THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

CIVIL SUIT NO. 127 OF 2020

GEOFFREY WASSWA :: PLAINTIFF

VERSUS

1. AMY FOR AFRICA LTD
2. BUIKWE DISTRICT LAND BOARD :::::::::::::::::::::::: DEFENDANTS
3. COMMISSIONER LAND REGISTRATION

RULING

Introduction

The Plaintiff brought this suit for:

i. A declaration that the 1st Defendant trespassed on his land.
ii. A declaration that the land comprised in Kyaggwe Block 293 Plot 422, land at Njeru registered in the Plaintiff's names vide instrument No. MKO 129483 on 16th November 2011 is under private mailo tenure.
iii. A declaration that the 2nd Defendant illegally granted and issued a freehold offer which led to the creation of a title for land comprised in FRV MKO 1904 folio 6 Block 541 Plot 382 in Kyaggwe.

iv. A declaration that the 2nd Defendant had no authority to grant and allocate the suit land to the 1st Defendant.

v. A declaration that the freehold title comprised in FRV MKO 1904 Folio 6 Block 541 Plot 382 which sits on the Plaintiff's land is null and void.

vi. An order cancelling the freehold title.

vii. An order granting vacant possession of the suit land to the Plaintiff and an eviction order against the 1st Defendant.

viii. A demolition order of all the structures illegally erected on the land.

ix. A compensation order for the damage done to the land in respect of the current developments undertaken by the 1st Defendant.

x. A permanent injunction against the Defendants from dealing with the suit land in any way.

xi. General damages.

xii. Interest on the general damages

xiii. Costs of the suit.

xiv. Interest on the costs of the suit from the date of judgment.

The Plaintiff claims that together with his brother John Kityo Lukyamuzi, they purchased the suit land from Mariam Nankabirwa sometime in 2000/2001 and it was vacant at the time of purchase. In 2003, they subdivided the land and processed the certificate of title which was first registered in the brother's names vide instrument number MK067722 pending the settlement of the Plaintiff who was not available at the time of the transfer. Subsequently, it

was transferred into the Plaintiff's names vide instrument No. MKO 129483 on 16th November 2011.

The Plaintiff discovered various construction activities on his land and upon inquiries, he discovered that it was the 1st Defendant constructing. He informed one of its' officials that they were illegally constructing on his land but they did not heed his pleas. The 1st Defendant instead claimed ownership by virtue of the freehold certificate obtained from the 2nd Defendant. The Plaintiff instructed Survey Tech Solutions Ltd to ascertain the extent of the trespass and they issued a report. The parcel of the land claimed by the 1st Defendant as freehold is situated on the Plaintiff's mailo land.

In its Written Statement of Defence, the 1st Defendant denied the Plaintiff's claims of ownership of the suit land and averred that it purchased the suit land from Nafula Rose on 20th March 2018 at Ug.shs. 270,000,000/=. Nafula had through various transactions bought it from Kigenyi Khalid on 23rd January 2005, Asega N on 26th December 2004, Twaha Kazungirizi on 22nd July 2004 and Joseph Kinobe on 16th July 2004. It carried out due diligence to establish that Nafula was in possession thereof, and even the LC1 chairperson of the area and the neighbors confirmed her unchallenged ownership of the suit land.

The 1st Defendant further stated in its defence that it purchased the suit land and soon after applied to the 2nd and 3rd Defendants for a certificate of title which was by instrument No. MKO- 00077749, issued on 10th July 2019. The 1st Defendant further states that the Plaintiff's claims of purchasing the suit

land from Nakabirwa was illegal, null and void ab initio because she has never owned the suit land.

Further claims by the 1st Defendant are contained in its Written Statement of Defence which was filed in this honourable court on 2nd September, 2020.

When this matter came up for hearing on 25th October 2021, the Plaintiff was present together with his advocate, Kasolo Jesse from M/s Celer Advocates. The 1st Defendant was represented by Counsel Timothy Mugote. The 1st Defendant's National Director, one Mwoka Patrick also appeared in court. The 2nd and 3rd Defendants were absent. When court inquired whether there was service of the hearing notice, Counsel for the Plaintiff replied that an affidavit of service sworn by one Kato SSebadduka confirmed that there was service of the 2nd and 3rd Defendants. Counsel for the Plaintiff further stated that the Defendants were served with summons and plaint on 11/8/2020 and that there is affidavit of service on court record. This is subject to proof as I have seen that on court record. Counsel for the Plaintiff further submitted that the 2nd and 3rd Defendants have not filed any Written Statements of Defence neither have they applied to for extension of time to file the same. He then prayed to proceed against the 2nd and 3rd Defendants as though they had filed a defence as provided for under O.9 r10 of the Civil Procedure Rules.

In response, Counsel for the 1st Defendant submitted that the current suit stands abated under Order X1A of the Civil Procedure Rules as amended in 2019 because the Plaintiff failed to take out summons for directions within

28 days from the date of the last reply of the rejoinder. The reply to the 1st Defendant's Written Statement of Defence was filed on 26th February 2021 but there were no summons for directions extracted by the Plaintiff. Counsel for the 1st Defendant concluded that the consequence of such is covered under rule 6 of O.X1 of the Civil Procedure Rules. It provides

" If a plaintiff does not take out a summons for direction in accordance with rule 2, the suit shall abate".

In response, Counsel for the Plaintiff submitted that the rule has exceptions. Under rule 4 (e) where an action has been referred to an official referee or arbitrator, the matter does not abate. He said that this matter was referred for mediation on 12th November 2020. The Plaintiff was present, though the Defendants were absent. On 8th December 2020, the Plaintiff was present for mediation but the Defendants were absent. The accredited mediator Mr. Obbo Gerald closed the mediation and filed a mediation report on 19th December 2020. He prayed that court overrules the objection and proceeds to hear the matter on merit.

The issues at this point are:

(a) Whether the suit abated; and
(b) Whether there are any remedies available.

Resolution of the Court

Order 11A rule 2 of the Civil Procedure Rules as amended provides that

"where a suit has been instituted by way of a plaint, the Plaintiff shall

take out summons for direction within 28 days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these Rules."

Rule 3 provides that the summons in sub-rule (2) shall be returned within fourteen days from the date they are taken out. Rule 4 creates exceptions to the rule. Clause (e) of rule 4 creates an exception where "an action in which a matter has been referred for trial to an official referee or arbitrator." Rule 6 provides that "If the Plaintiff does not take out a summons for directions in accordance with sub -rules (2) or (6), the suit shall abate."

The phrase "or (6)" appears to be an error. It should be "or (5)" instead. Sub-rule 6 is the one that provides for abatement of a suit.

According to the Concise Oxford Dictionary of Current English, 11th Edition (1995) the word "abate" means to become less strong, severe, intense etc. the second meaning of "abate" in law is to quash a writ or action. It also means to put an end to (a nuisance, for example). The said dictionary defines "quash" at page 1122 as to annul, reject as not valid by a legal process.

According to Mozley & Whiteley's Law Dictionary, 11th Edition (1993) at page 1, "abatement of an action or suit" takes place when, from some supervenient cause, one of the parties is no longer before court...

Under the Civil Procedure (Amendment) Rules, 2019, the supervening cause here would be the failure to take out summons for directions under Order X1A rule 2. The exceptions to this rule include where a case is referred for trial to an official referee or arbitrator.

Relying on the definition of a referee in the Black's Law Dictionary 5th Edition page 1151 and the definitions of mediation and a mediator under the Judicature (Mediation) Rules No. 10 of 2013, the court in **MA No. 150 of**

2020 Carlton Douglas Kasirye v. Sheena Ahumuza Bageine a.k.a Tash held that "It is clear to me that by virtue of the role played by a Mediator, he/she performs the function of an official referee of the Court. The Court refers a pending cause to him/her to, among others, hear parties and report to court depending on whether or not an agreement is reached towards an amicable resolution of the dispute that is the subject of the cause pending before the court. The person is exercising judicial powers for a specific purpose. A court accredited mediator therefore fits well within the meaning of an official referee as used under Order 11A Rule 1 (4) (e) of the CPR as amended. It follows therefore that where a matter is referred by the Court to mediation, the Plaintiff would not be expected to take out summons for directions within the 28 days provided for under sub-rule (2) of Rule 1 of Order 11A. The suit would therefore fall under the exceptions provided for under sub-rule (4)."

The above decision is in line with the current matter in that on court record there is a direction by Lady Justice Elizabeth Kabanda on 25th March, 2021 that the case be referred to a mediator. There is no report on court record that such mediation took place or not. Consequently, it is my ruling that a case cannot abate when mediation has not been started or concluded. Therefore O.X1A rule 4(e) applies to this case.

Further on the issue of abatement, court has to look at the intention of the legislature. The latter can be derived from the statute itself. The rule on abatement of suits was introduced as a case management mechanism. Under Order X1A rule 1 (1), it is stated that the court shall for purposes of preparing for every action to which this rule applies, provide an occasion for consideration of a suit for scheduling conference and trial of a suit so that –

(a) any matter which should have been dealt with by an interlocutory application and has not been dealt with may, so far as possible be dealt with; and

(b) directions may be given for the future course of action as appears best to be adapted to secure the just, expeditious and economical disposal of the matter.

Where summons for directions are not taken out the suit shall abate under sub-rule (6). This brings court to a consideration of the principles governing the use of ***shall*** in a legislative sentence. In its ordinary significance, ***shall*** is a word of command. It is a word which should normally be given a compulsory meaning, because it is intended to denote an obligation. The auxiliary verb ***shall*** should be used only where a person is commanded to do something. (see Driedger, *The Composition of Legislation* pp 9-12).

However, ***shall*** is sometimes intended to be directory only. In that case, it is equivalent to ***may*** and would be construed as merely permissive to carry out the legislative intention. This usually applies in cases where no right or benefit accrues to anyone, or where no public or private right is impaired by its interpretation as directory.

In Kagimu Moses Gava & others vs Sekatawa Muhammed & others Misc Appeal No. 25 of 2020, Lady Justice Olive Kazaarwe Mukwaya said

"the intention of the framers of Order X1A rule 1 of the Civil Procedure Amendment Rules 2019 was to mitigate the delays and inefficiencies brought on by the actions of officers of court and the parties in civil proceedings. In order that these rules achieve the desired objective, a

holistic and judicious approach to their applications should be adopted by the courts."

I find that the suit has not abated and overrule the objection of counsel for the 1st Defendant. Had the suit abated, according to Order XIA rule 1(7) of the Civil Procedure (Amendment) Rules, 2019, the Plaintiff may, subject to the law of limitation, file a fresh suit. There is evidence on court record that the suit is not dormant. A joint trial bundle filed in court on 8th June, 2021 is further proof that some actions are being undertaken in the suit.

I further direct that service of hearing notice be made on the Defendants in order for the case to be heard on merit. The purported service on the 3rd Defendant through receipt of documents by a lady whose name was not determined by the process server cannot tantamount to effective service of court process. The affidavit of service by Kato Ssebadduka Henry dated 22nd October, 2021 stated in paragraphs 9 and 10 that a lady receptionist whose name was unknown received the hearing notice on behalf of the 3rd Defendant. Until proper service of court process is done, the procedure prayed for by the plaintiff's counsel under Order 9 rule10 of the Civil Procedure Rules would not arise.

On the second issue of remedies available, that would only arise where a suit abates. In this case, it has not abated. I so rule.

Signed this ...29th... Day of November, 2021.

Florence Nakachwa

JUDGE