

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 01 OF 2001

JULIET

AIKO.....PLAINTIFF

VERSUS

OBURE JOSEPH.....DEFENDANT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

After conclusion of the scheduling conference on this matter, learned Counsel for the Defendant Kwemara Kafuuzi raised a preliminary objection (PO) that the plaint does not disclose a cause of action as the Plaintiff has no *locus standi* to challenge the Defendant's title. He contended that the Plaintiff is not a person deprived of any land by fraud or a mortgagee or lessor as to be entitled to bring an action against the Defendant under section 176 of the Registration of Titles Act (RTA). He cited the case of **Kampala Bottlers Ltd V Damanico (U) Ltd SCCA 22 OF 1992** to support his contentions. He argued that the person to sustain an action under section 176 of the RTA must have been deprived of land. He maintained that according to the prayers in the plaint, the Plaintiff seeks to recover land. He contended that the Plaintiff had however not pleaded any facts showing that the land was hers and was then taken away from her, or that she bought this land in her own name, or that she is a beneficiary from an estate. Counsel submitted that the Plaintiff has no nexus with the suit land at all, in short, that she is not a person deprived of land. He contended that this is not an action of tracing but an action of recovery of land yet the Plaintiff is not linked to the land. He submitted that the matter looks more like an act of settling scores rather than a genuine action for recovery of land considering that the title was received in 2006 but the Plaintiff is just raising the matter now. He prayed court to strike out the action with costs.

Counsel Sulaiman Musoke for the Plaintiff opposed the PO contending that it was misconceived and should be rejected to allow the parties proceed with the case on merit. He argued that section 176 of the RTA gives various grounds upon which ownership of title can be challenged and one such instance is fraud. He argued that in this case the Plaintiff had pleaded fraud and is yet to adduce the evidence which will be done when the suit is allowed to proceed. He contended that it is pre mature at this stage to determine whether there was fraud or not unless you call for evidence. He submitted that the fact that the Defendant has a certificate of title is not enough to guarantee that he is the absolute owner in circumstances where fraud is pleaded by the Plaintiff. He stated that the scheduling conference indicates that these people were at one time together as lovers in the same house, and the fact is not denied by the Defendant. He stated that there is a lot of information which can be revealed when the

case is heard, and that the Written Statement of Defence (WSD) does not reveal any relevant facts to rebut the allegations raised in the plaint. He contended that the fact that the Defendant obtained a certificate of title in 2006 does not bar her from raising the claim in 2011 as she has not yet exceeded the twelve years limitation period. He contended that stopping the Plaintiff from raising her case against the Defendant at this point would tantamount to condemning her unheard which action would deprive her of her legal and equitable rights to bring a cause of action. He submitted that the annexures to the WSD including bank statements show that there was exchange of money from the Plaintiff to the Defendant. He submitted that the matter is serious involving property worth over U. Shs. 50,000,000/= and it should not be determined by merely submitting a PO. He prayed court to overrule the PO and assist the parties to resolve the case on merit irrespective of who eventually wins it.

Counsel Kwemara Kafuuzi in rejoinder dismissed Counsel for the Plaintiff's submissions as emotional devoid of any legal basis. He contended that court at this point is not looking at the merits of the suit but has to look at the proceedings. He reiterated that the case was not properly before court. He cited the case of **Auto Garage V Motokov [1971] EA 514** which highlights the criteria for establishing whether there is a cause of action. He maintained that for one to bring an action for fraud, one must have a right to claim fraud and contended that the WSD denies fraud and that should be all.

I have carefully considered the pleadings and Counsel's submissions, together with the authorities on this matter.

The question to address is whether the plaint discloses a cause of action. A cause of action means every fact which is material to be proved to enable the Plaintiff to succeed. It has been established through case decisions that in order to prove that there is a cause of action, it is necessary for the Plaintiff to establish in the plaint three essential elements, namely that:-

- (a) The Plaintiff enjoyed a right;
- (b) The right has been violated; and
- (c) The Defendant is liable.

If all the three elements are present in the plaint then a cause of action is disclosed and any defect or omission can be put right by amendment. This is the legal position as held in **Tororo Cement Company V Frokina International Ltd Civil Appeal No. 2 of 2001**; and in **Auto Garage & Others V Motokov (No. 3) [1971] EA 514**, PER Spry VP at 519.

In disclosing whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true. This was so stated by Spry Ag P in **Attorney General V Oluoch [1972] EA 392, at 394**. In **Sullivan V Mohamed Osman [1959] EA 239 (CA) (T)**, Windham J A, at p.244, in the same connection, stated that;

"The plaint must allege all facts necessary to establish the cause. The fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact was not pleaded and could not be true."

I may also state here that, according to decided cases, an application to strike out a pleading can only be made where it can be shown that the pleading discloses no cause of action or defence on the face of it, without extrinsic evidence. This was so stated by Smith L J in **AG of Duchy V London & North Western Railway Co (1892) 3. Ch. 279**. In the same spirit of the law, Sir Charles Newbold in **Mukisa Biscuit Manufacturing Co V West End [1969] EA 696, at 701** stated that:-

“ A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is extrinsic evidence of judicial discretion.”

The principle, as I understand it, is that court will use its inherent powers to strike out a plaint or written statement of defence where the defect is apparent on the face of the record and where no amount of amendment will cure the defect. The procedure is intended to stop proceedings which should not have been brought to court in the first place and to protect the parties from continuance of futile and useless proceedings.

Applying the foregoing authorities and principles to the instant case, the plaint has to show, first, that **the Plaintiff enjoyed a right**. This is shown in paragraphs 3 and 4(a), (b), (c) & (e) of the plaint where the Plaintiff claims to be declared owner of the suit land, and alleges that she raised money which she entrusted to the Defendant, who was her lover and friend, to purchase land on which she later constructed a house which they occupied with the Defendant. Secondly, the Plaintiff must show that **the right has been violated**. This is shown in paragraphs 4(d)& (f), and 5 of the plaint where the Plaintiff alleges that the Defendant registered the land in his names fraudulently and compelled her to vacate the house. Thirdly, the Plaintiff must show that **the Defendant is liable**. This is shown in paragraphs 4 and 5 of the plaint which allege the Defendant to have committed the acts complained of in the plaint. In my opinion, the three elements as set out in **Tororo Cement Company V Frokina International Ltd Civil and Auto Garage & Others V Motokov (No. 3), supra**, are present in the plaint in the instant case.

It is in this light that I would, with respect, disagree with the submissions of Counsel Kwemara Kafuuzi for the Defendant that the plaint does not disclose a cause of action against the Defendant.

Counsel Kwemara Kafuuzi contended that the Plaintiff is not a person deprived of any land by fraud within the meaning of the provisions of section 176 of the RTA and that she is not a mortgagee or lessor. It was his argument that to sustain an action under section 176 of the RTA, a person must have been deprived of land. He submitted that the Plaintiff had however not pleaded any facts showing that the land was hers and was then taken away from her, or that she bought this land in her own name, or that she is a beneficiary from an estate. He accordingly maintained that the Plaintiff has no nexus with the suit land at all, in short, that she is not a person deprived of land. He contended that this is not an action of tracing but an action of recovery of land yet the Plaintiff is not linked to the land.

Section 176 of the RTA is very clear. It states, in part, as follows:-

“ No action for ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases-

- (a) *the case of a mortgagee as against a mortgagor in default;*
- (b) *the case of a lessor as against a lessee in default;*
- (c) *the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud....”*

It is my opinion that section 176 of the RTA gives various grounds upon which ownership of title can be challenged. One such instance is **deprivation of any land by fraud by any person as against the person registered as proprietor of that land through fraud** (emphasis mine). As already indicated above, the Plaintiff in this case has pleaded that the the Defendant has deprived her of the suit land through fraud. She would therefore clearly have the locus to bring this action under section 176(c) of the RTA.

With respect, I do not agree with Counsel for the Defendant’s submissions that one must first plead facts showing that the land was hers and was then taken away from her, or that she bought this land in her own name, or that she is a beneficiary from an estate in order to qualify as a person deprived of land for purposes of bringing an action under section 176(c) of the RTA. In my opinion, for purposes of establishing whether a cause of action is disclosed in the plaint against the Defendant, it is enough that the plaint pleads facts which allege that the Plaintiff has a claim to the land, legal or equitable, and was deprived of land by fraud as against the person registered as proprietor of that land through fraud. It is immaterial at this point that the allegations are true or not, as that is a matter to be determined after hearing the case on the merits. In the given circumstances therefore, where the issue is to determine whether or not a cause of action is established by the Plaintiff against the Defendant, the case of **Kampala Bottlers Ltd V Damanico (U) Ltd** cited by the Defendant’s lawyer would not be applicable as the appellate court in that case was addressing the question of whether the trial Judge had erred in law in holding that the certificate of title was obtained by fraud. In that case the appellate court was dealing with evidence already adduced in court unlike in this case where this court has only to look at the plaint and assume that whatever is pleaded there is true.

Thus, I find that Counsel Kwemara Kafuuzi’s submissions that the Plaintiff has no nexus with the suit land; or that she is not a person deprived of land; or that she is not linked to the land; are matters to be raised by way of defence, in proof of which, evidence can only be adduced during the hearing of the case on the merits. Addressing them at this point as a basis for determining whether or not a cause of action is disclosed in a plaint would tantamount to delving into extrinsic evidence. As indicated by the authorities cited above, one looks at the plaint to determine whether or not a cause of action has been established by the Plaintiff against the Defendant. In doing this one assumes that the facts as alleged in the plaint are true. This, I believe, is purely for determining whether or not the plaint discloses a cause of action. As to whether or not the cause of action is eventually proved against the Defendant is an entirely different matter which can only be determined by adducing evidence in the course of hearing the case. I would therefore agree with learned Counsel for the Plaintiff that the Plaintiff had pleaded fraud and is yet to adduce the evidence which will be done when the suit is allowed to proceed, and that it is pre mature at this stage to determine whether there was fraud or not unless you call for evidence.

Learned Counsel Kwemara Kafuuzi had also based his prayer to strike out the action with costs on the premises that since the title was received in 2006 yet the Plaintiff is just raising the matter now, it looks

more like an act of settling scores rather than a genuine action for recovery of land. With respect, I am not persuaded by this contention. As argued by the learned Counsel for the Defendant, the fact that the Defendant has a certificate of title is not enough to guarantee that he is the absolute owner in circumstances where fraud is pleaded by the Plaintiff. The provisions of the RTA are very clear that a certificate of title can be impeached on grounds of fraud. Secondly, the Plaintiff has not yet exceeded the twelve years limitation period. I agree with learned Counsel for the Defendant that stopping the Plaintiff from raising her case against the Defendant at this point, and in the given circumstances of the case, would tantamount to condemning her unheard.

In the premises, and for the reasons given above, I do not find merit in the preliminary objection.

I accordingly overrule it with costs to the Plaintiff.

Dated at Kampala this 1st day of December 2011.

Percy Night Tuhaise

JUDGE.