

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**

**CIVIL SUIT NO. 77 OF 2010**

**ALICE NORAH MUKASA ::: PLAINTIFF**

**VERSUS**

**1. CENTENARY BANK LIMITED }  
2. BONNY NUWAGABA } ::: DEFENDANTS**

**Before: Hon. Mr. Justice J. W. Kwesiga**

**JUDGMENT**

The Plaintiff, represented by M/S MUBIRU-MUSOKE, MUSISI & CO. ADVOCATES filed this suit against the two named Defendants seeking orders of this Court namely;

- (i) A declaration the first Defendant unlawfully and fraudulently transferred the suit property to the second Defendant.
- (ii) That the Transfer be set aside.
- (iii) That the Plaintiff redeems the property by paying the sums due on the loan account of Late Harriet Nakasi.
- (iv) That the Plaintiff be awarded costs of this suit (see paragraph 3 of the Plaintiff and the prayers for reliefs). The Plaintiff raised two aspects as particulars of fraud/illegality:-
  - (a) That the first Defendant sold the suit property without serving a statutory notice upon the Plaintiff.

(b) Removal of the Plaintiff's caveat without notice to her.

The first Defendant, represented by M/s Nambale, Nerima & Co. Advocates denied the Plaintiff's allegation and the general defence is that the Plaintiff gave a Power of Attorney to her daughter Harriet Nakasi who pledged the suit property as security, she failed to repay the loan and the Bank, first Defendant, sold the mortgaged property or the suit property properly.

The second Defendant Bonny Nuwagaba represented by M/s Muhimbura & Co. Advocates avers in defence that pursuant to the advertisement in the Monitor News paper of a sale of Kyadondo Block 223 Plot 482 and his subsequent search of the Land Register confirmed the suit property had been mortgaged to the 1<sup>st</sup> Defendant by the Plaintiff's Attorney who had failed to pay the loan. He purchased the property at Shs.31,000,000/= . He pleads to be a bona fide purchaser for value without notice of any fraud. He made a counter claim that he was a bona fide purchaser for value without Notice of any fraud, a registered proprietor and he prayed for:-

(a) Vacant possession.

(b) Eviction Order.

(c) Permanent injunction prohibiting interference with his quiet enjoyment of the suit property.

(d) Compensation for loss of income from the suit property from the date of purchase of the property until date of handover.

(e) General damages, interest and costs.

At the Scheduling Conference, the parties' advocates recorded the following agreed facts:-

The Plaintiff was the registered proprietor of the suit land and she granted Powers of Attorney to Harriet Nakasi (now deceased) to use the suit land as security for her loan. Pursuant to the Powers of Attorney, the first Defendant advanced a loan to Harriet Nakasi Shs.15,000,000/=.

As security for repayment, the Plaintiff and Harriet Nakasi pledged to the first Defendant the suit property comprised in Kyadondo Block 223 Plot 482 at Nabwojjo-Namugongo. The Plaintiff and her Attorney defaulted in loan repayment, the first Defendant foreclosed and advertised the suit land for sale. The second Defendant purchased the property from the first Defendant on 26<sup>th</sup> August, 2008. The Plaintiff filed a caveat on the suit land on 13<sup>th</sup> October, 2008 after the sale had been completed.

The following issues were agreed upon for determination:-

1. Whether the sale and Transfer of the suit property by the first Defendant to the second Defendant was unlawful and fraudulent?
2. Remedies available to the parties.

Pw<sub>1</sub> ALICE NORAH MUKASA gave evidence which basically repeated the above agreed facts. She added that she did not know whether Nakasi had paid back the money she borrowed by the time she died on 19<sup>th</sup> November 2008.

A week after 19<sup>th</sup> November 2008, she was told by the Bank's employee that Nakasi had defaulted and the Bank had sold the mortgaged property to Nuwagaba Bonny. Nuwagaba had not taken possession, she filed a caveat.

She prayed that the house be returned to her. Under cross-examination she said she never read the News Paper where the sale was advertised. The property is occupied by her son and that she resisted take-over because it is her house. She had not followed up the loan matter until the daughter Nakasi had died.

Pw<sub>2</sub> Nanozi Edith, an administrator of the Estate of Nakasi who died on 19<sup>th</sup> November 2008, when she made efforts to find out the status of the suit property she was informed by the first Defendant's officers that it was too late to redeem the property for it had been sold to the 2<sup>nd</sup> Defendant.

Under cross-examination by Mr. Katono for the first Defendant, Pw<sub>2</sub> confirmed that the deceased had borrowed Shs.15,000,000/= and she did not know whether it was paid back. This was all the Plaintiff's evidence.

Dw<sub>1</sub> MUBIRU JUMA ALI told Court Nakasi borrowed money from the Bank. She did not comply with the repayment schedule and the Bank sold the mortgaged house to the second Defendant.

Dw<sub>2</sub> KASHIRINGI JAMES stated that he was instructed by the first Defendant to sell the suit property and recover the Bank money. He was shown the property by Bank officials. He talked on telephone with the borrower Nakasi who directed him to leave the demand Notices with her brother SAM GITA who occupied the house. He advertised the sale of the property, carried out valuation of the property and sold it to second Defendant at Shs.31,000,000/= after expiry of the Notice. He testified that although he did not meet Nakasi

Harriet, he kept talking to her on telephone. He served Notices on GITA on her instructions. He served a copy on the area LC I Chairperson. He produced Defence exhibits D2(1) and D1(2). The advertisement for sale and the Valuation Report respectively. He did not produce any copy of what he said to have served.

The Second Defendant, NUWAGABA BONNY told Court that he learnt the property was on sale from News papers. After 30 days Notice in the papers, the Auctioneers informed him the property was still on sale. Two months later he went to the Auctioneers and the property was still on sale. He carried out a search and established that the property was mortgaged to the first Defendant, the Bank that was selling the property. The registered proprietor was Alice Norah Mukasa (see D2(6)). The Bank had a mortgage and he found a Power of Attorney Ex.D2(4) an admitted document. He purchased the property on 26<sup>th</sup> August 2008 under the Agreement Exhibit D2(2) and the first Defendant executed a transfer deed in his favour, dated 11<sup>th</sup> September 2008. This document was admitted by consent of the parties as Exhibit D2(5). Exhibit D2(6) shows that he was registered as the proprietor of the suit property on 5<sup>th</sup> November 2008 under Instrument KLA 395361 of that day.

On instructions of the Bank, he paid Shs.31,000,000/= the purchase price on the Account of Harriet Nakasi. He stated on cross-examination that he did not meet Nakasi.

The written submissions for the Plaintiff fundamentally confirms that the Plaintiff authorised the Late Harriet Nakasi to mortgage the suit property, she borrowed Shs.15,000,000/= executed a mortgage on 17<sup>th</sup> March, 2008 and failed to pay according to the mortgage terms. The Plaintiff discovered after Harriet's

death that the suit property was sold and had been transferred to the 2<sup>nd</sup> Defendant on 5<sup>th</sup> November, 2008, 14 days before Harriet Nakasi died.

The Plaintiff's contention is that she had not been informed that Nakasi had defaulted and if she had been informed, she would have paid the Bank. It is on this basis that she contests the sale of her property. The rest of the submissions by the Plaintiff's advocate attack the process that led to the second Defendant's registration as the purchaser namely;

- (i) That no demand Notice was served on the defaulting borrower.
- (ii) That the first Defendant did not notify the surety of the default or the intended sale of the mortgaged property and this rendered the sale unlawful
- (iii) That the transfer to the second Defendant was fraudulent and abused provisions of Section 77 of Registration of Titles Act because it was effected notwithstanding the Plaintiff's caveat lodged on 13/10/2008.
- (iv) The transfer document states this was undeveloped Plot whereas the property was occupied with a house and servants' quarters.

The first Defendant's submissions repeat the evidence which I have already summarised above and relied on Section 116 of Registration of Titles Act (RTA) and contended that a notice of default was not mandatory because the Section provides:-

*"...the mortgagee or his or her transferees may serve on the mortgagor or his or her transferees notice in writing to pay the money owing on the*

*mortgage or to perform and observe the foresaid covenant, as the case may be.”*

I have considered the above provisions together with Section 117 of the Registration of Titles Act which states:

*“Where money secured by a mortgage under this Act is made payable on demand, a demand in writing pursuant to the mortgage shall be equivalent to the notice in writing to pay the money owing provided for by Section 116; and no other shall be required to create the default in payment.”*

My understanding is that demand in writing which would constitute the notice of default was an essential step before foreclosure and sale mortgaged property. The purpose is to give the borrower or the guarantor the opportunity to redeem the property.

M/S Nambale, Nerima & Co. Advocates further submitted that paragraph 5 (a) of the Loan Agreement empowered the Bank to sell in the event of default without demand. M/S Muhimbura & Co. Advocates submitted for the second Defendant that; the second Defendant’s Title can only be impeached if the provisions of Section 176 of Registration of Titles Act are satisfied and that the law requires that fraud must be pleaded and proved (see Order 6 Rule 3 of the Civil Procedure Rules).

The second Defendant contended, and I agree, that the Plaintiff, in her plaint specifically pleaded and listed the following particulars of fraud:-

(a) The first Defendant selling the property without serving statutory Notice upon the Plaintiff as required by law. Failure to comply with the statutory provisions governing sale of a defaulter's security renders the sale unlawful.

(b) The removal of the caveat without her notice.

From the onset of this Judgment I did identify that paragraph 3 of the plaint listed two elements of fraud on which the trial proceeded and if this Court was to allow the Plaintiff to introduce fresh charges/allegation of fraud through written submission would offend the principles of fair trial. Such allegations after the closure of the pleadings without first amending the pleadings would deprive the party, in defence, the opportunity to lead evidence in defence or rebuttal of such belated accusation which, in my view, would offend rules of natural justice.

Order 6 Rule 3 of the Civil Procedure Rules makes it mandatory for the party alleging fraud to plead it specifically and give the particulars. Rule 3 states:-

*“In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.”*

The allegation of fraud against the second Defendant is founded on the filling of the form for application for consent to transfer in which the filled information on whether the Plot was developed or not; states NIL development. I agree that this was not pleaded in the particulars of fraud as required by Order 6 Rule 3 above quoted. I have also examined this entry in light of what was presented for purposes of assessing the stamp duty on transfer which, in my view, is the



purpose of this form. The actual consideration of the sale/purchase of Shs.31,000,000/= was declared. The Chief Government Valuer satisfied himself/herself and stated:

*“For the purpose of the Stamp Act Cap. 342 and the Finance Act (No.7 of 1982) I hereby assess the value of this property as Shs.31,000,000/= ”*

My understanding is that the Chief Government Valuer had a duty which he discharged by assessing the value. Defence exhibit D1(2) the Valuation Report dated 5<sup>th</sup> June 2008 before the sale states the developments on the property. The Report valued the property at Shs.50,000,000/= and forced sale value of Shs.30,000,000/=. There is no doubt this was a forced sale at Shs.31,000,000/=. The Sale Agreement states the consideration to have been Shs.31,000,000/= (see Exhibit D2(2) which is consistent with the Valuation Report and the declared consideration in the Form in question. If the alleged fraud had been pleaded, the Government Valuer would have been called most probably to tell Court that he considered the Valuation Report or visited the particular property or used any other method to arrive at the value for purposes of assessing the stamp duty.

Be that as it may, there is no evidence that Bonny Nuwagaba concealed or misrepresented the above facts and he testified he did not know what the advocate who was instructed to transfer his property filled in the form.

I am unable to attribute the illegality or irregularity to the second Defendant. I am not satisfied that this was a fraudulent act in view of the fact that the rest of material disclosures of the consideration for all purposes of this case were based on facts and evidenced by the exhibits above examined. The above irregularity did not prejudice the Plaintiff because the forced sale was based on the

Valuation Report which is not contested. The Government was not prejudiced because appropriate stamp duty was paid and there is no specific loss proved to impeach this transfer on the basis of non-payment of the legally required transfer fees to the Government. The instant cases' facts and circumstances are distinguishable from the decision of MUBIRU & ANOTHER vs BYENSIBA & ANOTHER (1985) HCB 106. In the case of MUBIRU & ANOTHER (Supra) Karokora J (as he then was) held inter alia;

*“The mode of acquisition of the Title deed in question was tainted with fraud and illegality because bona fide include without fraud or without participation in wrong doing. When the second Plaintiff inserted Shs.500,000/= as the consideration for the land and factory when he had paid Shs.21,400,000/= the design was to defraud the government of its revenue by way of paying less stamp duty. Furthermore, by public policy, any transaction designed to defraud the government of its revenue is illegal. The effect of its illegality was to prevent the first Plaintiff from recovering under the contract which he secured illegally. The Title procured by the first Plaintiff was therefore void because of fraud.”*

The above quoted holding is the true statement of the law and I totally agree and follow this settled law. I have set out above how the instant case differs from the above settled principles of law and in conclusion, I find that the Plaintiff did not plead or prove the alleged fraud against the second Defendant.

In my view to get the correct answer to the first and fundamental issue in this case; “whether the sale and transfer of the suit property by the first Defendant was unlawful and fraudulent” calls for evaluation of the evidence that establishes the manner in which the sale was conducted and find out whether the first Defendant breached the law or the Agreement that governed the

relationship or the understanding between the Bank and the Guarantor of the loan, now the Plaintiff.

The purpose of a Guarantor to a loan is to render assurance to the lender that in the event the borrower dies or fails to pay back the loan sums, the Guarantor would pay the money. This is why the Mortgage Agreement makes the borrower and the guarantor jointly and severally liable. The purpose of the property as a security is yet a further assurance that in the event that the guarantor fails to settle the borrower's debt the Bank would resort to selling the property to realise the security. Each party's rights/interest must be protected and in event of a dispute the Courts of Law have a duty to make sure that justice is done to all the parties. The interests of these parties to this case must be delicately balanced to ensure that there is no miscarriage of justice.

The fact that Nakasi died while she owed the Bank money is not contested. The fact that Alice Norah Mukasa had the duty to pay the owed money is similarly not contested. What is in issue is that the Bank did not give her the opportunity to redeem her property by paying what Nakasi, her attorney failed to pay.

- (a) My finding is that the Bank had a duty to communicate to Alice Norah Mukasa, the guarantor of the default in repayment of the loan as required by Section 117 of the Registration of Titles Act.
- (b) The bank had a duty to demand that the Guarantor pays the outstanding loan.
- (c) The Bank had a duty to notify the Guarantor of the intention to foreclose within a specific period before advertising the property for sale.

The Bank, the first Defendant had a duty to prove that the above were complied with and I have considered the evidence available in the case as a whole but on the aspect of Notice, 1<sup>st</sup> Defendant was unable to prove that Harriet Nakasi was served with a Demand letter or Notice as provided for under the Mortgage Agreement or Section 117 of Registration of Titles Act.

The first Defendant relied on the evidence of Dw<sub>2</sub> Kashiringi Mugisha James. That in May 2008, he was given telephone contact of Nakasi Harriet, he talked to her on telephone. She instructed him to leave the Demand Note with GITA. He never met Nakasi. This was not effective service of a written Notice as provided for above. There must be clear evidence of service. He should have adduced evidence of service to GITA or Nakasi and preferably in presence of the LC official of the area.

Dw<sub>1</sub> Mubiru Juma, a banker working for the first Defendant, told Court that he did not know whether the Bank issued default Notice to the borrower in default. The Bank file on this case had no copy of the Demand Notice.

From Dw<sub>1</sub> and Dw<sub>2</sub> I have found no proof that this Bank, the first Defendant, issued any notice to the defaulter or her guarantor.

Was this fatal to the sale and transfer of the suit property?

Mr. Steven Musisi for the Plaintiff relied on Section 117 of the Registration of Titles Act that requires that a demand Notice should have been given. He further pointed out that the Loan Agreement contained a requirement that “... *In the event of the borrower’s failure to pay back all the principal or any part thereof at the agreed time the Lender shall be free to sell by private treaty without recourse to Courts of Law.*” He submitted that according to the

Mortgage deed the borrower and her surety, the Plaintiff, were jointly and severally liable to pay to the Bank on demand all monies and liabilities which are or may be due and owing to the Bank by the borrower.

I agree with the Plaintiff's submission and I hold that failure to call upon the guarantor to pay the outstanding sums and selling her property without first issuing a Demand Notice and Notice of intention to foreclose amounted to withholding material information from her which was an act done in bad faith and the whole process of the sale became unlawful.

Reference was made to two leading Judgment by both parties namely: Kampala Bottlers vs Damanico (U) Ltd. SCCA No. 22 of 1992 and Waimila, Saw Milling Co. Ltd. (in Liquidation) vs Waione Timber Co. Ltd. [1947] A. C. 101.

Mr. Musisi for the Plaintiff picked the holding in Kampala Bottlers vs Damanico (U) Ltd. (Supra) that fraud must be attributed to the transferee, the second Defendant. I have already held that there was no fraud proved against the second Defendant. I have already held that the first Defendant unlawfully sold the property.

Bonny Nuwagaba's evidence is that Dw<sub>2</sub>, the first Defendant's agent assured him that the sale was being unlawfully done. My view is that the sale was designed to defeat the existing rights of the Plaintiff by the first Defendant which was unlawful and the sale must be declared void and set aside,

Throughout the trial, and by the manner in which the Plaintiff and her witness were cross-examined, the two Defendants conducted their cases as joint Defendants. The second Defendant did not join any issues with the first Defendant yet the circumstances of this case clearly show that both the Plaintiff

and the second Defendant were both victims of mala fides of the first Defendant. This is a typical case where the principles of law in Makula International vs His Eminence Cardinal Nsubuga [1982] HCB 12 are very handy and instructive. Where it was held that an illegality once brought to the attention of Court should not be left to stand. It states:-

*“A Court of Law cannot sanction what is illegal and illegality once brought to the attention of the Court, override all questions of pleading including any admissions made thereon.”*

The sale of the Plaintiff's property offended the provisions Section 177 of the Registration of Titles Act and the Mortgage deed. Therefore despite the fact that the second Defendant is not guilty of fraud shall not be allowed to take benefit of the unlawful sale just because he insisted to not being a bona fide purchaser without pleading in alternative for indemnification by the first Defendant.

I have considered the evidence that has proved that the Plaintiff is under the threat of being deprived of her property, but pursuant to Article 26 (2) (ii) has had access to this Court which holds that she has a right to redeem her property by paying off all liabilities that her Attorney, Late Nakasi owed to the first Defendant at the time of the impeached sale to the second Defendant. It is not contested, the Plaintiff is in occupation of the suit property and the status quo shall be maintained. The sale of the property to Bonny Nuwagaba is hereby set aside and the name of the Plaintiff shall be restored on the Register of the suit property.

I have considered just remedies for the second Defendant in the circumstances of this case pursuant to the provisions of Section 33 of the Judicature Act (Cap. 13). This law states:-

*“The High Court shall, in exercise of the Jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoid.”*

If the first Defendant had made full disclosure of the fact that sale had not followed the law, the second Defendant would be condemned for lack of diligence but this not being the case, and having held that the sale is set aside for being unlawful, it is hereby ordered that the first Defendant shall pay the second Defendant the following compensations:-

1. Refund of the full consideration for the sale that has been set aside.
2. The transfer expenses for the transfer of the property that is hereby cancelled.
3. The first Defendant shall, in addition, to shs.31,000,000/= pay the second Defendant an interest from the date of the impeached sale at Bank lending rate (22% per annum) up to the date of full payment. To remove any doubt whatsoever the following are the summarised orders of this Court:-

1. It is declared that the sale of the suit property was unlawful and it is hereby set aside and the Plaintiff's proprietorship is hereby restored.
2. The Plaintiff shall pay the first Defendant the amount of money that Harriet Nakasi owed the Bank up to the date of her death, on 19<sup>th</sup> November, 2008.
3. The first Defendant shall pay the second Defendant Shs.31,000,000/= plus interest at 22% per annum from 26<sup>th</sup> August, 2008 until payment in full.
4. The first Defendant shall pay the Plaintiff and the second Defendant costs of this suit.

Any party not satisfied with this Court's Judgment and Orders is granted 30 days from the date of Judgment to appeal.

Dated at Kampala this 24<sup>th</sup> day of January, 2014.

**J. W. Kwesiga**

**JUDGE**

In presence of:-

Mr. Steven Musisi for the Plaintiff.

Mr. Katono – for 1<sup>st</sup> Defendant.

Mr. Omony Stanley for the 2<sup>nd</sup> Defendant.

Second Defendant in Court.

Mr. Magala S. – Court Clerk.



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