

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

CIVIL SUIT NO. 446 OF 2007

SIRIVE MUSOKE MBIDDE.....PLAINTIFF

VERSUS

1. LUBOWA TADEWO 2. MULEME GEOFREY 3. KAVUMA SALONGO 4. NAKIRANDA ROBINA 5. NAMAGEMBE DORAH	}	:..... DEFENDANTS
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BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The plaintiff instituted this suit against the defendants for cancellation of their names from the certificate of title to land comprised in Kyaggwe Block 105 plots 1733, 1734, 1735, 1736 and 1737 and entry of the plaintiff's name to the said plots; an order of eviction of the defendants from the respective plots; a permanent injunction restraining the defendants, their servants, agents, workers, and/or employees or any person claiming under them from making any future trespass or laying any claim on the suit plots; demolition order of any structures erected on the suit plots by the defendants, their agents, employees or any person claiming under them; general damages for trespass, inconvenience and mental suffering; interest of 25% per annum on general damages from date of judgment till payment in full; and costs of the suit.

The plaintiff is the former registered owner of land formerly comprised in Kyaggwe Block 105 Plot 121 land at Seeta. The plaintiff pleads that, being the father to the first three defendants, he gave them permission to use part of the former plot 121 for cultivation. The defendants later sub divided plot 121 to plots 1733, 1734, 1735, 1736, 1737, 1738, 1739 and 1740. The plaintiff remains on plots 1739 and 1740 being the balance by residue, and plot 1738 was sold to a third party not a party to the suit. The plaintiff contends that the land was fraudulently sub divided and registered by the defendants and he never transacted with them to effect the said sub divisions and registrations.

The case had partly been handled by two Judges, one of whom had retired, by the time I took over its hearings. The court record indicates that the defendants filed a joint written statement of defence and signed a joint scheduling memorandum filed in court on 27/04/2009. The matter was adjourned several times at the request of the defendants' Counsel to allow progress of negotiations reportedly between the defendants and the plaintiff. However, the negotiations eventually failed. At one point, the matter was stood over to wait for the defendants and their Counsel to appear in court in vain. On 26/02/2013 when

the matter was called for hearing, the defendants and their Counsel failed to turn up or explain their non attendance though they were served and an affidavit of service was filed on the court record. The hearing of the matter proceeded *ex parte* under Order 9 Rule 20(1) of the Civil Procedure Rules which provides that where the plaintiff appears and the defendant does not appear when the suit is called for hearing, the court may proceed *ex parte* if satisfied that the summons or notice of hearing was duly served.

The plaintiff produced three witnesses including himself. The witnesses gave oral testimonies on oath before this court. The plaintiff also tendered in court exhibits **P1, P2, P3, P4, P5, P6, P7, P8, P9, P10 & P11**, all certified copies of documents formerly annexed to the plaint. Counsel for the plaintiff filed written submissions within time schedules set by this court.

Issue 1: Whether the defendants obtained registration of the suit plots of land by fraud.

Fraud is defined to include anything calculated to deceive whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture. It includes dishonest dealings in land or sharp practice to deprive a person of an interest in land. Among other things, fraudulent acts may be inferred from facts intent. Fraud must be attributed either directly or by necessary implication to the transferee. The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of it. The registered proprietor must have gained registration through a fraudulent act or with full knowledge of the fraud. Allegations of fraud must be specifically pleaded and proved. The degree of proof of fraud required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must however be more than a mere balance of probabilities. See **Fredrick Zaabwe V Orient Bank & 5 Others SCCA 04/2006; Kampala Bottlers Ltd V Damanico(U) Ltd CA No.22/1992; W. Kazoora V Rukuba , Civil Appeal No. 13/1992.**

The plaintiff pleaded fraud against the defendants in paragraph 8 of the amended plaint. He set out the particulars of fraud to include the defendants' causing sub divisions of his land without his knowledge and authority; forging of his signature on the transfer, consent and mutation forms; and their undervaluing the fraudulently transferred plots to pay less stamp duty.

The plaintiff testified as PW1 that the 1st, 2nd and 3rd defendants who are his children, together with the 4th and 5th defendants who are unknown to him, stole his land. When his grandson Kiwanuka told him his land had been stolen, he conducted a search at the Mukono land office. He found out that his land had been sub divided and sold. He has never donated the land to any of his children. He identified certified copies of the mutation form exhibit **P1** plus transfer forms and consent forms purportedly signed between him and all the defendants in respect of the respective plots.

Exhibit **P2** reads that it was signed between the plaintiff and Lubowa Tadewo (1st defendant) on 27/01/2006 in respect of plot 1734. Exhibit **P3** reads that it was signed between the plaintiff and Kavuma Salongo (3rd defendant) on 16/01/2006 in respect of plot 1733. Exhibit **P4** reads that it was signed between the plaintiff and Muleme Geoffrey (2nd defendant) on 27/01/2006 in respect of plot 1735. Exhibit **P5** reads that it was signed between the plaintiff and Nakiranda Robinah (4th defendant) on 14/12/2005 in respect of plot 1736. Exhibit **P6** reads that it was signed between the plaintiff and Namagembe Dorah (5th defendant) on 14/12/2005 in respect of plot 1737.

The plaintiff testified that the signatures on the said forms were all forged and not his. He testified that he did not know the 4th defendant Nakiranda though he saw her in court. He testified that his land is used to bury people and that he does not want the buildings that were erected on the land to remain there. He requested court to cancel the fake titles and order the defendants to pay him costs and compensation of Uganda shillings 50,000,000/= (fifty million).

PW2 Kakumba Zinabala Joseph, a grandson of the plaintiff, testified that when they went with his father and others to the land office in Mukono, they found that Block 105 Plot 121 was sub divided into small plots, namely, 1733, 1734, 1735, 1736, 1737, 1738, 1739 and 1740. They found that only two plots 1739 and 1740 were left as residue in the plaintiff's names. He testified that the land office gave them certified copies of the white pages of each plot, transfer forms and mutation forms against which the land was sub divided. He identified the said forms, which were admitted in evidence as exhibits **P7, P8, P9, P10** and **P11**. The certified copies were in respect of plot 1733 in the names of Salongo Kavuma (**P7**), plot 1734 in the names of Lubowa Tadewo (**P8**), plot 1735 in the names of Muleme Geoffrey (**P9**), plot 1736 in the names of Nakiranda Robina (**P10**), and plot 1737 in the names of Namagembe Dora (**P11**).

PW3 Christian Kiwanuka Silvester, also a grandson of the plaintiff, testified that the defendants came on the land in 2007. When he returned from safari, he saw materials deposited on the part of the land he occupied and some construction was going on. When he asked his grandfather the plaintiff whether he knew the people, he said he did not. He then called his brother Kakumba Joseph and told him what had happened. When they came he left them to go to the land office. He got a cameraman who took photographs of what had happened.

In his submissions, learned Counsel Tswekyerera for the plaintiff reiterated the evidence as adduced by the plaintiff and his witnesses. He submitted that the defendants obtained registration of the suit plots of land through fraud. He invited court to answer the first issue in the affirmative.

Though this suit proceeded *ex parte*, the law is that whether a suit proceeds *ex parte* or not, the burden of the plaintiff to prove his/her case on the balance of probabilities remains. See **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**. I will only add that in the case of fraud, as already stated, the degree of proof is one of strict proof, that is, more than a mere balance of probabilities, but not amounting to one beyond reasonable doubt.

The evidence adduced by the plaintiff proves that he was the former registered owner of land formerly comprised in Kyaggwe Block 105 Plot 121 land at Seeta. There is also proof, in form of the sworn testimonies of PW1 and PW2, and exhibits **P7, P8, P9, P10** and **P11** that the said land was sub divided in plots 1733, 1734, 1735, 1736, 1737, 1738, 1739 and 1740 by the defendants. The defendants left the land occupied by the plaintiff as residual plots 1739 and 1740. The plaintiff in his pleadings and testimony denies ever signing the mutation and consent forms (exhibits **P1, P2, P3, P4, P5, P6**) that were used in sub dividing the land and transferring it from the plaintiff to the defendants. He also denied ever donating the said land to any of his children.

The available evidence in form of exhibits **P7, P8, P9, P10** and **P11** reveals that the five defendants derived their purported interests in the suit land directly from the plaintiff. The said exhibits which are certified copies of the white pages of each plot were in respect of plot 1733 in the names of Salongo Kavuma (**P7**), plot 1734 in the names of Lubowa Tadewo (**P8**), plot 1735 in the names of Muleme

Geoffrey (**P9**), plot 1736 in the names of Nakiranda Robina (**P10**), and plot 1737 in the names of Namagembe Dora (**P11**). These are the five defendants. The plaintiff in his evidence denied ever selling or donating or transferring the plots in question to the defendants or any other person. The consent and transfer forms exhibits reveal they were purportedly signed between the plaintiff and each of the five defendants but the plaintiff denied this in his testimony. The plaintiff testified that his signatures were forged by the defendants. The evidence as adduced by the plaintiff has neither been denied nor rebutted.

In my opinion, based on the above adduced evidence and legal authorities, the plaintiff has proved fraud to the required standard against the five defendants severally and jointly as pleaded. Issue 1 is therefore answered in the affirmative.

Issue 2: What remedies are available to the plaintiff?

The plaintiff prayed for cancellation of the defendants' names from the certificate of title to the suit land and entry of the plaintiff's name to the said plots. Section 77 of the Registration of Titles Act (RTA) provides that any certificate of title, entry, removal of encumbrances or cancellation in the register book, procured or made by fraud, shall be void as against all parties or privies to such fraud. It was held in **Kigozi Mayambala V Sentamu & Anor [1987] HCB 68** that once it is proved that a certificate of title is null and void, it must be cancelled under section 185 (now section 177) of the RTA. The evidence adduced in this case would justify the cancellation of the defendants' titles, namely plot 1733 in the names of Salongo Kavuma, plot 1734 in the names of Lubowa Tadewo, plot 1735 in the names of Muleme Geoffrey, plot 1736 in the names of Nakiranda Robina, and plot 1737 in the names of Namagembe Dora, and reinstatement of the plaintiff's names in respect of the said plots.

The plaintiff prayed for eviction and demolition orders, plus a permanent injunction restraining the defendants, their servants, agents, workers, and/or employees or any person claiming under them from making any future trespass or laying any claim on the suit plots. Regarding the prayer for eviction, there was no evidence before this court about the said defendants' servants, agents, workers, and/or employees or any person claiming under them or whether or not they are in occupation of the suit land. Regarding the prayer for demolition of their structures on the land, there was no evidence of who put up or owns the structures. The said third parties were not sued nor were they heard in this case though the plaintiff seeks to have the eviction and demolition orders to be issued against them as well. This would be against the principles of natural justice and contrary to the spirit of Practice Direction No. 1/2007 issued by the Chief Justice on 22nd March 2007. This court will therefore restrict its orders of eviction or demolition to the five defendants who were sued.

The plaintiff has adduced evidence establishing his right of proprietorship on the suit land as against the defendants who are proved to have acquired proprietorship of the same land through fraud. This would entitle the plaintiff to the orders of eviction, demolition and a permanent injunction against the five defendants. The defendants should however be granted compassionate time of two months from the date of judgement within which to vacate the suit land and or remove their illegal structures. The plaintiff should only proceed to execute the eviction and/or demolition orders against the five defendants, and not against third parties who have not been sued or heard, if the said five defendants fail or refuse to remove themselves or their structures or otherwise vacating the land within the time given by this court.

The plaintiff also prayed for general damages for trespass, inconvenience and mental suffering. It is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental stress, pain and suffering. General damages must be pleaded and proved. See **Kampala District Land Board & George Mitala V Venansio Babweyana SCCA 2/2007**. The plaintiff who suffers damages due to the wrongful act of the defendant must be put in the position he would have been had he not suffered the wrong, as was held in **Dr. Dennis Lwamafa V AG [1992] KALR 21**.

The plaintiff has adduced uncontroverted evidence establishing his rights over the suit land. There is evidence that he has been denied use of his land from 2005 and 2006 when the defendants committed the frauds. There is evidence that he suffered inconvenience, having had to move to various offices including the land office, the police and the law courts to remedy the situation. He was denied use of the five plots of land that were transferred fraudulently to the defendants. In his evidence he prayed for a sum of U.Shs.50,000,000/= (fifty million) as being sufficient to restore him to the position he would have been had he not suffered the wrong. His Counsel prayed that he be awarded the general damages with an interest of 25% per annum from the date of judgement till payment in full.

The plaintiff cannot be without the remedy of an award of general damages where it has been proved to this court that he was denied use of his land from around 2005 and 2006 when the defendants committed the frauds. He must have clearly suffered inconvenience in terms of being dispossessed of his property and trying to claim it. He was denied use of the five plots of land that were transferred fraudulently to the defendants. The five plots he was deprived of altogether amount to about one acre of land. The land in question is registered land located in Seeta. I would in the premises, award the plaintiff general damages of U. Shs.30,000,000/= (thirty million).

Counsel prayed that the plaintiff be awarded the figure with an interest of 25% per annum from the date of judgement till payment in full. The burden is on the party claiming interest to plead and adduce some evidence entitling the party to interest. In this case though the plaintiff prayed for the interest of 25% per annum on general damages from date of judgment till payment in full in the pleadings, he did not adduce any evidence to justify it. In **Uganda Revenue Authority V Wanume David Kitamirike Civil Appeal No. 43/2010** the Court of Appeal declined to award interest where it was not pleaded and no evidence adduced to that effect. It appears to be rather on the high side, more so when it is not justified. In this case where the claim for interest was made in the prayers but no evidence adduced, court can only safely award interest on general damages at court rate of 06% per annum from date of judgment till payment in full.

In conclusion, I am satisfied that the plaintiff has formally proved his claim against the five defendants jointly and severally to the required standard of proof. I enter judgment for the plaintiff against the defendants jointly and severally for the following orders:-

- a) for cancellation of the defendants' names from the certificates of title to land comprised in Kyaggwe Block 105 plots 1733, 1734, 1735, 1736 and 1737 and entry of the plaintiff's name to the said plots;
- b) An order of eviction of the defendants from the respective plots, two months from the date of this judgement.

- c) A permanent injunction restraining the defendants from making any future trespass or laying any claim on the suit plots.
- d) Demolition order of any illegal structures erected on the suit plots by the defendants, two months from the date of this judgement.
- e) General damages of U.Shs.30,000,000/= (thirty million) for trespass, inconvenience and mental suffering;
- f) Interest of 06% per annum on general damages from date of judgment till payment in full.
- g) Costs of this suit.

Dated at Kampala this 6th day of June 2013.

Percy Night Tuhaise

JUDGE.