

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO. 497 OF 2005

1. NABANOBA DESIRANTA)
2. NAMBOOZE EDRISA) ::::::::::::::::::::::::::::::: **PLAINTIFFS**

VERSUS

1. KAYIWA JOSEPH)
2. KASSAIJA CHRISTOPHER) ::::::::::::::::::::::::::::::: **DEFENDANTS**

BEFORE: HON. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The Plaintiffs brought this suit against the Defendants for an order of cancellation of the 2nd Defendant's title to the suit property comprised in Mailo Register Busiro Block 379 Plot 10, Bunamwaya measuring approximately 20 acres which was said to be illegally and fraudulently registered in the names of the first Defendant who subsequently transferred it into the 2nd Defendant's name.

During the scheduling conference the following facts were agreed:

- (1) That the Plaintiffs and the 1st Defendant are children of the late Ezra Busulwa Lumala who died on 10th April 1968.
- (2) That at the time of his death, the late Ezra Busulwa was the registered proprietor of land comprised in Busiro Block 379 Plot 10 at Bunamwaya.

- (3) That the Plaintiffs as beneficiaries to the estate of the late Busulwa Lumala authorised the 1st Defendant to administer the estate of their late father.
- (4) The 1st Defendant got registered as proprietor of Busiro Block 379 Plot 10 and sold the same to the 2nd Defendant who also transferred the land into his own names and got registered on 27th February 2004.

The Plaintiffs averred that the fact that they allowed the 1st Defendant to apply for letters of administration to administer the estate on their behalf was to enable 1st Defendant alienate portions of their share in the estate. However the 1st Defendant did not do as agreed but instead registered the land in his names and subsequently transferred it to the 2nd Defendant without any recourse to the Plaintiffs. The Plaintiffs averred that in April 2008 the 2nd Defendant threatened to evict them from the land which they lawfully inherited from their father and on which they have resided for over 50 years. Lastly Plaintiffs averred that the Defendants were at all material times aware of their entitlement in their father's estate according to his last wishes and written will and that their actions were therefore fraudulent to defeat the Plaintiffs' interest.

The Plaintiffs pleaded the following particulars of fraud:

- (a) Registration of the 1st Defendant as proprietor without obtaining a grant of Letters of Administration to the deceased's estate.
- (b) Representation of the 1st Defendant as appointed administrator in law and thereby transferring the land to the 2nd Defendant.
- (c) Transferring of the land by the 1st Defendant to the 2nd Defendant without authority from the Plaintiffs as beneficial owners yet well knowing of their claims.

Wherefore the Plaintiffs prayed for the following orders.

- (i) Cancellation and rectification of the certificate of title of the suit premises.

- (ii) Permanent injunction restraining the Defendants from interfering with the Plaintiffs' quiet possession of the suit land.
- (iii) General Damages for pain and suffering and costs of the suit.

The 1st Defendant in his written statement of Defence admitted that he was nominated by the Plaintiffs to apply for Letters of Administration and that the Plaintiffs were children of the late Ezra Busulwa Lumala. The rest of the Plaintiffs' claims were denied. He averred inter alia, that as a registered proprietor he was entitled to transfer the suit property as he wished.

The 2nd Defendant on his part averred that he purchased the suit property from the 1st Defendant for value after carrying out a search from the registry of titles and satisfying himself that the 1st Defendant was the registered proprietor thereof. He averred further that he made inquiries from the local authorities of the area where the suit was about the 1st Defendant's ownership before entering into sale agreement with him.

Agreed Issues:

- (1) Whether the 1st Defendant was validly registered as proprietor of Busiro block 379 Plot 10 situate at Bunamwaya.
- (2) Whether the 2nd Defendant is a bona fide purchaser for value.
- (3) What remedies are available to the parties if any.

EVIDENCE ADDUCED

To prove the above issue the Plaintiffs adduced the evidence of four witnesses including the Plaintiffs themselves. The Defendants also relied on the evidence from four witnesses, including themselves.

In summary the evidence adduced by the Plaintiffs ran as follows:-

Yudaya Nackyenga Kasamba Pw1 testified that she got to know the Plaintiffs in the year 2000 when she developed interest in land at Bunamwaya where a lady called Mariam Kizza had a Kibanja. She came to know the Plaintiffs as daughters of the late Busulwa and Mariam was their step mother. When she agreed to pay the purchase price she insisted on meeting the owners of the land she was buying whereupon she was introduced to the Plaintiffs as the owners of the suit land. The Area Local Council Chairperson Mr. Segawa and the neighbours confirmed that the Plaintiffs were the owners of the land and they told him how the Plaintiffs got the land through their father's will. The suit land was 20 acres and were given to 4 girls but two had died leaving the Plaintiffs. She stated that after getting the truth she paid the purchase price for the Kibanja in the presence of the LC I Chairperson, the Defence Secretary and Secretary for Women. Thereafter, she took possession of the Kibanja and planted thereon crops. However in November 2005 problem arose when she was informed that the land had been sold by the 1st Defendant to the 2nd Defendant who was threatening to evict all the occupants. She informed the Plaintiffs about the matter but they said they had never sold the land to the 2nd Defendant or authorised the 1st Defendant to do so.

Christopher Kawesi 79 Pw2 years old testified inter alia that he knew the Plaintiffs because he had lived with them when he was a student and their deceased father was his guardian. Before his death the deceased asked him to write for him a will which he did. The deceased had three pieces of land – one in Kyadondo, one in Bunamwaya and another in Katale Busiro. The deceased distributed the land as follows: Kyadondo land was given to Kawuma and Kayiwa. The land in Busiro was given to Zikula Batesaki his sister, Nabanoba his daughter, Nakakawa his daughter, Nambooze his other daughter and Nasozi his daughter. Those were 20 acres.

The deceased left 5 acres as for burial ground. In Busiro there were two pieces of land. The other piece the deceased gave to his son Busulwa who later died and his successor called Kawuma also died. Nasozi and Zikala also died. He continued that Ezra Busulwa made two copies of the will and gave one copy to Polycarp and remained with one copy of the will. The will was read during Ezra Busulwa's burial and no one objected to its contents. He concluded that in the will the late Busulwa gave the 20 acres of land to his sisters and the four daughters Nabanoba, Nasozi, Nambooze and Nakakawa. He stated that he knew the contents of the will because he was the one who wrote it and because he had never left that village and had been in touch with the Plaintiffs. He swore statutory declaration exhibit P3 because the will had been hidden by the 1st Defendant.

Desiranta Nabanoba Pw3 80 years old testified inter alia, that the 1st Defendant was their brother. She testified that the suit land was given to them by their deceased father and that is where she is staying together with the 2nd Plaintiff who is her follower. She testified that the deceased gave the boys land in a different place from theirs. However the 1st Defendant decided to sell off the suit land without their authority or consent. They got information about the sale from their squatters. After learning about the unlawful sale she contacted the lawyer Kiiyimba who wrote to the person who had bought the same. She concluded that they gave the 1st Defendant consent to obtain Letters of Administration to look after the estate but not to sell the suit land.

Edisa Nambooze Pw4 70 years old testified that Nabanoba was her elder sister while Kayima Joseph, the 1st Defendant was their half-brother. She testified that their father the late Ezra Busulwa made a will bequeathing the suit land to them. Subsequently they gave the 1st Defendant authority to apply for Letters of Administration so that he could transfer the suit land into their names. However after getting Letter of Administration, the 1st Defendant decided to fraudulently register the suit land in his names before selling to the 2nd Defendant.

In his defence Kayiwa Joseph Dw1 denied that the suit land was bequeathed to the Plaintiffs by the deceased. He stated that the 20 acres belonged to him and he was right to sell it to the 2nd Defendant as the administrator of the deceased. Mariam Kizza Dw2 testified that she was the

wife of the late Ezra Busulwa, and that she knew the land in dispute and that the Plaintiffs had given the 1st Defendant responsibility to look after the suit land. Later on she came to learn that the 1st Defendant had sold the suit land to the 2nd Defendant.

Male Moses Dw3 gave a short evidence in which he stated that there was no problem with the sale of the suit land made by the 1st Defendant because he had been given responsibility to oversee the estate of his grandfather by the Plaintiffs who were his aunties. He concluded that the 1st Defendant had the power to sell the suit land.

Lastly Christopher Kassaija Dw4 testified that he was a bona fide purchaser for value without notice. He stated that before purchasing the suit land he verified the title and was assured by the neighbours that the 1st Defendant was the real owner of the suit land.

RESOLUTION OF ISSUES

Issue No. I: Whether the 1st Defendant was validly registered as the proprietor of Busiro Block 379 Plot 10 at Bunamwaya.

From the evidence on record, particularly evidence of Christopher Kawesi Pw2 aged 79 years testified that the late Ezra Busulwa, the father of the Plaintiffs and the 1st Defendant died in 1968. Before his death the deceased who was also his guardian, requested him to write for him a will which he did. In that will, the deceased bequeathed Land in Kyadondo to Kauma and the 1st Defendant while the suit land was given to Nabanoba Desiranta, Nambooze Edisa, Nakakawa, Nasozi and Zikula Batesaki. 5 acres of land was left as burial ground. He testified that during Ezra Busulwa's burial, the said will was read after the funeral and the 1st Defendant never objected to the contents of the will giving the Plaintiffs the suit land. Mariam Kizza Dw2 in her evidence confirmed that the suit property was given to the Plaintiffs who in turn gave responsibility to the 1st Defendant to look after it.

The said will could not be traced allegedly because it was said to be in the custody of the 1st Defendant who could not produce it because of his personal interest in the suit property.

However Pw2 swore a statutory declaration (exhibit P3) to the extent that he had written the said will. Looking at the contents of the declaration I do believe that the witness was familiar with the same to enable him remember the contents of the will after a very long time. The witness stated that ever since drafting the will he has lived in the same village. I find him a credible witness to testify about the will and the ownership of the suit property.

The Plaintiffs testified that they gave the 1st Defendant consent to apply for Letters of Administration to look after the estate but they did not authorise him to sell their land. That authority was merely to enable him oversee the estate and transfer the suit land into their names.

LAW APPLICABLE

It was the contention of the defence that upon getting authority to apply for Letters of Administration the 1st Defendant was entitled to deal in the suit property in the way he did by registering it in his names and selling to the 2nd Defendant.

Section 25 of the Succession Act clearly states that all property in an intestate devolves upon the personal representative of the deceased upon trust for those persons entitled to such property.

The import of the above section is that upon receipt of Letters of Administration or probate the 1st Defendant's duty was to transfer the suit land into the names of the beneficiaries and to ensure that they got their own certificates of titles. To the chargin of the Plaintiffs, the 1st Defendant never did the above but instead transferred the land into his own names and sold it to the 2nd Defendant. The Plaintiffs even in their lay status had a better appreciation of the law where they were emphatic that they never authorised the 1st Defendant to transfer the ownership of the suit land into his names and to sell it. In her own words the 1st Plaintiff said:

“We gave him consent to obtain the Letters of Administration to look after the estate but when you get the Letters of Administration, does it mean that you sell?”

The 2nd Plaintiff made a similar observation:

“We went to the office of the Administrator General because we wanted to transfer the land from our father’s name to our names. Joseph Kayiwa was the one who took us there as you see we are old women. We did not know that he was going to cheat us when he took us to the Administrator General’s office. We gave him authority to obtain Letters of Administration but we did not authorise him to sell our land. He was only to oversee the estate because we believed that he was going to have the suit land transferred into our names and he would bring us our title.”

By transferring the land into his names and selling it to the 2nd Defendant, the 1st Defendant contravened Section 25 of the Succession Act making his registration invalid.

The procedure for transferring proprietor of land from the deceased person to his or her personal or legal representative as provided under **Section 134 of the Registration of Titles Act** was also contravened by the 1st Defendant.

The above section provides as follows:-

“Upon receipt of an office copy of the probate of any will or of any letters of administration or of any order by which it appears that any person has been appointed the executor or administrator of any deceased person, the Registrar shall, on an application of the executor or administrator to be registered as proprietor in respect of any land, lease or mortgage therein described, enter in the Register book and on the duplicate instrument, if any when produced for any purpose, a memorandum nullifying the appointment of the executor or administrator and the day of the death of the proprietor when the day can be ascertained, and upon that entry being made that executor or administrator shall become the transferee and be deemed to be the proprietor of such land, ..., or of any such part of it as then remains unadministered and shall hold it subject to the equities upon which the deceased held it.”

In brief the above section provides as follows:-

- (1) The Applicant must first obtain an office copy of the probate of the will or of Letters of Administration. That means that the Applicant must have petitioned a competent court for the grant of probate or Letters of Administration and the same must have been granted before he goes to the Land Registry to have the deceased's land transferred into his or her names.
- (2) The Applicant must present the probate or Letters of Administration to the Registrar together with an application to change the current ownership of the land from the deceased into his own names.
- (3) The Registrar enters in the register book and on the duplicate certificate a memorandum notifying the appointment of the executor or administrator.
- (4) Upon that entry being made, the executor or administrator becomes the transferee and is deemed the proprietor of such land or such part as remains unadministered.

In the instant case the 1st Defendant was appointed administrator on 22nd September 2005 which was five years after he was registered as proprietor.

In the absence of Letters of Administration as of the 31st October 2000 in favour of the 1st Defendant, his registration was neither proper nor legal as it was done contrary to **Section 134 (1) of the Registration of Titles Act**. Therefore the acts of the 1st Defendant was fraudulent and as such he was not validly registered as proprietor of the suit land.

Secondly transfer into the executor or administrator's name does not mean that the land devolves upon the personal estate of the executor or administrator such that he can do whatever he wishes with the land without recourse to the interest of other beneficiaries. His or her duty is to hold the land in trust for this beneficiaries: See **JONAH SENTEZA KANYEREZI & Another v The**

Chief Registrar of Titles & 2 Others, High Court Miscellaneous Application No. 919 of 1997
(Unreported).

In view of the above finding I find that the 1st Defendant was not validly registered as proprietor of Busiro block 379 Plot 10, the suit land situate at Bunamwaya. Hence his title was void as per **Section 77 of the Registration of Titles Act** for fraud.

Issue No. 2: Whether the 2nd Defendant is a bona fide purchaser for value.

Section 181 of the Registration of Titles Act is to the effect that only a bona fide purchaser for value is protected under the Act in any action of ejection, or for recovery of damages or for deprivation of the estate.

A bona fide purchaser is defined in Black's Law Dictionary 8th Edition at page 1271 as follows:-

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has good faith paid valuable consideration without notice of prior adverse claims.”

The above definition should be considered together with **Section 136 of the Registration of Titles Act** which provides that;

“Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land, lease or mortgage shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to

the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

According to the Plaintiffs the 2nd Defendant was affected by actual or constructive notice and was dishonest and fraudulent in failing to inquire into the transaction. This was denied by the 2nd Defendant.

In Fredrick Zaabwe v Orient Bank Ltd. & Others, SCCA No. 4 of 2006 Hon. Bart Katureebe JSc cited Black’s Law Dictionary to define fraudulent as “To act with intent to defraud means to act wilfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another or bringing about some final gain to oneself.”

The Learned Judge also cited KAMPALA BOTTLERS LTD. V DAMANICO (U) LTD, SCCA No. 22 of 1992:

“Fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.... I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.”

By analogy proof of fraud requires evidence to show that the 2nd Defendant was fraudulent or had such knowledge of fraud and took advantage of it.

It was contended for the Plaintiffs that the 2nd Defendant had constructive or actual notice of the Plaintiffs’ interest and therefore his title was affected by the said interest and as such that knowledge was to be imputed as fraud. It was contended further that the 2nd Defendant did not bother to inquire into the ownership of the suit property for fearing to find the truth or that the results of the inquiry might operate against his interest, having had reasonable notice of the Plaintiffs’ occupation of the suit land.

I would like to point out that before one enters into a transaction involving purchase of land very serious inquiries should be done to establish what is on the ground. This is so because our land tenure system is full of contraverses. Therefore one has to be sure about what he or she is purchasing. In most cases it would involve using the area local authorities to help establish who are in occupation of the land and their interests. In the instant case, the sale agreement was done without involving the local area Chairperson. That procedure seems to be contrary to the standard procedure in that area according to Yudaya Kasamba Pw3 who testified inter alia that before buying land in that area she made inquiries before the LC I Chairperson and the neighbours. The fact that the 2nd Defendant opted to enter into the transaction without involving neighbours and local area authorities would imply that he had knowledge of the existence of the Plaintiffs' interest but decided to ignore because of reasons best known to himself. As the law stands a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a bona fide purchaser without notice. See **UPTC v Abraham Katumba [1997] IV KARL 103**. Here since 2nd Defendant failed to make reasonable inquiries of the persons in possession as such his ignorance or negligence formed particulars of fraud: See **Taylor v Stibbert [1803 – 13] AIIER 432**.

In this case the 2nd Defendant allegedly bought the suit property which was in occupation of the Plaintiffs. There was therefore physical encumbrance which he ought to have taken notice thereof. He was therefore guilty of gross negligence or deliberately omitting to make proper inquiries about the status of the property. Therefore his negligence was particular of fraud on his part.

Another problem with the transaction was the value of the suit land. Christopher Kassaija in his testimony stated inter alia, that he was to buy the land at a total price of 50,000,000/=. However he realised later that he did not have enough money. So he entered into a mutual understanding with Mr. Kayiwa and paid him Shs.13,000,000/= for the 20 acres on condition that he would pay him the balance later. However in the Sale Agreement (exhibit P7) the purchase price was indicated at 13,000,000/= and did not show that there was unpaid balance. That was clear evidence that Kassaija was deceitful and fraudulent.

Thirdly, it was the testimony of the 1st Defendant that he sold the suit land to the 2nd Defendant at 50,000,000/= of which he received Shs.45,000,000/=. However the valuation documents showed that the 2nd Defendant had paid Shs. 6,000,000/= which both Defendants acknowledged to be false declaration. This false declaration which caused financial loss to the Government clearly casts a shadow of doubt about the genuineness of the Sale Agreement. It further casts doubts on the credibility of the two Defendants.

For the above reasons I find that the alleged transaction was surrounded by frauds attributable to the both the transferee and transferor. As a result the 2nd Defendant does not qualify to be a bona fide purchaser for value without notice. The transaction was concocted to deprive the elderly ladies of the suit property which legally belonged to them by their birth rights.

Issue No. 3: Remedies available to the parties.

The Plaintiffs prayed for the following orders:-

- (a) Cancellation and rectification of the title of the suit property.
- (b) Permanent injunction restraining the Defendants from interfering with the Plaintiffs' quiet enjoyment of the suit land.
- (c) General Damages.
- (d) Costs of the suit.

Having answered the 1st and 2nd issue in favour of the Plaintiffs it goes without saying that the illegal entries in the certificate of title and entries in the register book be rectified by cancelling out the name of the 2nd Defendant and replacing it with the names of the Plaintiffs as beneficiaries of the suit land. This is followed with a permanent injunction restraining the Defendants from interfering with the Plaintiffs' quiet enjoyment of the suit land.

As for general damages, the law is strict that it has to be pleaded and proved. Though pleaded there was no proof of eviction. Infact it was the evidence of the Plaintiffs that they were not dispossessed. The 2nd Defendant merely threatened to throw them out of the suit land. However, there was evidence that the Plaintiffs suffered loss and injuries. They did suffer psychological and physical suffering because it was their own brother who was trying to defraud them. They lived under constant threats of eviction. This land was granted to them by their late father and it was the only thing which was attaching them to their beloved father. They had a very serious sentimental attachment to the suit property. Those were compounded by the fact that they are very old ladies. It was very harsh to subject them to the rigors of litigation. For the above reasons I find that they are entitled to general damages. Taking the fact that assessment of general damages is not an exact science and there is no Mathematical formula which court can use to determine the amount, I find that considering the conduct of the 1st Defendant and the circumstances I have outlined above, a figure of 10,000,000/= (ten million) by way of general damages would be reasonable. It is accordingly awarded.

The Plaintiffs are further entitled to costs of this suit. I so order.

HON. JUSTICE RUBBY AWERI OPIO
JUDGE

15/2/2010

16/2/2010

Mr. Katutsi for Defendants

Plaintiffs present.

Judgment read in Chambers and signed.

**HON. JUSTICE RUBBY AWERI OPIO
JUDGE**

16/2/2010