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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT No. 41 of 2019**

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PAUL KAYANJA

MARIA GORETTI NAMUKWAYA PLAINTIFFS

VERSUS

1. VINCENT WASSWA

2. UGANDA MICRO CREDIT FOUNDATION LTD DEFENDANTS

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BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

Introduction

The Plaintiffs instituted this suit against the Defendants jointly and severally wherein, they seek for the following remedies:- A declaration that the 1st Defendant fraudulently transferred property comprised in Busiro Block 424 Plot 66 at Mpala (hereinafter referred to as the "Suit Property") in his favour; A declaration that the 1st and 2nd Defendants fraudulently mortgaged the Suit Property to secure the 1st Defendant's indebtedness to the 2nd Defendant; An order for cancellation of the 1st Defendant's title in the Suit Property; An order for cancellation of the 2nd Defendant's Mortgage over the Suit Property; An order for release of the Certificate of Title of the Suit Property by the 2nd Defendant to the Plaintiff and the registration of the Plaintiff's on the Suit Property as Administrators of the Estate of the Late Sylvester Sentamu; General damages, Interest on general damages from the date of Judgment and costs of the suit.

Facts

The Plaintiffs, who are suing as Administrators of the Estate of the Late Sylvester Sentamu contend that the Suit Property in which the 1st Defendant secured a loan of UGX 15,500,000(Uganda Shillings Fifteen Million Five Hundred Thousand shillings

5 only) from the 2nd Defendant, was fraudulently transferred in favour of the 1st Defendant and later, fraudulently mortgaged to the 2nd Defendant.

The 1st Defendant did not file a defence to the suit and a default judgment was entered against him.

10 The 2nd Defendant contests the claim and avers that the Suit property was lawfully mortgaged to it by the 1st Defendant. That the 1st Defendant defaulted in his loan repayment obligations and was adjudged by a Decree of Court to pay a sum of UGX 17,706,000 (Uganda Shillings Seventeen Million Seven Hundred and Six Thousand only) to the 2nd Defendant. That the 2nd Defendant exercised its rights as a Mortgagee to advertise for the sale of the suit property.

15 The facts agreed upon by the Plaintiffs and the 2nd Defendant during the scheduling proceedings are that: –

- (i) Property comprised in Busiro Block 424 Plot 66 at Mpala was mortgaged to the 2nd Defendant by the 1st Defendant to secure a borrowing in favour of the 1st Defendant;
- 20 (ii) At the time of the Mortgage, the suit property was registered in the name of the 1st Defendant.
- (iii) The 1st Defendant registered himself as the owner of the suit property on 27th October, 1997 after the death of Sylvester Sentamu who was the owner of the suit property and,
- 25 (iv) At the time of the Mortgage of the suit property, it was occupied by the Late Sylvester Sentamu's wife and not the 1st defendant.

Representation

30 The Plaintiffs were represented by Mr. Walukagga Isaac of M/S MMAKS Advocates and the 2nd Defendant by Ms Birungi Christine of M/S Frank Tumusiime & Co. Advocates.

The issues agreed upon by the Plaintiffs and the 2nd Defendant for Court's determination are as follows: –

- 35 1. Whether the Suit Property was lawfully mortgaged to the 2nd Defendant by the 1st Defendant.
- 2. What remedies are available to the parties?

40 At the hearing, the Plaintiffs and the 2nd Defendant filed witness statements as directed by Court which, was admitted on Court record as their evidence in chief.

5 Paul Kayanja (PW1) stated that they as the Plaintiffs and the 1st Defendant are children of the Late Sylvester Sentamu formerly, a resident at Mpala. That the Late Sylvester Sentamu was on the 11th November, 1968 registered as the proprietor of the Suit Property under Instrument No. KLA 43874 and that he passed on at Kisubi Hospital on 15th June, 1996 leaving the Plaintiffs and the 1st Defendant among his
10 children together with their mother. That at the time of his demise, the Late Sylvester Sentamu had a residential house on the Suit Property where he lived with his wife, Geraldine Sentamu who also died in 2017.

That following the death of Sylvester Sentamu, the Plaintiffs obtained Letters of
15 Administration in respect of the Estate of the Late Sylvester Sentamu but before they registered their names as Administrators of the said Estate on the title of the Suit Property, the 1st Defendant, without any authority or colour of right, transferred the Suit Property in his favour on 27th October, 1997 and that at the time the 1st Defendant did this, their mother, the Late Geraldine Sentamu was in occupation
20 of the Suit Property.

That the 1st Defendant thereafter, obtained a loan from the 2nd Defendant where, he pledged the Suit Property as security and that the 1st Defendant failed to service the said loan and as a result, the 2nd Defendant, filed a suit for recovery of its dues against the 1st Defendant. That the 2nd Defendant obtained an exparte
25 judgment and proceeded to arrest and detain the 1st Defendant in prison for six months in satisfaction of the Decree.

That upon failure by the 2nd Defendant to recover their dues, they proceeded to advertise the Suit Property for sale and that it was at this point that the Plaintiffs discovered that the 1st Defendant had fraudulently transferred the Suit Property
30 in his favour and mortgaged it to the 2nd Defendant whereupon, the Plaintiffs filed an objector application and obtained an interim Order restraining the 2nd Defendant from selling the Suit Property.

That the 1st Defendant concealed to the Administrators and the widow to the Late Sentamu, that the Suit Property had been mortgaged to the 2nd Defendant and disregarded the late Geraldine Sentamu's occupation of the Suit Property
35 and mortgaged it to the 2nd Defendant. That the 2nd Defendant failed to conduct due diligence on the Suit Property that would have disclosed that it is occupied by someone other than the 1st Defendant and that on this basis, the 2nd Defendant has no legal mortgage over the said property.

5 On the part of the 2nd Defendant, Suda Christopher (DW1) stated that he is the Head of recoveries with the 2nd Defendant Company dealing in money lending and is conversant with the facts of this case. That he knows the 1st Defendant as the 2nd Defendant's client. That the 1st Defendant applied for a loan of UGX 15,500,000 which he secured with the Suit Property.

10 That the 1st Defendant defaulted and the 2nd Defendant handed over the file to their Lawyers M/S Tumusiime & Co. Advocates to recover the outstanding amounts due. That the Lawyers secured judgment in favour of the 2nd Defendant but still the 1st Defendant did not pay the judgment debt until an arrest warrant was issued. That he was arrested and detained in Civil prison for six months but still
15 failed to pay.

That this left the 2nd Defendant with no option but to run an advert for the sale of the mortgaged property. That the 2nd Defendant could not have been and expected to be aware of the Plaintiffs' alleged interest as the Land title of the mortgaged property was in the name of Wasswa Vincent and that nobody on
20 the land disputed his ownership including the mother who informed him that Wasswa was the owner of the mortgaged property.

That the 2nd Defendant did all the due diligence required and expected in advancing the loan to the 1st Defendant and that the Plaintiffs' claims against the 2nd defendant are misguided and the allegations of fraud are not only unfair but
25 they are unfounded as well.

The 1st Defendant did not file a defence and a default judgment was entered against the 1st Defendant.

Issue No.1: Whether the Suit Property was lawfully mortgaged to the 2nd Defendant by the 1st Defendant.

30 This Court has taken into consideration the evidence of the witnesses, documents adduced by the parties and the submissions by Counsel for the parties herein; what is crucial here, is the manner in which, the 1st Defendant acquired title in his favour in respect of the Suit Property and secured a loan from the 2nd Defendant with the Suit Property.

35 Its settled law that a certificate of Title is conclusive proof of ownership and is not impeachable however, there are exceptions to this general rule as provided under sections 64, 77 136 and 176 of the Registration of Titles Act Cap 230 (hereinafter referred to as the "Act") on grounds of fraud or an illegality
40 committed at the time of procuring registration.

5 Its trite law that fraud must be particularly pleaded and strictly proved. Counsel for the parties herein, cited the case of **Kampala Bottlers Vs Damanico (U) Ltd S.C.C.A No. 22 of 1992** in their submissions on this proposition of law.

The Plaintiffs under paragraph 5 of the plaint, pleaded fraud on the part of the 1st Defendant and paragraph 6 thereof, on the part of the 2nd Defendant.

10 I am in agreement with the judicial interpretation of the term fraud by the Supreme Court in **Fredrick J.K Zaabwe Vs Orient Bank & others S.C.C.A No. 4 of 2006** cited with approval in the case of **Kansiime K. Andrew Vs Himalaya Traders & 7 others Consolidated H.C.C.S No. 132 of 2011** (unreported), where Katureebe JSC. (as he then was) stated that:

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“... Anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood ... a generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth ... and unfair way by which another is cheated, ... As distinguished from negligence, it is always positive, intentional. It involves all acts ... involving breach of legal duty or equitable duty resulting in damage to another.”

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25 Counsel for the Plaintiffs relied on the definition of the term fraud as above, to submit that the 1st Defendant was fraudulent in transferring property of the deceased person without a transfer issued in his favour by the Legal Representatives of the late Sentamu and that the 1st Defendant's title should be impeached.

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The principle in the law of evidence is that, whoever alleges a given fact and wishes the Court to believe in the existence of any fact, has the burden to prove that fact unless, it is provided by law that the proof of that fact shall lie on another person. **(See sections 101-103 of the Evidence Act Cap 6)**

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In the given circumstances of this matter before me, the Plaintiffs have the burden of proving fraud to a heavier standard than on a balance of probabilities generally applied in civil cases.

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The evidence adduced by the Plaintiffs in exhibits PE6 the 1st Defendant's Loan Application Form; PE3 the Loan Agreement; PE2 the Credit Collateral Form and PE1 the Certificate of Title in the name of Wasswa Vincent, proved on a balance

5 of probabilities that the 1st Defendant applied for and obtained a loan from the 2nd Defendant, which was secured with the Suit Property.

It is notable, that the 2nd Defendant relied on the same documents adduced by the Plaintiffs above, as seen in DE3 the Loan Agreement; DE1 the Certificate of Title and DE2 the Credit Collateral Form.

10 It was the evidence of PW1 as above, that the 1st Defendant transferred the suit property in his favour as seen in Exhibit PE1 the Certificate of Title and that he concealed to the Administrators, in whom Letters of Administration (PE5) was granted in 2015 and the widow to the Late Sentamu, that the Suit Property had
15 been mortgaged to the 2nd Defendant, in disregard of the late Geraldine Sentamu's occupation of the Suit Property.

It is my considered view that those acts, points to the fact of fraud; a generic term embracing all multifarious means which human ingenuity can devise, and which
20 are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth. (Emphasis is mine)

I respectfully disagree with the submission by Counsel for the 2nd Defendant that the Plaintiffs did not prove to the Court that the Suit Property formed part of the
25 Estate of the Late Sentamu at the time of execution of the Mortgage since, the period of 19 years had lapsed from when the father to PW1 passed away in 1996 and the time when, the Plaintiffs obtained letters of Administration in 2015.

The burden of proof was instead on the 1st Defendant to prove that the Suit Property did not form part of the Estate of the Late Sentamu; and yet, with the
30 knowledge that the late Geraldine Sentamu, a widow to Late Sentamu was in occupation of the Suit Property at the time of execution of the said Mortgage with the 2nd Defendant, this leaves a lot to be desired on the conduct of the 1st Defendant.

Counsel for the 2nd Defendant submitted that the Plaintiffs must demonstrate that
35 the acts of the 2nd Defendant were dishonest, aimed at wilful perversion of the truth and intended to deprive them of their legal rights as Administrators.

This Court finds that the evidence adduced by the Plaintiffs, proved the fact of fraud on the part of the 1st Defendant, which is that the 1st Defendant's acts were calculated to make false suggestions and to suppress the truth to the 2nd
40 Defendant since, the 2nd Defendant adduced evidence to indicate that they

5 carried out the due diligence required and expected in advancing the loan to the 1st Defendant.

In the result, this Court finds that the Suit Property was unlawfully mortgaged to the 2nd Defendant by the 1st Defendant.

Issue No.2: What remedies are available to the parties?

10 Having found issue (1) above in the negative, this Court will consider the remedies available to the Plaintiffs and the 2nd Defendant as hereunder:

This suit instituted by the Plaintiffs as against the 2nd Defendant is dismissed with costs to the 2nd Defendant.

15 In regard to general damages, it's settled law that an award of general damages is at the discretion of Court which, should be exercised judiciously. (**See Crown Beverages Vs Sendi S.C.C.A No. 1 of 2005**).

Counsel for the Plaintiffs argued that, the Plaintiffs as Administrators to the Estate of the Late Sylvester Sentamu have been subjected to inconvenience by the
20 actions of the 1st Defendant and that the sum of UGX 33,000,000(Uganda Shillings Thirty Three Million only) be awarded to the Plaintiffs in general damages.

Following the decision in **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305**, where the Justices, enunciated the factors to be considered by the Courts when assessing the quantum of general damages as follows: - the value of the subject
25 matter; the economic inconvenience that the Plaintiff may have been put through, and the nature and extent of the injury suffered.

In the given circumstances of this case before me, I find that the sum of UGX 30,000,000 (Uganda Shillings Thirty Million only) in general damages will suffice for the Plaintiffs, on account of the value of the subject matter.

30 On the issue of interest on general damages, its trite law that interest should be awarded from the date of Judgment until payment in full. (**See Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd No.2 [1970] EA 469**)

Accordingly, interest is awarded on the sum of UGX 30,000,000(Uganda Shillings Thirty Million only) in general damages to the Plaintiffs as above at the rate of 6%
35 per annum from the date of Judgment till payment in full.

5 This Court has taken into consideration the provision of the law, under subsection 1 of section 27 of the Civil Procedure Act Cap 71 on costs and the decision in **Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) HCB 35** where Justice Manyindo (as he then was) held that:

10 “A successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit”; to find that there is no justifiable reason to deny the Plaintiffs costs of this suit. The Plaintiffs are therefore, entitled to costs of this suit which, follow the event upon the success of the party in the suit.

15 In the final result, Judgment is hereby entered for the Plaintiffs and this Court grants the reliefs sought for as follows: -

1. A declaration that the 1st Defendant fraudulently transferred in his favour, property comprised in Busiro Block 424 Plot 66 at Mpala.
2. A declaration that the 1st Defendant fraudulently mortgaged the Suit Property to the 2nd Defendant.
- 20 3. An Order for cancellation of the 1st Defendant's title in the Suit Property.
4. An Order for cancellation of the 2nd Defendant's mortgage over the Suit Property.
5. An Order for the release of the Certificate of Title in the Suit Property by the 2nd Defendant to the Plaintiffs and their registration as Administrators of the Estate of the Late Sylvester Sentamu.
- 25 6. An order for general damages and interest thereon, at the rate of 6% per annum from the date of Judgment till payment in full.
7. Costs of the suit are awarded to the Plaintiffs as against the 1st Defendant.
- 30 8. The suit as against the 2nd Defendant is dismissed with costs to the 2nd Defendant.

Dated, signed and delivered to the parties by email this 25th day of March, 2022.

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SUSAN ABINYO
JUDGE
25/03/2022