

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVIL SUIT NO. 61 OF 2005

IPOLITO SEMWANGA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

KWIZERA BUCHANA PAUL & OTHERS ::::::::::::::: DEFENDANTS

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The Plaintiff in 1998 acquired the suit land comprised in Leasehold Register Volume 464, Folio 22, Plot 130 B, Sixth Street, Industrial Area, Kampala. The Plaintiff was registered on the title on 5th June 1998 and he is in possession of the premises. During the month of January 2005 when the Plaintiff was at his premises, he received a Notice from the 2nd Defendant stating that the 2nd Defendant was the mortgagee of the suit premises and asking him to vacate the premises presumably for failure to pay off the loan of which the Plaintiff had no knowledge of.

On receiving the said letter the Plaintiff went to the Land Office to check on the records of his land title and to his surprise, he got the following information:-

- (i) That he, the Plaintiff had sold the land and executed the transfer in favour of the 1st Defendant on 31st August, 2004.

- (ii) The Plaintiff also discovered that two mortgage charges were entered against his land title on 7th October, 2003 and 8th September, 2004 by Ipolito Semwanga in favour of the 3rd Defendant.
- (iii) The Plaintiff also discovered that a third mortgage was registered against his title by the 1st Defendant in favour of the 2nd Defendant.
- (iv) The Plaintiff sued the Defendants for cancellation of the 1st Defendant's name from the Certificate of title, cancellation of all entries of mortgage entered on the said land title by the 2nd and 3rd Defendants and general damages and costs of the suit.

The Plaintiff claimed that the suit land was unlawfully sold to the 1st Defendant and that the suit land was fraudulently transferred into the 1st Defendant's name.

The case for the 1st Defendant was that he is the registered proprietor of the suit property. He denied the allegations of fraud against him and contended that he was a bona fide purchaser of the suit property for valuable consideration without notice. He contended that he purchased the suit property from the Plaintiff in May 2003 pursuant to the discharge of a mortgage on the suit property in favour of the 2nd Defendant. He concluded further that the Plaintiff had mortgaged the suit property to the 2nd Defendant on 25th September, 2003 and 24th February, 2004. The Plaintiff defaulted in repaying the loan sums borrowed and opted to sell the suit property to the 1st Defendant through the 2nd Defendant.

The 1st Defendant filed a counterclaim contending that he suffered damages for being denied the suit property. He sought against the Plaintiff and the 3rd Defendant a declaration that he is a bona fide purchaser of the suit property, an

order for vacant possession, general damages for trespass and loss of the use of the suit property, interest and costs of the suit.

The Plaintiff did not file a reply to the 1st Defendant's counterclaim. It was the 2nd Respondent in the counterclaim who replied to the 1st Defendant/counterclaimant's counterclaim and acknowledged that the Plaintiff/1st Respondent in the counterclaim obtained credit facilities from the 2nd Respondent and defaulted on his obligations under the credit facilities. The 2nd Respondent pleaded that it was not privy to the contract of sale of the suit property between the Plaintiff and the 1st Defendant/counterclaimant. The 2nd Respondent pleaded that it was a bona fide tender for value.

Issues for Determination:

(1) Whether the transaction through which the 1st Defendant was registered as proprietor of the suit property was false and fraudulent as alleged in the Plaintiff.

(2) Whether the 1st Defendant is a bona fide purchaser for value without notice.

(3) Whether the parties are entitled to the remedies prayed for.

ISSUE NO. I: Whether the transaction through which the 1st Defendant was registered as proprietor of the suit property was false and fraudulent as alleged in the Plaintiff.

Paragraph 6 of the Plaintiff, the Plaintiff denied ever selling the suit property to the 1st Defendant. In paragraph 9 of the Plaintiff the Plaintiff alleged that the 1st Defendant committed four acts of fraud in respect of the transaction through which he was registered as proprietor of the suit property:

(a) That the 1st Defendant forged the Plaintiff's signature.

(b) That the 1st Defendant stole the Plaintiff's Certificate of title.

(c) That the 1st Defendant falsely applied for a special Certificate of title.

(d) That the 1st Defendant used the Plaintiff's Certificate of title to get loans of money without his consent.

Under **Section 101 and 103 of the Evidence Act**, the burden of proving all the above allegations lies on the Plaintiff.

The gist of the Plaintiff's testimony was that he never sold the suit property to the 1st Defendant. He denied ever signing the purported Sale agreement dated 7th May 2004 and the consequent transfer and consent forms that led to the transfer of the suit land from his names to those of the 1st Defendant. The Plaintiff denied ever borrowing money from the 2nd Respondent. The Plaintiff testified that his first encounter with the 1st Defendant was when the 1st Defendant came to the suit property looking for a one Semwanga and told him that he (the 1st Defendant) had bought the suit property. It was from there that he went to the Land Registry and found that the suit property had been transferred into the 1st Defendant's names. He testified that he gave title to the suit property to his wife Nassuna Getrude so that she would obtain a loan to

facilitate her business of hides and skins. He denied ever having dealt in the sale of the suit land with the 1st Defendant.

Edward Bwanika Pw₃ a former Police Officer attached to Land Protection Unit testified that he investigated the complaint of the 1st Defendant made to Police concerning the sale of the suit land to him by Ipolito Semwanga and found out that the man who sold the land to the 1st Defendant was Mbuga Kato who represented himself as Ipolito Semwanga. He stated that Mbuga sold the said land together with a woman called Getrude Nassuna. Getrude Nassuna was then arrested and charged in Court with the offence of obtaining money by false pretences.

The 1st Defendant **Kwizera Buchana Dw₁** testified in his evidence that it was not the Plaintiff who sold to him the suit land and that the Plaintiff was not the one who signed the agreement of sale, the transfer and consent forms but someone else. The 1st Defendant made the same testimony during the criminal trial of Nassuna before Buganda road Chief Magistrates Court. On the face of the above evidence, it is safer to conclude that the Plaintiff did not sign the sale agreement, the transfer form and consent forms which led to the registration of the 1st Defendant.

ISSUE NO. 2: Whether the 1st Defendant was a bona fide purchaser for value without notice.

A bona fide purchaser is defined in **Black's Law Dictionary 8th Edition at page 1291 as:**

“One who buys something for value without notice of another claim to the property and without actual or constructive notice of any defects in or

informalities claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

In **David Sekajja Nalima v Rebecca Musoke, Supreme Court Civil appeal No. 12 of 1985** a bona fide purchaser was defined as a person who purchased the land without the notice of any suitable interest or claim.

The tests of a bona fide purchaser is that (S)he:

- (1) Must have a valid certificate of title from a person registered as proprietor through fraud or otherwise.
- (2) Must have paid valuable consideration for the land.
- (3) Must have acted in good faith without notice of fraud whether actual constructive or implied.

The concept of a bona fide purchaser for valuable consideration without notice is enunciated in **Section 176 (c) and 181 of the Registration of Titles Act**. The effects of the sections is that once a registered proprietor has purchased the property in good faith, his title cannot be impeached on account of fraud of the previous registered proprietor. Therefore a bona fide purchaser obtains a good title even, if he purchases from a proprietor who previously obtained it through fraud: In **David Sejjaka Nalima v Rebecca Musoke (Supra)** it was held thus:

“..... It is well settled that fraud means actual or some act of dishonesty. Where there are a series of subsequent transfers, for the title of the incumbent registered proprietor to be impeachable, the fraud of the

previous proprietors must be brought home to him.... A fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out the fraud had he been more vigilant and had made further inquiries which he omitted to make does not itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be ascribed to him...”

The questions to answer here are:

- (1) Did the 1st Defendant purchase the suit property in good faith?
- (2) If there was fraud in his registration as proprietor, would he deliver good title at law from a transaction arising out of such fraud?
- (3) Did he have knowledge of such fraud?
- (4) Can fraud be brought home to him or his agents?

In his testimony, the Plaintiff stated inter alia, that he did not sell the suit property or authorise anybody to sell it or sign transfer forms in favour of the 1st Defendant. That, he never dealt with the 1st Defendant or the 2nd Respondent and had never borrowed any money from the 2nd Respondent. He testified that his wife, a one Nassuna Getrude was arrested and tried in Buganda Road Court for conniving with the Semwanga who appeared in some photographs. During cross-examination he stated that he did not know how the title to the suit property left his Kitende home. Upon further questioning he stated that his wife Nassuna Getrude picked the title from their

bedroom in Kitende home from the cupboard where he had kept it. Again on further questioning he admitted that he authorised his wife Nassuna to use the title to the suit property as security for the repayment of a loan she had borrowed for the purposes of her hides and skin business. He acknowledged his signature on **exhibit D₁** which was a written note from him to an unnamed recipient authorising Nassuna his wife to use the suit title as collateral for a loan. In his reply to the question put to him by Court the Plaintiff stated that he chased away Nassuna after people came to the suit property claiming to have bought it.

In his defence, the 1st Defendant told Court that through a land broker called Sam Mutabazi, he was introduced to a couple whom he got to know as Mr. and Mrs. Semwanga. That the couple had mortgaged the suit property to the 2nd Respondent M/S Victoria Finance Company Limited. He confirmed it according to certificate of title of the suit property **exhibit D₂** and the mortgages thereon **exhibit D₁₃** and **D₁₄**.

He testified that through a lawyer called Jambo Godfrey he verified the ownership of the suit property and that he was dealing with the rightful owners who were trying to salvage the value of the suit property following their default to pay the mortgage instalments. The 1st Defendant testified further that he inspected the suit property in the company of the vendors the Semwangas. On 13th May 2004 he entered into a sale agreement for the suit property **exhibit D₈** with the said Mr. And Mrs. Semwanga, the people he believed to be the owners and made all the payments in accordance with the sale agreement and all the receipts and acknowledgements of payments were collectively exhibited in Court as **exhibit D₉**. That a further acknowledgement of Shillings nineteen million (Ug. Shs.19,000,000/=) was made by the vendor couple on the 2nd page of the sale agreement (**exhibit D₈**).

The 1st Defendant testified further that upon making payments for the suit property the vendor signed transfer forms in his (1st Defendant's) favour **exhibit P₃**. He testified that he obtained the Certificate of title from the 2nd Respondent on 20/5/2004 and immediately embarked on transferring the suit property into his names and was registered on 23/11/2004.

The 1st Defendant acknowledged that he later discovered that the people with whom he dealt with were not the Plaintiff. That the Plaintiff neither signed the sale agreement nor the transfer forms.

The 1st Defendant testified that after he paid for the suit property about the 15th May 2004, he went to the suit property and met the Plaintiff and told him that he was looking for a one Semwanga about the suit property, that the Plaintiff told him that he knew the person he was looking for but that he was not around. Later on he called the Semwangs who sold him the property and asked them to meet him at the 2nd Respondent's offices where he asked the Plaintiff's wife whether there were two Semwangs. She told him that the Plaintiff was a brother to her husband and that Semwanga was a family name. That he later learnt that he had been set up and reported the fraud to the CID for investigations.

Dw₂ Tusiime Roselyn a loan officer with Victoria Finance Limited testified inter alia that, around September 2003 Ipolito Semwanga approached them for a loan which he was given on 25/9/2003 after signing loan agreement mortgage deed personal guarantee. After failing to pay the loan Ipolito Semwanga approached them together with the 1st Defendant who had agreed to buy the property. Ipolito Semwanga instructed them to release the title to

the 1st Defendant whereby the 1st Defendant paid a total of Shs.24,486,000/=. Upon receipt of that money they released the title to 1st Defendant.

She testified that Ipolito Semwanga approached them together with Getrude Nassuna and both of them handed their photographs in support of the loan application. She confirmed that the Ipolito Semwanga she dealt with was different from the Plaintiff.

It is clear from the above evidence that the 1st Defendant did not know that he was dealing with impostors. He was introduced by impostors who had mortgaged the property to the 2nd Respondent and paid the redemption money to the 2nd Respondent. He accordingly bought the same in good faith. The 1st Defendant did not have any knowledge that Nassuna and Mbuga had defrauded the Plaintiff's title. In the premises fraud was not brought home to the 1st Defendant or his agents. Therefore his registration as proprietor gave him good title to the suit property.

It must also be observed that the Plaintiff was privy to the fraudulent acts of Getrude Nassuna his wife and Mbuga Kato for impersonating him. In the 1st place it was the Plaintiff who authorised Nassuna to use the title for securing loan facilities which she failed to service. In her Police Statement Getrude Nassuna stated that she discussed obtaining a loan from the 2nd Respondent with her husband (the Plaintiff) who owing to his fear for his 1st wife and children to learn about the loan, advised her to get a man of about his (Plaintiff) age to personate him as the owner of the land title and suit property. That she then got a man by the names of Kato Mbuga. She further stated that when her business failed and she defaulted on the loan she had obtained from the 2nd Respondent, the Plaintiff advised her to use all means possible to have the title rescued. In addition the Plaintiff's affidavit in

support of the caveat he subsequently lodged (**exhibit P2**) also corroborates the above statement of Getrude Nassuna. The Plaintiff was aware of the mortgage and also knew the mortgage account. It was only after realising that he had gone down too much, the Biblical Samson in the hands of Nassuna that he realised that she had become a murderer and could no longer trust her and he chased her away. In those circumstances the Plaintiff stripped himself of the protection he would have otherwise enjoyed under **Section 176 (c) of the Registration of Titles Act: See Kampala Bottlers v Dominico (U) Limited, Supreme Court Civil Appeal No. 22 of 1992.** In that case **Hon. Chief Justice W. W. Wambuzi** (as he then was) held that where fraud cannot be attributed to the transferee either directly or by necessary implication, the title of the transferee cannot be impeded. The transferee is protected by **Section 184 (c) (now Section 176 (c) of the Registration of Titles Act.**

In conclusion therefore I ascribe fraud to the Plaintiff and find that the 1st Defendant is a bona fide purchaser of the suit property for valuable consideration without notice.

ISSUE NO. 3: Whether the parties are entitled to the remedies sought in the pleadings.

Having found that the 1st Defendant is not guilty of any fraud and that he is a bona fide purchaser, it is hereby declared that he is a bona fide purchaser of the suit property for valuable consideration without notice.

Accordingly he is entitled to vacant possession of the same. Considering the circumstances of this case, this is not a matter where Court should grant general damages to the 1st Defendant. The 1st Defendant is entitled to costs of

the suit and the counter claim only against the Plaintiff. Now therefore the Plaintiff's suit is dismissed in the above terms.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

18/9/2012