

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL SUIT NO.573 OF 2015

JOHN W KATENDE:.....PLAINTIFF

VERSUS

THE UGANDA LAND COMMISSION:.....DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT:

The Plaintiff's suit against the Defendant is founded on fraud and he claim for the following reliefs;

1. A declaration that the registration of the Defendant's names on the certificate of title comprised in Kyadondo Block 244 Plot 2306 (suit land) at Kisugu through acquisition under Instrument No. SI 79 of 1987 was wrongful and fraudulent,
2. A declaration that Instrument No. SI 79 of 1987 the basis upon which the Plaintiff's land was transferred into the names of the Defendant was not applicable to the Plaintiff's land,
3. An order of cancellation of the Defendant's names from the certificate of title to the suit land and reinstatement of the Plaintiff's names,
4. And/or in the alternative full compensation for the full economic market value of the land,
5. Exemplary and General damages,

6. Costs of the suit; and

7. Any other reliefs that Court deems fit.

It is the case of the Plaintiff that he purchased the suit land in 1985 from a one Lavisa Nambi Mwebe and thereafter became registered thereon same year. That in 2015, he was surprised to learn from the Land Registry, Kampala, that his title to the suit land was transferred to the Defendant without his knowledge under Instrument No. SI 79 of 1987 which does not in any way apply to the suit land. He adds that the said acquisition was unconstitutional given that it was done without prompt, adequate, fair and prior compensation.

Despite being served on two different occasions, the Defendant did not enter appearance in defence of the Plaintiff's suit. Consequently, an interlocutory judgment was entered against it and suit set down for formal proof.

The following issues were framed for determination by Court;

1. Whether the Defendant is in breach of a statutory duty
2. Whether the Defendant trespassed on the suit land
3. Whether the Defendant fraudulently acquired the suit land
4. What remedies are available to the parties

At the hearing, the Plaintiff produced two witnesses in proof of his case. Counsel for the Plaintiff also filed written submissions which I shall consider in the resolution of the issues above.

PW1, the Plaintiff, testified that he purchased the suit land from a one Lavisa Nambi Mwebe vide a land sale agreement which was witnessed by his Lawyer, Mr. Serwanga Ssengendo, also PW2. The said sale agreement was exhibited as Plaintiff evidence. PW1 added that the suit land was vacant at the time of purchase and; that he took possession therefrom by fencing it. Further, that, in the same year of purchase, he was registered on the title of the suit land. The said title was also exhibited.

It was also his testimony that he used to visit the suit land once in a while until early 2012, but; that he was surprised to find enclosed developments on the suit land in 2015 prompting him to

make a search at the Land Registry whereupon he discovered that the suit land was without his knowledge transferred into the names of the Defendant. He adduced a photocopy of the search statement to that effect which was admitted only for identification purposes pending the production of the original although this was not done. I however find no reason for not admitting the photocopied search statement as an exhibit considering that this was uncontroverted evidence.

Going ahead, PW1 also testified that the transfer into the Defendant's name was done under Instrument No. SI 79 of 1987, for diplomatic properties, which instrument does not apply to him. It was his further evidence that his land was acquired unconstitutionally and, fraudulently by the Defendant because the latter misrepresented that his land was acquired under the said instrument whereas not. He added that the Defendant also went ahead to allocate the suit land to third parties who immediately developed it with houses so as to defeat his claim and; that as a result, the Plaintiff has suffered loss of income and inconvenience for which he wants Court to, among others; order the Defendant to compensate him for the actual market value of thereof or grant him vacant possession. A copy of an evaluation report was adduced and exhibited as Plaintiff's evidence in proof of the market value of the suit land. PW2 also testified in support of the Plaintiff's evidence.

In determining the matter at hand, I shall resolve issue 3, 2, 1 and 4 in that order.

Issue no.1:

Whether the Defendant fraudulently acquired the suit land

In his submission, Counsel for the Plaintiff argued that the Defendant was guilty of fraud. He defined fraud to denote actual fraud or some act of dishonesty by citing ***Kampala Bottlers Ltd versus Domanico (U) Ltd SCCA No.22 of 1992, Waimiha Saw Milling Co. Ltd versus Waione Timber Co. Ltd (1926) AC 101, Assets Co. versus Mere Roihi (1905) AC 176 and David Sejjaka versus Rebecca Musoke CA No. 12 of 1985.*** He accordingly submitted that the Plaintiff had demonstrated that the Defendant's title was acquired fraudulently on ground that the Instrument under which it was obtained was not applicable to him nor was the suit land diplomatic property. He added that the Defendant's officials displayed dishonesty when they misrepresented to the Land Registry as to the applicability of the said Instrument and thereby

causing the transfer of the suit land to the Defendant who thereafter issued out leaseholds to third parties now in occupation.

I agree with Counsel for the Plaintiff that fraud denotes any act of dishonesty. This definition has also been noted in the case of **Zabwe Fredrick versus Orient Bank & Others SCCA No. 4 of 2006**. According to that case fraud constitutes;

An intentional perversion of truth for the purpose of inducing another in reliance upon it 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 words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

In order to succeed on an action based on fraud, the Plaintiff must attribute the fraud to the transferee that is; by showing that Defendant is guilty of some dishonest act or must have known of such act by somebody else and taken advantage of such act. **See: Supreme Court decision of Kampala Bottlers Ltd vs Domanico (U) Ltd SCCA No.22 of 1992**

The Plaintiff herein has proved that he was the registered proprietor of the suit land. He has also demonstrated that the Defendant became registered on the same land without his knowledge under SI No.79 of 1987, the Diplomatic Property Application (Amendment) Order, 1987. I have had a benefit of looking at this statutory instrument and, it clearly shows that its application is on diplomatic property. It was the Plaintiff's uncontroverted evidence that the suit land is not, and has never been, diplomatic property.

One may therefore wonder how the Defendant became registered on the suit land under the said instrument. No evidence was given by the Defendant to controvert the Plaintiff's evidence. Considering that the Plaintiff's evidence was uncontroverted, I am convinced that the Defendant is the transferee of the suit land. I am also convinced, in the absence of contrary evidence, that the Defendant exhibited dishonesty as to the application of the above statutory instrument hence becoming registered on the suit land. I therefore find that the Defendant is guilty of fraud.

Issue No.2:

Whether the Defendant trespassed on the suit land

In regard to this issue, the Plaintiff's Counsel cited the case of **Onega Obel & Anor vs. The Attorney General & Anor HCCS 006 of 2002** wherein trespass to land was said to consist of the following unjustifiable acts;

- (a) Entering upon the land in possession of another,
- (b) Remaining upon such land, or
- (c) Placing any material object upon it.

It was also observed in the same case that trespass by wrongful entry consists of entry by the Defendant, or by some other person through his procurement, into land or building occupied by the Plaintiff. He accordingly concluded that the Defendant committed trespass when it entered and remained on the suit land by leasing it out to its agents without the Plaintiff's consent.

I am in agreement with the submission of the Plaintiff's Counsel as to what denotes trespass to land. For the Plaintiff, therefore to succeed on trespass to land, he must prove the following;

- i) That the suit land belonged to him;
- ii) That the Defendant had entered upon it, and
- iii) That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the suit land.

See: **Sheikh Muhammed Lubowa versus Kitara Enterprises Ltd CACA No. 4 of 1987.**

In his uncontroverted evidence, the Plaintiff demonstrated that he was registered on the suit land in 1985 upon purchase from a one Lavis Nambi. He also showed that he was in constructive possession of the same after he fenced it off upon purchase. He further demonstrated without his knowledge, the Defendant became registered on the suit land. I have already found that the Defendant's registration was done fraudulently. According to Section 77 of the Registration of Titles Act Cap 230, title acquired through fraud is void ab initio as against all parties privy to the fraud. Consequently, the Defendant could not have obtained any right or interest in the suit land.

See also: **David Sejjaka Nalima versus Rebecca Musoke SCCA 12/85 reported in [1992] V KALR 132**

Going further, it was the evidence of the Plaintiff that the Defendant entered and remained onto the suit land without his consent. It is indicated in the images attached to the valuation report indicate that the suit land is now developed with several buildings. In his uncontroverted evidence, the Plaintiff testified that the said buildings belong to the Defendant's agents who allegedly obtained leases from the latter. Considering all this evidence, I am convinced that the Defendant also trespassed on the suit land which belongs to the Plaintiff.

Issue No.1:

Whether the Defendant is in breach of a statutory duty

In regard to this issue, Counsel for the Plaintiff submitted that by the Defendant not complying with particular provisions of the law, he acted in breach of its statutory duty. I was referred to Section 72(1)(3) and 73 of the Land Act Cap 227, and Article 26(2) of the Constitution of the Republic of Uganda, 1995. It is provided under Section 72(1) of the Land Act that where any officer of the Government necessarily and unavoidably in order to carry out his or her duties needs to enter private land, he or she may enter, giving not less than three days' notice of the proposed entry to the owner or occupier of the land. It is further provided under Section 72(3) of the same Act that the Government shall pay promptly a reasonable fee to the owner or occupier of the land for every day that the land is encamped upon and compensation for any damages caused to the land in issue.

Lastly Section 73(1) of the same Act also provides that where it is necessary to execute public works on any land, an authorised undertaker shall enter into mutual agreement with the owner of the land in accordance with this Act; and that where no agreement is reached, the Minister may, compulsorily acquire land in accordance with section 42. It is also a fundamental obligation of the State under Article 26(2) of the Constitution not to deprive any person of his or her right to property saves in public interest and upon prior and prompt adequate compensation.

It was the submission of Counsel for the Plaintiff that there was nothing to show that the acquisition of the Plaintiff's land was in public interest or that the Government compensated the

Plaintiff for the said acquisition. He accordingly submitted that the Defendant's actions were in breach of its statutory duty.

In the instant case, the Defendant, which is an agency of the Government, caused a transfer of the suit land and also took over possession of the same even with knowledge that the same belonged to the Plaintiff. This was in my view in total disregard of the Plaintiff's property rights and contrary to the above provisions of the law. Considering this, I also find that the Defendant breached its statutory duty.

Issue No,4:

What remedies are available to the parties

Counsel for the Plaintiff invited Court to grant declaratory orders as prayed by the Plaintiff on the premise of O.2 r7 of the Civil Procedure Rules SI 71-1. Having noted as above, I am inclined to grant the Plaintiff all the declaratory orders sought.

The Plaintiff also prayed for an order of cancellation of the Defendant's names from the certificate of title to the suit land and reinstatement of the Plaintiff's names or, full compensation for the economic market value of the land which is shs.1,000,000,000/- as per the valuation report. Considering the fact that the suit land is now developed with numerous structures belonging to third parties, it is my view that the prayer of reinstatement of the Plaintiff's name on the title upon cancellation of that of the Defendant may be in vain. It also appears to me that the Plaintiff's Counsel was alive to this fact that he only submitted in support of the alternative prayer. Although I consider the alternative prayer more appropriate in the circumstances, I am doubtful of the value claimed by the Plaintiff given that the valuation was conducted by his agent. I am, therefore of the opinion that a Court valuer should to be appointed for purposes of conducting an independent valuation.

I therefore decline to order the said amount as prayed pending an independent valuation to be done by the Chief government valuer within sixty days from the date of this judgment.

In regard to exemplary damages, Counsel for the Plaintiff submitted that the Plaintiff is entitled to these owing to the unconstitutional and arbitrary conduct of the officers of the Defendant. In support of his submission, he cited the cases of *Esso Standard (U) Ltd versus Semu Amanu Opio SCCA No.3 of 1993 and Onegi Obel & Anor versus The Attorney General & Anor HCCS 006 of 2002* which are to the effect that an award for exemplary damages can be made where the acts complained of, among others; were unconstitutionally and arbitrarily done by officers of government. I agree with these authorities and submissions. The Defendant in this case is an agency of the Government. I have already noted that the acts of its officers were done in contravention of its statutory duty in utter disregard of Plaintiff's property rights. I am therefore of the opinion that this is an appropriate case for an award of exemplary damages. In the circumstances I award the Plaintiff shs.25 million only (*twenty five million shillings*) as exemplary damages, guided by the principle of (*Onegi Obel & Anor versus AG & Ors; CS No. 006 of 2002*) above.

Turning now on the prayer of general damages, I understand that these are at the discretion of Court and are intended to place the injured party in the same position he or she would have been had the breach not occurred. Plaintiff Counsel cited the case of *Phillips versus Ward [1956] 1 ALL ER 874* which is to the same effect, and submitted that the Plaintiff is entitled to general damages on ground that he was deprived of whole of the suit land which has put him at a great inconvenience in demanding for compensation. This I also agree with. Considering this to be the case, I award to the Plaintiff Ugshs. 15 million (*fifteen million shillings*) as general damages.

Judgment is entered for the Plaintiff with orders that;

- i) The Defendant compensates the Plaintiff for his property as per Article 26(b)(2) of the Constitution by payment of a figure to be determined by the Chief Government Valuer within 60 days of this judgment.

It is hereby declared that;

- (i) The registration of the Defendant's names on the certificate of title to the suit land under Instrument No. SI 79 of 1987 was wrongful and fraudulent,

- (ii) The Instrument No. SI 79 of 1987 the basis upon which the suit land was transferred into the names of the Defendant was not applicable to suit land,
- (iii) The Defendant shall pay Ugshs. 25 million only (*twenty five million shillings*) to the Plaintiff as exemplary damages,
- (iv) The Defendant shall pay Ugshs 15 million only(fifteen million shillings) to the Plaintiff as general damages;
- (v) The Defendant shall also pay costs of this suit.

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Henry I. Kawesa

JUDGE

20/03/2019

20/03/2019

S. K. Katende and Tumusiime for Plaintiff.

Defendants absent (case was exparte)

Court:

Judgment delivered to the parties above.

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Henry I. Kawesa

JUDGE

20/03/2019

