

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 136 OF 2011

5 GRACE MANJERI NAFULA:::PLAINTIFF

VERSUS

1. BRIG. GEN.ELLY KAYANJA

2. THE COMMISSIONER LAND :::::::::::::::::::::::::::DEFENDANTS

REGISTRATION

10 BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW JUDGMENT.

Grace Manjeri (*hereinafter referred to as the “plaintiff”*) brought this suit against Brig. Gen. Elly Kayanja and the Commissioner for Land Registration (*hereinafter referred to as the 1st and 2nd defendants respectively*) jointly and severally for a declaration that the plaintiff is the validly registered as proprietor of Kyadondo Block 216 Plot 370 land at Mulema Buye (*hereinafter referred to as the “suit land*) an order that the 2nd defendant cancels the certificate of title in the name of the 1st defendant and maintains the plaintiff as the registered proprietor thereof.

Background:

The plaintiff’s father, one Caphas Buluma, bought the suit land for his daughter, the plaintiff, in October 1995, when the plaintiff was still a minor. The plaintiff became registered as proprietor thereof on 25/10/1995. All the relevant documents including the transfer forms effecting transfer

of the suit land into the plaintiff's name were signed by her said father. The plaintiff, again through her father, took possession of the suit land and constructed a temporary structure thereon and put a caretaker.

On 17/03/2011, the 1st defendant also got registered as proprietor of the same suit land but with
25 certificate of title different from that of the plaintiff. He was registered on a special certificate of title which was issued upon the claim that the duplicate title (owner's copy) had been lost. The plaintiff avers that her duplicate copy of the title has never been lost and she still holds the same in her name. She also avers that she has never at any one time sold the suit land to any person.

The plaintiff further maintains that the registration of the 1st defendant on the suit land was
30 fraudulently done, and that the 1st defendant was privy to or should have known of the fraud, if he had done the necessary due diligence regarding ownership of the suit land. The plaintiff thus prays for the reliefs stated above.

The 1st defendant filed a defence and denied the allegations of fraud leveled against him by the plaintiff. He contends that he is a bona fide purchaser for value without notice of fraud, if any.
35 That the certificate of title as alleged by the plaintiff never indicated that the plaintiff was a minor by 25/10/1995. Further, that he inspected the suit land before he purchased it and found that it was not in possession or occupation of the plaintiff. The 1st defendant thus prays for the dismissal of the suit against him with costs.

The 2nd defendant never filed a defence to the suit despite having been served with summons to
40 do. As such the suit proceeded *ex parte* against the 2nd defendant as if it had filed defence to the suit.

The parties filed a joint Scheduling Memorandum in which the following facts were admitted;

1. *The 1st defendant is the registered proprietor of the suit land.*
2. *The 1st defendant purchased the suit land from Mukasa Ssekikubo Paul.*

45 The issues for determination were framed as follow;

1. ***Whether the 1st defendant's acquisition of the suit land was tainted with fraud.***
2. ***What remedies are available to the parties?***

The plaintiff adduced evidence of two witnesses to wit; herself Grace Manjeri Nafula as PW1, and Cephas Buluma her father as PW2. The 1st defendant also adduced evidence of three
50 witnesses to wit; himself Brig. Gen. Elly Kayanja as DW1, AIP Baker Ojokoit as DW2, and D/CPL Alex Justine Iyereget as DW3. Mr. Pater Kusiima of *M/s. Kusiima & Co. Advocates* represented the plaintiffs while Mr. Kajeke Kenneth of *M/s.Kajeke, Maguru & Co. Advocates* represented the 1st defendant. Both counsel filed written submissions to argue the case; which I have taken into account in arriving at a decision in this judgment.

55 ***Resolution of the issues:***

Issue No.1: Whether the 1st defendant's acquisition of the suit land was tainted with fraud.

The Supreme Court in the case of *Fedrick Zaabwe vs. Orient Bank & O'rs SCCA No. 04 of 2006*, relying on Black's Law Dictionary 6th Ed. at page 660, defined fraud to mean the intentional perversion of the truth by a person for the purpose of inducing another in reliance
60 upon it to part with some valuable thing belonging to him or her or to surrender a legal right. It is a false representation of a matter or fact whether by words or by conduct, by false or misleading

allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury.

Further in *Kampala Bottlers Ltd vs. Damanico (U) Ltd, SCCA No.22 of 1992*, it was also held
65 that fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters. It was held further held that;

***“The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and
70 taken advantage of such act.”***

This court will be guided by principles enunciated in these decisions in the evaluation of the evidence in this case.

It is an admitted fact in the joint Scheduling Memorandum that the 1st defendant is currently the registered proprietor of the suit land. Section 59 of the Registration of Titles Act, Cap 230,
75 provides to the effect that a certificate of title is conclusive evidence of ownership. Also under Section 64 (1) (supra) the estate of a registered proprietor is paramount and is indefeasible except in case of fraud. Further, Section 176 (c) (supra) accords protection to a registered proprietor on registered land from ejection except on grounds of the fraud attributable to the registered proprietor.

80 Therefore, to impeach the title of the 1st defendant who is currently the registered proprietor of the suit land, the plaintiff in this case bears the burden of proving actual fraud on part of the 1st defendant. In her pleadings, in the amended plaint, the plaintiff particularized fraud in paragraph 7 thereof, as follows;

85 (a) *The defendant knowingly acquiring registration when he knew or should have found out that he was acquiring registration by fraud since the land was in possession of the plaintiff.*

(b) *Purchasing or otherwise being registered from a person he knew or ought to have known was not in possession of the land.*

To prove these particulars, the plaintiff testified that upon purchase of the suit land by her father, 90 she was registered as proprietor on 25/10/1995 under *Instrument No. KLA 176189*. She adduced in evidence a duplicate copy of a certificate of title of the suit land as *Exhibit P3*; of which she is in possession. The title invariably shows that the plaintiff is the registered proprietor thereon and it gives all the particulars of her registration. The plaintiff further led evidence of PW2, her father, who testified that he purchased the suit land for his daughter from one Hilda Molly 95 Namaganda who was registered on the title way back in July, 1974.

The plaintiff further adduced in evidence copy of a caveat which she lodged in the Land Office Registry forbidding any transactions in the suit land without her consent. It is necessary to reproduce the relevant portion of the contents as they have a strong bearing on the alleged particulars of fraud.

100 ***“TAKE NOTICE that GRACE MANJERI NAFUNA of c/o Kusiima & Co. Advocates Plot1 Wilson Road P.O.Box 30081 Kampala claims interest in the above land having been registered as proprietor thereof on the 25/10 1995 under Instrument No. KLA 176189 and is in possession of the duplicate certificate of title issued to her but has discovered that her name was cancelled from the registry on 21/01/10 and instead***
105 ***WALUGEMEBE KITYO was registered as proprietor thereof and subsequently the***

current registered proprietor MUKASA SSEKIKUBO PAUL was registered after a special certificate of title was issued

She forbids the registration of any interest therein without her consent...

The copy of the caveat and the supporting Statutory Declaration (erroneously titled “Affidavit”) show that the caveat was duly lodged in the Land Office on 25/11/2010 under *Instrument No. KLA 478769*. The Uganda Revenue Authority “Duty paid stamp” also shows that the lodgment fee for the caveat was duly paid on 20/11/2010.

Also adduced in evidence, by the plaintiff, is a copy of a search letter showing the registration status of the suit land as at 29/09/2011, upon the request of PW2, Baluma Caphas, from the Ministry of Lands, Housing and Urban Development. It shows that as at that date, the registered proprietor was Elly Kayanja, the 1st defendant, having been registered on the title on 17/03/2011 under *Instrument No. KLA 491580*. The search letter also shows that the title was incumbered by the caveat of Grace Manjeri Nafula, the plaintiff by the time the said Elly Kayanja, the 1st defendant, got registered.

The plaintiff also vehemently denied having ever applied for a special certificate of title that was issued in the names of Walugembe Kityo. She also denied having ever sworn the statutory declaration for issuance of the said special certificate of title copy of which the 1st defendant relied upon to show that he is the registered owner of the suit land.

For his part, the 1st defendant denied having committed any of the acts of the alleged fraud. He primarily contended that he is a bona fide purchaser for valuable consideration without any knowledge of the alleged fraud, if any. He adduced in evidence copy of the special certificate of

title *Exhibit D2*. It indicates thereon that it was issued on 28/07/2007. It also indicates on the face of it that the plaintiff transferred title to Walugembe Kityo who was registered on 21.01.2010 vide *Instrument No.KLA 442480*. He too transferred the suit land to Mukasa Ssekikubo Paul who
130 was registered on 11/05/2010 under *Instrument No.KLA 454490*, who also transferred to the 1st defendant who was registered on 17/03/2011 under *Instrument No.KLA 491580*.

The 1st defendant further stated that at the time of the lodgment of the transfer into his names, there was no any incumbrance registered on the title. He contended that the caveat purportedly lodged by the plaintiff was backdated. The 1st defendant further stated that when he searched the
135 Land Office, prior to his purchasing, he found that the suit land belonged to Ssekikubo Mukasa Paul, and that there was no caveat registered on the title. According to *Exhibit D1*, the sale agreement between the 1st defendant and the said Ssekikubo Mukasa Paul, it is shown that the sale was executed on 22/11/2010.

From the evidence, it is in no doubt that by the time the 1st defendant got registered on the title
140 for the suit land on 17/03/2011, there was a subsisting caveat of the plaintiff; having been duly lodged thereon and registered on the White Page (the original certificate of tittle for a mailo interest in the Land Registry) having been registered thereon as an incumbrance much earlier on 25/11/2010. From the contents reproduced above, it is quite clear that the caveat forbade any registration or transaction in the suit land without the consent of the plaintiff.

145 Premised on the above, this court finds no iota of any truth in the claim imbued in the allegation of the 1st defendant that he did a search in the Land Office which revealed no subsisting incumbrance on the title. It is trite law, and Section 101 of the Evidence Act encapsulates the same principle, that he who alleges must prove. The 1st defendant did not adduce any proof to

support that claim in his allegations. If he had indeed done a search at all, it would have
150 unfailingly revealed to him that the title was incumbered by the plaintiff's caveat. The claim of
the caveat having been backdated also bears no merit whatsoever. A proper perusal of the caveat
reveals a number of entries which completely dispel that claim. The caveat shows that it was
lodged on 25/11/2010 and assigned an *Instrument No.KLA No.478769* by the Land Office. It
further shows that fees for lodgment were paid to the URA account on 20/11/2010. Surely the
155 alleged backdating could not have possibly been effect at the two levels of institutions
responsible for tax collection and lodgment of the caveat. It is a far-fetched claim.

In addition, even if the caveat could have been backdated, which is not the case, the time of the
alleged backdating would be the effective date of the instrument lodging the caveat. Section 46
(2) of the Registration of Titles Act Cap 230 provides for the time when the registration of any
160 instrument on the title becomes effective. It provided as follows;

***“(2) Every instrument purporting to affect land or any interest in land, the title to
which has been registered under this Act, shall be deemed to be registered when a
memorial of the instrument as described in section 51 has been entered in the Register
Book upon the folium constituted by the certificate of title.***

165 ***(3) The memorial mentioned in subsection (2) shall be entered as at the time and date
on which the instrument to which it relates was received in the office of titles together
with the duplicate certificate of title and such other documents or consents as may be
necessary, accompanied with the fees payable under this Act.”***

In the instant case the “Certified” Memorial of the *Instrument No KLA 478769* under which the
170 plaintiff’s caveat was registered on the title as the encumbrance shows the date of 25/11/2010
way before the 1st defendant was registered on 17/03/2011 under *Instrument No. KLA 491580*.

Section 48 (1) (supra) provides that instruments shall be entitled to priority according to date of
registration. For ease of following I quote the relevant part.

175 ***“(1) Every instrument..... presented for registration may be in duplicate and
shall be registered in the order of and as from the time at which the instrument
is produced for that purpose, and instruments purporting to affect the same
estate or interest shall, notwithstanding any actual or constructive notice, be
entitled to priority as between themselves according to the date of registration
and not according to the date of the instrument.”***

180 In the instant case, the date of the instrument lodging the caveat is 25/11/2010. On the other
hand, the instrument affecting the registration of the 1st defendant is dated 17/03/2011. The
caveat instrument is earlier in time and of an earlier registration, and therefore, is entitled to
priority as against one that effected the registration of the 1st defendant. Clearly, the 1st defendant
never did the necessary search. If he had, the caveat would have put him on actual notice of the
185 plaintiff’s interest that the suit land was incumbered. His failure or negligence to do the search
would invariably constitute fraud as he got registered in spite of the subsisting caveat forbidding
such registration. Section 141 RTA (supra) also provides that;

190 ***“So long as any caveat remains in force prohibiting any registration or dealing, the
registrar shall not, except in accordance with some provision of the caveat, or with the
consent in writing of the caveator, enter in the Register Book any change in the***

proprietorship of or any transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which that caveat is lodged.”

From the above cited provisions of the law, it is quite clear that the Commissioner for Land
195 Registration, the 2nd defendant, was also under duty not to effect any registration owing to the
subsistence of the plaintiff’s caveat on the title at the time. Apparently the 2nd defendant instead
went ahead to register the 1st defendant on the suit land. Court thus finds that the plaintiff has
duly attributed fraud on the 1st defendant by showing that the 1st defendant had actual knowledge
of the existence of the caveat but went ahead to have his name registered on the title.

200 In addition, PW1 in her testimony stated that the plaintiff’s father constructed a two roomed
house on the suit land and it was in possession and occupation of his relative Jafari. This
evidence was corroborated by that of DW2 D/CPL Alex Justine Iyireget. He testified that he
received a complaint of criminal trespass on the suit land from a one Umar Kimera an agent of
the 1st defendant. That he proceeded to the suit land and found a one Jafari Ismail who was
205 occupying a one – roomed building structure. Another police officer AIP Baker Ojokoit (DW2)
also testified that he visited the suit land. That he found some ongoing cultivation of food crops,
although he did not get to know the owner. The 1st defendant did not claim having owned the
house or the crops. This means he has never taken possession of the suit land. He was thus
required to inquire from the occupants of the premises on the suit as to what their interest was in
210 the suit land. He did not; either for fear of knowing the truth or in order to intentionally defeat
the plaintiff’s interest in the land. In either case, it would amount to actual fraud.

In the case of *Nabanoba Desiranta & Another vs. Kayiwa Joseph & Another*, HCCS No. 496
of 2005 quoting the case of *UP&TC vs. Abraham Katumba [1997] IV KALR 103*, it was held

that as the law now stands, a person who purchases an estate which he knows to be in occupation
215 and use of another other than the vendor without carrying out the due inquiries from the persons
in occupation and use commits fraud. Further citing Taylor vs. Stibbert [1803 – 13] ALL ER
432, the court held that the failure to make reasonable inquiries of the persons in possession and
use of land or the purchaser’s ignorance or negligence to do so formed particulars of fraud.
Similarly, in the case of Hajji Nasser Katende vs. Vithalidas Halidas & Co. Ltd., CACA No.84
220 of 2003 citing the case of Sir John Bageire vs. Ausi Matovu, CACA No.07 of 1996, at page 26,
Kikonyogo, DCJ, quoting Okello JA. (as he then was) emphasized the value of land property and
the need for thorough investigations before purchase, and held *inter alia* that;

***“Lands are not vegetables that are bought from unknown sellers. Lands are valuable
properties and buyers are expected to make thorough investigations; not only of the
225 land but of the sellers before purchase.”***

The 1st defendant made a claim that before purchasing the suit land in 2010, he carried out
inspection of the same and it was in possession of Mukasa Ssekikubo Paul. However, Mukasa
Ssekikubo Paul was never called to buttress the 1st defendant’s claim that he was in possession or
that the house and crops on the suit land belonged to him. DW1 also stated that the area LC1
230 Chairperson where the suit land is situate informed him that it belonged to Mukasa Ssekikubo
Paul. The said LC1 Chairperson was also never called to confirm the statements attributed to
him. He purely remained an “out - of – court” witness. This lack of evidence clearly shows that
the person from whom the 1st defendant claims to have purchased was never in possession of the
suit land. Had the 1st defendant exercised the necessary due diligence, he would have found that
235 the plaintiff is the rightful owner of the suit land. The 1st defendant’s acquisition and registration
as proprietor of the suit land was hence tainted with fraud.

Issue No.2: What remedies are available to the parties?

Section 177 RTA (supra) provides that;

240 *“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 registrar to cancel any certificate of title or instrument, or any entry or 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 registrar shall give effect to that order.”*

245 Accordingly, having found as above, the plaintiff is declared the validly registered proprietor of the suit land. The Commissioner for Land Registration is ordered to cancel the certificate of title in the names of the 1st defendant and all other entries on the title and maintain the plaintiff as the registered proprietor thereof.

250 Section 27(2) of the Civil Procedure Act Cap 71 provides to the effect that costs shall be in the discretion of the court and shall follow the event unless for good reasons court directs otherwise. Even though the plaintiff’s pleadings do not show costs as a prayer, the cited provision as to costs is that they “shall follow the event”; which means that the successful party, in absence of any order of court to the contrary, shall necessarily be entitled to costs. In summary, it is ordered as follows;

255 **1. The plaintiff is the validly registered proprietor of the suit land.**

2. *The Commissioner for Land Registration is ordered to cancel the certificate of title in the names of the 1st defendant and all other entries on the title and maintain the plaintiff as the registered proprietor thereof.*

3. *The plaintiff is awarded costs of the suit.*

260

BASHAIJA K. ANDREW

JUDGE

22/06/2017

Mr. Peter Kusiima counsel for the plaintiff present.

265 1st defendant Brig. Gen. Elly Kayanja present.

Mr. Godfrey Tumwikirize Court Clerk present.

Court: Judgment read in open court.

270

BASHAIJA K. ANDREW

JUDGE

22/06/2017