

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO.715/99

F.D.K. ZAABWE.....PLAINTIFF

VERSUS

ORIENT BANK LTD & 5 OTHERS..... DEFENDANT

BEFORE: THE HON. MR. JUSTICE MUGAMBA

JUDGMENT.

Mr. Frederick Jackson Katono Zaabwe, a Kampala Advocate of long standing, brought this action against the following defendants:

1. Orient Bank Ltd.; 2. Mars Trading Co. Ltd.; 3. Alan S. Shonubi;
4. Martin Nkutu; 5. Tito Twijukye; 6. Rwenzigye Byaruhanga.

The plaintiff seeks the following reliefs against the defendants jointly and severally.

- (i) a declaration that the defendants committed fraud against the plaintiff.
- (ii) a declaration that the 1st defendant's mortgage on KB 9 plot 534 is invalid, null and void on account of fraud/illegality.
- (iii) an order cancelling the registration of the 1st defendant's mortgage on KB9 plot 534.
- (iv) A declaration that the defendants committed trespass on KB9 plot 543.

- (v) General damages for trespass to land and inconvenience caused to the plaintiff and his family.
- (vi) Exemplary/punitive and or aggravated damages for the defendants' malicious, outrageous and illegal acts against the plaintiff.
- (vii) Mesne profits.
- (viii) An injunction to restrain the defendants from trespassing onto and or interfering with the plaintiff's land.

The undisputed facts leading to this action are that the plaintiff was the registered proprietor of mailo land at Kagugube Hill, Makerere known as Kibuga Block 9 plot 543. During November 1996 the plaintiff found he owed money to the Uganda Law Council and sought to raise Shs. 1,000,000/=. In this respect he approached one of his clients, Livingstone Masambira Ssewanyana. The latter agreed to be of assistance but required the plaintiff to execute a power of attorney in favour of Mars Trading Company, the second defendant. Ssewanyana was a shareholder and director in that company. On 7th November 1996 the plaintiff executed a power of attorney in respect of land comprised under Kibuga Block 9 plot 534. For good measure Ssewanyana gave the plaintiff a personal cheque for Shs. 1,000,000/= written in favour of the Law Council, presumably to tidy over the plaintiff's obligation towards the legal body. The cheque was never honoured by the bank for want of sufficient funds on the account.

The second defendant secured not only the power of attorney but also the title deed from the plaintiff. The power of attorney was then registered with the Registry of Documents. Thereafter the second defendant mortgaged the plaintiff's property at Kibuga Block 9 plot 534 with the first defendant for an overdraft of Shs. 15,000,000/=. A mortgage deed was duly drawn to this effect. When the second defendant failed to pay back money owed on the mortgage the first defendant sold Kibuga Block 9 plot 534 to one Alwi Hassan for Shs. 35,000,000/= on 11th December 1998. On 19th May 1999 the plaintiff was evicted from his house on the property aforesaid by the 5th and 6th defendants. He and his family have consequently had to live away from his property. His legal office on the property also had to

close. Hence this suit.

The second defendant entered no defence. As a result an interlocutory judgment was entered against it on 26th July 1999. It is also on record that following an application for discovery on 31st August 1999 this Court ordered the defendants, excepting the second defendant, to make a discovery of certain items within 30 days of the order. This was not complied with. On 1st October 1999 the plaintiff wrote to the Deputy Registrar stating that since the period prescribed by Court had gone by and the defendants had not complied with order 10 rule 21 of the Civil Procedure Rules their defence be struck out accordingly. Hon. Justice Rugadya on 6th October 1999 directed the Deputy Registrar that the plaintiff should make an application if he so desired. That remained the position until July 2000 when the hearing started and there was no mention of an application in that direction up until submissions on behalf of the plaintiff. While I note that the rule is not mandatory, I observe also that no application was made for an order to that effect and that the case was allowed to proceed normally. As it is plaintiff's argument is not persuasive. Plaintiff has also referred to order 6 rules 7 and 9 and order 8 rule 3 of the Civil Procedure Rules. Respectfully I find nothing amiss with the defence as it is. See Joshi v Uganda Singer Factory Ltd [1968] EA 570, Shah v Patel [1967] EA 397.

At the outset to the hearing the following issues were agreed:

- (i) Whether the first defendant's mortgage is valid?
- (ii) Whether the defendants collectively committed fraud against the plaintiff?
- (iii) Whether the defendants committed trespass on the plaintiff's property?
- (iv) Whether the plaintiff suffered loss and injury as a result of the defendants' acts?
- (v) Whether the defendants are liable to the plaintiff?
- (vi) Whether the plaintiff is entitled to the reliefs he prays for?
- (vii) Quantum of damages.

Concerning the first issue, it is contended by the plaintiff that the mortgage is not valid. As I have stated above, the mortgage was a consequence of the power of attorney. Black's Law Dictionary, 6th edition describes a power of attorney as an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal. Indeed in the power of attorney relevant to this case the plaintiff appointed the second defendant (M/s Mars Trading Company Ltd) in the following terms inter alia:

‘... my attorneys and in fact and in law and in my name and on my behalf to do and execute the following acts and things that is to say:-

1. To use, mortgage or give in as security for a loan or loans my land and house situated at Kagugube Hill, Makerere and comprised in KIBUGA Block 9 Plot 534.

.....

The terms of the power are plain. The plaintiff himself drafted the power or had his firm draw it. He signed the power. As a lawyer he must have known what the power was about. To his credit he ensured the power was attested by a lawyer. Paul Byaruruhanga Esq. did. The power was duly registered with the Registry of documents. It is worthy of note that no one questions the existence and legitimacy of the power. I too so find. It was prepared and ready for effect.

After the second defendant had acquired the power of attorney and the title deed he was soon on his way to secure a mortgage. Perhaps before I go over objections by the plaintiff to the mortgage I do well at this stage to quote from the case of Chappell and Company vs. Nestle Company Ltd [1969] AC 87:

‘A peppercorn does not cease to be good consideration if it is established that the promisee did not like pepper and will throw away the corn.’

In my view the power of attorney was a carte blanche. Nevertheless the plaintiff questions various aspects of the mortgage deed. The plaintiff submits that the loan of Shs. 15,000,000/= was in existence long before the mortgage. DW2 Dick Omara, credit manager with the first defendant testified to the effect that the loan was a consequence of the mortgage, not the other way round. As a supplement to that evidence Exhibit D7, the statement of account, showed

how the second defendant operated its account with the first defendant. Especially manifest are six withdrawals between 25th November 1996 and 9th December 1996 amounting in all to Shs.14,945,000/=. The cheque leaves used are, for the six occasions, 3302, 3303, 3304, 3305, 3306 and 3307. It is noteworthy that a different cheque book was used before and after the six occasions mentioned. I have no doubt in my mind therefore that the second defendant incurred the loan in consequence of the mortgage deed.

The plaintiff further contends that because no mention was made of the power of attorney in the mortgage deed it never formed part of the mortgage deed and as such the security could not be sustained. In his testimony DW2 stated thus:

‘As a matter of policy where we take security over 3rd party property we require the donor of the power of attorney to sign a declaration form to the effect that the property is free from any other encumbrance. We also take particulars of the donor such as identity card, tax ticket or driving permit. We did that in regard to the plaintiff. Mr. Zaabwe signed the declaration’

That declaration is exhibit D2. Exhibit D5 is the sanction letter dated 21st November 1996. It includes terms and conditions for the credit facility. Terms relating to security and interest are amongst others. The second defendant agreed to the terms proposed by the first defendant. I am satisfied that when the mortgage deed was drawn and the security was obvious and that it was not affected by non-mention of the power of attorney. In any case no one was prejudiced as a result. This factor in no way effects the validity of the deed which came to be registered.

The plaintiff contends that the resolution of the second defendant was false and/or a forgery. He gives no valid basis for this. Suffice it to say that the resolution was acceptable to the first defendant and to the Registry where the mortgage got registered. What is more the second defendant nowhere indicates that the resolution was not properly reached. The plaintiff has contested that the second defendant’s resolutions elsewhere but his witness, PW1, a State Attorney at the Registrar General’s Department testified that nothing was amiss with resolutions registered in the Department by the second defendant.

Another issue the plaintiff finds with the mortgage is that B.M. Satyanarayan should not have attested for the first and second defendants as this was contrary to provisions of S.155 of the Registration of Titles Act. DW1 told court that he knew Satyanarayan to be manager of the first defendant, a bank. S. 155 of the Registration of Titles Act includes a bank manager among the select few permitted to act as witnesses under the Act. Consequently I see no genuine basis in the plaintiff's misgivings. I also do not see much validity in the circumstances by the plaintiff that company seals for the firm and second defendants were not used. Use of the company seals is, under the Act, subsidiary and not primary. The plaintiff would do well to read S.141 of the Registration of Titles Act. Non-use of the seals was not out of order as the seal will be used in place of signatures.

Further concern by the plaintiff arises out of the fact that the suit property was variously described as Kyadondo Block 9 plot 534, Kagugube, Makerere or Kibuga Block 9 plot 534, Kagugube, Makerere. DW1 told Court that so far as he knew the two were descriptions of the same property. In all his effort the plaintiff did not show

- that the two referred to two different entities. I note that the power of attorney referred to Kibuga Block 9 plot 534. The title deed referred to the same and so did several other documents. The mortgage deed however referred to Kyadondo Block 9 plot 534. In the end it was the plaintiff's property that was made incidental to the mortgage. I am at sea to appreciate the plaintiff's concern here because the property that was subject of the mortgage eventually was what had been intended. I discern no merit in this contention. If there is to be one to complain it would perhaps be the person to whom the property was ultimately sold.

The manner in which the second defendant secured a power of attorney from the plaintiff could be subject of tongue wagging. We have only the plaintiff's word. I discern no fraud in the goings on as the plaintiff was looking for money and Sewanyana promised to bring him money. Is it not possible that Sewanyana's activities were attended by failure rather than fraud? Unfortunately he was not available to testify.

At any rate, I find as a fact that the mortgage is valid and that arguments by the plaintiff do not vitiate its registration. See S. 51 of the Registration of Titles Act for effect.

The second issue is whether the defendants collectively committed fraud against the plaintiff. As I have noted earlier the second plaintiff was unfortunately not available to explain its role

and antecedents to getting the power of attorney. But the Cambridge International Dictionary of English describes 'collective' as of or shared by every member of a group or people. In effect the question is whether all the defendants together committed fraud against the plaintiff. I find no evidence supporting that proposition and I would answer the second issue in the negative.

I should move next to the sixth issue. Whether the plaintiff is entitled to the reliefs he prays for. After the second defendant failed to meet its obligations under the mortgage the first defendant sold the security to Alwi Hassan. Evidence of the sale is exhibit D8. Clause 4 of the Mortgage Deed allowed for sale pursuant to sections 8 and 9 of the Mortgage Decree 1974 and the necessary steps preparatory to sale were effected by the first defendant. Hassan Alwi did buy the property after all. There is no evidence that he was aware of the registered interest of the plaintiff, if any, or of any fraud if any for he would have, upon being on notice, been expected to investigate. There is no evidence that for fear of having the truth he declined such investigation. Being a bona fide purchaser for value without notice his interest cannot be impeached. See David Sejjaka Nalima vs. Rebecca Musoke SCCA No.12 of 1985 (unreported) and Hotel International Ltd vs. The Administrator of the Estate of Late Robert Kavuma SCCA No.37 of 1995 (unreported). The law considers the purchase by Alwi Hassan to have been perfect and his title to be unimpeachable, even in relation to the plaintiff, and as such the plaintiff would get no relief concerning the property in issue. See S.189 of the Registration of Titles Act.

With regard to the third and fourth issues, I have decided that the purchase agreement between the first defendant and Hassan Alwi was perfect. It was on 11th December 1998. Eviction of the plaintiff was on 19th May 1999 after property had passed to Alwi Hassan. Trespass is unlawful interference with one's person, property or rights. The property at the time of eviction of the plaintiff belonged to Alwi Hassan so there cannot be said to have been trespass to property or to rights of the plaintiff. Thankfully there as no trespass to the person on that occasion. The fourth issue is whether the plaintiff suffered loss and injury as a result of the defendants' acts. While the plaintiff did possibly suffer loss and probably injury to his feelings I do not find that this resulted from the acts of the defendants given sordid background to these events because the plaintiff had himself to blame for the casual manner in which he allowed himself to be drawn into the trap that ultimately caught him.

With regard to issue five I find that the defendants are not liable to the plaintiff because their transactions were not unlawful as for issue seven quantum of damages is not applicable in the circumstances of this plaintiff.

In the result, I dismiss this suit with costs.

P.Mugamba

Judge

1st March 2002.