaint 708 of 2013 he deposed;

“That I had occasion to peruse the complaint allegedly filed in court and the same bears a signature which is not mine and no advocate in my firm whether at the purported time of filing the suit or presently has that signature.”

On whether his colleague MrNsobya Ronald whose name appeared on the decree really appeared as counsel, he deposed;

“That I have perused the decree and I recall that MrNsobya Ronald Kamya whose name was entered on the decree as Counsel for the Plaintiff had already been appointed and posted to Kabale Chief Magistrates Court as a Grade One Magistrate.”

The foregoing clearly unveils criminal activities right from the making of the Agreement, filing of the suit, obtaining of ex parte Judgment, the subsequent execution by attaching the very subject of the suit and sale thereof as a premeditated scheme to remove the property from the Applicant through fraudulent means with the sole purpose of financial gain through sale.

The sum total is that every act that was done from the acquisition to sale was founded on fraud. Such a sale cannot stand notwithstanding the court’s involvement. It is revoked and set aside.

Counsel for the 3rd Respondent argued that third party rights had accrued which could not be defeated. He also argued that the land was now a subject of a mortgage in favour of Standard

Chartered Bank. To begin with Counsel had no instructions from the Bank. Furthermore, record shows that the Bank was served but chose not to attend the proceedings.

As to third party rights being infringed, I must say that this court cannot allow the subsistence of rights whose base and foundation is riddled with fraud at the expense of an innocent owner being deprived of property in the manner I have described herein earlier. The 4th Respondent is free to seek recovery from whoever he bought the property from and all Respondents may do so down the ladder.

The sum total is that since the suit 708/2013 was filed by fictitious Deogracious Bwanika the 1st Respondent was dismissed, and since the attachment and sale was based on a fraudulent transaction, the Consequential Order sought by the Applicant is granted.

The attachment and purported sale and or transfers of the said property to the 2nd, 3rd and 4th Defendants of Kyandondo Block 257 Plot 917 and all entries made thereon are cancelled.

The Registrar of Titles is directed to reinstate the Applicant as the registered proprietor.

Costs to be borne by the 1st Respondent if traceable.

Dated at Kampala this 14th of December 2017

HON. JUSTICE DAVID WANGUTUSI

JUDGE