

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL SUIT NO. 15 OF 2020

1. ZAKAYO BITYO
2. KAMBEIJA BITYO FRANCIS
3. KAAHWA MARTIN } PLAINTIFFS

VERSUS

JOHN PAUL BAINGANA DEFENDANT

AND

1. ARNEST KIIZA
2. KAAHWA MARTIN
3. ZAKAYO BITYO
4. KAMBEIJA FRANCIS }COUNTER RESPONDENTS/DEFENDANTS

JUDGMENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

- [1] In this suit, the 3 Plaintiffs sued the Defendant for fraud, cancellation of Certificates of Title for land comprising in **LRV 1076, Folio 17, Plot 120, Masindi District land at Buruli County at Kaitansa** (suit land), recovery of the suit land, permanent injunction and general damages, interest and costs of the suit.
- [2] It is the Plaintiff's case that the 1st and 2nd Plaintiffs are the registered proprietors of the land comprised in **LRV 1817, Folio 19, Buruli County at Kaitansa Masindi District measuring 61.854 Hectares.**

On the 22nd June, 2018, they sold 25 Acres of land out of the said land to the 3rd Plaintiff and the parties executed a Sales Agreement and further executed a consent to subdivide and mutate the 25 acres from the said land in favour of the 3rd Plaintiff.

- [3] That the 3rd Plaintiff immediately took possession of the land measuring **25 acres** and is enjoying quiet possession thereof. However, when the 3rd Plaintiff engaged services of the surveyor for the purpose of subdividing his land (**25 acres**), he discovered that the Defendant had already mutated and subdivided the land to comprise **HQT 1076 Folio 19, Plot 120 land at Buruli Masindi District** to his benefit and without the authority of the 1st and 2nd Plaintiffs thereby defeating the 3rd Defendant's interest in the suit land.
- [4] It is the contention of the Plaintiffs that land comprised in **HQT 1076, Folio 17, Plot 120 land at Buruli Masindi District** was fraudulently acquired by the Defendant for they have never offered him that land save for the **2 acres** they gifted him on the lower part of the suit land.
- [5] The Plaintiffs particularized the fraud as follows:
- (a) The Defendant fraudulently subdividing and transferring **2 acres** of the suit land comprised in **HQT 1076, Folio 17, Plot 120, land at Buruli Masindi District** into his names without the knowledge, will and consent of the Plaintiffs well aware that the same land was never gifted to him.
 - (b) The Defendant being aware of the fact that the 3rd Plaintiff is in possession of the 25 acres which includes the suit land.

(c) That the 1st and 2nd Plaintiff gifted **2 acres** to the Defendant in the location different from the suit land but the Defendant fraudulently acquired the Certificate of Title for the suit land.

[6] In his defence, the Defendant denied the Plaintiffs allegations and contended that the 1st and 2nd Plaintiffs agreed and indeed gave or gifted him with **5 acres** of land at Kaitansa in recognition of the financial consideration he offered towards the education and graduation of the 1st Plaintiff's daughter, the 2nd Plaintiff's sister a one **Kugonza**. That however, while the surveyor a one **Babinge** was entrusted with the subdivision of the **5 acres**, he erroneously created a land title for **2 acres** (instead of 5 acres).

[7] The Defendant averred that the 3rd Plaintiff is a mole or surrogate of a one **Arnest Kizza** who is interested in the Defendant's land comprised in **Buruli Block 9, Plot 120 at Kaitansa measuring 0.8740 hectares** and is hell bent at acquiring it. That the Plaintiffs therefore, have no interest on **Plot 120** for he has legal title following a legitimate titling process that was conducted by the 1st Plaintiff personally.

[8] The Defendant filed a counterclaim against the Plaintiffs/Counter Defendants and **Arnest Kiiza** for the following:

(a) An order that the 3rd and 4th Counter Defendants hand over **3 acres** of land to the Counter Claimant. (This claim was however abandoned during the hearing of the suit).

- (b) A declaration that the Counter Claimant is the legal owner of the property comprising in **Buruli LRV 1076, Plot 120, Folio 17, land at Kaitansa, Masindi District.**
- (c) An order that the Counter Claimants stop any act of blockage of the access road and enable the counter claimant access his property.
- (d) An order of permanent injunction restraining the counter defendants by themselves or their agents or employees from interfering with the counterclaimant's interest on the suit land and or intimidating and threatening violence unto the counterclaimant's agents, servants and any person with his authority.
- (e) An order of general damages, interest thereon and costs of the suit.

Representation

- [9] Whereas the Plaintiffs were initially represented by the firm of **M/s MACB Advocates, Kampala** who filed the pleadings, in the course of the trial proceedings, the 1st Plaintiff who responded to the hearing notice and the Defendant self-represented themselves.

Determination of the Suit

- [10] On the due date for hearing of the suit, the Plaintiffs/Counter Defendants and **Arnest Kiiza**, the 1st Counter Defendant were duly served with the Hearing Notice on 3rd December, 2021 and save for the 1st Plaintiff, none of them appeared for hearing. The Counter Defendants had also been duly served with the Defendant's Counter Claim, summons to file a Defence but no Defence to the Counterclaim was filed by the 1st Counter

Defendant. When the suit came up for hearing, the suit proceeded as if the 1st Counter Defendant had filed a defence in accordance with **O.9 r.10 CPR**.

Issues for determination of the Suit

- [11] 1. **Whether the Plaintiffs have any claim against the Defendant in respect of the suit land comprised in Buruli LRV 1076, Plot 120, Folio 17, land at Kaitansa, Masindi District.**
2. **Whether the Counter Claimant is the lawful owner of the suit land.**
3. **What remedies are available to the parties.**

Issue 1 & 2: Whether the Plaintiffs have any claim against the Defendant in respect of the suit land and whether the Counter Claimant is the lawful owner of the suit land.

[12] The 1st Plaintiff **Zakayo Bityo** appeared as **Pw1**. He testified simply that the 2nd Plaintiff and the Defendant are his sons. That he and the 2nd Plaintiff were co-registered proprietors of land (**comprised in LRV 1817, Folio 19, Buruli at Kaitansa Masindi District measuring 61.854 hectares**). That he and the 2nd Plaintiff sold the 3rd Plaintiff a certain portion of the land (**25 acres**) but that when it came to the 3rd Plaintiff curving off his portion, he encroached on the Defendant's land. He testified further that as regards the Defendant, he gifted him **5 acres** of land and processed for him a Certificate of Title to that effect.

[13] On the other hand, the Defendant **Paul Baingana** testified as **Dw1**. He explained that the 1st Plaintiff gifted him **5 acres** of land out of the suit land, but the 1st Plaintiff had also sold **35**

acres of land to a one **Arnest Kiiza**, the 1st Counter Defendant. That both of them i.e. the Defendant and **Arnest Kiiza**, the 1st Counter Defendant, had processed their respective Titles i.e. **Block 9, Plot 120** for **5 acres** for himself and **Plots 117, 118, 119 & 121** adding up to **35 acres** for the 1st Counter Defendant. That however, his Title came out with an error caused by the surveyor a one **Babinge** who curved off **2 acres** instead of **5 acres** contrary to **D.Exh. 1**, a document the 1st Plaintiff and the 2nd Plaintiff (joint tenants) signed and issued to enable Masindi Land Board to cause a mutation and create land titles for specific transferees, his inclusive.

[14] Otherwise, he referred to the 3rd Plaintiff/Courter Defendant as a broker and mole/surrogate being fronted by **Kiiza Arnest** to acquire property for him. He concluded that the 3rd Plaintiff/Counter Defendant has no interest whatsoever in any of the suit land.

[15] Under **S.101 of the Evidence Act** it is provided as follows:

“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”.

S.103 thereof 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 the proof of that fact shall lie on any particular person”.

The cardinal principle under the above provisions is that he who alleges has the burden to prove. In civil cases the burden

lies on the Plaintiff to prove his or her case on the balance of probabilities; **Nsubuga vs Kavuma [1978] HCB 307.**

[16] In the instant case, the Plaintiffs sued the Defendant for fraud, cancellation of the Certificate of Title in the names of the Defendant comprised in **Buruli LRV 1076, Plot 120, Folio 17 land at Kaitansa, Masindi** and for recovery of the land thereof. The cancellation of the Certificate of Titles and recovery of the land thereof are anchored on, in the first place, proof of the alleged fraud.

[17] According to **Kampala Bottles Ltd vs Damanico (U) Ltd S.C.C.A. No. 22 of 1992**, Wambuzi, Chief Justice held:

“... It is generally accepted that fraud must be proved generally, the burden being heavier than on a burden of probabilities generally applied in civil matters”.

It is a cardinal principle that fraud cannot be presumed. It has to be pleaded with particulars and strictly proved: **O.6 r.3 CPR**, See also the decision of this Court in **Kafu Sugar Ltd & Anor vs AG & 5 Ors H.C.C.S. No. 55 of 2017.**

[18] In the instant case, the 1st Plaintiff/Pw1, having testified that it is the 3rd Plaintiff who instead of curving off the **25 acres** of land he had purchased from the 1st and 2nd Plaintiff, encroached on the Defendant's land he lawful obtained from the 1st Plaintiff measuring **5 acres** as a gift. I find no proof of fraud on the part of the Defendant. Besides, the 1st Plaintiff testified that he had never intended to sue the Defendant in any Court but it is the 3rd Plaintiff's Counsel who merely included his name on the Plaintiff as a Plaintiff. It therefore in the circumstances become apparent that the 3rd Plaintiff intended to use the 1st Plaintiff to grab the Defendant's land and defeat the lawfully acquired

interest therein. It is the 1st Plaintiff himself upon gifting the Defendant with the **5 acres** of the suit land who processed the title in the Defendant's names through the surveyor of his preference, a one **Babinge** who by error processed a title comprising of **2 acres** instead of **5 acres**. The Defendant's Certificate of Title **D.Exh. 2**, is otherwise conclusive evidence of ownership and cannot be impeached in absence of any proof fraud attributable to him.

[19] The Plaintiffs thereof are found not to have any claim against the Defendant in respect of the land comprised in **Buruli LRV 1076, Plot 120, Folio 17 land at Kaitansa, Masindi District**. The Defendants is the lawful owner thereof.

[20] The 1st and 2nd issues are therefore in the premises found in favor of the Defendant.

Issue No. 3: What remedies are available to the parties

[21] The Plaintiffs having failed to prove fraud against the Defendant, and since therefore the Defendant's Certificate of title was not obtained through any fraud and as such it cannot be impeached and or cancelled, it follows that the Plaintiff's claims against the Defendant have merit and as a result, the Plaintiffs are not entitled to the reliefs sought. The Plaintiffs suit against the Defendant is therefore accordingly dismissed with costs against the 2nd and 3rd Plaintiffs.

[22] The Defendant having proved that he lawfully acquired land comprised in **Buruli LRV 1076, Plot 120, Folio 17, land at Kaintasa, Masindi**, the counter claim is allowed and Judgment is entered in his favour with the following declaration and orders:

1. A declaration that the Defendant/Counter Claimant is the legal owner of the property comprised in **Buruli LRV 1076, Plot 120, Folio 17 land at Kaintasa, Masindi District.**
2. An order that the Counter Defendant stop any acts of blockage of the access road and enable the Counter Claimant access his property by reopening the access road.
3. An order of permanent injunction issues restraining the counter Defendants by or their agents or employees from interfering with the Defendant's interest on the suit land and or intimidating or threatening violence onto the counter claimant's agents, servants and any person with his authority.
4. General damages: The Defendant/Counter Claimant failed to utilize his land because he was denied access to his property. He intended to plant trees thereon and as a result, he suffered inconvenience and psychological stress for which he is entitled damages, as a consequence of the Defendants' acts, **James Fredrick Nsubuga vs A.G; H.C.C.S No. 013/1993.** In the premises, I award the Plaintiff **Ugx. 60,000,000=** (sixty million shillings only) against the 1st, 2nd and 4th Counter Defendants.
5. The general damages shall attract interest at the rate of 8% per annum from the date of Judgment till full payment.
6. Costs follow the event (**S.27 CPA**). As the Defendant/Counter Claimant is the successful party in the counter claim is awarded costs of the counterclaim against the 1st, 2nd and the 4th Counter Defendants.

Ordered accordingly.

Dated and Delivered at Masindi this **22nd day of September, 2022.**

Byaruhanga Jesse Ruyema
JUDGE