THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MA-0566-2008

(ARISING OUT OF H.C.C.S NO. 320 OF 2007)

1. **BANK OF UGANDA**
2. **STANDARD CHARTERED BANK (U) LIMITED :: APPLICANTS**
3. **CHRISTOPHER KIBANZANGA**

VERSUS

1. **BASAJJABALABA HIDES & SKINS LIMITED**
2. **THE COMMISSIONER LAND REGISTRATION**
3. **SAIDI KYADONDO**
4. **DAN KATARIBWE KWATAMPORA RESPONDENTS**
5. **STEPHEN KAGORO**
6. **TUMWINE SILAGI**
7. **IMAM KANKURIHEMU**
8. **JAMES MAGEZI**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application by Notice of Motion was brought under Section 33 of the Judicature Act, Sections 34 and 98 of the Civil Procedure Act and O.52 rr.(1) and (2) of the Civil Procedure Rules. It is for orders that:

(i). The purported 'Consent Decree' dated 25th June 2008 be vacated/set aside as never having been entered into;

(ii). The special certificate of Title issued by Commissioner Land Registration (the 2nd respondent herein) in respect of the twenty (20) plots items (1) to (14) in the said purported 'Consent Decree' on the basis that the original Duplicate Certificates of Title were lost be cancelled together with any entries made thereon and the original Duplicate Certificates of Title held by the 1st and 2nd Applicants be reinstated in their place with the proprietorship and encumbrances as indicated therein.

(iii). Costs of this application be provided for.

When the application came up for hearing on 22/06/09, learned counsel for the respondents, led by Mr. Muzamiru Kibedi, raised what he called a point of law. He submitted that the suit is improperly before court and should be struck out with costs. He did not cite any specific legal provision that may have been infringed but based his objection on three grounds:

1. That in their Notice of Motion the applicants are seeking to vacate or set aside a consent decree. That the procedure for setting aside a consent decree is either with consent of the parties or fresh suit on ordinary plaint. He cited ***Nagita Kafuma vs Kimbowa Builders and Contractors HCCS No. 1366 of 1972*** in support of his argument.

2. That the grounds upon which the application is based are different ways of alleging fraud. The standard of proof of fraud being higher than in ordinary civil suits, affidavit evidence becomes unsuitable. He cited ***Sanyu Lwanga vs Ntate Mayanja SCCA No. 59 of 1995*** in support of his submission.

3. That the orders sought and grounds upon which these orders are based are contrary to pleadings in the main suit and yet it is settled law that no remedy can be given to a party which is contrary to pleadings in the main suit. He cited to me ***Interfreight Forwarders vs EADB [1994 – 95] HCB 54***.

On the basis of these grounds the respondents have submitted that the application is improperly before court and that it should be struck out with costs to the respondents. Learned Counsel for the applicants, Mr. Masembe – Kanyerezi and Mr. Kigundu Mugerwa, do not agree. They contend that ***Nagitta Kafuma*** case is helpful to the applicants' case.

I have directed my mind to the able arguments of all counsel.

From the pleadings, two plaintiffs, Harry Kasigwa and Christopher Kibanzanga, both members of Parliament filed a suit against 4 corporate entities. They allege in that suit misuse of public funds by Bank of Uganda through alleged lending to Basajjabalaba Hides and Skins Limited (the 3rd defendant). While the suit was pending hearing, a 'Consent Decree' was filed in that suit purportedly between the plaintiffs and the defendants. In the 'Consent Decree' (hereinafter referred to as "the impugned decree"), Basajjabalaba Hides and Skins Limited (hereinafter referred to as 'Basajjabalaba') agreed to refund all the money, the subject matter of the suit, and thereafter get back the collateral property.

On the strength of that impugned decree, the old title deeds of the various properties which Basajjabalaba had pledged as collateral for the loan were allegedly cancelled, fresh ones issued to them and thereafter the property was sold to the 3rd – 8th respondents.

I now turn to the objections.
The first relates to the procedure for setting aside the impugned decree.

From the arguments of both counsel and from my perusal of the Civil Procedure Rules, no specific procedure is prescribed for such actions. Resort is accordingly had to case law.

The case cited to me by learned counsel, Mr. Kibeedi, is ***Nagitta Kafuma***, supra. The main issue in that case was the efficacy of a consent order authorized by some Advocate not previously known to represent any of the parties to the suit. The court held that if either party is willing to consent to a judgment or order against himself or if both parties are agreed as to what the judgment or order ought to be, effect may be given by the court to the consent order. That a judgment which met that definition was a consent judgment and could not be set aside except with the consent of the parties or by fresh action.

My understanding of the decision of court in that case is that for any document to come within the meaning of a consent judgment, either party to the suit must be willing to consent to it. As lawyers would say, there must be a meeting of the minds. In the instant case, assuming that any express or implied allegations of fact in the notice of motion are true, the impugned decree wouldn't come within the meaning of a consent judgment as stated in the ***Natitta Kafuma*** case because parties alleged to have signed it have distanced themselves from it. In that event, it wouldn't be a 'consent judgment' that can only be set aside with the consent of the parties or by a fresh suit. It would simply be annulled. In practical terms, there is no need for an order of the court to set aside a nullity though it is sometimes convenient to have the court declare it so. Such a declaration can be made in an application by Notice of Motion as was done in ***Kibuuka Nelson & Anor vs Yusuf Zziwa HCT – 00 – CV – MA – 0072 – 2008*** and ***HCT – 00 – CV – MA – 0225 – 2008*** (Unreported) arising out of HCT – 00 – CV – CS – 0081 – 2007 (Still pending) where an ex parte judgment and decree obtained through deceit were set aside in an action brought to court by way of Notice of Motion.

This court is cutely aware that it is improper to commence proceedings to challenge alleged acts of fraud by Notice of Motion because the standard of proof is higher in fraud causes. Thus in ***Hannington Wasswa vs Maria Onyango Ochola & Others SCCA No.***

22/1993 reproduced in ***[1994] IV KALR 98*** court held that the allegation of fraud required an ordinary suit where witnesses could be cross-examined. Court did not find the procedure wrong but inappropriate. Every case must be decided on its own unique facts and circumstances. In the instant case, the applicants' argument is that the impugned consent decree is void and therefore a nullity. The respondents deny it. In my view, the point being highlighted by Mr. Kibeedi that affidavit evidence is rather unsatisfactory in some cases is appreciated. However, I am unable to say that this case is one of them. Under the Civil Procedure Act, Section 2 (x), 'suit' means all civil proceedings commenced in any manner prescribed. There is no specific prescribed manner of challenging in court of the alleged nullity.

In my opinion the court can treat the proceedings herein as a suit, which it is by definition, call for further affidavits, if necessary, in order to clarify the exact issues and widen the trial beyond mere affidavit allegation and counter-allegation by allowing either side, if need be, to cross-examine the deponents on their averments on their affidavits.

It is, of course, as stated by Mr. Kibeedi, well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. As observed in ***B.E.A Timber & Co. vs Inder Singh Gill [1959] E. A. 453*** at p. 469, however, fraud is a conclusion of law. If the facts alleged in the pleading are such as to create fraud, it is not necessary to allege fraudulent intent. The acts alleged to be fraudulent must be set out, and then it should be stated that these facts were done fraudulently, but from the acts fraudulent intent may be inferred.

Relating the same principle to the instant case, fraud has in my view been sufficiently pleaded in the Notice of Motion and it has also been sufficiently disputed in the responses thereto. What remains is cross-examination of any party the other feels should be cross-examined and the rest is determined on legal arguments of counsel in their closing remarks.

Accordingly, much as I accept learned counsel's argument that the issue of alleged fraud requires stricter proof, I am unable to fault the procedure adopted by the applicants to bring the issue of the alleged fraud to the attention of court. This takes care of objections (1) and (2).

Finally, learned counsel argued that the pleadings herein are a departure from the remedies sought by the applicants in the main suit. I think this goes without saying. In the main suit the defendants are the Attorney General, Bank of Uganda, Basajjabalaba Hides & Skins Ltd and Standard Chartered Bank (U) Limited. In the instant application, Bank of Uganda, Standard Chartered bank and the plaintiff Christopher Kibanzanga are seeking relief against Basajjabalaba Hides & Skins Ltd for allegedly defrauding them by rendering the Certificates of Title in the custody of the Bank useless through issuance to them of fresh ones when the old ones are in existence. According to them, if the impugned decree is not set aside, the remedies in the main suit, if it is decided in their favour, will be rendered nugatory. The two issues are necessarily different and so are the pleadings and prayers. With all due respect to learned counsel's argument, I have not seen the applicability of the decision of the Supreme Court in ***Interfreight Forwarders (U) Ltd vs E.A.D.B [1994 – 95]*** HCB 54 to the instant cause.

In the result, I have found no merit in any of the objections raised before me. They are over-ruled. The case shall be adjourned till 14/09/09 at 2.30 p.m. for conferencing and thereafter determination of the issues on merit.

Costs herein shall abide the outcome of the application.

Orders accordingly.

Yorokamu Bamwine
JUDGE

07/07/2009

07/07/2009

Mr. Kanyerezi
Mr. Zimula } for applicants

Mr. Kibeedi for 1st respondent

Mr. Tusubira for 2nd and 3rd respondents

Mr. Kwensiima for 5th and 6th respondents

Court:

Ruling delivered. Conferencing on 14-09-2009 at 2.30 p.m.

14/09/09

Mr. Masembe – Kanyerezi for 1st and 2nd applicants

Mr. Kiggundu Mugerwa for 3rd applicant

Mr. Kibeedi for 1st respondent

Mr. Paul Tusubira
Ms. Syson Vekurutso for 3rd respondent

Mr. Obed Mwebesa for 4th respondent

Mr. Henry Kyarimpa for 5th, 6th and 7th respondents (on behalf of Kwerisiima).

Kekurutso:

Holding brief of Nelima Nelson, Counsel for 8th respondent.

Masembe:

1st applicant's Legal officer present.

Mr. Kibeedi:

If we are given 10 minutes we shall come up with agreed issues.

Court:

Prayer granted.

Later at 3.20 p.m.

Mr. Masembe:

We have agreed as follows:

1. The 1st respondent was indebted to the 2nd applicant in the sum of US $16,644,872 plus Shs.808,268,477= as at 4/4/03 and to Stanbic Bank in the sum of US $3,464,467= as of 1/4/03 and both creditor Banks made demands for payments on the said debts on the dates aforementioned. In default of payment, receivers were appointed over the 1st respondent.

2. The first applicant took contractual assignments from the said Creditor banks in respect of the debts and Securities held and in consideration thereof paid to the 2nd applicant US $9,150,000 on 1/6/04 and paid to Stanbic Bank (U) Ltd US $2,425,000 in May 2004. Deeds of assignment were executed by Standard Chartered Bank and Stanbic Bank in consideration of the said payments.

3. HCCS No. 320/07 was filed by inter alia the 3rd applicant contesting the lawfulness of the payment to Standard Chartered Bank and seeking repayment by Standard Chartered Bank and the 1st respondent to the consolidated fund of the moneys paid.

4. On 26/6/08 a 'Consent Decree' was filed by the 1st respondent (as the 2nd defendant) providing that agreement had been reached with 3rd applicant (as plaintiff) for inter alia the cancellation of the Titles and mortgages held by the 1st and 2nd applicants as security for the indebtedness and re-issuance of fresh unencumbered titles to the 1st respondent.

5. The said 'Consent Decree' was not signed by counsel for 1st and 2nd applicants.

6. Pursuant to the said 'Consent Decree', the 2nd respondent did cancel the said certificate of title held as security by the 1st and 2nd applicants together with the mortgage encumbrances.

7. The second respondent subsequently issued fresh titles which titles were then transferred variously to 3rd – 8th respondents.

Issues:

1. Whether the 'Consent Decree' was not signed by counsel for the plaintiff (3rd applicant) and counsel for 3rd defendant (1st respondent).

2. The effect of the 'Consent Decree' on the 1st & 2nd applicant's security/mortgage interests.

3. Whether the issuance of fresh unencumbered certificates of Title by the 2nd respondent was lawful.

4. Whether the 3rd – 8th respondents are bona fide purchases for value without notice of any defect in title and whether their proprietorship is protected as such.

5. If not, whether the titles held by 1st & 2nd applicants as security should be reinstated together with the mortgage encumbrances thereon.

6. Other remedies, if any.

Procedure

1. The applicants to present the deponents of affidavits in support of the application for cross-examination.

2. The respondents to present the deponents of affidavits in support of the defence for cross-examination.

Deponents for applicants: 2

Respondents: 8

Language: English/Luganda.

Hearing date; 19-10-2009 at 2.00 p.m.

Yorokamu Bamwine

JUDGE

14/09/2009

19/10/09:

Mr. Kanyerezi for 1st, 2nd respondents

Mr. Kigundu Mugerwa for 3rd applicant

Mr. Kibeedi for 1st respondent

Mr. Mwebesa for 4th respondent

Mr. Kanyerezi:

Henry Kyalimpa is here for the 5th respondent. We are ready to proceed.

Mr. Kibeedi:

I'm not ready to proceed. We have filed an application under O.1 r.10 (2) seeking to add Attorney General as co-respondent. He is a necessary party to these proceedings. It is our prayer that the application be heard first before the main matter. We have not even served the other counsel.

Mr. Kanyerezi:

We have had some discussion outside. We oppose the application for adjournment. We framed issues for determination. The Attorney General's participation cannot be necessary for determination of any of these issues.

Mr. Kibeedi:

The approach adopted by my colleague goes to the merits of that application. This is not time to do so. The issue now is whether the existence of an application within an application is enough ground to sustain an application for adjournment, and if so, what next?

We contend that an application like the one we have filed has to be disposed of before the main one is heard. The option would be to allow us to argue the application now or another date. The Attorney General's participation will assist in the settlement out of court.

Court:

This application was filed here on 11/12/08, close to a year now. It has suffered adjournment after adjournment.

We did frame issues for determination on 14/09/2009 and all we are hearing after one month's adjournment is that the respondents have filed an application for Third Party proceedings. This is to say the least absurd.

I have seen the said application, yet to be fixed for hearing. It did not have to wait for today to be brought up. For reasons which I will detail in the main ruling, I would agree with the submission of learned counsel for the applicant's that the Attorney General's participation is not necessary at least for the determination of the issues which have been

framed. The Attorney General may be needed for other reasons, certainly it is not for the determination of the said issues.

The case was listed for cross-examination deponents. We shall proceed to have them cross-examined as per the day's listing or else I will invoke action under O.17 r.4 of Civil Procedure Rule.

Mr. Kibeedi:
We did not bring witnesses for cross-examination. We apply for leave to appeal.

Court:
The respondents may wish to appeal but this will not be without prejudice to the determination of the application on merits. Counsel can appeal against the decision of the application after the ruling has been delivered. For the avoidance of the doubt, since neither party is presenting witnesses for cross-examination, case shall be closed for submissions under O.17 r.4 Civil Procedure Rule.

Mr. Kanyerezi:
We need up to 29/10/09.

Court:
Applicants shall have their submissions filed on or before 29/10/09. Respondents shall have theirs filed on or before 12/11/09. Rejoinder, if any, shall be on or before 19/11/09. Ruling shall be on 14/12/09 at 9.00 a.m.

Yorokamu Bamwine

JUDGE

19/10/09