

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 534 OF 2003

BETTY KIZITO ::: PLAINTIFF

VERSUS

1. DAVID KANONYA KIZITO	}	:::::::::::::::::::::::::::::::::::: DEFENDANTS
2. DICKSON NSUBUGA		
3. DIANA SEMAKULA		
4. DENIS KAVULU		
5. JOYCE NANSUBUGA		
6. IVAN ZZIMBE		
7. DANIEL KIZITO		
8. MARTHA NANKYA		

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The Plaintiff and the 1st Defendant are full blooded siblings being the daughter and son respectively of the late **Semei Kizito** of Tula, Kawempe. The Plaintiff is older than the 1st Defendant.

The 2nd to 8th Defendants are the children of the 1st Defendant and his wife Joyce Nakakande Kanonya (and therefore are nieces and nephews of the Plaintiff). At the commencement of the hearing of this suit some of the 4th to 8th Defendants were minors and were represented by their said mother as *guardian ad litem*. Subsequently, they achieved the age of majority and therefore stand each on their own behalf represented by MPANGA Advocates.

The suit is concerned with land comprised in **Kyadondo Block 244 Plot 5091 land at Muyenga** (the suit property). This land was at one time registered in

the joint names of the Plaintiff and the 1st Defendant and then on 22nd January 2002 was transferred into the joint names of the Defendants as tenants in common, vide **Instrument No. KLA 232 631**. The Plaintiff contends that the suit property was acquired jointly by her and the 1st Defendant using funds that were the proceeds of a joint business and that the Defendants became registered as proprietors fraudulently thus entitling her to an order cancelling the names of the Defendants from the said title and reinstating the names of the Plaintiff and the 1st Defendant as tenants in common as well as sub-dividing the suit property equally so that the said land may be shared equally between the Plaintiff and the 1st Defendant.

The Defendants challenged the Plaintiff's version and averred that the suit property was acquired by the 1st Defendant using his own funds and means but was registered in the joint names of the Plaintiff and the 1st Defendant because the latter wanted the former to act as a trustee for his children, the 2nd to the 8th Defendants.

The suit was first placed in the docket of Hon. Justice J. B. Katutsi who did the scheduling conferencing before it was reallocated to me. During the conferencing the following facts were agreed upon:-

(1) The Plaintiff and 1st Defendant are sister and brother.

(2) Before the registration of the Defendants both the Plaintiff and the 1st Defendant were jointly registered owners of the suit property.

(3) At some stage and up to 2002 there was joint venture between the Plaintiff and 1st Defendant.

(4) The Plaintiff and 1st Defendant operated A/C No. 1326362 with Barclays Bank of Uganda jointly.

Agreed issues:

(1) Whether the Defendants were registered in respect of the suit property fraudulently.

(2) Whether the Plaintiff is entitled to the remedies sought.

Documents:

The following were the Plaintiff's exhibits:-

(1) Certified copy of registered transfer (marked **exhibit P₁**).

(2) Application for consent to transfer (**exhibit P₂**).

(3) Copy of a Plan for the suit premises (marked **exhibit P₃**).

(4) A set of photographs of the suit premises (**exhibit P₄**).

(5) Certified copy of Certificate of title (**exhibit P₅**).

Defence exhibits - NIL.

Evidence:

Pw₁ Betty Kizito Nalongo, 52 years old resident of Makindye, testified inter alia, that she used to work with Barclays Bank as Cashier from 1974 to 1978. From there she went to work with Mobil Oil Company from 1978 to 1998, still as Cashier. She testified that the suit land is Block 244 Plot 5091 land at Kisugu which is in the Defendants' names. Before the said land was registered in the Defendants' names it was registered in her names and that of the 1st Defendant right from 1995 when the two of them became owners. She testified that they bought the said land when she was working with UPET Oil Company where she was being paid very well.

She testified further that she had a joint business with David Kanonya in Kikuubo, Kampala. Before they started that business Kanonya used to sell sugar canes in Owino Market. Because Kikuubo business was small she decided to open a retail shop on Salaama road where Kanonya worked as a Shop Attendant where he was selling beers. From that joint business they built two blocks of houses on their grandmother's land and it was storeyed with three shops with flats and stores. Thereafter getting money from the Katwe house and their joint business, they bought land at Kisugu Plot 1766 Block 244. They developed that Plot and built two storeyed buildings each one had one storeyed building although they did not put their understanding in writing, simply because she trusted Kanonya very much. She stated that the Kisugu title was registered in the names of David Kanonya. Because they did not have enough money for constructing the two double storeyed building at Kisugu they had to go to Housing Finance Bank to get facilities. She stated that she realised in 1994 that the Kisugu house was in the sole name of Mr. Kanonya and that when he asked him why he replied that at the time of transfer she was not around.

However she did not take any further steps because Kanonya was her trusted brother.

As regards the suit property at Muyenga, she testified that the money for building the same was from her personal savings, joint business with Kanonya at Kikuubo and rent from houses at Katwe and Kisugu. She testified that it was Kanonya who handled transactions in respect of the Muyenga property. However the property was registered in her names and that of Kanonya jointly. She stated that she made sure that her name was in the title because she had made her contributions to the property.

She testified further that around 2001 she got disagreement with David Kanonya regarding the business in Kikubo where she was now working after her retirement. Kanonya told her that her contribution towards the business had been exhausted. She then told Kanonya that if that was the case they should share all the houses they had built jointly. Kanonya told her that out of the six houses in Muyenga, Katwe and Kisugu, she was entitled to only one house in Muyenga and yet their understanding was that she would take one house in Muyenga, one in Kisugu and one in Katwe. At that time Kanonya's children were not yet involved in the sharing arrangements. After the said arrangement David Kanonya took her to the tenants at Kisugu to introduce her as the landlady and she was introduced to Mr. Musoke who was with the Ministry of Defence then and they drew a tenancy agreement. However she failed to get title to the Kisugu property. Kanonya promised to work on the transfer of the land during the following week at his own cost. Kanonya later brought blank forms for Kisugu and Muyenga houses. Kanonya was in a hurry and told her that he had brought a valuer to value the houses and told her to sign where it was necessary. She signed the copies but did not retain any copies. After obtaining her signatures Kanonya started avoiding her over the Kisugu transfer.

Kanonya told Musoke her tenant that he had sold the house. She later got a letter written to Musoke by Kanonya telling him (Musoke) to stop dealing with her in respect of the Kisugu property. She testified that after being told that the house had been sold she went to the Lands Office to check on the Muyenga house Block 244 Plot 5091. The Lands Officers showed her transfer forms where the land was transferred from David Kanonya and Betty Kizito to David Kanonya Kizito and his children. She testified that when she signed the transfer forms she was not dealing with Kanonya's children. She noted that the consideration on the transfer forms was a gift to Kanonya and his children. However, she disputed having given any gift to the Kanonya's family. She testified further that she signed the blank transfer with David Kanonya after agreeing that Kanonya would take Muyenga house while she would take the Kisugu Plot 1766 and part of the Katwe house on Plot 702, where she was staying. She stated that when she looked at the consent form (**exhibit P₂**) she discovered that Kanonya had declared that there were no developments on Muyenga Plot 5091 Block 244 and yet the Plot had two houses on it (**exhibit P₆**). She stated that Kanonya's house was completed in 1999 while hers was completed in 2000; and that both houses were valued by Government Valuer at Shs.10,000,000/= but according to her, the value was 1 billion. She prayed Court to order cancellation of transfer of Plot 5091 Block 244 to Kanonya's children and substitute it with hers and that the houses be sub-divided into two equal parts.

Joseph Oloya Okwanga Pw₂ a Government analyst testified that he examined signatures of the Plaintiff in some questioned documents.

Gabindalde Musoke Pw₃ testified that he was a Permanent Secretary attached to Ministry of Lands, Housing and Urban Development. He stated that he was living in Munyonyo. However before 2002 he was residing at Kisugu in the

house belonging to David Kanonya Kizito. He stated that David Kanonya introduced Betty Kizito to him as his landlady. She was introduced to him after one year when he was a tenant. Thereafter the introduction he signed a tenancy agreement with Betty Kizito which ran for one year. At the end of the year he wanted to renew the tenancy agreement but Kanonya came back and informed him that he had taken over the house from Betty Kizito. Because of their disagreement he decided to leave the house.

Defence:

Dw₁ David Kanonya Kizito 54 years old testified that he was residing on the suit property with his family. He testified that he got registered on the suit property on 29th January 2002. Before that he was a co-proprietor of the property with Betty Kizito, the Plaintiff with effect from 6th February 1995. He testified that the Plaintiff was his elder sister and more educated than him because she went up to senior four. He could not go far with his education because of the death of their father. After the death of their father he went and stayed with his mother in Katwe. During that time his relationship with the Plaintiff was good because they were related and friends. He worked at his mother's restaurant but when he got money he started selling sugar canes in Owino market (now called St. Balikuddembe Market). He stayed at his mother's place until when he decided to rent a room at Salaama Lodge. By that time the Plaintiff used to be a civil servant before she moved to Barclays Bank. He denied that at the time he was selling sugar cane he was a dependant of the Plaintiff. He denied that the shop at Salaama was opened by the Plaintiff. He stated that he opened that shop when the Plaintiff was still residing at her father's home. He testified that it was not true that the Plaintiff worked with Mobil and that she gave him capital to start business at Kikuubo. He stated that he used to trade in Beers and Whiskies and he used to get credit from Nokoso

Trading Company and later he started getting supplies from the Bakiga who were smuggling goods from Rwanda. Because the business was booming he started going to Nairobi , trading in smuggled goods like sugar, salt, milk, etc where he used to get good money. By that time the Plaintiff was working in Barclays and she advised him to open an account. He then opened a joint account with the Plaintiff but it was not for a joint business. He denied holding a joint business with the Plaintiff. He denied holding a joint property with the Plaintiff. He denied building on their grandmother's land at Katwe with the Plaintiff. He stated that he built those houses there for rent. He wanted to buy land in Rubaga but his mother advised him to get the Katwe land instead. So he decided to buy the Katwe land from Kampala City Council (KCC). He stated that the Katwe house was subject of Court case with his half-brothers whereupon the Plaintiff was his witness and Justice Ntabgoba ruled in his favour but that he had to pay compensation to those brothers. He testified further that he bought the Kisugu Block 244 Plot 1766 from Kagwa who was working in Mbogo Mission and that the land was registered in his names alone and money for buying the same was not contributed by the Plaintiff nor was it from a joint business with her.

In the Kisugu building Plan he is listed as client and owner of the Plan. He got money for building Kisugu property from rent paid by the Uganda Revenue Authority for his houses at Katwe together with the loans he secured from Housing Finance Bank. He stated that he got 20 million by way of mortgage on 7/10/1994 and never got any help from the Plaintiff to pay that loan. He stated that he did not use any money from joint business to pay back that loan. He stated that the Plaintiff had never complained to him about her ownership of Kisugu property. He only heard after the Plaintiff had brought a suit which was before Hon. Justice Katutsi.

He further stated that he bought Kisugu Block 244 Plot 5091 in 1991 from the daughter of Sekindi and he paid for it in cash. The Kisugu house was being rented by Ethiopians who were paying him one million for each house totalling two million. They paid six months in advance and that was the money he used to pay for the Muyenga property. He testified that he registered the Kisugu Plot 244 in his name and that of Betty Kizito because he had chosen Betty Kizito as the trustee of his children. He stated that he decided to choose his sister and not his wife because he feared that upon his death the relatives of his wife would claim the property because his wife had shares in the property. So the Plaintiff being a paternal relative would keep the property in the interest of the children. He stated that his wife did not agree with the above arrangement but that was his decision because at that time he was worried for his life because he was undergoing an operation on his abdomen. He stated that when he was taken to the theatre for operation the Plaintiff was around and he sent her to pick money from Gabidande Musoke who was his tenant in Kisugu but the Plaintiff instead decided to use the money. From there he decided to remove the Plaintiff's name from the title and replaced it with the children's name. He told the Plaintiff that his children had grown up and wanted to transfer the property in their names. He did not show the Plaintiff that he was annoyed by the Plaintiff's actions with Mr. Musoke of signing or making a tenancy agreement in respect of the Kisugu house. The Plaintiff inquired from him which of the houses he was going to transfer and he told her that it was the Muyenga house.

He concluded that he did not forge the Plaintiff's signatures and that he did not have reasons to do so. That he declared that there were no developments on the land after being advised by the officers in the Land Registry that he would pay taxes if he declared that the land was developed.

Resolution of Issues:

The evidence on record in a nutshell is that the Plaintiff and the 1st Defendant are blooded relatives. It is clear from the evidence that before the 22nd January, 2002, the Plaintiff and her brother David Kanonya Kizito, the 1st Defendant were registered proprietors of the suit land which they allegedly acquired at Shs.8.000,000/= (eight million) from a one Stanley Sekindi which they allegedly bought using funds from a joint business. The Plaintiff's evidence raises sentiment of breach of trust.

The Plaintiff gave evidence of co-investment which the 1st Defendant vehemently denies. The 1st Defendant testified that he started his own business from sugar cane selling in Owino market which progressed to Kikuubo and then to a shop on Salaama Road. He denied ever having a joint business with the Plaintiff. He also denied having bought any property jointly with the Plaintiff. He stated that he put the name of the Plaintiff on the Muyenga property as a trustee of his children.

It is clear from the above evidence adduced by both parties that this case borders the Biblical story in **1 Kings 3: 16-28** where two women went before **King Solomon** wrangling over whose child had died and whose child was alive. The two had a very strange evidence before the King and I am more than excited to quote it to emphasize nature of the evidence and the gravity of this dispute between blood relatives:

“Then came there two women, that were harlots unto the King and stood before him.

And the one woman said, O my Lord, I and this woman dwell in one house; and I was delivered of a child with her in the house.

And It came to pass the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house.

And this woman's child died in the night, because she overlaid it. And she arose at midnight, and took my son from beside me, while thine handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. And when I rose in the morning to give my child suck, behold, it was dead: but when I considered it in the morning, behold, it was not my son, which I did bear. And the other woman said, Nay; but the living is my son, and the dead is your son. And this said, No; but the dead is your son, and the living is my son. Thus they spoke before the King.

Then said the King. The one says, This is my son that lives, and your son is the dead; and the other says, Nay; but your son is the dead, and my son is the living. And the King said, Bring me a sword. And they brought a sword, before the King. And the King said, Divide the living child into two, and give half to the one, and half to the other. Then spoke the woman whose the living child was to the King, for her bowels yearned upon her son, and she said O my Lord, give her the living, and in no wise slay it. But the other said, Let it be neither mine nor yours, but divide it. Then the King answered and said, Give her the living child, and in no wise slay it: She is the mother thereof. And all Israel heard of the judgment which the King had judged; and they feared the King: for they saw that that the wisdom of God was in him, to do judgment.” King James Bible.

The above landmark decision clearly shows that justice is not only about law but is about truth and fairness. It is a holistic concept which even covers values, norms and aspirations of a given society: See **Article 126 of the Constitution of Uganda**.

From the above evidence Court is enjoined to determine two issues:-

(1) Whether the suit property was fraudulently transferred.

(2) Whether the Plaintiff is entitled to the remedies sought.

Issue No. I: Whether the suit property was fraudulently transferred.

The Plaintiff alleged that the suit property was fraudulently transferred. The law as stated in **Section 101 of the Evidence Act** provides that:

“Whoever desires Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.”

The burden of proving fraud therefore lies on the Plaintiff: See **Miller v Minister of Pensions {1947} 2 ALLERL 372, 373**.

Since the allegation is about fraud, the law requires that proof must be almost to the criminal standard of beyond reasonable doubt: See **Kampala Bottlers Ltd. vs Domanico (U) Limited, Supreme Court Civil Appeal No. 22 of 1992**.

In the instant case like the Biblical case, one is saying the property was bought from proceeds of co-investment and therefore co-owned while the other one is saying NAY. It is therefore a question of one party's word against the other. Like the Biblical story, both parties have been living closely as blood brother and sister and appear to be supportive of each other. There is a better probability that the parties might have had a co-investment by the fact that the parties had a joint account with Barclays Bank. Another factor to consider is the fact that prior 2002 the property in question was registered in the names of both the Plaintiff and the 1st Defendant. It is more probable that the same was because the property was co-owned by the two blood relatives. I cannot believe that the same was because the Plaintiff was a trustee of the 1st Defendant's children. Had it been so, such a scenario should have been indicated on the title itself. That could not have been an oversight. Furthermore, the fact that the 1st Defendant introduced the Plaintiff to Musoke Gabindadde as his landlady and that the said Musoke started paying rent to the Plaintiff (**exhibit P₆**) was also evidence that the Plaintiff had interest in the property. I do not think the Plaintiff would follow the footsteps of the 1st Defendant with her tears all these time if she had no plausible claim. Her claim was even fortified by the 1st Defendant's declaration in the transfer forms that the Plaintiff had given the suit property to the children of the 1st Defendant as a gift which she denied. The 1st Defendant also lied that the suit property was undeveloped and yet it was two double storeyed building. From the above legal points it is clear that the 1st Defendant acted fraudulently. In **Kampala Bottlers Limited v Damanico (U) Limited, Supreme Court Civil Appeal No. 22 of 92** it was held inter alia, that fraud means actual fraud, an act of dishonesty and that fraud must be attributed to the transferee either directly or by necessary implications. See the Judgment of **Wambuzi C. J.** in the said case. The above findings were cited with approval by **Hon. Justice Bert Katureebe** in **Frederick Zaabwe v The Orient Bank Limited and Others, Supreme Court Civil Appeal No. 4 of 2006**. In

that case fraud was defined to mean *“surprise trick, cunning, dissembling and any unfair way by which another is cheated and includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false.”*

In the instant case there was an act of cheating the Plaintiff of the property she co-owned with the 1st Defendant when it was transferred allegedly as a gift in favour of the children of the 1st Defendant. The 1st Defendant acted cunningly and deceitfully and dishonestly in depriving the Plaintiff. The Plaintiff appeared to me as a truthful witness and was emphatic that she co-owned business with the 1st Defendant and used the proceeds and her personal savings to acquire property including the suit property, together with the 1st Defendant. She had no reason to tell lies against her blood brother. It is therefore my conclusion that the 1st Defendant transferred the suit property fraudulently.

Issue No. 2: Whether the Plaintiff is entitled to the remedies sought.

The Plaintiff prayed for the following orders:-

- (i) Cancellation of the registration of the Defendants as proprietors of the land comprised in Kyadondo Block 244 Plot 5091, Land at Muyenga.

The legal principles guiding Court in a suit for impeachment of title or recovery of land under the Registration of Titles Act is very broad but straight forward. The starting point is **Section 176 of the Registration of Titles Act** which provides as follows:-

“No claim of ejectment or other administration for the recovery of any land shall lie or be sustained against the person registered as proprietor under this act,

Except in any of the following cases;

(a)....

(b)....

(c) The case of any person deprived of land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bonafide for value from or through a person so registered through fraud from the above section a registered proprietor of land can have his/her title impeached if such a person was registered through fraud.”

Section 77 of the Registration of Titles Act is also pertinent. It provides as follows:-

“Any Certificate of title, entry in the Register Book, procured or made by fraud shall be void as against all parties or privies to the fraud.”

In the instant case it was proved that the 1st Defendant transferred the suit property fraudulently from the Plaintiff's name to the names of the children of the 1st Defendant. Therefore an order of cancellation of those children's names from the title would be a remedy. The Plaintiff would naturally be entitled to and it is accordingly ordered.

- (ii) The Plaintiff also prayed for an **Order** sub-dividing the land into two equal parts where the Plaintiff would get one title and the 1st Defendant the other at the cost of the 1st Defendant.

That possession of her portion should be given immediately even before the sub-division.

Since the 1st Defendant has proved that he is the legion of dishonesty (**by dispossessing his own blood sister of one father and mother**) it would only be fair that the Plaintiff be given one equal side of the building.

However possession of her portion should be with immediate effect. The cost of the sub-division shall be at the cost of the Plaintiff.

- (iii) **Mesne profits of \$1,500 per month since 2002.**

The law would require that a person who is deprived of his or her property should be entitled to mesne profits. However, the dispute is between blood relatives who have a blood bondage. Litigation should not destroy the value of family bondage because it would have implications on other members of the family. For reasons of creating harmony I would not grant the prayer of mesne profits.

- (iv) The Plaintiff prayed for general damages in the tune of Shs.200,000,000/= claiming that the 1st Defendant acted in a high handed manner and callously evicted her from Katwe where she was residing. That the 1st Defendant subjected her to suffer mental anguish.

As I indicated above, reconciliation in family conflict is paramount. The Constitution of this country enjoins Courts of law to promote reconciliation between parties. See **Article 126**. If I may say an ounce of harmony is better than a pound of monetary gains out of a family conflict. These are blood relatives who are bound to see each other in any event. In that regard, money would certainly be thinner than blood. In the circumstances I would refrain from awarding general damages prayed for by the Plaintiff.

(v) Costs of the suit.

In resolving this family conflict the Plaintiff was forced to introduce other parties (the Advocates and the Court). In doing so the Plaintiff paid costs. Under the law a successful litigant is entitled to costs unless the Court orders otherwise. See **Uganda Development Bank v Muganga Construction Company Limited {1981} HCB 35**.

In the instant case my view is that costs should follow the events and it is ordered accordingly against the 1st Defendant.

In conclusion I enter judgment against the Defendants in the terms set above.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

25/5/2012