

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CAUSE NO. 79 OF 2011

HON. JUSTICE PROF. DR. GEORGE W. KANYEIHAMBAAPPLICANT

VERSUS

- 1. THE COMMISSIONER LAND REGISTRATION**
- 2. RICHARDSON MUSINGUZI.....RESPONDENTS**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE
RULING

This is an application by notice of motion brought under sections 182 & 188 of the Registration of Titles Act (RTA), section 98 of the Civil Procedure Act (CPA), section 33 of the Judicature Act, and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) for orders that:-

1. The respondents doth substantiate and uphold the grounds contained in her letters referenced BUS.397/266 dated 17th November 2010 and BUS.397/266 & 447 dated 7th March 2011, which rejected the applicant's request to correct errors made by the respondents on Busiro Block 397 plot 266 at Bweya.
2. That the respondent does correct the errors made on the said titles by cancelling the registration of Richardson Musinguzi on plot 266, which transaction was done without the applicant's consent and knowledge, and re instate thereon the name of Hon. Justice Dr. George W. Kanyeihamba.
3. That in the alternative and without prejudice to the above, the respondents jointly or severally compensate the applicant for the land wrongfully transferred to Richardson Musinguzi and his predecessors.
4. Costs of this application be provided for.

The grounds of the application, in brief, are that the applicant is the registered proprietor of the suit land, that the respondents facilitated the fraudulent and wrongful transfer of the land from the applicant to Livingstone Mpiima and eventually to the 2nd respondent, and that it is just and equitable that the orders are granted.

The application was initially against the Commissioner Land Registration. Mr. Richardson Musinguzi was eventually added as a 2nd respondent by agreement of both Counsel before court, and the application was amended to that effect.

The application is supported by the supporting affidavit to the original application and a supplementary affidavit to the amended application, both sworn by **Hon. Justice Dr. George W. Kanyeihamba** the applicant. It is opposed by the respondents through affidavits in reply respectively sworn by **Golooba Haruna** a Registrar of Titles, and **Richardson Musinguzi**, to which the applicant filed two respective affidavits in rejoinder. Counsel for the applicant and for the 2nd respondent filed written submissions within time schedules set by this court. The 1st respondent did not file any written submissions though he/she filed an affidavit in reply to the application.

The applicant's case, as deduced from the application and affidavits sworn by the applicant, is that he is the registered proprietor of land comprised in Busiro Block 397 plot 264 and 266 at Bweya, having purchased it from Mpiima Livingstone Kataza who has since died. It is the applicant's case that the respondents facilitated the fraudulent and wrongful transfer of plot 266 from the applicant back to Livingstone Mpiima and eventually to Richardson Musinguzi without the applicant's consent. The particulars of fraud are specifically averred to by the applicant in clauses 6 to 14 of his supplementary affidavit. It is also averred that when the applicant wrote to the 1st respondent to rectify the register after discovering the fraud, the 1st respondent refused to comply with the request. This prompted the applicant to file this application against the respondents. The applicant's letters in connection with the dispute are annexed collectively as **D** and the responses to it as **C** to his supporting affidavit.

It was submitted for the applicant by learned Counsel Juliet Oyulu Otto that Mpiima acquired the title through fraud and that subsequent transfers by him were void and impeachable. Learned Counsel also submitted at length on the law and facts as to why the 2nd respondent, Richardson Musinguzi, cannot claim to be a *bona fide* purchaser for value.

The respondents' case, as deduced from their affidavits in reply, is that the applicant was verbally requested to avail his duplicate certificate of title to the Principal Registrar of Titles for perusal but this was not done. It is the 1st respondent's case that the transfer of land to Livingstone Mpiima Kataza was facilitated by the applicant himself. The 1st respondent maintains that Busiro Block 397 plot 264 was not sub divided by the office of titles but by the drawing office of Wakiso, and that Block 397 plot 447 belongs to a one Namayanja. The 2nd respondent also denied the allegations of fraud in his affidavit in reply. The gist of his denial is that he is a *bona fide* purchaser for value without notice and registered proprietor of the suit land, having purchased the same from a Mr. Edward Sekabanja Kato who himself had obtained a transfer from Livingstone Mpiima Kataza. He also challenged the applicant's letters to the Registrar to cancel his title as informal requests in respect of which no fees were paid.

In his submissions, learned Counsel Gilbert Nuwagaba for the 2nd respondent challenged the applicant's letter to the Commissioner Land Registration for want of form. He submitted that there was no application to the said Commissioner to do or perform an act, and that applications to rectify a register must be in form of instruments which are registered and fees paid in respect

of the same. He argued that the letter annexed as **D** to the applicant's supporting affidavit was not an application and that, consequently, the responses to it, annexure **C**, were not specific refusals or decisions, but were responses to his letter by the said Commissioner. It was also submitted for the 2nd respondent that the letter in question was addressed to the registrar in the mailo division, which was not the same as addressing it to the Commissioner Land Registration. He further submitted that the applicant's claim for compensation is misplaced because section 182 of the RTA does not provide for compensation but only provides for substantiation of the Commissioner's grounds for refusal or decision.

In her submissions in rejoinder, learned Counsel for the applicant strongly objected to the 2nd respondent's submissions that the application is grounded on fraud. She argued that the application is based on the refusal by the Commissioner Land Registration to act upon the request of the applicant, and that applications need not be in any form. She also submitted that the applicant was abandoning the prayer for compensation made in the application. I will therefore not address the prayer for compensation in this ruling.

I have carefully looked at the application and all affidavits, together with the submissions of learned Counsel from both sides.

Section 182 of the RTA provides that if on application of any owner or proprietor to have land brought under the operation of the Act, or to have any dealing registered or recorded, or to have any certificate of title or other document issued, or to have any act or duty done or performed by the registrar which he/she is required to perform, the Registrar refuses to do so, or if the owner or proprietor is dissatisfied with any decision of the Registrar the owner or proprietor may require the Registrar to set forth in writing the grounds of his or her refusal. The owner or proprietor may if he/she thinks fit, at his or her own cost, summon the Registrar to appear before the High Court to substantiate and uphold those grounds.

Applications under section 182 of the RTA usually arise where the Registrar has, or has not, exercised statutory powers conferred on him/her under the law on request by a land owner or proprietor. The Registration of Titles Act (RTA) and the Land Act notably spell out special powers accorded to the Registrar. Sections 73 of the RTA and 90 of the Land Act for instance empower the Registrar of Titles to call in duplicate certificates of title for the purposes of, among other things, rectifying or cancellation as the case requires. Section 91(8) & (9) of the Land Act requires the Registrar, while exercising the said functions, to give 21 days' notice to the party likely to be affected by the decision, to provide such party with an opportunity to be heard, to conduct the hearing within the rules of natural justice, to give reasons for any decision, and to communicate the decision in writing to the parties and the Committee. It would appear that the Registrar acts as a quasi judicial body when exercising the said functions. Section 91(10) & (11) of the Land Act provides for a right of appeal by the party aggrieved by the Registrar's decision. The appeal is to the District Land Tribunal, and a transfer is not to be effected until the determination of the appeal.

District Land Tribunals that were set up by the Land Act, as amended, have since ceased to operate after expiry of their contracts. However, the Chief Justice issued **Practice Directive No. 1 of 2006** which enables magistrates of the rank of grade 1 and above to exercise jurisdiction over land matters until new chairpersons and members of District Land Tribunals are appointed or otherwise. The High Court has also been handling matters where the Registrar's decisions are challenged by land owners or proprietors under section 182 of the RTA.

The applicant averred in paragraph 16 of his supplementary affidavit that he informed the 1st respondent (Commissioner Land Registration) about the errors and requested her to correct them but she refused to perform her statutory obligations. The correspondence, in form of letters to the Registrar and others, was attached to the supplementary affidavit and collectively marked annexure **D**. The first annexure **D**, a letter addressed to the registrar of titles in the Mailo Division signed by the applicant and dated 8th September 2010, reads as follows:-

“Dear Sir,

FRAUDULENT TITLE: OUT OF BUSIRO BLOCK 397, PLOT NO.447

Some people who appear to be associated with a firm of lawyers by the name of KGN Advocate of Plot 5 Princess Avenue, Nakasero, P. O. Box 2219 Kampala have committed forgery by creating out of my land a fraudulent title plot No. 266, which is clearly forged.

I have written to both the Minister of Lands and to the Inspector General of Police on the matter.

Meanwhile, I have instructed my surveyor, Mr. Charles Mukwaya to undertake any tasks that are needed to enable you strike out that title which is not even reflected on mine.

Thank You.”

The other two letters dated 2nd July 2010 and 14th September 2010 respectively, also annexed as **D** and signed by the applicant, were addressed to Hon. Omara Atubo, then Member of Parliament and Minister of Lands, Housing and Urban Development, concerning fraudulent deals in the Land registry.

The letter of 8th September 2010 reproduced above appears to be the only relevant letter in as far as communication to the Registrar is concerned. It would be irregular to assume that the two letters to the then Minister responsible for Lands were addressed to the Registrar. The applicant's Counsel rightly argues in her submissions in rejoinder that section 1 of the RTA defines a registrar to mean a registrar of titles as appointed under section 3 of the said Act and it includes the deputy registrar, assistant registrar of titles or land registry assistant. In that respect I find that the letter addressed to the registrar of titles in the Mailo Division was a letter addressed to the registrar within the meaning of section 182 of the RTA.

The question at this point is whether the letter in question was an application to the registrar to rectify the title. Forms of applications to amend the certificate and rectify the register are contained in the nineteenth schedule of the RTA. Section 200 of the RTA is permissive of the form an application may take. Under the said section the forms may be modified or altered in expression to suit the circumstances of every case, and any variation of the said forms in any respect not being a matter of substance shall not affect their validity or regularity. The applicant's letter of 8th September 2010 was informing the Registrar of the happenings on Block 397 plot no. 447 and what its author (now applicant) had done about it. In the last paragraph of the said letter, the applicant seemingly invited the Registrar to "strike out" the 2nd respondent's title.

The kind of information required to be given in the forms set out by the RTA includes details like nature of proposed amendment or rectification, declarations about how and by whom the land has been occupied and used, names and addresses of persons occupying the land, supposed cause of discrepancy, or a statement that the applicant is not able to assign any specific cause for the discrepancy, among other particulars.

In the instant case, in view of section 200 of the RTA which is permissive about form, I would not fault the applicant for writing an ordinary letter in applying for cancellation of a title. However, I do not find the substance of the letter to be an application in the context envisaged on rectification of titles and certificates under the RTA. The substance of the letter hardly sets out the information required in such applications as highlighted in the forms in the nineteenth schedule to the RTA. The fact that the Registrar replied it by ordinary correspondence (annextures **R1** to the 1st respondent's affidavit in reply and **C** to the applicant's supporting affidavit), as opposed to conducting a hearing after giving the required notice, infers that even the Registrar did not treat the applicant's letter as an application to rectify a register or cancel a title. If she had treated the letter as an application to rectify a register and made a decision after conducting a hearing, that would have been an appropriate basis for the applicant to bring the application under section 182 of the RTA.

Thus, it is my finding that the letter written by the applicant to the lands office was not an application to rectify a register or cancel a title as envisaged under section 182 of the RTA. Section 182 of the RTA, in my opinion can only be invoked when, on the application of a proprietor or owner of land to such registrar, the Registrar refuses to perform the duties required of him/her, or if such owner or proprietor is not satisfied with the registrar's decision. The Registrar's refusal or decision should relate to the landowners or proprietor's application to such Registrar. In this case, in view of the analysis of evidence above, there was no such application.

The 1st respondent in his affidavit in reply to the application avers that the applicant was verbally requested to avail his duplicate certificate of title to their office for perusal but this was not done. He also averred that the transfer of land to Livingstone Mpiima Kataza was facilitated by the applicant whose signature was proved by a handwriting expert in his report **R2**. The 1st

respondent attached annexures **R3, R4** and **R5** to his affidavit in reply as proof that Busiro Block 397 plot 264 was not sub divided by their office of titles but by the drawing office of Wakiso. He also averred that Block 397 plot 447 belongs to Namayanja Florence. He attached annexure **R6** the area schedule from Wakiso drawing office.

It is my finding that the instant application is not based on the Registrar's decision or refusal to exercise a duty after an application had been made to her to that effect. What happened is that the applicant in the letter of 8th September 2010 annexure **D** to his supporting affidavit invited the Registrar to strike out the title to plot no. 226 allegedly fraudulently created out of the applicant's land. The Registrar refused to do so and gave reasons that the applicant himself transferred the land to Livingstone Mpiima Kataza, as per annexure **R1** to the 1st respondent's affidavit in reply. The applicant then invoked section 182 of the RTA and applied to this court to cancel the title alleging fraud on the part of the registrar and a one Richard Musinguzi as respondents.

Order 6 rule 3 of the CPR provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings. In **Fredrick Zaabwe V Orient Bank & Others Civil Appeal No. 04/2006** Katureebe J, at page 6, stated, "*In my view, allegations of fraud need to be fully and carefully inquired into. Fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others.*" In **J. W. Kazoora V Rukuba, Civil Appeal No. 13/1992**, Oder JSC held that allegations of fraud must be specifically pleaded and proved. The degree of proof required is one of strict proof, but not amounting to one beyond reasonable doubt. It must however be more than a mere balance of probabilities. Also see **Hannington Wasswa V Maria Onyango Ochola & Others SCCA No. 22/1993**.

I have looked at the grounds of the application and the affidavit evidence on record. They clearly allege fraud against the respondents. The grounds of the application itself are clearly allegations of fraud against both respondents. The circumstances constituting the fraud are specifically averred to by the applicant in clauses 6 to 14 of his supplementary affidavit. These are further echoed in the submissions of the applicant's Counsel both on the law and the facts. In that regard, with much respect, I am not persuaded by the submissions of learned Counsel for the applicant that the application is based not on fraud but on the refusal by the Commissioner Land Registration to act upon the request of the applicant.

In the circumstances, and on basis of the authorities cited, it is my opinion that the allegations of fraud raised by the applicant against the respondents in the instant case require a full and careful inquiry where witnesses can be cross examined. This would, in my opinion, appropriately be through an ordinary suit rather than by notice of motion where the evidence adduced is mainly through affidavit evidence. It would be impracticable for this court to address the allegations in this application without having to inquire into the allegations of fraud.

I find this application by notice of motion incompetent to address the allegations of fraud raised against the respondents.

The application is dismissed with costs.

Dated at Kampala this 13th day of December 2012.

Percy Night Tuhaise.

JUDGE.