THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

H.C.C.S. NO. MMB 44/1997

MBARARA MUNICIPAL COUNCIL…… PLAINTIFF

VS

NATTA MARY NALONGO ……...DEFENDANT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

On 21st November 1997 Mbarara Municipal Council, hereafter referred to as the plaintiffs, registered this suit against Natta Mary Nalongo, hereafter referred to as the defendant. Nevertheless summons accompanying the plaint and the plaint itself were not served on the defendant within time. An application was made to this court for extension of time within which to serve the process. That application was duly granted on 30 April 1998 requiring the plaintiff to effect service on the defendant within 15 days of that date. As it was, process was served on the defendant on 22nd May 1998. Thereafter the defendant filed a defence with a counterclaim.

On 16th June 1999 the parties agreed the following issues:

1. Whether the plaintiff has any interest in the suit property.
2. Whether the plaintiff has the capacity to bring this suit.
3. What property did the defendant buy from the plaintiff.
4. Was it the plot with one house or both houses.
5. Whether the defendant's title is tainted with fraud.
6. Whether the defendant is entitled to the prayers sought in the counterclaim.
7. Whether the suit is properly before court
8. Whether the plaintiff is entitled to the remedies and orders set out in the plaint.

Counsel for the defendant, Mr. Kandeebe Ntambirweki, on 18th March 2003 raised preliminary points of objection. The first was that the plaint did not disclose a cause of action and should be rejected under Order 7 rule 11 (a) of the Civil Procedure Rules.

Court found this objection well grounded and ruled that the plaint should be rejected. The second objection regarded service of summons following the order made by this court on 30th April 1998 where the plaintiff was required to serve the defendant within 15 days of that date. In the event the defendant was served on 22nd May 1998, outside the period ordained by court and without extension of time possible under Order 47 rule 6 of the Civil Procedure Rules. Court ruled that in consequence the suit ought to be struck out.

On 25th October 2004 Counsel for the defendant/counterclaimant sought to call evidence in support of the counterclaim. Mr. Paul Byaruhanga, counsel for the plaintiff, however said that before court could proceed to hear evidence he wished to raise objections which he believed would dispose of the counterclaim. He questioned the vitality of the counterclaim after the plaint had been struck out. Counsel also pointed out that in the event the defendant had no locus standi. It was agreed however that hearing on the counterclaim should proceed but that any objections at this stage would be addressed in the submissions. I must now address those points of objection before I proceed to what merits there might be in the counterclaim.

Counsel for the plaintiff contended that the counterclaim should fail as it did not comply with Order 8 rule 7 of the Civil Procedure Rules which requires the person making the counterclaim to state specifically in his statement of defence that he does so by way of counterclaim. Counsel said the requirement is mandatory. On 18th June 1998 the defendant filed her defence and counterclaim. The counterclaim is contained at page 4 of those pleadings which were filed after payment of a fee of Shs. 85,000/-. A mere statement of defence attracts no fee but a defence with a counterclaim does. I am satisfied that given that payment and the fact that at page 4 of the pleadings there is a counterclaim no basis exists for the objection by counsel. As a matter of fact counsel did not show where the fault in the papers lies. Again I see no merit in counsel's objection to the counterclaim based on Order 8 rule 8 of the Civil Procedure Rules. He calls to his aid the case of *Nampera Trading Co vs Yusufu Ssemwanje & Anor* [1973] I ULR 69. Respectfully, that case is distinguishable. In *Nampera* it was indeed necessary to make alterations to the original title by reason of more litigants having been added. The circumstances of the present case do not warrant it since the original litigants remain unchanged.

It was further submitted by counsel for the plaintiff that the defence and counterclaim were ‘stultified’ by the rejection of the plaint, such rejection not being ‘stay, discontinuance or dismissal’ in words of Order 8 rule 13 of the Civil Procedure Rules. For the record, the plaint was rejected and struck out as well. The effect. Demobilization of the suit in the plaint. Semantics aside, the words in Order 8 rule 13 should not be construed narrowly. To my mind they refer to a situation where the plaint is put out of action. This was one such occasion, never mind the appellation. Consequently there is an avenue along which the counterclaim may be proceeded with. This is because a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff, in the action, may instead of bringing a separate action, make a counterclaim in respect of that matter and where he does that he must add a counterclaim to his defence. Court may then pronounce a final judgment in the action both to the original claim and on the counterclaim. In a manner of speaking a counterclaim bears a separate suit from the one in the plaint. It is not proper to argue, as is argued on behalf of the plaintiff, that the defendant put herself outside court’s jurisdiction through the ruling which put the plaint out of action. The counterclaim remained. Finding both the counterclaim and the defendant’s locus standi not at fault, I must declare these and related objections not sustainable.

Regarding the relationship of one Drani to the property in issue which counsel for the plaintiff alluded to in connection with the integrity of the rejected plaint, one needed to read no further than paragraphs 11 and 14 of the rejected plaint to reach the inevitable conclusion.

I proceed to consider what issues remain for resolution. It has been argued for the plaintiff that issues 3, 4 and *5* remain for resolution. Issue 6 also remains in my view. It is key to these proceedings. Since evidence was given by both parties regarding the counterclaim, it is inevitable it merits pride of place.

Issue 3 and issue 4 question what property the defendant bought from the plaintiff, whether it is a plot with one house or two houses. Exhibit D. 1 is an advertisement put in Orumuri of September 18-24, 1995. It sought out people interested in the purchase of houses/plots belonging to the plaintiff at the time. From all evidence at the time there were no surveyed plots existing in Kakoba Housing Estate. Surveying of plots was done later. What houses were sold in the exercise were sold subject to future demarcation of their respective plots. In the event the

defendant was sold the house in which she had been an erstwhile tenant. It was for a consideration of Shs. 5,100,000/=. After necessary procedure a survey was done and the area where her house, House 55, was situate was after survey confirmed as Plot 55 Bulemba Road. That plot included another house in the neighbourhood. Exhibit DIII allocates a residential plot number *55* Bulemba Road to the defendant. Exhibit DIII is signed by no other than the Chief Township Officer of the plaintiff and is dated 24th February 1997. Interestingly the same Township Officer on 21st August 1997 wrote to the defendant and one Drani. In the communication he referred to House 55 and House 62 B Kakoba Housing Estate as well as Plot 55 A and 55 B Bulemba Road. Neither the two plots nor House 62 B existed in fact. What existed and continues to exist is Plot 55 Bulemba Road. Plot 55 Bulemba Road is registered in the names of the defendant and the title deed was proffered as Exhibit DVI. Consequently I find that what the defendant bought from the plaintiff was Plot 55 Bulemba Road. I must note that it is idle to imagine the defendant could have bought a house not situate on land. Her purchase was of the land comprised in the title deed. Section 59 of the Registration of Titles Act states that a certificate of title is conclusive evidence of title.

Nevertheless this court has held that while the cardinal rule of registration of titles under the Act is that the Register is conclusive, court can go behind the fact of registration in cases of actual fraud on the part of the transferee. Fraud must be proved strictly and the person alleging fraud must show that the person to whom the lease was granted dishonestly dealt with the land in issue so as to have it included in the lease.

See S. *Kyamulesire vs J Bikanculika* High Court Civil Suit No. 254 of 1992 (unreported). The Supreme Court in *Kampala Bottlers vs Damanico (U) Ltd* SCCA No. 22/92 (unreported) determined that fraud must be attributable to the transferee directly or by necessary implication so that the transferee must either be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of the act. In this case no evidence was led to show fraud on the part of the defendant within the parameters related to in *Kampala Bottlers* nor were particulars of fraud laid out in any pleadings as Order 6 rule 2 of the Civil Procedure Rules would required be the case. As I see no fraud elicited my answer to issue 5 is in the negative.

Next I turn to issue number six. It is whether the defendant is entitled to the prayers sought in the counterclaim. These prayers as laid out initially in the pleadings were:

a) Recovery of Shs. 5,l00,000/ being money had and received.

b) Special damages of Shs. 1,000,000/= as pleaded in para. 19 above.

c) General damages.

d) Mesne profits

e) A declaration that the defendant is the rightful owner of the suit property.

f) An eviction order against the plaintiff's agents/servants/employees from the suit property.

g) A permanent injunction against the plaintiff and its agents/employees/servants trespassing on her property.

h) Interest on (a) — (d) from the date of cause of action till payment in full.

i) Costs of this counterclaim.

j) Any other remedy that court deems necessary in the circumstances.

While I give judgment for the defendant in the counterclaim I find I can't grant several of the prayers. The prayer in (a) was abandoned by the defendant herself and the circumstances of this case would not justify such a grant. The prayers in (b) and (d) relate to special damages. Special damages need to be specifically pleaded and strictly proved. See *Masaka Municipal Council vs Semogerere* [1998 — 2000] HCB 23. This requires relevant evidence. Since this was not done the defendant will by no means recover (b) and (c). I find no basis for prayers (h) and (j). As such these will not be available to the defendant either. I pause to consider the prayers in (c). According to submissions on behalf of the defendant she was denied access to her property for 7 years and as such Shs. 10,000,000/= would suffice as general damages. Respectfully I do not find any justification shown for the amount claimed in evidence tendered or otherwise. Nevertheless I find that the defendant has been subjected to anxiety and some inconvenience over the 7 years she has not had quiet possession of her property. I find a sum of Shs. 4,000,000/ would suffice as general damages. Prayers (e), (f) and (g) are also granted as well as (i). Consequently the defendant is entitled to:

1. Shs. 4,000,000/= as general damages.
2. A declaration that the defendant is the rightful owner of Plot 55 Bulemba Road, Mbarara.

3. An order evicting the plaintiff's agents/servants/employees from Plot 55 Bulemba Road, Mbarara.

4. A permanent injunction restraining the plaintiff, its agents/employees and servants from trespassing on Plot *55* Bulemba Road, Mbarara.

5. Costs of the counterclaim.

P. K. Mugamba

Judge

16th February 2005