

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT No. 348 OF 2001

NIPUN NOROTTAM BHATIA ::::::::::::::::::::::: PLAINTIFF

- VERSUS -

CRANE BANK ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

J U D G M E N T:-

The plaintiff, Nippon Norottam Bhatia brought this action in a representative capacity as the holder of Letters of Administration to the estate of the Late Norattam Bhatia.

The claim against the defendant is for an order seeking vacant possession of land situate at Plot 1 Martin Road, Old Kampala and a declaration that the ownership of the said land had reverted to the estate of the Late Norattam Bhatia.

The facts constituting the cause of action are as follows:-

The Late Norattam Bhatia entered a sale of agreement with the defendant in respect of the suit property on 17th April 1996 in which the suit property was sold to the defendant at \$75000 (United States Dollars seventy five thousand). By the said agreement the defendant was to pay US\$37500 (United States Dollars Thirty seven thousand five hundred) on execution of the agreement and the remaining balance was to be paid on delivery of the title deed in the defendant's name. The agreement further stipulated that the vendor would indemnify the purchaser for any loss or damage suffered as a result of any damage suffered as a result of any defect in the vendor's title to the property which may prevent the purchaser from acquiring legal title to the same or from acquiring quiet possession of the same, and in such event a full refund would be effected and the property reverted to the vendor.

The Late Norattam Bhatia's interest in the suit property was as a sole beneficiary under a trust created by the registered proprietors now deceased. The whereabouts of the said trust deed were

unknown. The Late Norattam Bhatia made several fruitless attempts to have the legal title to the suit land vested in him to enable him effect transfer to the defendant, but was unable to succeed in the absence of the said trust deed.

After failing to transfer the title to the defendant, the Late Norattam Bhatia decided in the alternative to invoke the clause in the agreement to effect a full refund to the purchaser and have the property reverted back to the vendor. A refund was purportedly made through the Late Norattam Bhatia's Lawyers. Upon depositing the refund, the Late Norattam Bhatia proceeded to request the defendant to vacate the premises. The defendant however declined, refused or neglected to vacate. Hence this suit.

The defendant in its defence denied that the plaintiff had made proper attempts to have the legal title vested in him. The defendant averred and contended that clause 2 of the sale agreement provided that the vendor would indemnify the purchase for any loss or damage suffered as a result of any defect in the vendor's title to the property and not the failure to transfer as alleged. It was contended that in a bid to frustrate the contract, the plaintiff deliberately refused and/or neglected to regularize his title to the said land by adopting the right procedure proposed by the commissioner for land Registration. The defendant concluded that it was in effective occupation/possession of the suit property, legally and rightfully and was willing to complete payment therefore in accordance with the terms of the sale agreement but for the plaintiff's attempts to frustrate the contract.

The defendant made a counterclaim where it was contended that it was the plaintiff who was in breach of agreement as a result of which the defendant suffered loss and damage.

At the commencement of the trial the following significant facts of the case were admitted;

- (1) Firstly, it was admitted that the parties entered into a sale agreement on the 17th April 1996 whereby the plaintiff agreed to sell the suit property, Plot 1 Martin Road, to the defendant. The agreement was marked exhibit P3.

- (2) It was also admitted that the defendant paid to the plaintiff 50% of the agreed consideration of US \$75000, amounting to US\$ 37500, at the time of execution of the agreement.
- (3) It was a term of the agreement that the balance would be paid upon the successful transfer of title into the defendant's name.
- (4) It was admitted that the defendant had not completed payment of the purchase price.
- (5) It was further admitted that the plaintiff fulfilled part of his obligations by handing over possession of the suit property to the defendant upon execution of the agreement.
- (6) Lastly, it was agreed that the plaintiff had not managed to transfer title to the defendant under the agreement.

Arising from the above facts the plaintiff encapsulated that due to the circumstances beyond his control he was unable to transfer title to the defendant and therefore was entitled to rely on the provisions of the sale agreement, clause 2.2. The plaintiff contended further that he was entitled to invoke the clause and refund the purchase money and repossess the property.

The defendant on the other hand contended that by failing to transfer the property as per contract the plaintiff was in breach of that agreement, and that clause 2.2 protected the plaintiff in a situation where he had a defective title and not a scenario where he failed to transfer due to negligence or willful laziness.

Issues:

- (1) Whether the plaintiff was entitled to invoke clause 2 of the sale agreement;
- (2) Whether the plaintiff was in breach of contract by failing to transfer title to the defendant;
- (3) What remedies if any, are available to the parties.

During the hearing Nippon Norattam Bhatia (PW1) testified for the plaintiff while Sudhir Ruparelia (DW1) testified for the defendant.

Nippon Norattam Bhatia (PW1) testified as the plaintiff's attorney and later as legal representative, the plaintiff having passed away in the course of the trial. He testified that this

suit was in respect of Plot 1 Martin Road, which was purchased by his grandfather and grandmother and registered on 5th November 1935 under Instrument No.31655. On the same day they executed a declaration of trust in favour of his father Norattam D Bhatia which was reflected on the title deed under encumbrances. He testified that the trust deed used to be kept in the safe in their office at Buganda Road prior to the expulsion of Asians in 1972. Since then the trust deed was lost. He testified that there was a sale agreement (exhibit P3) between his late father and Crane Bank Ltd in which he acted on behalf of his father through his power of attorney. In that agreement his father was selling the suit property as lawful and beneficiary owner of the property by virtue of the trust declaration.

He stated that at that moment he was not in possession of the trust deed and that fact was brought to the attention of the purchaser before the agreement was executed. He stated that after the death of his grandparents who were registered proprietors, his aunt Mrs Naresh Kara became the executrix. In that circumstance, the plaintiff was not given power to administer the estate.

PW1 testified that prior to selling the property Mrs Kara had put a caveat on the title with the hope that she would usurp the property and prevent the plaintiff from getting the property, to his benefit. As a result of Mrs Kara's action the plaintiff could not regularize his title to the suit property. In 1993 they applied to the High Court for a directive to vest the property with the plaintiff being a sole beneficiary to the trust created by the registered proprietor but that application was disallowed. All that happened before the sale agreement was entered. He stated that all those difficulties were communicated to the defendant who despite that went ahead to enter into the agreement. Because of the above difficulties he created a clause in the agreement that full refund of money would be made in case of failure in transferring title to the buyer. He testified to the various attempts which were made to have the title deed registered in the names of the plaintiff without success. Among the same was an attempt to apply for vesting under which the Registrar of titles rejected.

The next option was to go through Mrs Kara for direct transfer or under succession. This option could not go through because of the mentality of Mrs Kara. The same Mrs Kara frustrated an option for the application of a limited grant under Administration Case No. 701/1998.

In view of the above dead-end, he decided to opt for a sub-lease which would allow the defendant to use the property for the balance of the period of the lease. That option also flopped because of lack of response from the defendant. Having tried all options in vain, he decided to invoke clause 2 of the agreement and refund the money in order to have the property returned to him. He concluded that court should order the defendant to return the property to him and for him to refund the advanced payment to the defendant. He also prayed for the defendant to give full account of the money they had received as rent to be paid to him.

As for the defendant Mr Sudhir Ruparelia (DW1) testified inter alia, that he was shareholder, Director and Vice Chairman of the defendant company. He stated that the suit property was acquired by the defendant in order to sell it to their prospective client, the late Lt. Col. Dragon's family. By agreement dated 17/4/96 (exhibit P3) the defendant acquired the suit property from Bhatia. Nippon B. Bhatia (PW1) signed on behalf the vendor as holder powers of attorney. The agreement was so prepared by Nippon Bhatia's lawyers. The agreement showed that Bhatia was selling the property as successor to his father. Clause 1 of the agreement stated that Bhatia was selling the property as a sole lawful and beneficiary of the property by virtue of a declaration of trust by the registered proprietors. He stated that during the execution of the agreement, he did not see the trust deed but it was agreed that the plaintiff's lawyers would transfer the property to the defendant and transfer forms were signed to that effect. Mr Sudhir testified that all along it was not mentioned to him that the trust deed was missing otherwise he would not have concluded the transaction. He stated that Mr Bhatia did not declare to the defendant that he had made attempts to transfer the property in his names but failed. He testified that since the certificate of repossession was in his father's name the issue of trust deed never came up. He testified that they had bought leasehold interest in the land so they could not accept a sub-lease offered by the defendant.

Mr Sudhir continued by stating that the plaintiff did not follow that advice of the Chief Registrar of title as to the procedure to follow to register the suit property through retransfer or under section 143 of the Registration of Titles Act. He stated that the plaintiff was not interested in transferring the property because it has now appreciated in value up to \$400000 as opposed to

\$75000 at the time of the agreement. He concluded that the property was now in possession of a third party who had bought it from the defendant. As such it was not available for return to the plaintiff. He prayed that the transaction should be fulfilled to enable the transaction finalized. In the alternative he testified that a second option was to refund the \$37000 with interest at 36%p.a. plus damages.

Resolution of issues:

Issue No.1:-

(1) Whether the plaintiff was entitled to invoke clause 2 of the sale agreement.

There is no doubt that clause 2 is the cornerstone of the sale agreement. It is therefore very central to the resolution of this dispute. It is therefore important to set it out for the sake of clarity:-

“The vendor undertakes to indemnify the purchaser for any loss or damage suffered as a result of any defect in the vendor’s title to the property which may prevent the purchaser, from acquiring legal title to the same or from acquiring quiet possession of the same, and in such an event a full refund shall be effected and the property shall revert fully to the vendor”.

The question to ask is whether there was defect in the plaintiff’s title. What amounts to defect to title was not particularized in the sale agreement. However the meaning of the term “defect of title” can be derived from the book. Words And Phrase Legally Defined by John Saunders, 2nd Edition at page 33 as follows:-

“Defect of title: Any fact calculated to prevent the purchaser obtaining such title to the property as he was led to expect constitutes a defect of title”.

The plaintiff’s evidence was that he was a beneficiary of a trust created by his parents whereby the property was settled on him as a sole beneficiary. However the plaintiff was not the registered proprietor. The registered proprietor was M/S Dharamsy Morarji Bhatia and his wife Motibhai. It was the plaintiff’s evidence that various attempts were made both before and after

executing the agreement to get title vested in the plaintiff for the purpose of transferring the same to the defendant. Firstly there was an attempt by way of a court application to have the trust wound up and the property vested in the plaintiff. That application was however frustrated by the absence of the trust deed. The second attempt was made through the office of the Chief Registrar of Titles for vesting order. The Chief Registrar of Titles rejected the various applications and advised the plaintiff to use other techniques – provided under section 143 of the Registration of Titles Act. The next option was an attempt to have Letters of Administration to enable the plaintiff deal with the suit property. That attempt also reached a dead-end because the executor of the estate of the Registered proprietors were unwilling to co-operate due to family wrangles. It was the plaintiff's contention that the above circumstances constituted defect in the plaintiff's title.

The defendant on the other hand contended that the plaintiff's title to the suit property was not disputed so as to make clause 2 of the sale agreement applicable. It was their evidence that the plaintiff was deliberately refusing and/or neglecting to regularize his title by adopting the right procedure proposed by the commissioner for Land Registration.

From the evidence on record, I note that the Registered Proprietors were Dharamsy Morarji Bhatia and his wife Motibai. The certificate of title (exhibit P1) clearly indicates the plaintiff's interest on the encumbrance.

“The said Dharamsy Morarji Bhatia and Motibai claim an interest in the said land as Trustees of Narottam Bharamsy Bhatia by virtue of a declaration of trust deposited as instrument No. 316567 Address for service P.O. Box 319, Kampala”.

It was the plaintiff's evidence that he took possession of the suit property in 1945 when he reached 21 years of age. That it to say that the property vested in him since 1945. As from that time it was the plaintiff collecting rent and paying taxes from the income accrued as well as ground rent and city rates until 1972 when properties of Asians were expropriated. When expropriated properties Act was enacted, the plaintiff repossessed the suit property in 1995 and thereafter entered into the sale agreement whose clause 2 is the subject matter in dispute.

It is true the plaintiff made several attempts to vest the property particularly through the Commissioner for Land Registration. In the first application for a vesting order, the Commissioner for land Registration noted that the application was not properly made under the relevant law (exhibit P8 (a));

“With regard to the vesting order, I am not satisfied that the application is properly made under section 175 of the said act. Again, in view of section 46, proprietorship can only accrue to your client through other techniques. Be that as it may, the application is rejected and returned herewith”.

In the second attempt the Commissioner responded as follows (exhibit P8 (c):-

“My advice is that you use another technique to try to get your client on the Register Book. You can try either a transfer or an application under section 143 of the said Act, if the registered proprietors are dead. I propose not to do any more correspondence on the subject”.

From the foregoing, it is clear that the plaintiff did not have any defect in title as alleged.

According to the Learned Commissioner for Land Registration, the plaintiff was not following the right procedure to enter the register book. The proper procedure available should have been either by direct transfer or by invoking section 143 of the Registration of Titles Act (now section 134 (1) of the Registration of Titles Act Cap 230). That section deals with succession on death of the registered proprietor.

It was contended by the plaintiff that part of the problem was because the sole executrix of the estate, a one Mrs Suman Naresh Kara was not willing to co-operate to have the property transferred into the names of the plaintiff. In my view the stubbornness of Mrs Kara could not create a defect in the plaintiff's title. She could not create a deadlock because if she was not willing for one reason or the other to perform her role as executrix of the will of Mambhai

Dharamsy Bhatia, there are still other options at the table for the plaintiff as a sole beneficiary of the estate to either remove the recalcitrant Kara or to compel her to act as the law demands of her under the Succession Act Cap 162.

Having failed to comply with the above steps, the plaintiff cannot be heard to say that there was a defect in his title. It could as well be true that the plaintiff was reluctant to regularize his title to take advantage of the current value of the property by invoking clause 2 of the sale agreement. All in all I find that the plaintiff has failed to prove on the balance of probabilities that there was defect in his title. Clause 2 of the sale agreement cannot be invoked in the circumstances.

Issue No.2:-

Whether the plaintiff was in breach of contract by failing to transfer titles to the defendant.

This issue has substantially been addressed in the first issue when I stated that the plaintiff had failed to explore all the avenues under the Registration of Titles Act and the Succession Act to have the property transferred to the names of the defendant as demanded by the sale agreement, (exhibit P3). Clearly this constituted a breach of the said agreement.

Issue No. 3:-

What remedies if any are available to the parties?

From the evidence adduced, it is clear that the defendant did acquire the suit property lawfully by virtue of the sale agreement in which he made a part payment of \$37500. The defendant was bound to pay the balance upon transfer of the suit property into its own names. The obligation to transfer the same was on the plaintiff. There is evidence that the plaintiff had failed and or refused to effect the transfer. In the circumstances, the defendant cannot be said to be a trespasser as it lawfully acquired the suit property under the said agreement.

The plaintiff cannot in the circumstances demand for mesne profits since the defendant is not a trespasser. Neither can the defendant be said to have wrongfully deprived the plaintiff of the suit

property. This is therefore a clear matter where the plaintiff would not be entitled to the reliefs sought in the plaint and answer to the counterclaim.

Instead I find that the defendant is entitled to the reliefs sought in the counterclaim. The defendant had sought the following orders.

- (a) A declaration that it is lawfully and rightly in possession of the land and is entitled to stay in possession as a bona fide purchaser for value.
- (b) An order for specific performance of the contract against the plaintiff.
- (c) General damages for inconvenience.
- (d) In the alternative special damages of \$37500 plus interest at 36% per annum with weekly rests from 17/4/1996 till payment in full.

Being a purchaser for value I do agree that the defendant is entitled to a declaration that it lawfully and rightly got possession of the suit land and is entitled to stay in possession.

As regards specific performance, it is clear that plaintiff neglected and or refused to invoke the provisions of the Registration of Titles Act and the Succession Act to effect transfer of the property into the names of the defendant. I accordingly order the plaintiff to make use of the above provisions in order to fulfill his obligations under the sale agreement.

In the alternative if the defendant is bent on the property he should indemnify the purchaser for the loss and damage suffered. The defendant would be entitled to special damage of \$37500 plus interest at 36% per annum with weekly rests from 17/4/1996 until payment in full. The defendant would also be entitled to general damages for inconvenience in the tune of US\$20000 (twenty thousand US dollars).

All in all the plaintiff's suit is dismissed with costs to the defendant. Judgment is entered for the defendant on the counterclaim with the following orders:-

- (1) Declaration that the defendant is in lawful and rightful possession of the suit land.

- (2) Order of specific performance against the plaintiff.
- (3) General damages for inconvenience in the tune of 20000 US \$ (twenty thousand US \$).
- (4) In the alternative specific damages of \$37500 plus interest at 36% per annum with weekly rests from 17/4/1996 until payment in full.

RUBBY AWERI OPIO

J U D G E

5/7/2005.

I direct the Registrar under Order 18 rule 2 (3) of the Civil Procedure Rules to pronounce this judgment.

RUBBY AWERI OPIO

J U D G E

5/7/2005.

6/7/2005:-

Ms Gorretti Arinaitwe for the defendant. I am holding brief for Mr Kiapi.

Plaintiff is absent.

The judgment was read.

PAUL GADENYA WOLIMBWA

DEPUTY REGISTRAR

6/7/2005.