

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CV-CS-0057-2010

HASSAN HASHIM.....PLAINTIFF

VERSUS

1. UGANDA LAND COMMISSION

2. AHAMADA NAMBAGALA.....DEFENDANTS

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

Through M/s Okuku & Co. Advocates the plaintiff **Hassan Hashim** filed this suit against the Ugandan land Commission and **Ahamada Nambagala** seeking for a declaration against the defendants jointly and severally that the first defendant's action of issuing to the second defendant a Certificate of title in respect of Plot No.5 Bishop Masaba Close was illegal and fraudulent and that the 2nd defendant is a trespasser onto the same property.

According to the plaintiff, the facts constituting the cause of action are that:

- a) The plaintiff bought Plot Mo.5 Bishop Masaba Clause Mbale Municipal Council from the registered owner, **Nambuya Jane** on 1st July 2009 and a sale agreement in annex A was made.
- b) Prior to the plaintiff's purchase of the said property, the legal owner **Nambuya Jane** had on 19th October 2009 under Ref. No. LAN/MMC/10781 Minute No. MDLB 08/05 (a) (60) of 29th and 30th June 2009 been offered a lease for a term of 5 years for the same plot measuring 0.280 hectares effective July 2009 by Mbale District Land Board.

- c) As a result of the above resolution and lease offer, **Nambuya Jane** was issued with a certificate of title registered on 2nd November, 2009 at 12:25p.m under instrument No 420187 as in annexure 'B'.
- d) That in disregard of the law, the first defendant went ahead and issued the 2nd defendant a second certificate of title LRV 4102 Folio 4 registered on 2nd June 2010 at 9:30A.M under Instrument 429753 for the same plot without any minute and without first cancelling the first title. The 2nd defendant's title is annexed as 'C'.
- e) The first defendant did not have any authority and mandate to act without first getting minutes from Mbale District Land Board under whose docket the land in issue falls.
- f) That the defendant's actions and/or omissions have adversely injured the interest of the plaintiff.
- g) That the 2nd defendant's title is tainted with fraud and ought to be cancelled for the same reasons.

The plaintiff gave particulars of fraud as:

- (i) failure by the 2nd defendant to formally apply for the said plot through Mbale District Land Board, the legal controlling authority of the suit land.
- (ii) failure by the 1st defendant to properly carry out investigation on the land Register to ascertain whether the land in issue was available for lease or not.
- (iii) Acting without a minute or resolution of the board.
- (iv) Negligently issuing multiple certificates without first cross checking the land Register.

- (v) Knowingly processing for a certificate of title on land which already has an earlier registered proprietor.

In the plaint the plaintiff further contends that at all material times plot No.5 Bishop Masaba Close has been under the management and control of Mbale District Land Board who legally leased it to **Nambuya Jane** under Minute No. LAN/MMC/10781 Leasehold Register Volume 4036 Folio 8 and not under the Uganda Land Commission. Further that since the 2nd defendant's title was procured through fraud due to lack of any minute from the District Land Board it is null and *void ab initio*.

The plaintiff prays that this court declares the 2nd defendant's title null and void for fraud and orders the cancellation of the same from the Register book and eviction of the 2nd defendant. Further that court awards general damages for trespass, aggravated damages and mesne profits as well as costs of the suit and interest.

Both defendants were served. The 2nd defendant was served by substituted service through the Daily Monitor Newspaper of 6th April 2011 and was required to file a defence within 15 days from the date of publication of the order. The 1st defendant was served with a copy of the plaint and summons to file a defence on 3rd February 2011 and an affidavit of service dated 21. June 2011 is on record. The defendants failed and/or neglected to file their respective written statements of defence within the time stipulated in the summons. This prompted the plaintiff to apply for a default judgment and set down the suit for formal proof *ex parte* under O.9 r.5, 10 and 11 CPR. The default judgment was entered by the learned Deputy Registrar on 28th June 2011.

At the hearing of the formal proof two witnesses testified. PW.1 was **Nambuya Jane** an office attendant at Uganda Christian University Mbale Branch. She confirmed that she sold to the plaintiff plot 5 Bishop Masaba Road near fairway primary school Mbale. That she applied for the land to Mbale District Land Board and she was granted a certificate of title. The application for the land was tendered as exhibit P.1. That she was given a lease offer marked Exhibit P.2. Thereafter she was given a land title Vol. 4036 Folio 8 marked Exhibit P.3. PW.1 further testified that she no longer owns the land because she sold it to one Hassan in 2003, a reference to the plaintiff. A sale agreement was made and translated to her in Lugishu. She signed the agreement.

PW.2 was **Hassan Hashim** a businessman. He testified that he bought the suit land from PW.1 at 20M/= and an agreement endorsed by the seller and buyer was made before an advocate. The same was tendered and marked Exhibit P.4. That the land he bought has a title in the names of **Nambuya Jane** and is situate at Plot 5 Bishop Masaba Clause. PW.2 identified the land title.

PW.2 further testified that after two months of purchase he found the land fenced off with a small mad and wattle structure thereon. He made inquires and no one seemed to know the owner. He proceeded to Kampala Land office and made a search and found out that one **Ahamed Nambagala** had another title to the land. He did not know **Nambagala**.

PW.2 tendered a search statement marked P.5. He secured a copy of **Ahmad Nambagala**'s title marked Exhibit P.6 and thereafter notified PW.1. That the title he bought was given in 2009 but that of **Nambagala** was later in time in 2010.

PW.2 further testified that he wanted to construct on the land but could not since it is fenced off. That he has been inconvenienced hence the prayer for general damages. He also prays for cancelation of the second title so that he can access his land.

After a careful evaluation of the above piece of evidence, I am satisfied on a balance of probabilities that **PW.1 Nambuya Jane** is the registered proprietor of land comprised in Exhibit P.3 a land title for plot 5 Bishop Wasike Road Leasehold Register Volume 4036 Folio 8 measuring approximately 0.280 Hectares. She went through due process to secure the said land. I am also satisfied that she voluntarily sold her interest in the said land to the plaintiff herein for a consideration of shs.20M/= and an agreement to that effect was made (Exhibit P.4) dated 1st July 2010 drawn by M/s Madaba & Co. Advocates. When the buyer who is the plaintiff successfully executed the purchase agreement he in law acquired an equitable interest in the land which he has failed to register because of the existence of a later instrument to the same land in the names of the 2nd defendant given by the 1st defendant.

Despite being served with court process to join the suit and explain how this came about, the defendants did not seize the opportunity.

An unregistered interest/agreement in land is not effective to create or transfer an interest in land although it is not necessarily devoid of legal efficacy. It operates as a contract which is enforceable as between the parties.

In the instant case, the plaintiff is an intending lessee and has the right to obtain from the lessor a registerable lease. This makes him a lessee in equity and has an equitable interest in land.

- *Souza Figueiredo & Co. Ltd v. Moorings Hotel Co. Ltd* 196 E.A. 926 (U).
- *Walsh v. Lousdale* (1882) 21 Ch.D 9.

PW.1 who sold to the plaintiff had an un-impeached title. She sold her interest to the plaintiff. In disregard of the law, the 1st defendant went ahead and issued the 2nd defendant another certificate of title LRV 4102 Folio 4 on 2nd June 2010 at 9:30A.M under Instrument 429753 for the same plot without any minute and without first cancelling the first title. The 1st defendant did not have any authority and mandate to act without first getting minutes from Mbale District Land Board under whose authority the land in issue falls. This adversely affected the plaintiff rendering the 2nd defendant's title tainted with fraud rendering it liable to cancellation.

The plaintiff has proved the following particulars of fraud:

- (1) failure by the 2nd defendant to formally apply for the suit land through Mbale District Land Board, the controlling authority of the suit land.
- (2) failure by the 1st defendant to properly carry out investigations on the land register to ascertain whether the land in issue was available for leasing or not.
- (3) Acting without a minute or resolution of the board.
- (4) Negligently issuing multiple certificates without first checking the register.
- (5) Knowingly processing for a certificate of title on land which already had an earlier registered proprietor.

It is trite law as submitted by **Mr. Okuku** learned counsel for the plaintiff that where two conflicting equities are the same, the first in time prevails. First in time

is first in right. *Northern Counties of England Fire Insurance v. Whipp [1884] 26 Ch.D 48 Cotton L.J.*

In the circumstances therefore the earlier in title in the names of **Jane Nambuya** from which the plaintiff derives title prevails over any subsequent title that may have been issued for the same property. Given that the defendants did not in any way attempt to counter the claim and evidence by the plaintiff, the plaintiff's claim has been proved on a balance of probabilities.

In his prayers, the plaintiff asked for *inter alia* general damages, aggravated damages, mesne profits, costs and interest. However, there was no attempt to justify a claim for the aggravated damages or even mesne profits. Aggravated damages are awarded where it has been proved that aggravating circumstances exist in the act or intention of the wrong doer in order to deter a wrong doer from repeating the act or as compensatory for the wounded feelings of the plaintiff.

Regarding mesne profits there was no attempt to quantify what the plaintiff could have lost. I will not award aggravated damages or mesne profits to the plaintiff because none has been proved.

As regards general damages they are awarded where a tort has been committed and the plaintiff is entitled to compensation in money for the injuries he has sustained. In the circumstances of this case I will award shs.10,000,000/= as general damages.

For the reasons given herein I will enter judgment against the defendants jointly and/or severally and declare that:

- (1) The 2nd defendant's title is null and void *ab initio* for having been procured by fraud.
- (2) The 2nd defendant is a trespasser on Plot 5 Bishop Masaba Close Mbale Municipal Council.
- (3) The 2nd defendant's title under leasehold Register Volume 4102 Folio 4 Plot No.5 Bishop Masaba Close be cancelled from the Register Book.
- (4) The 2nd defendant shall be evicted from the suit land.
- (5) The plaintiff is awarded 10,000,000/= as general damages plus the taxed costs of this suit.

Stephen Musota

JUDGE

16.08.2012