

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA - NAKAWA CIRCUIT
CIVIL SUIT NO. 27 OF 2012**

**1. NAGAWA AGNES
2. SEBINA LAWRENCE ::**
PLAINTIFFS

V E R S U S

**1. SEGAWA SAMUEL
2. JOYCE NAKIBINGE
3. BEN LWANGA BWEBawe
4. DAN SERUFUSA
5. MAYAMBALA
6. KIMULI GODFREY
7. SARAH NAMUKWAYA
8. MPUNGU PAUL
9. NANDAWULA JULIET ::**
DEFENDANTS

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

RULING

The Plaintiffs' suit against the Defendants' jointly and severally is for an Order of cancellation of a Registered Certificate of Title on Block 397-399, Plot 176 and all other extended Plots thereon (the suit land), A Permanent Injunction against the Defendants' from claiming ownership of the suit land, an Eviction Order of the Defendants' from the suit land, General Damages and Costs of the suit.

The Plaintiffs in Paragraph 4 of the Plaint aver that they are the Administrators of the Estate of the Late Katumba Christopher who died testate in 1974 leaving one Bisaso Dick as a Heir and a Caveat which the deceased lodged in 1945 on his land; Block 397-399, Plot 176 measuring about Seventeen and a Half Acres (17 ½). The Plaintiffs further aver in paragraphs 5, 6 and 7 that on the 29th of May, 2002, the first Defendant (Segawa Samwiri) without any color of light removed the deceased's Caveat and fraudulently became a proprietor of the deceased's property, divided Plot 176 into two (2) Plots that is; Plot 208 measuring Two and a Half acres (2 1/2) and Plot 209 measuring Five acres (5). The Plaintiffs' contend that they made a survey in the Ministry of Lands in September, 2011 through the Area Schedule Form, they discovered that the First Defendant had become the second Proprietor of the deceased's property and the Eight (8) other Defendants' had become the Co- Proprietors. They are still extending to other new Proprietors Plots thereon. It is also alleged that the Area Schedule Form marked as "E" indicates that the late Christopher Katumba had transferred Plot 208-461 yet he had left a caveat on the original land title on Block 397-399, on Plot 176 prior to his death in 1974 is a forgery and unlawful obtaining of a Certificate of Registration on a Land Title.

In their Written Statement of Defence under paragraph 2, it is stated that the Defendants' shall at the trial raise a Preliminary Objection to the effect that the Plaintiffs' suit is bad in law, misconceived, frivolous, and vexatious as it does not disclose a cause of action and that the suit should be dismissed with costs. The Defendants also plead under paragraph 6 that they have never removed any Caveat nor sold Plot 176 as alleged by the Plaintiffs.'

The Plaintiffs' were represented by BB Associates & Legal Consultants while the Defendants' were represented by Counsel Deus Nsengiyuva of M/s Ayigihugu and Co. Advocates.

Indeed, on the 31st of October 2013 when the matter came for a Pre-trial hearing, The Defendants' Counsel, Mr. Deus Nsengiyuva raised a Preliminary objection to the suit that the Plaintiff does not disclose a Cause of Action because it seeks a cancellation of a Certificate of Title which does not exist but alluded to the fact that the Certificate of Title was issued in 1946. Secondly, Counsel Nsengiyuva contended that there are no particulars of fraud in the Plaintiff to give rise to a cause of action. Since the Plaintiffs' Counsel was absent to reply to the Preliminary Objection raised by the Defendants' Counsel. I advised Counsel Nsengiyuva to file his application for the Preliminary Objection by 11/11/2013 and gave the Plaintiffs' Counsel an opportunity to file a reply to the Preliminary Objection within seven days (7) that is; by 18/11/2013.

To date, the Plaintiffs' Counsel has never filed his/her reply to the Preliminary Objection raised by the Defence Counsel. I will take it that she left it upon the Court to make its findings on the same.

Counsel Nsengiyuva submitted that the suit be dismissed and the Plaintiff struck out on the grounds that;-

- a) It offends the provisions of O.7 r 11 (a) and (e) of the Civil Procedure Rules S.I 71-1 for it does not disclose a cause of action against the Defendants hence being frivolous and vexatious.
- b) The Plaintiff does not give particulars of fraud offending O.6 r 3 and 30 of the Civil Procedure Rules S.I 71-1.
- c) The irregularities contained in the Plaintiff are so fatal, a nullity and cannot be cured by an amendment.

- d) The Plaintiffs' do not state what particular interest the late Christopher Katumba had in the land and that there is no proof of right and interest that the deceased had in the land
- e) The Plaintiffs do not disclose how the several Defendants procured fraud and how it is attributed to them.

Counsel Nsengiyuva cited O.6 r 3 Of the Civil Procedure Rules S.I 71-1 (CPR) which stipulates that in all cases in which the party pleading rules or any misrepresentation, fraud, breach of willful default or undue influence and in all cases in which particulars may be necessary with dates, shall be stated in the pleadings. Mr. Nsengiyuva contended that O.6 r 3 of the CPR is mandatory and the party who relies on fraud must state the particulars of fraud. According to him, the Plaintiffs have not attributed fraud to any of the Defendants. Therefore, the suit before this Honorable Court brought by the Plaintiffs' against the Defendant is vague.

In his submissions, Counsel Nsengiyuva stated that the Plaintiffs' claim against the Defendants' is for cancellation of the Certificate of Title of Plot 176 and the other extended plots thereon. Counsel for the Defendants' contended that the Plaintiffs' should have proved that they are the registered proprietors of the said Plots. In addition, it was Counsel Nsengiyuva's argument that the Plaintiffs' should have proved that the Defendants' acquired the said Plots using fraudulent means.

Counsel for the Defendants' raised a very crucial point to note. He gave a brief background of the suit land. He stated that the suit land is on Plot 176 which belonged to the late Christopher Katumba to which the Plaintiffs are claiming their interest as the Administrators. According to Counsel, the Defendants occupy Plot 175 having no extension on Plot 176. Their plot has never been occupied by the Defendants as claimed by the Plaintiffs. Counsel

Nsengiyuva submitted that the Defendants interest lie in Plot 175 which they occupy. It is further stated that the Defendants' further subdivided plot 175 into several other Plots to which they acquired the titles. Counsel also submitted that the Plaintiffs' claim against the Defendants' is unfounded as they have no facts to the land which they claim. He prayed that this Honorable Court be pleased to strike out the Plaint. They also seek an order to stop the Plaintiffs from interfering with the Defendants' and any other *bonafide* occupant, who are in occupation of their land.

I will start by considering whether the Plaintiff's Plaint discloses a cause of action against the Defendants.'

Whether the Plaint discloses a cause of action against the Defendant

In his written submissions, Counsel for the Defendant submitted that the Plaint offends O.7 r 1 (a) and (e) of the CPR. His written submissions are that under O.7 r 1 (e) of the CPR provides a mandatory requirement that a Plaint should contain particulars constituting the cause of action and when it arose. The Plaintiffs' Plaint does not state what particular interest the late Christopher Katumba had in the land. There is also no proof of what interest that the deceased had in the land. Moreover, the Plaint does not disclose how the several Defendants' procured the Certificate of Title on the suit land through fraud and how the same is attributed to them. Counsel Nsengiyuva submitted that because of failure to state the aforesaid, the Plaint fails to disclose a cause of action as well as its particulars as required by the rules. Counsel for the Defendant prayed that the Plaint be rejected under O. 7 r 11 (a) of the Rules. Counsel further submitted that the Plaint offends O. 6 r 30 of the CPR for failure to disclose a reasonable cause of action, and prayed that the Plaint be struck out with costs.

There was no reply to the Preliminary Objection raised by the Defense Counsel, Mr. Nsengiyuva Deus.

I have carefully considered the submissions of Defense Counsel and the Plaintiff together with the attachments thereto. The question of whether the Plaintiff discloses a cause of action is determined upon perusal of the Plaintiff alone and any attachments thereto. In the case of ***Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998***, Wambuzi CJ as he then was held at page 3 of his judgment that in determining whether a Plaintiff discloses a cause of action under Order 7, rule 11 of the CPR or a reasonable cause of action under order 6, rule 30, of the CPR only the Plaintiff can be perused. He said:

“I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the Plaintiff can be looked at...”

Similarly, in the case of ***Attorney General vs. Oluoch (1972) EA page 392***, it was held that the question of whether a Plaintiff discloses a cause of action is determined upon perusal of the Plaintiff and attachments thereto with an assumption that the facts pleaded or implied therein are true. I agree with the provisions of O.7 r 11 (a) and (e) and O.6 r 3 and 30 of the CPR S.I 71-1 as cited by Counsel Nsengiyuva.

The position regarding “cause of action” was well stated in ***Auto Garage & others Vs. Motokov (No 3) (1971) EA. 514*** where it was stated that the Plaintiff must establish that he or she enjoyed a right, the right was violated, and that the Defendant is liable. (See: ***Al Hajj Nasser N. Sebaggala vs. Attorney General & Others Constitutional Petition No. 1 of 1999***. Further, that the provision (***under Order 7 r.11 CPR***) that a Plaintiff shall be

rejected if it discloses no cause of action appears mandatory. **(See: Hasmani vs. National Bank of India Ltd (1937) 4 E.A.C.A.55.)**

I reiterate the provision cited by Counsel Nsengiyuva, *to wit*, O.6 r 3 of the CPR S.I 71-1, which states that "*In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.*"

This rule has been variously interpreted in several cases where fraud is alleged. The rule applies to cases of misrepresentation, fraud, and breach of trust, willful default or undue influence. Consequently, the requirements for pleading fraud are the same as the requirements for pleading misrepresentation, breach of trust, willful default or undue influence. It follows that decisions on how to plead cases of fraud are relevant on how to plead in cases of misrepresentation as well.

In the case of ***Kampala Bottlers Ltd versus Damanico (U) Ltd Civil Appeal No. 22 of 1992***, Hon. Justice Platt JSC held and I quote at page 5 of his judgment:

"In the first place, I strongly deprecate the manner in which the Respondent alleged fraud in his Written Statement of Defence. Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 and plead fraud properly giving particulars of the fraud alleged. Had that been done, and the Appellant had been implicated, then on the Judge's findings that would have been the end of the Defence. If, on the other hand, the officials had been implicated, then on the usual interpretation of Section 184 (c) of the Registration of titles Act, that would have been found to be insufficient." (Emphasis added)

Wambuzi CJ held that:

“Normally, where fraud is pleaded, particulars of the fraud must be given.”

The above cases demonstrate that where a fraud is pleaded, it is necessary to give the particulars of fraud. Additionally, the Courts have held that the requirement for pleading particulars of fraud is mandatory. In the case of ***Lubega vs. Barclays Bank [1990 - 1994] EA 294***, the Supreme Court as per Justice Manyindo DCJ, at page 303, held that as far as fraud is concerned the requirement is that particulars of the alleged fraud are pleaded:

This principle is embedded in order 6 rule 3 of the CPR which I have already cited. In my mind, failure to plead and particulars of fraud is a fundamental defect and not an irregularity curable by evidence or otherwise. Fraud must be pleaded and proved.

In ***Okello vs. Uganda National Examinations Board CA No. 12/1987 reported in [1993] II KALR 133 at 135*** Ag. Lubogo JSC held that Order 6 rule 3 of the CPR is mandatory in that the particulars of fraud and dates regarding the alleged fraud should be given.

It is a mandatory requirement that fraud has to be pleaded and particulars given for it to be proved. Failure to do that is fatal. In the case before me, fraud was averred by the Plaintiff in alleging that the Defendants acquired the Certificate of Title on the suit land fraudulently. This is the sole foundation of the Plaintiffs' cause of action against the Defendants'. However despite the above pleading, no particulars were given as required by the mandatory rule, 3 of order 6 of the CPR. The cause of action in fraud constitutes the core of the Plaintiffs' claim against the Defendants.

Again, it is a trite rule of pleading that all facts which are necessary to prove the cause of action of the Plaintiff are to be averred in the Plaintiff. What is not

pleaded cannot be proved. The Supreme Court of Uganda considered the requirement for necessary facts to constitute a cause of action in the case of **Attorney General V Major General David Sejusa (formerly known as Tinyefunza) Constitutional appeal No. 1 of 1997 in the** Judgment of Wambuzi, C. J Page 18 - 19

“On the authorities referred to us, I obtain guidance from the definition given by **Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206**. The learned author says:

A cause of action means every fact, which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the Plaintiff a right to relief against the Defendant. It must include some act done by the Defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the Plaintiff to prove to enable him to obtain decree. Everything which if not proved would give the Defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the Plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the Defence which may be set up by the Defendant, nor does it depend upon the character of the relief prayed for by the Plaintiff. It is a media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit.” (Emphasis added)

It was held in the East African Court of Appeal in case of **Sullivan vs. Ali Mohammed 1959 E.A 239** (Windham J) that the Plaintiff must allege all the necessary facts that establish the cause of action.

On these grounds, it is my conclusion that the Plaintiff does not allege the necessary facts to constitute a cause of action against the Defendants. I hold that the Plaintiff, did not comply with the provisions of O.6 rule 3 of the CPR. Secondly, Under O.6 r 30 CPR, any pleading shall be struck out on the ground that it discloses no reasonable cause of action if it is shown that such pleadings are frivolous or vexatious. Subsequently, where a Plaintiff does not allege all the necessary facts needed to constitute a cause of action, it shall be rejected under order 7 rule 11 (a) of the CPR for not disclosing a cause of action is mandatory.

In view of the above authorities, this Honourable Court is persuaded by the arguments of the Defendants based on allegations of fraud that was never pleaded and with no particulars set out in the Plaintiff.

On these premises, and in view of what I have outlined herein, I uphold the Preliminary Objection raised by Counsel of the Defendants' that the suit is misconceived and bad in law and does not disclose a cause of action against all the Defendants. The suit is hereby dismissed pursuant to O.7 r.11 of the CPR and struck out under O.6 r 30 Civil Procedure Rules of the CPR.

COSTS ARE AWARDED to the Defendants.



Signed:.....

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Hon. Lady Justice Elizabeth Ibanda Nahamya.

J U D G E

04th February, 2014