

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO.1112 OF 1996

FLORENCE NDAULA TAZALIKA.....PLAINTIFF

VERSUS

HAJATI ZAWADI SHARIFU.....DEFENDANT

BEFORE; THE HON MR. JUSTICE E. S. LUGAYIZI

JUDGMENT:

The plaintiff sued the defendant for trespass and fraud in respect of her customary holding (popularly known as Kibanja) lying on Block 3 Plot 530 Mengo, Nakulabye and prayed Court to grant her the following reliefs,

- (a) An order cancelling the defendant as the registered proprietor of the suit premises;
- (b) An order reinstating the caveat lodged by the plaintiff on the Certificate of title for the suit premises;
- (c) An order evicting the defendant from the suit premises;
- (d) General damages for trespass and fraud;
- (e) Costs of this suit;
- (f) Interest of 20% from the date of judgment until payment in full.

In her amended WSD the defendant denied the above claim and, among other things, averred that she was a bona fide purchaser for value of the suit premises.

At the time of hearing the suit, the plaintiff called five witnesses namely, herself (PW1); Sozi Grace (PW2); Lewis Peterson (PW3); Jane Nakiyemba (PW4) and Opio Robert (PW5). In very brief terms those witnesses testified as follows. That in 1958, the plaintiff bought the Kibanja in

question from one Miriamu Nakimu. The said Kibanja is found in Kiwunya at Nakulabye. Subsequently the plaintiff built two houses on it. One of them had five rooms and the other one had three rooms with a kitchen and a bathroom. Eventually, when Nakimu died, her successor was willing to allow the plaintiff to buy the land on which the Kibanja in question is found. However, around 1990 the plaintiff had a serious accident and remained very sick for some time. She gave her nephew, one Willy Mudima, money and entrusted him with the responsibility of buying the said land for her. Mudima took the money and bought the land, but did not transfer it into the plaintiff's name. Instead, he had it transferred into his name, mortgaged it and obtained a bank loan which he failed to pay back. Mudima did not tell the plaintiff what he had done. However, after some time, when the plaintiff realised that there was a wrangle in respect of the suit premises, she lodged a caveat on its Certificate of title that is kept by the Land Registry. Eventually, the plaintiff was evicted from the Kibanja in question. She was not given any notice prior to that or compensation for the developments on the Kibanja. She therefore prayed Court to give her the remedies outlined in the amended plaint.

On her part, the defendant called three witnesses namely, herself (DW1); Paulo Kafeero (DW2); and Haji Nyika Umar Kisuule (DW3). Those witnesses testified as follows. That the defendant bought the suit premises from Allied Building Society in 1997 for a sum of Shs.8m/-. That took place after court brokers who were acting for the bank advertised the suit premises. Prior to buying the suit premises, the defendant, her husband (Umar Kisuule- DW3-) and the bank's lawyer (Nagemi) inspected it and liked it. The defendant and her husband were shown the Certificate of title for the suit premises and a court order in connection with that matter. The defendant signed an agreement in respect of the suit premises and paid the purchase price after being satisfied that there was no one claiming it as his or her own. The defendant had no knowledge before the sale that the plaintiff had an interest in the suit premises. She therefore prayed Court to dismiss this suit with costs.

The agreed issues were five in number, but on the evidence on record it seems clear that it is not disputed that the defendant bought the suit premises and had, herself registered as the proprietor thereof. It is also not in dispute that the plaintiff had an interest in the suit premises at one point. However, the defendant maintains that at the time she bought the suit premises she was not

aware of such interest. As a result of the foregoing, Court thinks that the only issues to resolve are as follows:

1. Whether the defendant fraudulently bought the suit premises?
2. Whether the defendant was a bona fide purchaser of the suit premises?
3. The available remedies.

Court will dispose of the above issues in the order in which they are presented.

However, before discussing the first issue, Court wishes to point out a few things. Firstly, despite the fact that the plaintiff was a Kibanja holder her interest in the land in question was secured by a caveat that was registered on 28th April 1994. Court will for that reason consider her interest from that standpoint. Secondly, over time some well established principles have evolved in this area of land law, which are important to keep in mind as Court goes along. One of those principles is that it is not enough to show that there was fraud in the process in which the transferee acquired the land in question. The fraud complained of must have been directly committed by the transferee himself or, the transferee must have been aware of the fraud before and taken advantage of it to register as the transferee. (See Kampala Bottlers Ltd v Damanico (U) Supreme Court Civil Appeal No.22 of 1992). The other principle is that since an allegation of fraud is a serious matter, the standard of proof required to prove it is “a little higher” than the ordinary civil standard of proof. In the case of **R. G. Patel v Lalji Makanji (1957) E.A. 314 at page 317**, the Court of Appeal for East Africa expressed that standard in these words,

“...not...so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

The burden of proof lies on the party alleging fraud to prove it. (See sections 100 and 101 of the Evidence Act (Cap. 43)).

Be that as it may, with regard to the first issue, Court will begin by defining “fraud”. Blacks Law Dictionary Abridged (Sixth Edition) defines fraud as “An intentional perversion of truth .A false representation of a matter of fact... Anything calculated to deceive...”. However, in the case of

Waimiha Saw Milling Co. Ltd v Waione Timber Co. (1926) AC 101 the Privy Council at page 106 provided a simpler definition of fraud. That definition reads as follows fraud “implies some act of dishonesty.” Court shall, in the instant case, take fraud to mean, “Some act of dishonesty”. It will then proceed to examine whether the acts of fraud laid out in paragraph 9 of the amended plaint measure up to that definition; and whether those acts were actually committed by the defendant or, she was aware of their commission at the time she bought the suit premises. The first allegation of fraud was as follows:

- (a) The defendant purchased the above mentioned property from Alliance Building Society which is not the registered proprietor of the suit property nor had any authority to sell. A copy of the sale agreement is attached hereto and marked “B”.

The defendant did not deny that she purchased the suit premises from Alliance Building Society. However, against the background that Willy Mudima (the previous registered proprietor of the suit premises) mortgaged the suit premises to the bank and failed to pay the bank loan, prima facie, it was not a dishonest act for the defendant to purchase the suit premises from the bank. Nevertheless, supposing the bank had no court authority to sell the suit premises, on the strength of Kampala Bottlers Ltd v Damani (U) Ltd (supra), dishonesty would only be imputed upon the defendant if at purchase she knew that the bank had no such authority. The question is whether it was proved that at purchase the defendant had such knowledge? The answer is “No”. The plaintiff led no such evidence. In the circumstances the plaintiff did not prove the first allegation of fraud.

The second allegation of fraud was as follows

- (b) The defendant fraudulently removed the caveat lodged by the plaintiff from the Certificate of title without any competent court order or giving her the required notice of intention to do so.

It is true, Opio Robert (PW5) testified that the caveat was removed on 27th November 1997 as a result of the dismissal of the plaintiffs objector proceedings in Civil Suit No GK 57 of 1996 Alliance Building Society v Willy Mudiima. However, Court was not told who initiated that move. Court cannot therefore make assumptions. This is particularly so since the defendant was

not a party to the above suit. Secondly, although the caveat was not removed in the usual manner, the fact that the plaintiff lost the objector proceedings in *Alliance Building Society v Willy Mudiima* surely meant that there was no good reason why that caveat had to remain. All in all, it was not proved that the defendant was the one who removed the caveat in question from the Certificate of title. It was also not proved that such an act was a dishonest act in the circumstances of this case. The second allegation of fraud was therefore not proved.

The third allegation of fraud was as follows:

(c) The defendant fraudulently and erroneously issued an order in Civil Suit No. GK of 1996 *Alliance Building Society v Willy Mudiima* to remove the caveat yet it had nothing to do with the removal of the caveat.

The order in respect of Civil Suit No. GK 57 of 1996 *Alliance Building Society v Willy Mudima* that was used to remove the caveat in question was an order of court. An individual outside court set up did not issue it. It is therefore wrong and misleading to attribute its issuance to the defendant. For that reason the third allegation of fraud cannot succeed.

Since the 4th, 5th, 6th, 7th and 8th allegations of fraud involve the bank's lawyers and the court brokers, Court has found it convenient to deal with them together. However, before Court discusses them it is important to lay them out. They read as follows:

The fourth allegation:

(d) The transfer to the defendant dated 5. 8. 97 was signed by one Lawrence Lugemwa t/a Kyengera Court Bailiffs as Vendor/registered proprietor yet he did not have the authority to sell nor powers of attorney. A copy of the transfer is attached hereto and marked "D".

The fifth allegation:

(e) The said Lawrence Lugemwa had no warrant of attachment or order from court to sell the suit property. A copy of the warrant issued by court in 1994 which was stayed as regards the above property is attached hereto and marked "E".

The sixth allegation:

(f) The said transfer of 5. 8. 97 was not properly executed.

The seventh allegation:

(g) The transfer was in contradiction with the consent to transfer as regards the Vendor. A copy of the consent is attached hereto and marked "F".

The eighth allegation:

(h) Whereas the defendant purchased the said suit property from Alliance Building Society the transfer was executed by Lawrence Lugemwa as vendor.

Assuming the acts constituted under the above allegations were dishonest acts (amounting to fraud), can Court say that the plaintiff proved that the defendant committed those acts or that she was aware of their commission when she bought the suit premises and decided to take advantage of the situation? Court thinks that it cannot say so. It is clear from the evidence on record that Lugemwa the Court Bailiff directly committed the above dishonest acts; and perhaps hand in hand with him in that mess was the bank's lawyer (Nagemi) who apparently controlled the sale of the suit premises. Further to that, it was not proved that the defendant had knowledge or those dishonest acts at the time she bought the suit premises. In view of the foregoing, the 4th, 5th, 6th, 7th and 8th allegations of fraud were not proved against the defendant. (See Kampala Bottlers Ltd v Damanico (U) Ltd-supra-) That means that the defendant did not buy the suit premises fraudulently. The first issue is therefore answered in the negative.

With regard to the second issue, in determining whether the defendant was a bona fide purchaser Court will pose the same question the Chief Justice (Mr. Justice. Wambuzi) posed when he was faced with a similar situation in David Sejjaaka Nalima v Rebecca Musoke Civil Appeal No. 12 of 1985. That question is as follows. Did the defendant honestly intend to purchase the suit premises and did not intend to acquire it wrongfully? A consideration of the account (that was earlier on narrated in this judgment) of how the defendant acquired the suit premises does not, in Court's view, suggest the opposite. Rather, it confirms that the defendant honestly intended to

purchase the suit premises and did not intend to acquire it wrongfully. For it is clear from the beginning that when the defendant and her husband were alerted by an advertisement that the suit premises was on sale, they endeavoured to ascertain the genuineness of the whole matter. Not only did they visit the Court brokers who advertised it, they also went to the bank and verified why the suit premises were on sale. Mrs. Mutagamba an officer of that bank then, showed them its title and a court order. Finally, they visited the suit premises with the bank's lawyer (Nagemi) who assured them that all was well. In Court's opinion all this does not portray the defendant as a person who set out to acquire the suit premises dishonestly and wrongfully. Court is therefore satisfied that the defendant was a bona fide purchaser who is protected by section 189 of the RTA. The second issue is therefore answered in the affirmative.

With regard to the third issue, it follows from the way the above two issues have been answered that Court has no choice but to dismiss this suit with costs; and it is so ordered.

Finally, Court wishes to point out a few things. Firstly, despite the fact that it has made the above decision, it feels quite sorry for the plaintiff for having lost her Kibanja. Court is of the opinion that she might have fared better if she had sued Willy Mudima with one or two others instead of the defendant. Secondly, Court would like to thank both counsels for the well researched submissions they put in. Those submissions were of tremendous benefit to court.

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E.S LUGAYIZI

JUDGE

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