

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 21 OF 2008

JOSHUA SEKANYO.....PLAINTIFF

VERSUS

- 1. KASIRYE LEUBEN**
- 2. ISMA DAMBA**
- 3. THE REGISTRAR OF TITLES.....DEFENDANTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The Plaintiff filed this suit against the Defendants for the following orders:-

- a) A court declaration that Kasirye Leuben the 1st Defendant sold to the Plaintiff the land comprised in Bulemeezi Block 465 plot 13 at Kyali, Wabusaana, Luwero District.
- b) An order of specific performance against the 1st Defendant.
- c) A court order directing the Registrar of Titles who is the 3rd Defendant to cancel the names of Isma Damba, the 2nd Defendant from the Register and substitute the same with the names of the Plaintiff.
- d) A permanent injunction restraining the Defendants from interfering with the Plaintiff's ownership and possession of the suit property.
- e) General damages.
- f) Costs of the suit.

The Plaintiff's case is that the 1st Defendant, Kasirye Leuben sold him land on Block 465 plot 13 at Kyali, Luweero District.

The Defendants did not file any defence within the required time though they were served and an affidavit of service was filed on the court record. The Registrar of this court, on application by the Plaintiff, entered an interlocutory judgment against the Defendants on 19th April 2011. When the matter came up for formal proof before this court, the Plaintiff produced two witnesses who gave oral testimonies on oath. This was in addition to documents tendered in and marked as exhibits in the course of hearing the witnesses *ex parte*. Counsel for the Plaintiffs was allowed by this court to file written submissions within time schedules set by this court.

The oral testimonies of the two witnesses, Sekanyo Joshua (PW1 & Plaintiff) and Kajeruka Karaveri (PW2), the pleadings and the tendered exhibits indicate that in July 2005 Leuben

Kasirye (1st Defendant) sold his land comprised in Block 465 plot 13 at Kyali Wosana parish, Kikyusa sub county Luweero to the Plaintiff at Uganda shillings 600,000/= . The agreement (exhibit **P1**) was witnessed by Kajeruka Karaveri (PW2) and a one Erasmus. After that Leuben Kasirye signed mutation forms (exhibit **P2**) and transfer forms (exhibit **P3**) to have the land surveyed and transferred into the plaintiff's names. The Plaintiff lodged the documents in the Land office of Bukalasa with the Registrar of Titles (3rd Defendant) who indicated instrument no. BUK 60573 on the transfer and the mutation forms. The land title was supposed first to come out in the names of Leuben Kasirye and, subsequently, in the Plaintiff's names. Instead it (exhibit **P4**) came out in the names of Isma Damba (2nd Defendant). The same instrument number on the mutation form is the one that was used to transfer the land to Isma Damba. The Plaintiff instructed his Lawyer to lodge a caveat. The Registrar of Lands by then had been transferred but denied what was going on. Leuben Kasirye did not tell the Plaintiff that he is the one who effected the transfer but he (the Plaintiff) discovered that Isma Damba was a son to the wife of Kasirye (step son). When the Plaintiff asked Isma Damba how he got registered on the land, Isma retorted that he should not ask him but should ask Leuben Kasirye.

Learned Counsel for the Plaintiff, Bamwite Edward, submitted that the 3rd Defendant acted wrongly or illegally to transfer the land into the names of Isma Damba without any transfer signed by Leuben Kasirye in favour of Isma Damba. The transfer form, exhibit **P3**, which Kasirye signed was in favour of the Plaintiff bearing instrument number BUK 60573 and no reason was given as to why this transfer was ignored by the 3rd Defendant.

On the issue of the Defendants not filing a defence, Order 9 rule 11(2) of the Civil Procedure Rules provides that:-

“ Where the time allowed for filing a defence or, in a suit where there is more than one Defendant, the time allowed for filing the last of the defences has expired, and the Defendant or Defendants, as the case may be, has or have filed to file his or her or their defences, the Plaintiff may set down the suit for hearing ex parte.”

There are court decisions to the effect that in such circumstances, the Defendant will not be allowed to participate in the proceedings though he or she could be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37** court held that since the Appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 171**.

Order 9 rule 10 of the CPR provides that where a Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he/she had filed a defence. Case decisions on this point are to the effect that a party who has not filed a defence is deemed to have admitted the allegations in the plaint. See **Eridadi Ahimbisibwe V World Food Programme & Ors [1998] IV KALR 32**. In addition, the evidence as adduced by the Plaintiff has neither been denied nor rebutted.

In this case where fraud was specifically pleaded, the fraud must be positively and strictly proved, even if the suit proceeds *ex parte* as per Karokora J, as he then was, in **Yoswa Kityo V**

Eriya Kaddu [1982] HCB 58. The evidence adduced by the Plaintiff which is uncontroverted clearly points to fraud in as far as transferring the suit property in the names of the 2nd Defendant is concerned and it is by necessary implication attributed to the Defendants. The land title was supposed first to come out in the names of Leuben Kasirye and, subsequently, in the Plaintiff's names. Instead it came out in the names of the 2nd Defendant. The same instrument number on the mutation form is the one that was used to transfer the land. The Plaintiff eventually discovered that the 2nd Defendant was a step son of the 1st Defendant.

In **Fredrick Zaabwe V Orient Bank & 5 Ors SCCA O4 OF 2006** fraud is defined to include anything calculated to deceive whether by a single act or combination or suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo or by speech or silence, word of mouth or look or gesture. In **B. E. A Timber Co V Under Singh Jill [1959] HCB 469**, it was held among other things, that fraudulent acts may be inferred from facts intent. In **Kampala Bottlers Ltd V Damaniko (U), Civil Suit No. 22 of 1992**, the Supreme Court held that fraud must be attributable either directly or by necessary implication to the transferee, that is, the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. Also see **Hannington Njuki V George William Musisi [1999] KALR 783; J. W. Kazoora V Rukuba Civil Appeal No. 13 of 1992**.

On general damages, it is well settled law that the general damages are the direct or probable consequences of the act complained of. See **Kampala District Land Board & Anor V Venancio Babweyana, Civil Appeal No. 2 of 2003**. Such consequence might be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering, as per Kiryabwire J in **Assist (U) Ltd V Italian Asphalt and Haulage Ltd & Anor HCCS No. 1291 of 1999**, unreported, at page 35.

In the instant case the Plaintiff pleaded in paragraph 13 of the plaint that the fraudulent transfer of the land put him to unnecessary loss and inconvenience as he had spent money on surveying and transferring it. Though he and his Counsel did not assist court in quantifying the loss or specifying the inconvenience, it cannot be denied that he was inconvenienced in the given circumstances. In the premises, an award of U. Shs. 1,500,000/= as general damages would suffice.

In the premises, there being no response to the plaint and default judgment having been entered by the Registrar against the Defendants on 19th April 2011, I find for the Plaintiff. The matter has been subsequently proved before me. The Plaintiff has proved his claim against each of the Defendants that the transfer of land comprised in Bulemeezi Block 465 plot 13 at Kyali Wosana parish to the 2nd Defendant Isma Damba was fraudulent wrongful and improper intended to deprive the Plaintiff of land he had bought. Accordingly, judgment is entered as prayed against the Defendants for the following declarations and orders:-

- i) Kasirye Leuben the 1st Defendant sold to the Plaintiff the land comprised in Bulemeezi Block 465 plot 13 at Kyali, Wabusaana, Luwero District.
- ii) An order of specific performance against the 1st Defendant.

- iii) A court order directing the Registrar of Titles who is the 3rd Defendant to cancel the names of Isma Damba, the 2nd Defendant from the Register and substitute the same with the names of the Plaintiff.
- iv) A permanent injunction restraining the Defendants from interfering with the Plaintiff's ownership and possession of the suit property.
- v) General damages of U.Shs. 1,500,000/= be awarded to the Plaintiff.
- vi) Costs of the suit are awarded to the plaintiff.

Dated at Kampala this 19th day of January 2012.

Percy Night Tuhaise

JUDGE.