

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUIT NO. 1088 OF 1998

STREAMS OF LIFE GIVING WATER MINISTRIES..... PLAINTIFF

VS

1. AGNES OCHENG]

2. IRUMBA FRED]

3. DAVID MELVILLE ARYEM OCHENG]

4. DR. MARTIN ALIKER (ADMINISTRATOR

OF THE ESTATE OF THE LATE DAUDI

OCHIENG.....DEFENDANTS

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

JUDGEMENT.

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INTRODUCTION.

The plaintiff is a voluntary religious organization. It was registered under its present name on 30th March, 1994. (Exh P1). Prior to that date, it would appear, the plaintiff was known as Trinity Ministries International.

The plaintiff seeks through this suit, an order requiring the Commissioner for Land Registration to counsel the certificate of title held by the 2d defendant over land comprising,

Kibuga, Block 10, plot 201, upon the ground of fraud. In the alternative, the plaintiff seeks a declaration that it is a bona fide occupant of the disputed land

entitled to a certificate of occupancy. It seeks an order against the 1 defendant for a refund to it of a sum of shs.2,500, 000/= together with general damages, interest and costs.

The 1st defendant did not file a defence. The case proceeded against her proceeded as provided under Order 9 rule 8 of the Civil Procedure Rules.

The 3rd defendant too did not file a defence. However, the claim against him was withdrawn by the plaintiff.

The 2nd and 4th defendants each filed a defence. However only the 2nd defendant appeared in court to defend the case against him. The hearing proceeded ex-parte as against the 4th defendant.

RESPECTIVE CASES.

The plaintiff's case is that it entered into a contract of sale dated 13th June 1991 (Exh P2) with the first defendant. The first defendant agreed to sell the disputed land, measuring 0.19 acres, to the plaintiff for a consideration of 2,500,000/=. A sum of 1,700,000/= was paid by the plaintiff to the first defendant upon execution of the contract of sale. The balance, 800,000/= was to be paid to the first defendant before the end of September, 1991.

The disputed land was originally owned by the late Daudi Ocheng. After his demise, it was registered in the names of the fourth defendant as administrator of the estate of the late Daudi Ocheng. The first defendant was a daughter of the late Daudi Ocheng and, therefore, one of the beneficiaries of his estate.

Under the contract of sale, the first defendant undertook to get registered as proprietor of the disputed land. The plaintiff would take possession but completion of the sale would take effect after the registration of the first defendant as proprietor of the disputed land when she would execute transfer deeds in favour of the plaintiff

The first defendant never got herself registered as proprietor of the disputed land. Instead the

fourth defendant transferred the disputed land to the third defendant (one of the beneficiaries of the estate). The third defendant, in turn, transferred the disputed land to the second defendant. The second defendant was registered as proprietor on 15.7.1992.

The plaintiff claims that the second defendant obtained the certificate of title through fraud and seeks an order for the title's cancellation upon that basis and under the provisions of section 185 of the Registration of Titles Act.

In his defence, the second defendant denied knowledge of the fact that the plaintiff and the first defendant entered into an agreement of sale of the disputed land on June, 1991. The second defendant pleaded that he was the registered proprietor of the disputed land and that he was a bona fide Purchaser for value and that the plaintiff was a trespasser on the disputed land. He prayed, in a counter claim, for an eviction order, general damages, mesne profits and costs of the suit.

The fourth defendant's defence was that having divested himself of his duties as administrator of the estate of the late Daudi Ocheng, he could not be the subject of any of the claims set out in the plaint.

AGREED FACTS.

The following facts were of common agreement during the scheduling conference:

- a) that the plaintiff was incorporated under the Companies Act, originally as Trinity Ministries International, but on 30th March ,1994, the name was changed to Streams Of Life Giving Water Ministries,
- b) that the disputed land is registered in the names of the second defendant; and c) that the plaintiff is in physical possession of the disputed property.

ISSUES:

Four issues were agreed upon for determination in this suit. They are:

- a) whether the plaintiff purchased the disputed property;
- b) whether the second defendant obtained the certificate of title through fraud;
- c) whether the plaintiff is a trespasser on the disputed property; and
- d) what remedies are available to the parties?

FIRST ISSUE.

The only oral evidence on this issue was that of PW1, Jonathan Mitanda. His evidence was that the disputed land was donated to a church called Christian Cross Fellowship by one Andrew Kalibbala Kalanzi, now deceased. That was about 1983. Kalanzi donated several plots to that church.

The church started constructing a church building on a plot other than the one in dispute. They did not build the church on the plot in dispute because it was part of Kalanzi's compound.

Later Christian Cross Fellowship split into two different churches. One went to Mengo SSS. The other went to City Nursery School. It was the group which went to City Nursery School that formed Trinity Ministries International, which name, in 1994 was changed to Streams of Life Giving Water Ministries.

The defendant then moved from City Nursery School to the disputed land and constructed a shelter upon it. In 1991, the plaintiff entered the contract to purchase the disputed land with the first defendant, Exh P2.

It appears to me that the first issue would be easily resolved by answering two clear questions upon the evidence adduced in this case. The first question is whether the first defendant, Agnes Ocheng could lawfully sell the disputed land as a beneficiary of the estate of the late Daudi ocheng. The second question is whether there was a complete sale under the contract of sale, exhibit P2.

Mr. Kibedi, for the plaintiff, submitted that Agnes Ocheng, as beneficiary of the estate of the late Daudi Ocheng could lawfully sell the milo interest to the plaintiff even before the property was transferred to her names as a beneficiary. He relied upon the decision of the Supreme Court of Uganda in Isreal Kabwa Vs Martin Banoba Musego. SCCA NO. 52 of 1992.

With due respect, I must reject that argument. The relevant decision in Kabwa's case related to a beneficiary instituting a suit to protect his or her interests before obtaining letters of administration or probate. I find that to be a very different position from the one in the instant case where the transaction was a sale of the property of an undistributed estate. There is no

evidence that the disputed land had been bequeathed to the first defendant or that when the estate was eventually distributed the disputed land was transferred to the first defendant as the beneficiary. On the contrary, the evidence shows that Dr. Martin Atiker, the fourth defendant was registered as the administrator of the estate of Daudi Ocheng, on 28.2.1992. He transferred the disputed land, not to Agnes Ocheng but to David Melville Aryemi Ocheng as the beneficiary. That was nearly eight months from the 13.6.1991 when Agnes Ocheng purported to sell the disputed land to the plaintiff.

Exhibit P6, a letter, written by Dr. Martin Alier, the administrator of the estate of the late Daudi Ocheng, to the plaintiffs dated 18th March, 2003, perhaps best sums up the position in a very simple way. He wrote, “What happened to you was nothing less than fraud, committed at the time, perhaps, when Ugandans believed erroneously that the rule of law will never return to this country.”

I, therefore, find that Agnes Ocheng had no legal capacity to transact a sale of the property of the estate of her father when she purported to do so vide exh. P2. She was merely one of the eight beneficiaries of the estate generally. She had not made any application for any grant of probate or letters of administration. She never became the administrator of the estate eventually. Her action in relation to the disputed property cannot be protected by the provisions of section 191 of the Succession Act It amounted to intermeddling the property of the estate. That action was prohibited by section 190 of the Succession Act. It was an illegal act.

The final outcome of the above analysis is simply that the contract of sale executed between the plaintiff and Agnes Ocheng on 13th June 1991 was illegal not only because she lacked capacity to transact in the matter but also because it was contrary to the provisions of the Succession Act. The administrator of the estate disclaimed the transaction vide exhibit P6. That contract, obviously is not enforceable at law owing to the fact of illegality. This court cannot overlook the fact of illegality as it takes precedence over all other considerations. Makula International Ltd. Vs His Eminence Cardinal Nsubuga & Rev Dr. Father Kyeyune, Civil Appeal No.4 of 1981.

After funding the contract of sale, exhibit P2, illegal and unenforceable at law, it is only for academic purposes that I answer the second question in relation to the first issue. I do so

merely by stating that I agree with learned counsel, Mr. Mugenyi, that the evidence on record, shows that the purported sale of the disputed land by Agnes Ocheng to the plaintiff vide exhibit P2 was, clearly, not completed by the parties. Condition (d) of the conditions set in the agreement stated “completion of the sale shall take effect as soon as the vendor shall execute the transfer deeds in favour of the purchaser”. Similarly, condition (a) (ii) required that the balance of “shillings eight hundred thousand (shs 800,000) payable before the end of September, 1991.” It is clear from the evidence on record that both parties breached the purported contract of sale with regard to each of those two conditions. Agnes Ocheng never got registered as proprietor. Consequently, she never executed any transfer of the disputed property in favour of the plaintiff. The plaintiff never paid the balance of 800,000/= to before the end of September, 1991. There was no evidence that one pastor Jota paid the balance as PW1 claimed. What was called “the final payment”, in the sum of 25,000/= exemplified by exhibit P5, was not paid out before the end of September, 1991. It was not a payment to Agnes Ocheng. It was paid on 9th April 1992 and in favour of Dr. Martin Alier. If pastor Jota had paid the balance of 800,000/= as PW1 claimed in his evidence, then why was it necessary to pay the sum of shs 25,000/= on 9th April 1992, in respect of the same transaction?

In those circumstances, even if the contract of sale exemplified by exhibit P2 had been legal, I would still have found that the contract of sale between the plaintiff and Agnes Ocheing was never completed so as to give full rights to the plaintiff under the contract

SECOND ISSUE.

Fraud must be both pleaded and particularized in the plaint J.W.Kazzora Vs. Rukuba, SCCA No. 13 of 1992 (unreported).

Now, the plaintiff in his plaint, specified three particulars of fraud as follows:

“I) All the defendants (three of whom are relatives) and their advocate aforesaid well aware that the plaintiff had bought and paid for the suit property, proceeding to deprive the plaintiff of the same by transferring to the second defendant.

i) Transferring the suit property already bought and occupied by the plaintiff into names other than those of the plaintiff

ii) By virtue of (i) and (ii) above, tampering with the plaintiff’s ownership of the property”

It is trite law, in my humble view, that for fraud to constitute ground for an order canceling a certificate of title of a registered proprietor, the alleged fraud must reside in the transferee or the registered proprietor. Kampala Bottlers Ltd. V.Dominico (U) Ltd. SCCA No.22 of 1992 (unreported). Clearly all the three particulars of fraud pleaded and particularized by the plaintiff in this case, prima facie, relate to fraud not allegedly committed by the second defendant, who is the registered proprietor, but by Agnes Ocheng, David Marville Ochen and Dr. Martin Alikor and their advocates. Fraud on the part of those three even if proved strictly as the law requires, J.W.Kazzora Vs. MLS Rukuba (supra), could never constitute a good legal basis for an order canceling the certificate of title of the second defendant. Fraud must be proved on the second plaintiff's part. It must reside in him. It is my finding that in this particular case, the alleged fraud is not claimed to reside in the registered proprietor, the second defendant.

THIRD ISSUE

The second defendant's case is that the plaintiff is a trespasser on the suit property. The plaintiff claims he is an owner through purchase or a bona fide occupant of the disputed land entitled to a certificate of occupancy under the Land Act, 1998.

Regarding the plaintiff's claim of being a purchaser for value, I have already given reasons why he is not a purchaser under exhibit P2 which is an illegal contract of sale.

In order to determine whether the plaintiff is a bonafide occupant I have to examine both the law and the evidence relating to how the plaintiff came to occupy the disputed land.

The law regulating the legal concept of bona fide occupancy is found in section 30 (2) and (5) of the Land Act, 1998. Those provisions were the subject of judicial adjudication in a recent decision of the court of Appeal of Uganda in Venansio Bamweyaka And 5 Others Vs. Kampala District Land Bond And George Bamweyaka, Civil Appeal No. 20 of 2002 (unreported).

According to section 30(2) of the Land Act, 1998, a bona fide occupant is a person who before the coming into force of the constitution:

"had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more, or b.... (not relevant)".

According to Subsection 5 of Section 30 of the Land Act,
“Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act”

PW1’s evidence was that in about 1983, one Andrew Kalanzi donated the disputed property to an organization called Christian Cross Fellowship. Kalanzi donated several plots to that church. The church members then started constructing a church on a plot other than the disputed land. Kalenzi was in possession of the disputed land which was part of his own compound. Christian Cross Fellowship split up. The plaintiff started operating at City Nursery School while another splinter church operated at Mengo SSS. Later the defendant moved to the disputed land and constructed a shelter upon it.

I reject the submission made for the plaintiff that it occupied the land in 1983. There is no evidence to that effect. Exhibit P1 does not tell us when Trinity Ministries International was incorporated. In any case if the defendant had been in occupation of the suit property from 1983 then there would have been no reason necessitating it to operate at City Nursery School for some time as PWI stated it did. Secondly, if it had been in occupation of the suit property from 1983, then it would not have been necessary for the plaintiff and Agnes Ocheng to provide in the agreement of sale of 13th June 1991 as below:

b) the purchaser shall take immediate possession of the above property after the execution of this agreement .“

It is clear that both parties to exhibit P1 recognised the fact that at the time or as of 13th June 1991, the plaintiff was not in possession of the disputed land. He took immediate possession upon the execution of that illegal contract. That clearly explains why the plaintiff had to operate at the City Nursery School before taking possession in June 1991.

Now, apart from the fact that possession based upon an illegal contract of sale is no possession at all, the constitution came into force on 8th October 1995. By then the plaintiff had been in possession for less than five years. The plaintiff clearly falls outside the provisions of section 30 (2) and (5) of the Land Act, 1998.

On both accounts of illegality and less than 12 years occupancy, the plaintiff falls far short of qualifying as a bona fide occupant of Kibuga, Block 10, plot 201.

What then is the current position of the plaintiff at law?

In the counter claim, the second defendant seeks a declaration that the plaintiff is a trespasser. Trespass was defined in Sheik Mohammed Lubowe Vs. Kitara Enterprises Ltd. HCCS, No.4 of 1987, as entry unto the land by a person without the consent of the owner.

In the instant case, the plaintiff entered unto the disputed land in 1991 under the mistaken belief that it was a purchaser. Obviously the registered owner by then was Daud Ocheng. Ochieng's legal representative, who was registered on 28.2.92, did not legitimize the entry or occupation. The land was subsequently registered in the names of the second respondent who asked the plaintiff to leave or to legitimize its stay on the land by signing a tenancy agreement and paying rent to him. The plaintiff refused. And that appears to be the current position. It is clear to me that the plaintiff entered unto plot 201, Block 10, Kibuga, in 1991 both illegally and without the consent of the owner of the land. The plaintiff has refused to subsequently legitimize their illegal position to date. In those circumstances, I find no other legal description fitting the plaintiff's current position other than calling and declaring the plaintiff as a trespasser on the disputed property. And I so do.

REMEDIES.

The plaintiff has not proved its case against any of the three plaintiff on the balance of probabilities. Since the contract of sale which the plaintiff signed with the first defendant was out- rightly illegal, it cannot form the basis for any legal order in favour of the plaintiff against the first defendant.

The second defendant has proved his case against the plaintiff in the counter claim. He is therefore entitled to the declaration that the plaintiff is a trespasser on the disputed land and to an accompanying eviction order against the plaintiff.

The second plaintiff has, in my view, not made out any case for mesne profits but he has made out one for general damages for trespass. Considering the fact that the plaintiff is a voluntary religious organization, usually with no steady or reliable source of funding, I award a more or less a token sum of shs 1,000,000/= (one million) to the second defendant as

general damages against the plaintiff. The second defendant will also recover his costs for this suit, against the plaintiff.

CONCLUSION.

The plaintiff's case against all three defendants is dismissed but with costs only to the second defendant. The second plaintiff's claim in respect of trespass, presented in the counter claim succeeds and judgment is entered in his favour with regard to the counter claim.

I accordingly make the following orders:

- a) an order dismissing the plaintiff's case against all three defendants;
- b) an order declaring the plaintiff a trespasser on Kibuga, Block 10 plot 201;
- c) an order requiring the plaintiff to hand over vacant possession of Kibuga Block 10, Plot 201, to the second defendant within 30 days from the date of the delivery of this judgment;
- d) an order awarding general damages of shs 1 ,000,000/= (one million only) to the second defendant against the plaintiff;
- e) an order requiring the plaintiff to meet the second plaintiff's costs in respect of this suit.

V.F.MUSOKE-KIBUUKA

JUDGE

10.11.2003.