

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUIT NO. 514 OF 2001

(Arising out of Adm. Cause No. 189 of 2002)

1. DAN BYAMUKAMA

2. CHRISTOPHER:.....PLANTIFFS

VERSUS

PEACE RWOMWIJU:.....DEFENDANT

BEFORE: THE HON. V.F.MUSOKE-KIBUUKA (JUDGE)

JUDGEMENT.

The property comprising LRV 695, Folio 20, Block 250, Kyaddondo, plot 31, is situated at Bbunga, within the city of Kampala. In this short judgment, it is referred to as “the suit property”.

The suit property was part of the estate of the late Ambrose Rwomwiju, in this judgment called “the deceased”. The deceased died some time during the early 1990s. He died testate. In his will, he appointed the first Plaintiff and the Defendant as executors.

In 1993, probate of the will of the late Ambrose Rwomwiju was granted to the first Plaintiff

jointly with the defendant. Both were beneficiaries under the will. It appears, from the evidence brought out in this case, that, for all practical purposes, it was the first plaintiff who carried out the responsibility of executing the will of the late Ambrose Rwomwiju.

During the year 2000, the suit property was the subject of a mortgage held by International Credit Bank Limited (in Liquidation). The receivers of the bank were about to sell the suit property. The amount due to the bank was UGS 27,928,898/= as at 31st January,2000.

On 15 February, 2000, the first plaintiff sold the suit property to the second Plaintiff who paid consideration of UGS 167,500,000/=. The second plaintiff has since been in possession of the suit property. He subsequently carried out what he refers to as “extensive renovations involving colossal sums of money”.

The suit property, at the time of the sale, was registered in the names of the first plaintiff and the defendant. The defendant has since refused to sign transfer instruments in favour of the second plaintiff.

For that reason, the Plaintiffs took out an originating summons requiring this court, under order 34 rules 1 and 3, to determine the question whether the defendant could validly prevent the second plaintiff from acquiring title to the suit property. The Plaintiffs pray that the defendant be ordered to sign the transfer instruments. In the alternative, they pray that the Commissioner, Land Registration, be directed by this court to register the second Plaintiff by a transfer instrument signed only by the first plaintiff.

The originating summons were supported by two affidavits deponed by each of the two plaintiffs. The defendant did not file an affidavit in reply. Consequently, the averments contained in each of the two affidavits remain uncontroverted. Unless there is reason to disbelieve them, they must be acted upon. Samwiri Massa & Rose Achen (1978) HCB 297.

Mr. John Magezi who appeared for the defendant submitted that the originating summons was misconceived. According to learned counsel, Mr. Magezi, the second plaintiff should have sought relief only through an action filed by him against the first plaintiff. The same counsel submitted that there was no valid contract of purchase of the suit property between the first plaintiff and the second. That was because the first plaintiff had misrepresented to the second plaintiff that he had obtained all the necessary consents when, in fact, he was acting

unilaterally in selling the suit land. Counsel submitted that this court denies the second plaintiff the reliefs being sought because the second plaintiff had himself not been diligent enough to insist upon the production, by the first plaintiff, of the powers of Attorney from the defendant as coexecutrix of the estate of the deceased before executing the agreement of purchasing the suit property.

Ms. Victoria Nakintu Nkwanga, for the plaintiffs, submitted, on behalf of the plaintiffs that this court approaches the second plaintiff's case separately from any misunderstandings that might have existed or which may be existing between the first plaintiff and the defendant as executor and executrix of the estate of the deceased. Those differences, could best be settled through an action instituted by the defendant against the first plaintiff for their settlement. Ms. Nakintu submitted that the position of the second plaintiff was that of an innocent purchaser for value and, as such, the court should avail to him the reliefs sought by him.

Lastly, Ms. Nakintu relied upon the provisions of section 274 of the Succession Act, Cap 139 which provides that when there are several executors or administrators, the powers of all may, in absence of any direction to the contrary, be exercised by any of them who has proved the will or taken out administration. Counsel argued that the defendant had neglected to carry out her duties as co-executrix of the will of the deceased, and had for several years left the first plaintiff to perform those duties alone, she could not validly challenge the first plaintiff's action of selling the property to the second plaintiff.

It is, indeed, the finding of this court that the originating summons is not misconceived. As Windham, C.J, of the High Court for Zanzibar, observed, in Kulsumbai Gulamhusein Jaffe & Ramil And Another Vs. Abdul Hussein Mohamed Rahim, [1957] E.A 699, quoting an earlier observation of the court of the Chancery Division in England, in In re Giles [1890] 143 Ch. D. 391, the procedure by originating summons "was intended, so far as we can judge, to enable simple matters "to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious questions."

Learned counsel for the plaintiffs pointed out, and I duly agree with her, that the question raised in the instant case is simple and clear cut. The procedure originating summons is intended "for the summary or ad hoc determination of points of law or construction of certain questions of fact or for the obtaining of specific directions.

As I pointed out earlier, the defendant did not file any affidavit in this matter. The only evidence available is that contained in the two affidavits by the plaintiffs. In paragraph 2,3,5,6 and 8 of the affidavit in support of the originating summons, it is the evidence of the first plaintiff that the defendant has never carried out her duties as an executor in relation to the estate of the deceased.

Although it is not in dispute that when the agreement to sell the suit property was executed, the defendant was residing in America, there is nothing to show that before she travelled to America or ever since her return to Uganda, she has been involved in the administration of the estate. It is therefore, appropriate, in those circumstances to believe the evidence of the first plaintiff that for all the years since obtaining probate it has been the first plaintiff administering the estate single handedly. It appears to me that by unnecessarily leaving all the duties of the execution of the estate of the deceased into the sole hands of the first plaintiff, the defendant cannot escape liability for any act done by her co-executor. The authority in re Gasguoine, Gasguone Vs Gasguone (1894)lch.D.470, which learned counsel Ms. Nakintu, relied upon in respect of this particular argument, is, in my view, in very appropriate focus on the point.

Lastly, Mr. Magezi argued that the second plaintiff, owing to lack of diligence on his part, should be disentitled to the relief which he seeks. The plaintiffs seek alternative orders. First they are praying for an order compelling the defendant to sign the transfer instruments for the suit property in favour of the second plaintiff. In the alternative, the plaintiffs are playing for an order requiring the Commissioner, Land Registration, to register the second plaintiff with a transfer instrument signed only by the first plaintiff.

The evidence before me does not appear to support the proposition that the second plaintiff was not diligent. He engaged a reputable firm of advocates to handle the transaction on his behalf. A search was made on his behalf. He accepted the assurances by the first plaintiff that the first plaintiff had good title and lastly, the second plaintiff paid appropriate consideration and took possession of the suit property. The averment that the second plaintiff was an innocent purchaser for value stands unchallenged. Apart from the discharge of the mortgage obligations, the proceeds from the sale of the suit property were utilised to purchase another property comprising Block 244, Kyaddondo,plot 2047 at Kisugu, also in the city of Kampala. If the defendant is aggrieved either as an executor or as a beneficiary under the will. She has easily traced those proceeds.

It, finally, appears to me that even though the pleadings do mention the fact that the first plaintiff made a presentation that he had all the necessary consents and that transfer of the suit property to the second plaintiff would meet no impediments from the defendant, it is nevertheless clear from the Agreement, of sale annexed to the second plaintiff's affidavit, that the first plaintiff sold the property on his own behalf and not on behalf of himself and the co-executrix, the defendant. The agreement mentions the first plaintiff throughout as the vendor.

In those circumstances, therefore the provisions of section 274 of the Succession Act, cap 139, would be applicable. The contract made between the first plaintiff and the second plaintiff binds both executors. The court, in such a situation, may grant specific performance of the contract. (see: Halsbury laws of England vol. 17, paragraph 1197 p.616. The second plaintiff appears to me to merit the relief which he seeks.

Since there is, before this court, unchallenged evidence that the defendant has been unco-operative ever since 1993 and that even for the purposes of this suit she could not easily be located, I find that there is a high possibility that the defendant could delay or even frustrate an order requiring her to execute the transfer instrument in favour of the second plaintiff. For that reason, the second plaintiff will have the alternative order which he seeks. The Registrar of Titles (Commissioner for Land Registration is hereby ordered to register on the Register of Titles, the name of the second plaintiff, Christopher David Wilson, as proprietor of the property comprising LRV696 Folio 20, Kyaddondo Block 250, plot 31 at Bbunga Hill, in the city of Kampala, with transfer instruments signed only by the first plaintiff as executor of the estate of the late Ambrose Rwomwiju.

Each party to this application shall meet its own costs.

V.F.MUSOKE KIBUUKA(JUDGE)

5.11.2001.