

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS CAUSE NO. 83 OF 2010

LABAN ASHABA.....APPLICANT

VERSUS

BOB GAKIIRE BAKALI.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by notice of motion under sections 98 of the Civil Procedure Act and 33 of the Judicature Act for orders that the respondent transfers land comprised in Isingiro Block 38 plot 1 (suit land) to the applicant, and that costs of the suit be provided for. The grounds of the application are that the applicant was decreed the owner of the suit land by virtue of a sale and judgment of court, that the applicant is in possession of the suit land, and that it is just and equitable that the two acres be vested in the applicant.

The application is supported by the affidavit of **Laban Ashaba** the applicant. The respondent did not file any affidavit in reply though he was served by substituted service as per the directions of the registrar of this court. The court record indicates that he was served by substituted service in the Daily Monitor newspaper of 8th December 2012, and a photocopy of the same is annexed as **A** to the affidavit of service. The proceedings therefore proceeded *ex parte* under Order 9 rule 11(2) of the CPR. The applicant's Counsel filed written submissions on the matter.

There are court decisions to the effect that whether a suit proceeds *ex parte* or not, the burden of the plaintiff to prove his/her case on the balance of probabilities remains. See **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**.

The affidavit evidence of the applicant is that he is the purchaser of land comprised in Isingiro Block 38 plot 1. By virtue of a sale agreement dated 26/11/2007 the respondent sold the said land to the applicant and deposited the land title with him pending signing of a formal transfer into the applicant's names. The respondent disappeared from the applicant and became evasive upon which the applicant sued for breach of contract and an order for specific performance. The matter was decided in his favour by the Chief Magistrate's court of Mengo. The applicant is in possession of the suit land. The applicant's Counsel submitted that with the phasing out of district land tribunals, their powers were vested in magistrate's courts which similarly lack jurisdiction to order for cancellation of or making entries on a land title.

This application was made under sections 98 of the Civil Procedure Act and 33 of the Judicature Act for orders that the respondent transfers land comprised in Isingiro Block 38 plot 1 (suit land) to the applicant. Section 33 of the Judicature Act empowers court to grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy are completely and finally determined and multiplicity of proceedings are avoided. Section 98 of the Civil Procedure Act saves the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

Sections 98 of the Civil Procedure Act and 33 of the Judicature Act under which this application are based apply generally to all matters. They are mostly resorted to when there are no direct provisions on the remedy sought. In the instant case, there is a specific provision that caters for situations where a party who has recovered land through any proceedings can have the same registered under the RTA, but neither the application nor Counsel in his submissions mentioned it. Section 177 of the Registration Of Titles Act empowers the High Court to direct cancellation of a certificate or entry upon recovery of land estate or interest by any proceeding from the person registered as proprietor and to substitute such certificate of title or entry as the circumstances of the case require, and the registrar shall give effect to that order. In my view this is the most appropriate provision that this application should have been based on rather than

the general ones that were invoked. Nevertheless I will proceed to consider the application on the merits.

The application is based on a court decree issued by the Chief Magistrate's court of Mengo in civil suit no. 1289 of 2009, annexure C to the applicant's supporting affidavit, where it was ordered and decreed as follows:-

1. ***“That the plaintiff is declared to be owner of the suit land.***
2. ***The defendant effects a transfer of the aforesaid land into the plaintiff's names.***
3. ***The defendant prays (sic) to the plaintiff general damages of U. Shs. 1,000,000/= and costs of the suit.”***

A close scrutiny of the decree annexure C reveals that the details of the suit land are not mentioned. There are no other annexures to the supporting affidavit, like the judgment of the case handled by the Chief Magistrate of Mengo or any other document that would help court to determine whether the decree in question refers to the suit land mentioned in the application. The copy of the judgment itself was a photocopy and it could not easily be discernible whether it was sealed or not. Even the copy of the land title and the sale agreement averred by the applicant to have been annexed to his supporting affidavit respectively as A and B were in fact not annexed. To say the least, I find it to be an abuse of court process for one to depone that one has attached annexures to one's affidavit when that person has in fact not attached them. In my opinion, though this matter was heard *ex parte*, the applicant has not proved his case on the balance of probabilities as required under cases of this nature.

In the given circumstances, it would not be wise for this court to order a vesting order without details as to which land the judgment was referring to.

I therefore dismiss this application. The applicant will bear his own costs of the application.

Dated at Kampala this 20th of December 2012.

Percy Night Tuhaise

JUDGE.

