THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
HIGH COURT CIVIL SUIT NO. 422 OF 2013)

DEO SEMAKULA……. PLAINTIFF

VERSUS

1. **BAYOGERA VALENTINE KAJUNGO**
2. **TAKUBA NASSER KIBIRIGE …….. DEFENDANTS**
3. **THE COMMISSIONER LAND REGISTRATION**

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

At the commencement of this suit, the defendants raised preliminary objections which they argued would dispose of the suit. The court allowed the parties to file written submissions in support and reply to the objections which have been considered before making this ruling.

The objections raised for the 3rd defendants are twofold;

1) That the procedure followed in instituting this suit was wrong.
2) That the Commissioner for Land Registration has no capacity to be sued.

On the other hand, the objections raised for the 1st and 2nd defendants are that:-

1) The plaintiff followed the wrong procedure whilst instituting the suit, and,
2) The plaintiff has no cause of action against the 2nd defendant.

It was argued for the 3rd defendant that the head suit was filed after the plaintiff was dissatisfied with the decision of the Commissioner Land Registration, (therein after called the Commissioner) who by order amended the land register with respect to land comprised in Kyadondo Block 107 Plot 59 at Nakyesanga (hereinafter called the suit land). That the amendment order was made subsequent to a hearing in which the plaintiff participated. That under Section 91(10) Land Act, a person aggrieved by the decision of the Registrar of titles has a right to appeal that decision within 60 days and not to file a civil suit as was the case here. The same objection was raised for the 1st and 2nd defendants who agreed with the submissions made for the 3rd defendant. In response, it was argued for the plaintiff that Section 91 did not apply in the circumstances of this case as the decision was made (on 20/9/13) after the suit had already been filed (on 12/9/13). It was further argued that Section 91 is only permissive and not mandatory and did not constrain any aggrieved party from proceeding using another procedure

which in this case, was filing an ordinary suit. That all suits are ordinarily commenced by way of plaint.

Section 91 of the Land Act confers upon the Commissioner wide powers to do acts that will give effect to the Act including cancellation of a title. However, she should before making a decision, give notice to all parties and also conduct a public hearing to which they are invited to attend and given a hearing. The Commissioner then makes her decision in writing. Under Section 91 (10) of the Act, any party aggrieved by a decision or action of the Commission under that section may appeal to the District Land Tribunal within 60 days that such decision is communicated to them. (Emphasis mine). Plaintiff's counsel did not have serious contest to that provision, their only argument being that the suit was lodged before the decision of the commissioner was made and communicated to them and also that the provision was not mandatory.

It is not in argument that some kind of hearing was conducted by the Commissioner with respect to the dispute between the parties. The plaintiff at least admits so in paragraph 5d) of his plaint. It is also not in contest that the suit was filed before the decision of the Commissioner was given and communicated to the plaintiff. I see no express provision in the RTA that requires an aggrieved party to first await the closure of the public hearings or the decision of the Commissioner before they can resort to the High Court for a remedy.

In my mind, the grievances raised by such a party may involve other and even multiple parties other than the commissioner who cannot practically be captured in an appeal. Letting it so would result into multiplicity of suits that our law always abhors and tries to avoid. Also in circumstances as the case here, the issue raised against the Commissioner's actions (as evidenced by the pleadings) is so broad and require evidence which may not be adequately conversed by an appeal. It must be remembered that the RTA did not give the procedure to be followed if a party opts to appeal. An appeal in such circumstances will be filed either on memorandum of appeal under 0.43 CPR or a notice of motion under 0.52 CPR. Both of them are not likely to give an intending appellant sufficient room to plead certain actions to level expected under our civil law. This is so for example if issues of fraud and illegality are being raised as is the case in this suit. I therefore opine that the provisions of Section 91 of the Act were never meant to oust the jurisdiction of the High Court to hear an appeal against the decision Commissioner by way of plaint. Had that been the intention of the legislature then it would have expressly stated so. See for example **David B. Kayondo Vs The Cooperative Bank Ltd (Appeal No. 10 of 1991)** which was followed in **Edward Katumba Vs. Daniel Kiwalabye Musoke CA No. 2 of 1998. (CA).**

More important though, the use of the word "may" as opposed to "shall" appear to make the provision merely directory and not mandatory. While considering a similar question, the Court of Appeal in **Edward Katumba Vs Daniel Kiwalabye Musoke (supra)** was of the view that in order to determine whether a particular provision was intended to be mandatory

> *"..the court must consider the whole scope and purpose of the statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act. Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory"*.

In my view, the purpose of Section 91 was to provide for certain powers of the Commissioner and rule 10 there under, to provide the remedy of an appeal for one who was aggrieved by the exercise of such powers of the Commissioner. It merely gave a procedure (of appeal) that one would follow to the very same forum that one would resort to if they were to go by any other means, for example an ordinary suit. In my view, that section is not concerned with the jurisdiction of the High Court. It is only concerned about the decision of the Commissioner, the right by any individual to appeal such decision and the procedure to be followed in that event. In my view therefore, procedure by suit to challenge the decision of the Commissioner is not expressly prohibited by statute and can be used. I thereby dismiss that leg of the objection.

With respect to the second objection, if was argued for the 3rd defendant that the Commissioner cannot be sued in their capacity. Relying on Section 40 and 41 of the Land (Amendment Act) and Sections 182 and 174 RTA, they contended that the Commissioner may only be summoned to appear before the High Court where she has declined to perform her duties under the RTA or, where the Commissioner seeks the opinion of court in interpreting her duties. In the latter case, where necessary. The court may require proof of certain facts. That summons by the court for the first purpose may only be on application and if the Commissioner attends court on such summons and a question of fact arises, then the court may order that it be tried. It was concluded that there is no provision that gives the office of the Commissioner corporate status for him/her to be sued. In this they relied on the authority of **Gordon Sentiba & 2 Ors Vs IGG SCCA No. 6 of 2008.**

In reply, counsel for the plaintiff argued that the suit is based on fraud and bad faith on part of the Commissioner actions for which she can be sued. In this, they relied on the case of **Edward Kabugo Sentongo Vs Bank of Baroda (U) Ltd HCCS No. 166/02**. They further argued that the objection offends the law for it is not restricted to obvious points of law but it delves into the facts of fraud and malafide actions which can only be proved by calling evidence. It was also argued that this anomaly can be cured under Order 1 Rule 9 CPR which provides that misjoinder or non joinder of parties to a suit should not defeat it and the court should proceed to deal with the matters in controversy. The court was enjoined to rely on its inherent powers under Section 98 CPA to avoid an abuse of court process.

The office of the Commissioner and her subordinates is created by Section 3 RTA and according to Section 3(4) RTA, she is appointed as a public servant. There is nothing in the Constitution, RTA or Land Act that indicates that the office of the Commissioner shall be a body corporate. That notwithstanding, the issue of whether the Commissioner can sue and be sued has already received some attention by the Courts of record.

The court in IGG **Vs Kikonda Butema Farm Ltd Vs & AG (Constitutional Application No. 13 of 2006** the issue was whether the IGG has legal capacity to sue or be sued. After considering several authorities, the Learned Justices, in finding that the IGG could be sued in her capacity raised authority that:-

> *"….the inspectorate and the Inspector General of Government in particular must own its/her decisions and have the capacity to defend those decisions in any forum including courts of law if necessary. The Inspector General of Government can be e likened to the Registrar of Titles under the Registration of Titles Act. Although the post is held by a traditional civil servant, the holder has been dragged to court from time to time to defend and explain decisions he/she takes in the performance of his/her duties" (emphasis mine)*

The above decision was followed by my brother Justice Lameck Mukasa **in Edward Kabugo Sentongo Vs Bank of Baroda (U) Ltd HCCS N. 166/**02 which was relied on by the plaintiff. However the Supreme Court found the decision in **IGG Vs B. Kikanda Butema Farm Vs AG** (supra) bad law and refused to follow it. This is so in Supreme Court in **Gordon Sentiba & Ors Vs IGG SCCA (supra).** Although two cases principally dealt with the powers of the IGG, they both made some reference to the registrar of titles which can be instructive in this case. Although the Supreme Court disagreed with the constitutional court with respect to the powers of the IGG to sue or be sued, they agreed with them on that aspect with respect to the registrar of titles. In his lead judgment at page 17, Justice Odoki stated:

> "*the constitutional court likened the respondent (read IGG) to the registrar of titles under the registrar of titles act, but in the registration of titles Act, parliament did confer on the registrar of titles power to appear in court and defend his or her actions for instance under Section 182. Under Section 174, the Registrar has power to state a case for the High Court with regard to the performance of his or her duties and functions".*

In no uncertain terms, the Supreme Court was differentiating the office of the IGG from the office of the Registrar of titles in respect of powers to sue or be sued.

I have on page 4 of this ruling already given a detail of what sections 174 and 182 RTA entailed. Under S.174 the Commissioner may move the court on her volition, and it may be an exparte application. However, under S.182, she is summoned to court by a dissatisfied party and will if necessary even be given a right to give a response to any allegations leveled at her. S.182 would envisage certainly an adversarial hearing that can take the form of any of the procedures provided for under the CPR, either at the time such a complaint is filed or at the time that the commissioner is allowed into the proceedings table her response to the complaint.

I therefore, associate myself with and am bound by the finding of the Supreme Court in the case of **Gordon Sentiba & Ors Vs IGG (supra)** to find that the Registrar of titles is a party that can be sued. I therefore find no merit in this objection and it is also dismissed.

Lastly, it was argued for the 2nd defendant that the suit does not disclose a cause of action since the transaction between the 1st and 2nd defendant has no bearing to the plaintiff's claims. In this they relied on Order 7 Rule 1 CPR, and several authorities including the celebrated case of **Auto Garage Vs Motocov (N0.3) (1971) EA 514** which discusses the essential elements of a cause of action. It was further argued that the presence or absence of a cause of action isdetermined upon perusal of the plaint alone. In reply, counsel for the plaintiff agreed with the authorities cited but argued that indeed a cause of action has been established in the plaint. They argued that the plaintiff having purchased the land for valuable consideration and was in possession of it, he was entitled to uninterrupted occupation and enjoyment of the same. He argued that it is pleaded in the plaint that the joint actions of the defendants of illegality and fraud with intent to deprive him of his interest and ownership to the property constitute a cause of action against them. That with specific reference to the 2nd defendant he purchased the suit land from the 1st defendant then he took a host of forged documents to the 3rd defendant who acted upon them to cancel the title of the plaintiff. That the plaint clearly states the type of rights that the plaintiff enjoyed with respect to the suit land, how they were violated and that the defendants were responsible for such violation. That he showed in the plaint that the defendants have no valid or legitimate claim to the suit land and that the fraudulent and illegal acts of the defendants collectively, which were not seriously challenged by them is what constitutes the cause of action. Lastly, that the allegations of illegality and fraud raise serious triable issues that ought to be investigated with evidence.

In my opinion in order to maintain a cause of action against the 2nd defendant, the applicant must by his pleadings alone show that the former infringed on some right that he enjoyed in the suit land. I am convinced that the amended plaint brings out the sufficient facts that the plaintiff did at one time purchase land become the registered proprietor of the suit land. He also shows that after being registered, the 1st defendant raised pararrel claim to the suit land which precipitated into attempts by the 3rd defendant to cancel the title.

The involvement of the 2nd defendant is prominent in paragraph 5(b) in that it alleged that he signed a transfer instrument to purchase the suit land from the 1st defendant when the latter was neither registered owner not in possession of the suit land. Further, it is contented in paragraph 6(h) that the 2nd defendant was fraudulent when he relied on forged letters of administration and also dealt in land for which the vendor was not the owner. I believe the import of those facts is sufficient to establish a cause of action by the plaintiff against the 2nd defendant and hold as much.

In summary therefore I find no merit in all the objections raised for the defendants and dismiss them with costs to the plaintiff.

EVA K. LUSWATA
JUDG E
7/4/14