

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MUKONO

HCT-03-CV-CS-0038-2008

ABDU KALEMBA.....PLAINTIFF

VERSUS

KIWANNUKA ROBERT.....DEFENDANT

JUGEMENT OF HON.LADY JUSTICE MARGARET MUTONYI J.H.C

JUDGEMENT

1. Brief Background

Abdu Kalemba here in after referred to as the plaintiff sued Kiwanuka Robert herein after referred to as the defendant over a land. Needless to mention, this case has had a checkered history where at one time the plaintiff sued the defendant together with Haji Abdu Kalemba the plaintiff's father. It has had a protracted trial starting from Jinja where it was filed in 2008, with several applications and a consent judgment at one time between Abdu Kalemba the father and Abdu Kalemba the son which was set aside. This was way back on 10th December 2008.

The suit was withdrawn wholly against the 2nd defendant then, Hajji Abdu Kalemba who became the witness to the plaintiff. This was on 3/7/2009.

It has been handled by several judges including Hon. Lady Justice Irene K Mulyagonja in 2009, Hon Lady Justice Flavia Senoga Anglin in 2012, Hon. Justice Mr. Godfrey Namundi and now myself.

This protraction and inordinate delay needless to mention is a sign of poor case management and discredits our justice system.

I cannot find any reasonable explanation for a case remaining in the court system at a court of first instance for more than 9 years.

At one time Kiwanuka Robert was the plaintiff while Hajji Abdu Kalemba and Abdu Kalemba were the defendants. This was in Jinja High Court Civil Suit No. 149/2012.

The legal maxim that justice delayed is justice denied means that if legal redress is available for a party that has suffered some injury, but is not forth coming in a timely manner, it is effectively the same as having no redress at all.

It is absurd that for over 9 years, there has been no redress to the parties in this case.

With the above said, let me go to address the legal issues as justice demands.

The brief facts of the case are that the defendant is the registered proprietor of the suit land comprised in Kyagwe Block 110 Plot 1440 at Seeta. He claims to have bought it from Abdu Kalemba who is now a Hajji and the father of Abdu Kalemba the plaintiff.

The plaintiff's case is that he was the registered proprietor of the land in dispute which he bought from one Sarah Nabunjo and others. That he left his title with his father Hajji Abdu Kalemba for safe custody only to learn later that his interest in the land had been transferred to the defendant yet he never signed any forms transferring his interest in the land. He alleged the defendant fraudulently transferred himself on his certificate of title after stealing it from his father.

On the other hand, the defendant's case is that he bought the suit land from Hajji Abdu Kalemba the father of the plaintiff at 14,000,000 who bought it from Sarah Nabunjo.

That after payment, Abdu Kalemba the plaintiff delivered the duplicate certificate of title, transfer forms to enable the defendant register his interest in the land.

He contends that the plaintiff and his father are fraudsters with ill motives of taking away his land he legally acquired from the plaintiff's father.

2. Three issues were framed for courts resolution

1. Whether the transfer of the suit land into the names of the defendant was fraudulent.
2. Whether or not the defendant is a bonafide purchaser for value without notice of the plaintiff's interests.
3. What are the remedies to the parties

3. Burden and Standard of Proof

In civil matters, the burden of proof is provided for under *The Evidence Act Chapter 6. Sections 101 to 103, 106 and 110* are applicable in this case.

Section 101 (1) provides that:

“Whoever desires any 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.”

In this case, the burden of proof rests on the plaintiff who is claiming the legal right of ownership over land which is currently registered in the names of the defendant. According to his pleadings, he claims the defendant procured registration through fraudulent means since he has never signed transfer forms for him.

It is also settled law that the standard of proof in civil matters is proof on the balance of probabilities as laid out in the landmark case of **Miller vs. Minister of Pensions [1947] ALL ER 372** where Lord Denning held that **“the plaintiffs evidence must carry reasonable degree of probability but not so high as required in a criminal case,”**

The standard of proof in civil matters is therefore light as it is not beyond reasonable doubt like in criminal matters.

However, where fraud is alleged in a civil matter like in the instant case, where it is being alleged that the registration of the defendant as proprietor in the suit land was procured by fraud then, the standard of proof is slightly higher than in ordinary civil suits but not as high as in criminal matters.

This is so because **“allegations of fraud must be strictly proved although the standard of proof may not be heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”**

The above proposition was the holding in the case of **Ratilal Gordhanbhai Patel vs Laiji Makanji [1957] EA.314 at page 317** which has been followed in a plethora of authorities.

The plaintiff therefore has to prove the case against the defendant with the standard of proof higher than in the ordinary civil suits.

5. Resolution of Issues

Whether the transfer of the suit land into the names of the defendant was fraudulent.

As the trial court, the main responsibility is to evaluate evidence from both sides in order to arrive at a just and fair decision.

I have also put into consideration the submissions of both counsel together with the authorities cited.

Merriam Webster defines fraud as a deceit, trickery especially intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right.

Fraud is commonly understood as dishonesty calculated for advantage.

To prove fraud the plaintiff must adduce evidence establishing five main elements.

1. A false statement of a material fact intended to deprive the plaintiff/victim of a legal right.
2. Knowledge on the part of the defendant that the statement is untrue
3. Intent on the part of the defendant to deceive the plaintiff or alleged victim
4. Justifiable reliance by the alleged victim or plaintiff on the statement.
5. Injury of the alleged victim or plaintiff as a result.

Careful perusal of the plaintiff's evidence reveals that PW1 Hajji Abdu Kalemba and PW3 Abdu Kalemba are the main witnesses in the plaintiff's case.

Both PW1 and PW3 are called Abdu Kalemba and are related. One is the father of the other. PW1 is the father and PW3 the son.

PW1 the father gave a very long testimony but the gist of it is that he bought land comprised in Block 110, Plot 1440 from Sarah Nabunjo. He eventually got registered as the proprietor much as he claimed it was registered in his son's names.

He however agreed under cross examination which process tests the integrity of the witness that he is the one who was registered on the land title in his names of Abdu Kalemba s/o Abdu Kalemba.

PW1 also informed court that his son PW3 Abdu Kalemba also bought land from Sarah Nabunjo who signed transfer forms for him.

He again told court **that “it’s me who raised the money and gave it to Sarah Nabunjo because my son was not there”** and that Sarah Nabunjo, Eseza Namusoke and Milly Nakiwala signed as sellers.

Under cross examination he confirmed that both him and his son are called Abdu Kalemba and that the agreement for block 110 plot 1440 was between him and Sara Nabunjo.

He further said “I never bought plot 1332 from Nakiwala and that he sold plot1332 to the defendant”

When court asked him for clarification, he replied as under;

“I bought plot 1333 from Nabunjo block 110, I only bought one plot from Nabunjo which I sold to the defendant which is plot 1333 block 110’

The star witness for the plaintiff contradicted himself on the plots he bought from Nabunjo. He first claimed he bought block110 plot 1440 from Nabunjo and then said he bought block 110 plot 1333 which he sold to the defendant and then block 110 plot 1332.

The only facts which never changed are the following

1. He bought land from Nabunjo
2. He sold the land he bought to the defendant
3. He shares the same names with his son the plaintiff as both of them are called ABDU KALEMBA.

It is therefore Nabunjo who knows which exact land she sold to this witness.

PW2 Abdu Bagenda confirmed to court that he witnessed the agreement or sale of land between the defendant and PW1 which land was bought from Sarah Nabunjo.

The land is the one which is now housing the defendants Petrol Station and at that time had a squatter who was a lugbara.

This witness did not see or know the plaintiff at that time at all. PW2 was emphatic on the fact that Haji Kalemba sold land to Kiwanuka where the defendant has a petrol station and was not aware of any other plot Kalemba sold to Kiwanuka.

The consideration was 14 million. He witnessed payment of 10 million cash.

PW3 Abdu Kalemba the plaintiff stated inter alia that his father is the one who first bought the land and he processed the transfer forms from Sarah Nabunjo, Milly Nakiwala Nakyinga to Abdu Kalemba and that he also signed on the transfer forms.

This was in respect of Plot 1440 block 110. That he kept his certificate of title for block 110 plot 1440.

He informed court his father owned plot 1333 which was neighboring his and he wanted to sell it. That he was not around when his father sold his plot.

He was later called by his father who informed him that his title had been stolen. That when he came, he found when the defendant had grabbed his land.

The matter was reported to LC, and then Police and eventually, it is here in court.

When he went to the land office he realized that his names had been cancelled from the title and registered in the names of the defendant.

While under cross examination, he stated that he was 18 years old in 1993 and was living alone at Mbuya Kinawataka.

He admitted, it was his father who bought Block 110 plot 1140 in the following words;

“It is true my father is the one who bought the land, I also topped up the money at first, and the names of my father were the ones written as purchaser”

When he was asked why he did not sign as purchaser he responded as follows,

“At first my father signed, wrote his first name Abdu, it was not readable. I continued to write Kalemba in my handwriting.”

The above statement clearly shows that it was his father Abdu Kalemba who bought Block 110 plot 1440 not Abdu Kalemba PW3.

For avoidance of doubt DW1 Sarah Nabunjo was called as the defense witness. She was emphatic on block 110 plot 1440.

She informed court that she sold block 110 plot 1140 to Abdu Kalemba and never sold plot 1332 to him.

Block 110 plot 1440 had a squatter called Waddu Yusuf at the time she sold to Kalemba PW1

That she was around when Kalemba PW1 sold this land to the defendant and he had already received his land title. She informed court that her sister Milly sold plot 1332 to the defendant and that there was a road between the two petrol stations.

She denied ever selling plot 1332 to PW1 Abdu Kalemba.

From the evidence of DW1 there are two plots on Block 110. Plot 1332 and plot 1440.

DW1 sold plot 1440 to Kalemba Abdu senior if I may call him not Kalemba Abdu junior the plaintiff.

She did not sell to Kalemba Abdu senior plot 1332 and there is no evidence to the contrary. The plaintiff did not prove that Kalemba Abdu senior bought two plots from Nabunjo. Evidence shows that he bought block 110 plot 1440.

If Abdu Kalemba bought only one plot from Nabunjo Sarah which Nabunjo stated was Block 110 plot 1440, which plot did Abdu Kalemba sell to the defendant.

DW1 Robert Kiwanuka tendered in court so many documents but I will only refer to the relevant ones to this case. His evidence is in his witness statement dated 8/5/2017.

The gist of his evidence is that he bought Block 110 plot 1440 from PW1 Abdu Kalemba who had a certificate of title then.

The copy of the certificate was tendered in court and marked PE2, and was annexure B to the defense witness statement.

That this land had a Kibanja holder Waddu Yusuf who was later sorted out by Kalemba and Sarah.

When he started clearing the land, one Milly Nakiwala came up claiming part of the land which Abdu Kalemba sold to him (see paragraph 11 of his statement) this was plot 1332

That Milly Nakiwala understood his position and entered into some understanding with her as per DE6 (A)

In this exhibit, the defendant paid 2.2 million in respect of plot 1332 block 110.

Later on he concluded with Milly Nakiwala and she together with other registered proprietors on the land as administrators transferred plot 1332 block 110 to the defendant and he became the registered proprietor as per copy of certificate marked DE5

When the court visited the locus in quo, Sarah Nabunjo identified the land that was sold to the defendant by Abdu Kalemba senior and land that was sold to the defendant by her sister Milly Nakiwala.

Both land have developments that comprise of a petrol station and some buildings.

The plaintiff also occupies part of this land.

According to the evidence of Sarah Nabunjo DW1 and Hajji Abdu Kalemba senior PW1, the plaintiff did not have any transaction with the original registered proprietors and vendors of this land in dispute.

He never bought from Sarah Nabunjo or her sister neither did he buy from his father much as he claims he bought the land in dispute. His allegation of purchase of land is actually false because he did not adduce any evidence in form of sale Agreement between him and Nabunjo.

Land in Uganda like elsewhere is acquired by inheritance, or given as a gift or bought directly from the owners or granted as a lease from the leasing authority.

PW1 Abdu Kalemba senior agreed that he bought land from Sarah Nabunjo. He failed completely to prove that he bought plot 110 plot 1332. The copy of the agreement between him and Sarah Nabunjo dated 31/10/1993 marked DE4 (a) and DE4 (B) the luganda and English version clearly show that the transaction was between PW1 and DW1.

The plaintiff is nowhere in the picture.

It is also clear that PW1 eventually sold plot 1440 block 110 to the defendant as per PE 4(A) which agreement was witnessed by DW1 the original owner who had to clear the land free of any Kibanjo holder/ squatter who was on the land one Waddu Yusuf.

It would have been different if the plaintiff claimed that his father PW1 gave him the land. But he was emphatic about buying the land yet he has no evidence.

If PW1 bought block 110 plot 1440, and not block 110 plot 1322, and admitted in his evidence that he only bought one plot from Nabunjo Sarah DW1 which plot did he sell to the defendant?

The plaintiff purported to say that his plot was neighboring the father's plot which was a naked lie because he never bought any plot.

The plaintiff thought that because he uses the same names like his father, he would successfully lay a claim over this land using his father as a witness, forgetting that he had to lay credible evidence on how he acquired the land.

The law is very clear, ***section 101 (1) of the Evidence Act*** clearly states that **"whoever desires any 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"**

Under section 103 of the same act provides that **"the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that proof of that fact shall lie on any particular person."**

The plaintiff in this case pleaded to be the original registered proprietor and yet it was Milly Nakiwala, Nakinga and Sarah Nabunjo as administrators of the estate of Eriyazali Mabira vide administration cause 72/1986.

They became registered proprietors on 5/7/1995.

Sarah Nabunjo who was given block 110 plot 1440 as her share sold it to Abdu Kalemba PW1 who was also registered as proprietor on 5/7/1995 as per copy of the certificate title marked PE2.

The plaintiff and the defendant both agree that the defendant is the registered proprietor of the block 110 plot 1332 as per exhibits DE5, DE6 and DE6 (b)

Exhibit DE5 the copy of the certificate of the title for Block 110 plot 1332 reveal that Milly Nakiwala Nakinga and Nabunjo Sarah as administrators of the estate of the late Obadiya Kiku in administration cause No. 86/2004 were registered as proprietors on 16/9/2005 and on the same day transferred their interest to Kiwanuka Robert under instrument No.MK 075874

The plaintiff is not disputing this transaction in any way. His witness PW1 his father lied about buying plot 1332 block 110 because he has no evidence whatsoever that he bought from Nabunjo or Nakiwala.

The defendant informed court that PW1 even lied to him when he was showing him the boundaries of the land where he included plot 1332 block 110 which was not his.

Now that the land in dispute was owned by Sarah Nabunjo who sold to PW1 which land did PW1 sell to the defendant if the land was for the plaintiff who has no evidence of purchase?

The parties are bound by their pleadings. It is apparent from the evidence that the plaintiff never purchased any land from Nabunjo Sarah and was never registered on this land at any one time as registered proprietor.

It was PW1 Abdu Kalemba the father of Abdu Kalemba who in cohort planned to use their names to defraud and grab the defendant's land by claiming that the land belongs to Kalemba Abdu the son who never entered any land transaction with Nabunjo Sarah at any one time.

Given the definition of the word, fraud which include but not limited to a false representation of a matter of fact whether by words or by conduct by false or misleading allegations, the two PW1 and PW2, the father and son are fraudsters who made a false representation of a matter of fact by claiming PW3 bought block 110 plot 1440 whereas not.

Sharing the same names does not confer same personal identity. PW1 and PW3 are two different people who attempted to deceive this honorable court.

It was not enough to say that PW1 is a son to Mohammed Serwanga Kawombe. That is not important in this case but important in proving his lineage. What was important was who bought land comprised in block 110 plot 1440 from Sarah Nabunjo? Who got registered on that land after Nabunjo sold to him? And who sold the land to Robert Kiwanuka? It was PW1, the father of the plaintiff who bought from Sarah Nabunjo, got registered on the title and later sold the land to the defendant who acquired legal equitable interest in the land.

After careful evaluation of both the plaintiff and the defense case, it is very clear that the plaintiff failed to discharge his burden of proof in his wild allegations of fraud against the defendant.

It is very absurd that the father PW1 instead of teaching his son good morals and honesty, assisted him in a bid to grab land he had sold for value.

Even if court was to apply Cannon Law, the father and son can never be one person even if they are joined together. It is only a wife and husband who are treated as one in the some instances.

The plaintiff failed miserably to prove that he is the ABDU KALEMBA who bought the land from Nabunjo as Nabunjo denied him and rightly so because she dealt with ABDU KALEMBA, the father of the plaintiff.

The first issue is therefore resolved in favor of the defendant as no fraud has been proved against him.

The second issue is whether or not the defendant is a bonafide purchaser for value without notice of the plaintiff's interest.

For a purchaser to qualify to be bonafide, he must show that,

1. He acted in good faith in entering into the transaction
2. He gave value for the property whether partial or full payment
3. He acquired legal interest over the property
4. He had no notice of the equitable interest of the claimant/ plaintiff which means that he had no knowledge of the preexisting equitable interest before the transaction was complete

Without wasting courts time, I am of the view that the resolution to the first issue answers the second resolution as I do not intend to go into academic arguments.

I only wish to emphasize that for the defendant to claim to be a bonafide purchaser and put to task to defend that claim, the plaintiff must prove that he had a preexisting equitable interest.

The plaintiff in this case was riding on the equitable interest of his father PW1 who sold his interest and transferred it for value to the defendant only to change color like a chameleon.

The plaintiff in this case had no equitable legal interest whatsoever in the land in dispute at any one time. He was nowhere in the picture at the time of the transaction between his father PW1 and the defendant.

The second issue in my view is therefore rendered redundant in this case as there is no preexisting equitable interest to talk about.

Lastly, what are the available remedies to the parties?

It is trite law that where the plaintiff fails to prove the case, it is dismissed with costs which follow the event. The court or judge however is at liberty to exercise discretion as provided under **S. 27 of the Civil Procedure Act Cap 71**

The judge is therefore expected to evaluate the case before making a judicial decision on the award of costs.

I have carefully considered the character of the plaintiff in this case and the course he took to drag an innocent person to court. It would be very unfair not to grant the defendant costs after being subjected to a frivolous and vexatious suit.

In the result, the suit is dismissed with costs to the defendant. The defendant is at liberty to evict the plaintiff who is in occupation of part of this land.

I so order.

Margaret Mutonyi JHC.

11th October 2017.