

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS CAUSE NO. 42 OF 2011**

THEOPISTA NABUK EERA..... PLAINTIFF

VERSUS

- 1. RITA NANSIKOMBI**
- 2. ZAKAYO EDWARD KANGAVE**
- 3. BENGU DRUMOND NDUGA.....RESPONDENTS**
- 4. ERUKANA KIGOZI**
- 5. FRANCIS DIBA NDUGA**
- 6. THE COMMISSIONER LAND REGISTRATION**

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This is an ex parte application brought under S.177 RTA, S.98 CPA and Order 52 R.1 CPR by the applicant who seeks the following orders;

- a) The instrument of transfer of the suit land in the names of Francis Diba Nduga be nullified and set aside.
- b) The names of the first to fifth respondents be cancelled from the certificate of title and substituted with that of the applicant as administrator of the estate of the late Antonio Ssempe.
- c) A declaration that the entry of the names of the respondents in the Register of Titles in the certificate of titles of the said suit land is illegal as it is tainted with fraud.
- d) Any other consequential orders be made.
- e) The costs of this application be provided for.

The application is supported by the affidavit of Theopista Nabukeera in which she deposes that she is the sole surviving administrator of the estate of the late Antonio Ssempe vide Letters of Administration granted to her on 24/2/98. That she was one of the applicants in CS.No.307 of

2009, brought against the respondents seeking for cancellation of the title of land comprised in Block 250 Plot 7 at Sanamusera, Mengo, Gombolola Mumyuka. That the suit was determined by the ChiefMagistrate of Nakawa on 5/11/10 in her favour by which an order was issued to cancel the instrument of transfer. That it is now her wish to be entered on the Register as administrator of the estate of the late Antonio Ssempe and thereby seeks a consequential order of this court to that effect. She also sought for costs of this application. Counsel for the applicant filed written submissions.

In his submissions, counsel for the applicant argued that the suit land was fraudulently transferred into the names of the 1st-5th respondents under instrument Nos.KLA 76055 dated 12/12/74, KLA 81240, dated 15/9/76 and KLA 123458 dated 2/2/08. She then (together with her sister the late Nabukalu Sarah) successfully sued the respondents for cancellation of those entries. Relying on S.177 RTA and the authority of **Ssetuba C Misairi Vs Registrar of Titles (Misc. Cause No.55 of 2011)** he moved this court for consequential orders against the Registrar of Titles to cancel the name of the 1st-5th respondents and replace it with that of the applicant.

According S.177 RTA;

“Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the commissioner to cancel any certificate of title or instrument, or any entry of memorial in the Register book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the commissioner shall give effect to that order.”

The above section was interpreted in the authority of **Re:- Ivan Mutaka1981 (HC B) 28** where it was held that in order for this section to apply, the applicant must satisfy court that he/she has recovered the land, estate or any interest in question by any proceedings from any person registered as proprietor of the land. The applicant also adduced a decree of the Chief Magistrates court of Nakawa in NAK Claim No.307/09 in which judgment was entered in her favour and another against the 1st respondent and 6 others.

Going by the authority of **Ivan Mutaka (supra)**, before I can allow the cancellation and substitution, the applicant must prove that she recovered the land by some legal proceeding from the person registered. I note that although the applicant is named as the plaintiff in the suit, Francis Diba Nduga is not mentioned as the defendant (because the co-defendants of Rita

Nansikombi are only collectively termed as “5 others” and this also pertains in the proceedings of the court. Further, although the learned Magistrate entered judgment for the plaintiffs, he did not in his judgment and decree specify the actual land that was the subject of his order. Indeed, even in his application before this court, the applicant’s counsel by inadvertent omission or design, did not mention the land for which the application was sought. The only reference to the Block 250 Plot 7 is in paragraph 6 of the applicant’s affidavit. With respect, this was misplaced as the notice of motion, which is the primary document, is literally made no reference to the land.

Further, no evidence was attached to the applicant’s affidavit to support her evidence of the current proprietorship of the land. I notice that counsel attempted to redeem the situation by attaching a copy of a certificate of title with respect to Block 250 Plot 7 Sanamusera to his written submissions. Not only was that copy unclear, it was also uncertified and thus inconclusive. In any case, it could not be said to form part of the evidence as its introduction as an attachment to counsel’s submissions was procedurally wrong.

The powers of the High Court under S.177 RTA are quite significant in its import, but equally restricted. A declaration or order under that law, entails that the land register is altered by cancellation and substitution of title, thus interfering with rights to land, that are protected by no less than by our Constitution. Further, this court has no powers to inquire into the merits that preceded the decision of the lower court. The mandate of this court is only to give effect to that order. Therefore, the order of the Magistrate should be clear and certainly, in the circumstances of this case, include a description of the land that is to be recovered by the applicant. If it were not so, there could be a danger of this court making erroneous orders that deprive owners unfairly of their land. In my view, the application was quite carelessly drawn, which does not assist this court or the applicant.

Again, if I were to go by the copy of the certificate of title that counsel attempted to provide, the land is registered in the name of the 5th respondent only. Therefore, I find the prayers in paragraphs 2 and 3 of the application misplaced as the 1st-4th respondents are not indicated as registered proprietors of the land. Further, I find the 3rd prayer in the motion to be redundant. The High court is only sitting to issue a consequential order and not to investigate the legality of the transactions that were purportedly carried out on the suit land. In any case, no issue of fraud

was presented to this court to justify a declaratory order that the entry of the names of the 1st-5th respondents on the register of titles, and, is tainted with illegality and fraud. It is a well found principle that fraud can only be considered proved after it is well stated in pleadings, framed as an issue, testimonies given and tested in cross-examination. See for example **Sanyu Lwanga Musoke Vs Yakobo Ntale Mayanja Civil appeal No.59/1995** (unreported).

Thereby I am not satisfied that the applicant has presented an efficient application or placed before this court, sufficient material that would afford her the order for a consequential order of cancellation of a title and substitution of her name.

However, since this was an *ex parte* application for a consequential order, and the order of the Chief Magistrate exists, I take the liberal view not to dismiss the application. Instead, I order and direct that the file reverts back to the Chief Magistrate to correct or improve his order in Claim No.307/2009 by review to specify the land to which his judgment and order referred. I also note that counsel for the applicant may in addition require amending his motion and adduce evidence that will present all material that will assist the court to make a comprehensive consequential order.

I make no order as to costs.

I so order.

EVA K. LUSWATA
JUDGE
29th April, 2014.