



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 021 of 2016

In the matter between

1. LOUM KENNEDY }
2. PROF. NYEKO PHILLIP } **PLAINTIFFS**

VERSUS

OBWOMA CHARLES **DEFENDANT**

Heard: 6 March 2019

Delivered: 11 April 2019

Summary: Suit for cancellation of title on account of fraud.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiffs jointly and severally sued the defendant for cancellation of title to land comprised in LRV 3683 Folio 21 Plot 24, Ocan Ben Road, situated at Kirombe sub-ward, Alokulum Parish, Layibi Division in Gulu Municipality, a declaration that the second defendant is the rightful owner of that land, general damages, interest and costs.

[2] Their claim is that the land in dispute forms part of the estate of the late Okot Peter. As a consequence of previous litigation between the beneficiaries of the estate of the deceased and the administrator of that estate, a one Kinyera Justine, court on 30th November, 2007 directed a cancellation of title comprised

in LRV 3683 Folio 22 Plot 26, Ocan Ben Road, that formed part of the estate and for the land in respect thereof to be distributed among the beneficiaries. Under the scheme of distribution of that land, the defendant acquired plots 03, 28 and 26. The first plaintiff was given plots 22, 24 and 37. Subsequently, the first plaintiff transferred plot 24 to a one Ojok Awany who in turn sold it to the second plaintiff. The second plaintiff took possession of the plot and fenced it but on attempting to process a title deed in respect thereof, found that the defendant had already secured a title deed over that plot constituted in LRV 3683 Folio 21 Plot 24, Ocan Ben Road, contrary to the scheme of distribution. He has since then refused to hand it over to the second plaintiff. The plaintiffs contend that the defendant secured registration of that plot in his name fraudulently and in violation of the beneficiaries' the scheme of distribution.

- [3] In his written statement of defence, the defendant contended that he is the rightful owner of the land in dispute and the plaintiffs have no rightful claim to it. He counterclaimed on basis of the fact that by constructing a perimeter wall around the plot, the second plaintiff committed an act of trespass to land

The plaintiff's evidence:

- [4] When the suit came up for hearing on 20th September, 2018 the defendant did not turn up in court. According to Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the notice of hearing was duly served, it may proceed ex parte. In the instant case the affidavit of service indicated that counsel for the defendant was served on 5th September, 2018. There being no explanation for his and the defendant's absence, leave was granted to the plaintiff to proceed ex-parte.
- [5] The first plaintiff testified on 10th May, 2008, a family meeting had been convened by which the estate of the deceased was distributed among the beneficiaries.

The land was distributed according to the household of each of the four wives of the deceased. Each of the administrators originated from one of the four widows' households. Obwona Charles, the defendant got plots 3, 28, and 26; Okello Vincent got plot 29, 38, and 39; Lowum Kennedy, the first plaintiff, got plot 22, 24 and 27; Amon Beatrice got plots 31, 33, and 35. Each of the administrators continued staying on the land and later sold off all the land. It is on 3rd July, 2008 that the first plaintiff executed an agreement selling plot 24 now in dispute to Ojok Awani. Later Ojok Awani sold the plot to the second plaintiff.

[6] The second plaintiff testified as P.W.2 and stated that he bought the plot from Savio Ojok Awani on 17th May, 2009 at a price of shs. 18,000,000/= The plot measures 33. 2 x 46.3 x 41.2 x 46.1 metres. Before purchase he searched the title. He asked seller to show him documentary evidence of ownership. He showed him the sales agreement by which he bought it from the first plaintiff. He also availed him a photocopy of the land distribution minutes, in which the defendant and the rest of the administrators of the land agreed to share the land, and a copy of the judgment of the High Court. The Judgment indicated that the land should be shared equally among the wives of the deceased, who had four wives. The minutes of the distribution implemented that decision.

[7] The second plaintiff visited and inspected the land and found that it had been demarcated. After purchase he began cultivating and later constructed a perimeter wall around the plot. The defendant then came and threatened that it was his plot. The second plaintiff asked him to provide evidence of ownership. The defendant never produced such evidence but continued to threaten. The plaintiff conducted a search in the Ministry of Lands to check the status of plot 24. He found that LRV 3683-21 Folio 21 in respect of that plot was registered in the name of the defendant Obwona Charles of P. O. Box 140, Gulu registered on 29th January, 2007 at 4.03 pm under instrument number 376079. The second plaintiff was not aware at the time of purchase that there was a title in respect of

the land. He contended that the defendant's acquisition of title over the plot was fraudulent since it was contrary to the distribution agreed on 10th May, 2008.

The issues for determination;

[8] The following are the issues to be decided in this suit;

1. Whether the defendant procured registration as the proprietor of LRV 3683 Folio 21 Plot 24, Ocan Ben Road fraudulently.
2. Whether the plaintiffs are entitled to the reliefs sought respectively.

Final submissions of counsel;

[9] In his final submissions, counsel for the plaintiffs argued that here was a distribution of land comprising part of the estate of the deceased. The plot in issue was transmitted to the first plaintiff, Loum Kennedy who sold it to Ojok Savio Awany, who in turn sold it to the second defendant. During the distribution, the defendant did not disclose the existence of the title, with an intention of depriving the estate of this plot of land. In the proceedings that led to the distribution of the estate. He secured registration without knowledge of the rest of the family yet they were living on the land.

First issue; Whether the defendant procured registration as the proprietor of LRV 3683 Folio 21 Plot 24, Ocan Ben Road fraudulently;

[10] Section 59 of *The Registration of Titles Act*, guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*, which essentially relate to fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those

reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker* [1967] AC 569).

- [11] Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practices to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya* S.C. Civil Appeal No. 36 of 1995).
- [12] In seeking cancellation or rectification of title on account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others*, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd.*, S.C. Civil Appeal No. 22 of 1992). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited* [1987] HCB 130 and *M. Kibalya v. Kibalya* [1994-95] HCB 80).
- [13] By virtue of section 191 of *The Succession Act*, a beneficiary does not own any part of the property of a deceased until the executor or administrator distributes the property from the estate. A beneficiary does not own the property until the executor distributes the estate. Before distribution, the administrator is regarded as the "owner" of the assets in so far as the administrator holds the estate in trust

for the beneficiaries. The distribution having taken place on 10th May, 2008, the defendant had no right over the plot as at 29th January, 2007 when the plot was registered in his name. Following that distribution, the plot was given to the first plaintiff who sold it off to the second plaintiff's predecessor in title. The defendant was therefore fraudulent when he secured registration of part of the estate in his personal name before the distribution of the estate was actually done.

Second issue; Whether the plaintiffs are entitled to the reliefs sought respectively.

[14] The first plaintiff sold the land in dispute way back on 3rd July, 2008. He did not retain any interest in the land. He should therefore not have been joined as he is not entitled to any relief. The second plaintiff being the lawful purchaser of the land, he is entitled to possession and a declaration of ownership.

Order :

[15] Consequently, the counterclaim is dismissed with costs to the second plaintiff and judgment is entered for the second plaintiff against the defendant for;

- a) A declaration that the second plaintiff is the rightful owner of land comprised in Plot 24, Ocan Ben Road, situated at Kirombe sub-ward, Alokulum Parish, Layibi Davison in Gulu Municipality
- b) An order of cancellation of the defendant's title to land comprised in LRV 3683 Folio 21 Plot 24, Ocan Ben Road directed to the Commissioner land Registration.
- c) An order directing the commissioner Land Registration to register the second plaintiff as proprietor of LRV 3683 Folio 21 Plot 24, Ocan Ben Road.
- d) The costs of the suit.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the plaintiffs : Mr. Moses Oyet.

For the defendant : Mr. Lamunu Giovano.