

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-046-2008

GORDON WAVAMUNO.....PLAINTIFF

VS

PIDSON WAVAMUNO.....DEFENDANT

B E F O R E : THE HON. MR. JUSTICE LAWRENCE GIDUDU

J U D G M E N T

The Plaintiff is the elder brother of the Defendant. It is not in dispute that they worked together in several businesses and later developed a love/hate relationship that culminated in this suit. The two are disputing over pieces of land formerly comprised in plots 14, 57, 61, 62 and 63 Block 3 at Kashari, Nkonkojeru in Mbarara Municipality. These original plots have since been subdivided into various smaller plots.

By this suit, the Plaintiff seeks to recover from the Defendant titles of land which were generated or mutated from plots 14, 57, 61,62 and 63 all in Block 3 Kashari - Nkonkojeru, a declaration that he is the lawful registered owner of the said plots, a permanent injunction restraining the Defendant from the said plots and damages.

The Defendant on the other hand denies the Plaintiff's claims and counterclaims for a declaration that he is the lawful owner of land formerly

comprised in plots 14, 57, 61, 62 and 63 Block 3 Kashari

- Nkonkojeru and a further declaration that the Plaintiff obtained registration by fraud and also seeks general damages.

The summary of the Plaintiff's case is that in 1968, he acquired plot 14 Block 3 from the Omugabe of Ankole and duly paid 130/= as the purchase price. He processed a title into his names. Later the Omugabe sold to the Plaintiff more land and he got more titles that include plots 57, 61, 62 and 63 Block 3 Kashari.

In the meantime, the Plaintiff invited his brothers like Eriabu Wavamuno and the Defendant to live with him at Nkonkojeru on plot 14. The Plaintiff also assigned the Defendant key roles in his various companies and eventually both Eriabu and the Defendant built homes on plot 14.

Due to political instability in the mid-eighties, The Plaintiff went into self exile and delegated his businesses to the Defendant. He authorized the Defendant to transfer plot 14 into his names (See exhibit "P5") without consideration. Later in 2001, the Plaintiff demanded re-transfer of plot 14 into his names and the Defendant duly signed transfer forms (exhibit P. 11) while the Plaintiff paid him a kind of gratitude by giving him a lorry vide exhibit P10. This lorry proved difficult to maintain and the Plaintiff replaced it with a Mercedes Benz car.

Later in 2007, the Plaintiff instructed the Defendant to get a survey to subdivide plots 14, 57, 58, 61, 62 and 63 into smaller plots so that he could sell them off to developers. (See

Instructions in exhibits "P2" and "P3". The Plaintiff handed over the titles to plots 14, 57, 58, 61, 62 and 63 to the Defendant who obtained a surveyor and work was done as per agreement/contract signed by the Defendant

and the Surveyor. (See exhibit "P15").

Once the plots were sub-divided, the Defendant got some 3 buyers who bought 3 plots and money was paid to the Plaintiff's account.

It is during the sale of the plots in 2002 that the differences between the parties reached the climax when the Defendant lodged a caveat on the various titles that had been generated from plots 14, 57, 61, 62 and 63 Block 3 Kashari and even refused to surrender those titles to the Plaintiff that this suit was filed.

The Defendant denies any wrong doing and blames the Plaintiff for acting fraudulently in re-transferring back plot 14 into his names yet the Defendant had acquired its proprietorship after consideration and further that the Plaintiff fraudulently caused the sub-division of plots 57, 61, 62 and 63 in order to defeat the Defendant's equitable interest. It is the Defendant's case that the Plaintiff gave the Defendant the disputed plots as his share from the business companies from which he had separated with the Defendant.

During the conferencing, exhibits were admitted and marked by consent and were relied upon by all the parties.

Three issues were framed for my consideration:-

- (i) Whether the Plaintiff is the owner of the rest of the suit land.
- (ii) Whether the Plaintiff obtained registration of plot 14 or any part of the suit land without the Defendant's permission and with fraud.
- (iii) What remedies are available to the parties?

The suit land as I have indicated in the opening paragraphs comprises plots 14, 57, 61, 62 and 63 all on Block 3 Kashari- Nkonkojeru - Mbarara.

As regards the 1st issue, it is the Plaintiff's evidence that he bought all the disputed land and had it registered in his names as sole proprietor. He then invited his brothers who included the Defendant to live on this land with him and helped them build houses thereon. According to Tim Lwanga (PW2), the Plaintiff invited his brothers to join him in his businesses because Indians work with their relatives. Hajji Mukasa (PW4) confirmed in his testimony the Plaintiff acquired land in Nkonkojeru from the Omugabe at the same time that he and late Mbiringi acquired theirs in the same area. He denied the claim that the Defendant also acquired land in the area at that time. Maria Wavamunno (PW8) a sister to both parties testified that the suit land belonged to the Plaintiff and that the Defendant who was a teacher joined the Plaintiff on the suit land while she (PW8) was already living there with her siblings. PW8 portrayed the Plaintiff as a benevolent brother who looked after the welfare of his siblings who included the Defendant.

From the evidence adduced by both sides, it is not in dispute that the Plaintiff is the registered proprietor of the plots formerly styled as 14, 57, 61, 62 and 63 on Block 3 - Kashari - Nkonkonjeru. The plots have since 2002 been sub-divided into several smaller plots as described in paragraph 3 to the plaint. It is also not in dispute that prior to registration, the Plaintiff bought these plots from the Omugabe of Ankole in the late 1960s.

Under Section 59 of the Registration of Titles Act (Cap 230). A certificate of title is conclusive evidence that the person named in the certificate as the proprietor and in **Kampala Bottlers vs Damnico (U) Ltd** Supreme Court civil Appeal 22/2992 and **Katarikawe vs Katwiremu and Another [1977] HCB.18,**

production of a certificate in the names of a party is sufficient proof of ownership of the land in question except for fraud.

Both counsel in their formal submissions did not dispute the fact that the Plaintiff is the registered proprietor of the suit land and on the basis of section 59 of Cap 230 and case law cited above, the Plaintiff is the owner of the suit land by virtue of being a registered proprietor. Issue No. 1 is resolved in favour of the Plaintiff but I should hasten to add that issue number 2 is about fraud. So the conclusion on issue No.1 is subject to my finding on issue No. 2.

Did the Plaintiff obtain registration of plot 14 and the rest of the suit land without permission or consent of the Defendant and with fraud?

Mr. Bwanika, learned counsel for the Plaintiff asked me to find no fraud because the Defendant had not adduced any evidence to pursue fraud on the part of the Plaintiff. He referred me to a number of authorities for the proposition that fraud must be specifically pleaded and proved. That the counter-claim, apart from alleging fraud, no evidence was adduced to prove it. Learned counsel asked me to find that the Defendant who participated in the subdivision of the plots on behalf of the Plaintiff is estopped from crying foul.

Mr. Keneth Kakuru, learned counsel for the Defendant disagreed and invited me to find that the Plaintiff acted fraudulently to defeat the equitable interest of the Defendant in the suit property. It was the Defendant's counter-claim that the Plaintiff acted fraudulently when he re-transferred plot 14 into his names yet the said plot 14 had been given to him (defendant) as his share of profits in the company and in further exchange

of the plot he gave to the Plaintiff that was situate at Makerere. The Defendant further testified that he was entitled to retain the land originally comprised in plots 57, 61, 62 and 63 on Block 3 - Kashari which were exchanged for his shares in the companies owned by the Plaintiff. The Defendant relied on his protest to the Plaintiff dated 12/2/2008 which was exhibit DW1.1. where he complained that plot 14 was to remain his and that the Plaintiff was supposed to survey off only his house and leave the rest of the land to the Defendant. In the same letter, he complains that plots 57, 61, 62 and 63 were supposed to be transferred to him (Defendant) as the price of his shares in the companies. The Defendant further relied on exhibit DW1.2, which is the letter from the Plaintiff responding to the Defendant's exhibit DW1.1, in which the Plaintiff denies giving the Defendant land at Nkonkojeru comprised in plots 57, 61, 62 and 63. In that exhibit DW1.2, the Plaintiff states that he abandoned the idea of giving the Defendant land at Nkonkonjeru and the letter he had written to that effect was never dispatched once he changed his mind. Apparently, the Defendant obtained a copy of that letter which the Plaintiff denied ever dispatching and at one time attempted to tender it but the Plaintiff objected. The court upheld the objection since the said photocopy apart from not being certified, was apparently stolen from the Plaintiff's office and this court could not render a stolen document legitimacy by placing it on record to assist the one who picketed the same. It could only be an exhibit in a criminal case.

It is trite law that allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is

required. **R.G. Patel vrs Lalji Makanji (1957) E A . 3 1 4**, followed.

Fraud must be attributable to the transferee directly or by implication. The transferee must be guilty of some fraudulent act or must have known of such acts by somebody else and taken advantage of such act. See Wambuzi C.J. (as he then was) in **Kampala Bottlers vrs Damanico (U) Ltd** (Supra).

What then is fraud? Black's Law Dictionary defines fraud as an intentional provision of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

Did the Plaintiff induce the Defendant to rely on his lies to part with the title to plot 14; did he also through lies induce the Defendant to lose his equitable rights or indeed legal rights in plots 57, 61, 62 and 63?

I shall start with the history of plot 14. It is not in dispute that it was bought by and owned by the Plaintiff. The Defendant built a house on it.

According to the Plaintiffs testimony, he authorized the Defendant to transfer plot 14 into his (Defendant's) names on 11/6/1985 vide exhibit "P5" because of the political climate or instability at the time. The Plaintiff had all along from the 1970 worked with the Defendant as a trusted brother and when there were political upheavals in 1985, the Plaintiff secured him property including plot 14 to his brother the Defendant and he went to exile in the United Kingdom. PW2 who is a family friend to the two brothers confirmed that the Plaintiff trusted the Defendant a great deal while PW1 Dr. Mayanja G. W. who had known the two brothers in the

1960s and lived in the U.K. for a long time was positive that the Plaintiff ran away from Uganda and met him in the U.K. because his (Plaintiff's) life was threatened in Uganda.

The Defendant disagrees and in his testimony contended that by 1985, the Spear Group of Companies were making profits and when dividends were declared, the Defendant was given plot 14 as his share and the Defendant faults the Plaintiff for indicating in exhibit "P5" that the transfer was a gift and not the share of profits. The Defendant calls this fraud.

How did the Plaintiff get re-registered on Plot 14 as proprietor and how did the Defendant surrender the title?

In his testimony, the Plaintiff stated that he redeemed the title to plot 14 from the Defendant in 2007 in consideration of a steyr truck and signed an agreement (exhibit P. 10). The Defendant took the steyer truck and surrendered the title and signed transfer forms contained in exhibit P.11. Thereafter, the paper work was processed by Karuhanga John (PW6) a Registrar of Titles who effected a transfer back into the Plaintiff's names. No case of fraud or protest was made to PW6 at the time he did the re-transfer into the Plaintiff's names.

I should make an observation here that though this was a dispute about land, both parties took off a lot of time to bring in evidence of disputes in the companies which I, with respect, did not find very helpful.

Companies transact business in accordance with their memorandum and Articles of Association and in compliance with the provisions of the Companies Act Cap. 110. The titles in dispute are not registered in any company name and no company resolutions or minutes of company meetings were tendered in this suit.

Registered companies declare dividends by law and file returns that show in summary the business transacted in that year and the approval of the activities of the directors by the Annual General Meeting.

It is in light of this that I find the Defendant's evidence in support his counter claim in regard to plot 14 rather wanting. If a company declares dividends and decides to pay the Defendant those dividends by way of giving him land comprised in plot 14 - Nkonkonjeru, then it should be minuted in the company records and a company resolution is required to validate that transaction. However, it is worth noting that plot 14 was never company property at any one time. How then could it be used to pay a shareholder' dividends? If indeed the Defendant was given plot 14

- Nkonkonjeru as his share of the bumper profits of the Spear Group of companies, why did he sign it off back into the names of the Plaintiff? Exhibit P. 10 shows that the Defendant sold plot 14 to the Plaintiff and in return got a steyr truck. The Defendant says the truck was defective although the Plaintiff asserts that the Defendant was careless and could not maintain it and he (Plaintiff) decided to replace the steyr truck with a second hand Mercedes Benz UAB 089C as per exhibit DW1.8. The Defendant signed all the agreements acknowledging receipt of the steyr truck and the subsequent Mercedes Benz car. Where is the fraud that the Defendant particularizes in his counter claim?

I was asked by counsel for the Plaintiff to find that in view of Annexure 11 to the plaint which is exhibit "P7" an agreement was reached on 11/11/94 that the Defendant takes plot 14 and that the Plaintiff only survey off the plots comprising his house and that of Eriabu Wavamuno. I have already faulted these series of minutes which are not approved by the company and are not part of the returns of the various companies operated by the

Plaintiff and his brothers. There were a series of meetings held in 1994 to resolve the conflicts between these two brothers but none of the meetings resolved the impasse. If I was to take exhibit "P7" for what it is, I would say that it was overtaken by the subsequent agreement made on 27/12/2007 vide exhibit "P10" and the signing of transfer forms vide exhibit P11 by the Defendant.

The Defendant should have resisted signing exhibits P. 10 and P.11. in 2001 to give away what had been given to him in November 1994. Moreover, how could the agreement of November 1994 give the Defendant what was already his as his share of dividends of 1985?

These two brothers were conducting company business like family issues and instead of sitting in company premises to discuss company issues, they would call friends at their homes to try and patch up making it difficult to tell whether they intended to create legal relations or not.

The Defendant had obtained registration as proprietor of plot 14 when the Plaintiff signed transfer forms to that effect in 1985, in 2007, the Defendant signed transfer forms taking ownership back to the Plaintiff and also signed an agreement where he sold the said land (plot 14) to the Plaintiff and he (Defendant) acquired a steyer truck. Where are the acts of fraud or dishonest dealing by the Plaintiff for this court to find for the Defendant?

First of all, I do not find any fraud in these transactions and secondly, I do not find any fraudulent conduct on the part of the Plaintiff in regard to the transactions on plot 14.

I now turn to plots 57, 61, 62 and 63.

Exhibit "P2" carries instructions from the Plaintiff to the Defendant to cause subdivision of plots 14, 57, 58, 61, 62 and 63. The

Defendant complied and contracted John Karangwa (PW5) a Land Surveyor to do the job.

It was the Plaintiff's evidence that he wanted the sub-divisions done so that he could sell them while the Defendant contended that the sub-divisions was for enabling the Plaintiff gain access to his plot 58 at the back which he wanted to sell. What is strange is that the Defendant was known to PW5 and was acting as agent of the Plaintiff and passed on all payments for the work that was done. PW5 took both the Plaintiff and the Defendant to the site to see the sub-divisions. PW5 was told the plots were to be sold and even assisted in getting some buyers like Mrs. Rose Sabiiti (PW7) who bought one of the plots and money was banked on the Plaintiff's account.

The Defendant who was the agent of the Plaintiff did not complain to PW5 and PW6 that the Plaintiff was cheating him. The Defendant even handed over the new titles to 3 of the new buyers of the sub-divided plots yet he complains in his counter claim that the Plaintiff sub-divided the plots in order to cheat him and even sold some of them without the Defendant's consent. I would find it not just strange but very ridiculous for the Defendant who is not the registered proprietor of land to take the titles to the Land office, engage a surveyor on behalf of the registered proprietor, pay the surveyor with funds from the registered proprietor, take the surveyor to the site to do the work, collect the sub-divided titles, participate in selling some plots by handing titles to the buyers and then turn around to say he has been cheated or defrauded. To believe the Defendant would be an affront on common sense and logic.

Under cross-examination, the Defendant concedes it is the Plaintiff who instructed him to collect the land titles from Mbarara office and that is how

he came to possess and retain them.

If the Plaintiff was a fraudster, why would he engage the person he intends to cheat in the transaction and even ask him to collect the ready titles, keep them, look for buyers etc.

I was asked to find that the Defendant had an equitable interest in the disputed plots. Frankly, I am not persuaded in the least by this submission. The plots in question did not belong to Spear Group of Companies but belonged to the Plaintiff. If the Plaintiff wanted to give them to the Defendant in exchange for his shares in the companies, then a company resolution duly registered by the Registrar of Companies should have been filed and the Plaintiff should have signed transfer forms to that effect. I have already alluded to the casual manner in which the parties attempted to solve their company disputes and its on this basis that the Defendant sought to own registered land by having a copy of a letter allegedly written by the Plaintiff which was not copied to him or addressed to him to say he takes all the land at Nkonkonjeru as the price of his shares in the company. The land did not belong to the said companies. The companies could not transfer title to the Defendant for land they did not own.

The provisions of the Companies Act provide for how shareholders can leave a company and how shares are sold. The Articles of Association are more detailed on this. Before me is not a company cause but a land dispute founded on fraud.

If the Defendant felt very strongly that he had been mistreated in the said companies, he should have followed the companies Act to protect his interests.

On the basis of the authorities of **R.G. Patel vs Lalji**

Maleanji (Supra) and **Kampala Bottlers vs Damanico (U) Ltd** (Supra). The evidence adduced by the Defendant in respect of the counter claim falls short of the standard of proof required not only to prove an ordinary civil suit but more importantly, to prove fraud. No evidence has been adduced to attribute any act of fraud on the part of the Plaintiff in regard to the counter claim. The Defendant was at all material times the agent of the Plaintiff in processing the transfers and sub-divisions of the suit land. In fact, if I was to find that any fraud was committed, (which I have not) I would hold that the Defendant was part and parcel of the same on account of his actual and physical participation in the process complained of. Consequently, I answer the 2nd issue in the negative with the result that the counter claim fails.

The last issue concerns remedies. I was asked by learned counsel for the Plaintiff to award the Plaintiff damages of 100 million for loss of earnings from the plots since the Defendant confiscated the titles and for the inconveniences, humiliation and financial embarrassment. I was further asked to award the Plaintiff costs of the suit, declare the lawful registered proprietor and issue a permanent injunction against the Defendant from trespassing upon the Plaintiff's land.

On the other hand, learned counsel for the Defendant prayed for dismissal of the suit, a declaration that titles sub-divided from plots 57, 61, 62 and 63 belong to the Defendant and that the Plaintiff is only entitled to the plots on former plot 14 where his house and that of the late Eriabu stand.

He also prayed for costs.

I have already dealt at length with the issue of ownership in my analysis when resolving issues one and two above. I need not repeat the same

here. In view of my conclusions on those two issues, I declare that the Plaintiff is the lawful registered proprietor of the suit property and is entitled to quiet possession and enjoyment of the same. The Defendant has no legitimate claim to the suit land and for this reason has no justification to lodge caveats on that land. A permanent injunction hereby issues to restrain the Defendant from trespassing upon the suit land.

As regards general damages, the law is that they must be proved. It is clear from the Plaintiff's evidence that he transferred graves of their relatives from the suit land to pave way for its subdivisions into smaller plots for sale and it is not in dispute that after the Defendant had processed the sub-divisions, some sales took place. This process was halted when the Defendant made an adverse claim to the suit land. As a result the Plaintiff had to file this suit to challenge the Defendant's claim and to have the titles back. I was asked to award 100 million to compensate for humiliation, inconvenience and financial embarrassment arising from the confiscation of the said titles. The defence did not address me on this claim. The last sales were in November 2007 and I have found that the Plaintiff is entitled to have all titles subdivided from the original plots (the disputed land). Would 100 million be reasonable if the Plaintiff is to have back all his titles and proceeds with the sale? I find 100 million on the higher side. Given the Plaintiff's standing, from his own testimony, as Chairman of a Group of Companies, honorary counsel of Hungary, honorary doctorate and professor, I hereby award him general damages for loss of earnings from the confiscated titles and also for inconveniences and humiliation which I fix at Shs. 40 million. I have awarded 40 million for the reasons that the Plaintiff

shall have his titles back and resume sale of his land which has acquired a higher value than in 2007 when the first sales were made.

As the Plaintiff has succeeded in this suit and the counterclaim is dismissed, the Plaintiff shall have costs of the suit.

Lawrence Gidudu
J u d g e
22/4/2010

Parties in court

C. Bwanika for Plaintiff

K. Kakuru - absent

Tushemereirwe - clerk

Defendant

Mr. Kakuru is sick

Court:

Since the Defendant is in court I shall deliver the judgment.

Lawrence Gidudu
J u d g e
22/4/2010