

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
H.C.C.S. NO. 66 OF 2007

KONDE MATHIAS ZIMULA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

**1. BYARUGABA MOSES }
2. GRACE NAMPIJJA } ::::::::::::::::::::::::::::::::::::::: DEFENDANTS**

Before: The Honourable Mr. Justice J. W. Kwesiga

JUDGMENT

The Plaintiff sued the two Defendants for fraudulent transaction over the property comprised of Kyadondo Block 206 Plot 2076 at Mpererwe. He pleaded that he acquired and developed the Plot in 2000 by building a residential house. In 2004 the Plaintiff married the second Defendant and they lived in the suit house until 2006 when they divorced and the second Defendant left the suit property.

The Chief Magistrate of Mengo in Divorce Cause No. 16 of 2006, Konde Mathias vs Grace Nampijja ordered and decreed as follows:-

- (i) That the marriage between Konde Mathias and Grace Nampijja be dissolved.
- (ii) That the property comprised in Kyadondo Block 206 Plot 2076 is not a matrimonial property but the property of Konde Mathias the petitioner.

The Judgment was received as exhibit P.2. This Judgment stands and was never appealed from.

The Plaintiff's Certificate of Title for Plot 2076 Kyadondo Block 206 went missing and he obtained a Special Certificate of Title.

Without the knowledge of the Plaintiff the second Defendant had taken the original duplicate Certificate of Title used a Power of Attorney, purported to have been signed by the Plaintiff, used it and transferred the property into her own names and later transferred it in the names of the first Defendant who claims to be a bona fide purchaser for value without notice of fraud.

On presentation of the original duplicate Certificate of Title, the Plaintiff's Special Certificate of Title was cancelled and the alleged fraudulent transfer registration effected. The Plaintiff still holds his Special Certificate of Title although cancelled without his knowledge.

The first (1st) Defendant contended that he is a bona fide purchaser for value and that he had no notice of any fraud. He denied the rest of the allegations in the plaint. He pleaded that before the purchase he carried out a search and found the property free of any encumbrances. That he paid for the property and took possession and occupation until he was wrongfully evicted. In Counter-claim he seeks among other reliefs mesne profits of Shs.600,000/= per month.

The following issues were listed for determination:-

1. Whether the second Defendant's purported sale of the suit property to the first Defendant was valid.

2. Whether the first Defendant obtained registration of the suit property by fraud.
3. Whether the 1st Defendant is a bona fide purchaser for value without notice.
4. Whether the Plaintiff is entitled to the ownership, use, possession and occupation of the suit property.

Whether the second Defendant's purported sale of the suit property to the first Defendant was valid?

The evidence contained in Plaintiff's exhibit P.6 shows that the Plaintiff, Konde Mathias Zimula became a registered proprietor of the suit property on 2nd October 2000. The unchallenged evidence is that he married Nampijja Grace on 17th January 2004 and divorced her on 8th May, 2007. The Plaintiff acquired the property before marriage and it was adjudicate and declared his personal property (see P.2), Exhibit P.8 shows that the Plaintiff appointed GRACE VIAN NAMPIJJA as an Attorney. Among the authorities granted was "5. *To dispose off, sell, mortgage, assign to any one or in any way transfer ownership of the land herein described.*"

This Power of Attorney is dated 16th November, 2006 before the divorce Judgment. However on 29th November, 2006 she became a registered proprietor using the said Power of Attorney. Exhibit P.4 shows that on 21st November, 2006, Nampijja as Attorney of KONDE MATHIAS transferred the suit property to herself. She signed as the Vendor and as the Purchaser at the same time. In my view the validity of the above actions is fundamental in deciding whether the Nampijja's sale to Byarugaba Moses was valid.

P.W.1, the Plaintiff denied ever giving Nampijja the authority to sell the suit property. He never gave her the Power of Attorney she used to transfer the property into her names. P.W.4 NTARIRWA APOLLO MUTASHWERA, the handwriting expert who examined the questioned signatures of the Plaintiff on the Power of Attorney (P.8) made a Report that was admitted as Plaintiff's exhibit P.9. This Report concludes that the signature of Konde Mathias on the Power of Attorney was forged.

P.W.5 John Baptist Kakooza, an Advocate who appears to have signed the Power of Attorney as a witness to the signatures of the DONOR, the Attorney and other witness, denied knowledge of his involvement. He was sure he never saw Konde, he never saw Nampijja and did not know the person appearing as a witness on the Power of Attorney whose signatures he is alleged to have witnessed.

In my view, the evidence of P.W.I Konde, P.W.4 Mutashwera and P.W.5 J. B. Kakooza shows to my satisfaction that the Power of Attorney was forged. It was an illegal transaction that put Grace Nampijja on the suit property's Title with series proved illegalities, in my view that stand as follows:-

- (i) The second Defendant stole the Certificate of Title from the Plaintiff which they lived in the same suit house before divorce.
- (ii) The second Defendant forged a Power of Attorney, exhibit P.8.
- (iii) She fraudulently caused the cancellation of the Plaintiff's Special Certificate of Title which was done without his knowledge and or recalling the Special Certificate for cancellation.

It is important to address the third element of these illegal transactions.

The Plaintiff's evidence is that his Certificate of Title got lost and he obtained a Special Certificate of Title. In my view the moment a Special Certificate of Title was issued, the duplicate Certificate which was by a Statutory Declaration proved lost ceased to be evidence of proprietorship. Section 70 of the Registration of Titles states that the Special Certificate of Title shall be available for all purposes and uses.

“... and the Special Certificate shall be available for all purposes and uses for which the duplicate Certificate of Title so lost or destroyed or obliterated would have been available, and shall be equally valid with the duplicate Certificate of Title to all intents...”

In view of the above provisions once a Special Certificate is issued on application by the registered proprietor it shall become a replacement for the lost or destroyed Certificate of Title for ever. Even if the original duplicate Certificate of Title was to be found, it would be the registered proprietor and not anybody else to seek its reinstatement and more importantly, the Registrar of Titles would call for surrender of the Special Certificate of Title for purposes of cancellation. This was not done, and therefore the registered proprietor, holder of the Special Certificate of Title was denied opportunity to be heard in reversing the status of the Register. This was irregular and illegal and Courts of Law can perpetuate illegality once brought to its attention.

Section 77 of Registration of Titles Act states:-

“Any Certificate of Title, entry, removal of encumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud.”

I need to resolve whether Grace Nampijja acted fraudulently when she applied for or procured cancellation of the Special Certificate of Title which was in the hands or possession of the Plaintiff. To arrive at the correct decision there is need to examine the circumstantial evidence available.

- (a) Nampijja, the second Defendant, before the divorce she lived with the Plaintiff, the registered proprietor and the proprietorship of the suit property was an issue in the divorce proceedings which was declared as the Plaintiff's personal property (see P.8).
- (b) The original Certificate (duplicate copy) disappeared from the house she lived in with the Plaintiff. The loss was reported and Gazetted by Plaintiff.
- (c) The second Defendant, had possession of the lost copy and she presented it, without the knowledge of the registered proprietor to cancel his Special Certificate of Title with intention to have herself registered using a forged Power of Attorney.

These series of actions were fraudulent because they were done deliberately to pervert or distort the true status of the property.

Fraud has been adequately defined by superior of Courts in Uganda. In Fredrick J. K. Zaabwe Vs Orient Bank Ltd. Civil Appeal No. 4 of 2006 (Supreme Court) which has been widely followed stated that fraud is *“intentional perversion of the truth for purposes of inducing another in reliance upon to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by word or by conduct, by false or misleading allegations, or by concealments of that which deceives and is intended to deceive another so that he shall act upon it to his legal*

injury.” “... Anything calculated to deceive, whether by a single act or culmination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture ... a generic term, embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated...”

In my most considered view the acts and circumstances in which Grace Nampijja got registered on the Register of the suit property was dishonest, wilful perversion of the truth, a total false misrepresentation of the truth to deprive the Plaintiff of his legal right of being the owner and registered proprietor of the suit property. Therefore Nampijja Grace’s registration was illegal and fraudulent and no Court of law would uphold it or allow her to take advantage of it. Law does not permit a grantee of a Power of Attorney to derive personal benefits directly from its exercise or the discharge of personal liabilities when they are not interests of the grantor expressly provided for by law or the grant. In the instant case if the registered proprietor had intended to transfer the property in the names of the alleged Attorney he should have done so by executing a transfer deed. The Registrar of Titles ought to have rejected this illegal transfer and any diligent search should have included investigation of the entry into the Register immediately before his/her purchase which called for seeking of the Instruments (Transfer deed) that gave rise to registration of his/her seller. This in my view would constitute a diligent search of the Register.

Having found as I have, the sub-question in the first issue is whether the second Defendant passed on to the 1st Defendant a valid Title to the suit property. In

my view the validity of the sale of the suit property to the first Defendant calls for examination of the issue “Whether the first Defendant is a bona fide purchaser for value without Notice.”

The first Defendant, under the Written Statement of Defence and Counter-claim dated 20th November, 2007 filed in Court on 27th November 2007, he pleads that:-

- a) He is the registered proprietor of the suit property Kyadondo Block 206 Plot 2076.
- b) That he bought the suit property from the 2nd Defendant without knowledge of alleged fraud.
- c) In Counter-claim, he sues the Plaintiff for trespass and prays for vacant possession and several other reliefs.

Any person who puts up a defence of being a bona fide purchaser has the burden of proof to adduce evidence that establishes that he or she is actually a bona fide purchaser for value without Notice of any fraud. He must prove the following elements of this defence:-

- (a) That he has a valid Title from a person registered as a proprietor.
- (b) Must have paid valuable consideration.
- (c) Must have acted in good faith without Notice of fraud whether actual or implied.

See DAVID SEJAKA Vs REBECCA MUSOKE. Supreme Court, Civil Appeal No. 12 of 1985.

The learned Author, L. VOUMARD Q.C. in SALE OF LAND IN VICTORIA, 2nd Edition page 402 stated:

“The duty of a purchaser or a mortgagee to investigate the Title is not a duty owing to the holder or the possible holder of a latent Title or security. It is a merely the course which a man dealing bona fide is proper and usual manner for his own interest ought by himself or his solicitor to follow that course the omission of it may be a thing requiring to account for or explained. It may be evidence of a design inconsistent with what a bona fide dealing to avoid knowledge of the true state of Title... a purchaser who knows that the property purchased is in occupation of some person other than the Vendor is affected with constructive notice of the right of the occupier but if he registers a conveyance without making further inquiries he will lose the benefit of registration only if in the circumstances of the case abstention from inquiry evidences a want of good faith.”

In my view the above statement is the correct legal position which must be applied in each case and the decision should be made based on facts and circumstances of each individual case.

In the case before me, the Defendant contends that he is a bona fide purchaser for value without any Notice of fraud. That at the time of purchase the second Defendant (the Seller) was the registered proprietor of the suit land. He produced exhibit D.6 in proof of this fact and submitted that the principle of law

that protects him was settled in ORINDA DE SOUZA Vs KASAMALI MANJI (1962) EA at page 758. That:-

“The cardinal principle of the Statute is that the Register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor has an indefeasible Title against all the world.”

My view is that this principle has been further qualified by the detailed position stated by L. VOUMARD Q.C. (Supra).

In my view, the law has not been static and the duty to do due diligence in the designs of fraud requires the intending purchaser to do more than merely looking at the Certificate of Title but to investigate the validity of the Title. The mischief of fraud and elements of fraud have overtime mutated to involve the Registrars of Titles. For instance, there are cases where Instrument numbers that are used to register proprietorship have been found to be none existent or Instruments that rightly belong to other properties e.g. for caveats. This necessitates departure from what the position of the Courts in 1962, 52 years ago when the case of De SOUZA (Supra) was decided. I have found more instructive authority in a more recent decision by the Uganda superior Court, in the case of:- SIR JOHN BAGEIRE Vs AUSI MATOVU C.A. NO. 7 OF 1996 (C.A.U.)

The Court of Appeal considered what was expected, in that case, to discharge the burden of proving the plea of being a bona fide purchaser for value without Notice and His Lordship G. M. OKELLO, J. A, (as he then was) stated:-

“It must be noted that Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only of the land but also of the owner before purchase.”

In the instant case I have considered the following factors:-

- (a) The second Defendant out rightly committed series of fraudulent acts:- She forged the Power of Attorney as proved by the evidence of P.W.I, P.W.4 and P.W.5. This evidence stands unchallenged in that there is no evidence from the Defence either as evidence in chief or through cross-examination of Plaintiff’s witnesses on this fraud.
- (b) Use of a Power of Attorney for personal benefit of alleged Attorney is illegal. The Attorney ought to have only acted for the benefit of the donor of the alleged Power of Attorney. This notwithstanding the fraud found above it is a totally illegal transfer of the suit property into the name of the 2nd Defendant.
- (c) The 2nd Defendant’s Certificate of Title had indications that the Title deserved investigations before any purchase from her. The purchaser, the first Defendant had a duty to search for Instrument KLA 315646 which would show that there was no valid transfer of the property from the name of KONDE MATHIAS ZIMULA to NAMPIJJA VIAN GRACE. He had a duty to satisfy himself that Nampijja had a valid Title.

I have looked at Exhibit D.5 where Moses Byarugaba, 1st Defendant is seeking to facilitate a Search. Although it is a typed letter it does not have a typed date and there is no evidence that it was ever received by the Registrar of Titles.

Even if the search had been done, the purchaser had the duty to satisfy himself that the registered person was the owner of the property being searched. (Underlined for emphasis).

The evidence of P.W.I Zimula is that from the time he purchased and developed the suit property he has always been in occupation of the property. The purchaser had a duty to make inquiries about the occupants of the property; if he had he should have found that this property was built by the Plaintiff who was in occupation at the material time. A purchaser who knows or who ought to have found out that the property purchased is in the hands or occupation of some person other than the Vendor is affected with constructive notice of the right of the occupier and if he registers a conveyance without making further inquiries he will lose the benefit of registration. The abstention from inquiry evidences a want of good faith or fraudulent conveyance.

Courts of justice will not allow a person to keep an advantage which he obtained in bad faith. Fraud once pleaded and proved it vitiates judgments, contracts and all transactions whatsoever. I am satisfied that the purchaser in the instant case did not carry out diligent search when he did not inquire into the manner Grace Nampijja was registered on the Title, if he had he would have questioned why she used a Power of Attorney as opposed to the formal transfer from the Plaintiff. There is no evidence that before he purchased from Nampijja Grace he visited the property and confirmed with the local authorities i.e. L.C.I officials that Nampijja was the owner of the property and had the capacity to sell it. The Local Authority and neighbours would have informed him who the owner of the property was. It is not enough to say that he found Nampijja in the house.

It is settled that fraud must be attributable to the transferee, in the instant case he had constructive knowledge of Nampijja's fraudulent registration and took advantage of its merely contending that the Certificate of Title she held was in her names. He should have inquired into the validity of the Title as discussed above. In the final conclusion the first Defendant Byarugaba Moses is not a bona fide purchaser for value without Notice.

My examination of the evidence and the law above settles first, second and third issues and what remains to be answered is:-

“Whether the Plaintiff is entitled to ownership, possession and occupation of the suit property?”

It follows from my conclusions in this Judgment as a whole that the Plaintiff Konde Mathias Zimula is the lawful owner of the suit property. It is not contested that he is in occupation of the suit property. In my view it is irrelevant whether Byarugaba Moses ever occupied it for whatever length of time and was forcefully thrown out by the Plaintiff using Police or any other method. There is nothing illegal in using force in self-defence to one's property. I have found no evidence to support the Defendants Counter-claim. It is wholly dismissed and therefore he is not entitled to any single relief he prayed for. I grant the Plaintiff the following reliefs:-

(a) It is declared that Mathias Konde Zimula, the Plaintiff is the lawful owner of the property comprised in Kyadondo Block 206 Plot 2076 at Mpererwe and I grant him an order of permanent injunction stopping or prohibiting the Defendants from interfering with his quiet enjoyment of the property.

(b) The Plaintiff did not lead evidence as to what should be awardable General damages. I have considered that the 1st Defendant attempted to evict him, he struggled to regain his occupancy, he suffered stress due to these events and in his testimony he stated that the stress aggravated his ill-health.

He deserves award of General damages and in my assessment General damages of Shs.30,000,000/= (Thirty million) would be a fair compensation for the inconveniences and stress he suffered. The two Defendants shall be liable in equal portions of these General damages.

(c) It is hereby ordered that the first Defendant's registration as the proprietor of the suit property shall be cancelled and the name of the Plaintiff shall be restored as the registered proprietor of the same property.

(d) The Defendants shall pay costs of this suit to the Plaintiff in equal portions.

Dated at Kampala this 10th day of November, 2014.

J. W. KWESIGA

JUDGE

Delivered in the presence of:-

Mr. John Mary Mugisha for the Plaintiff.

Mr. Shwekyerera for 1st Defendant.

The Defendant is absent.

The Plaintiff is present.

Mr. S. Magala – Court Clerk.