

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVIL SUIT NO. 2171 OF 2014

KIGULI EDDRIN WILLIAM:.....:PLAINTIFF
VERSUS

TAKIA NIGHTNGALE TAQWA MUKASA CLARK:.....: DEFENDANT

Being sued through Her Lawful Attorneys
Abdul Aziz, Kakooza Sophia Mukasa & Hawa Mukasa

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff brought the suit against the Defendant s for

- i. A declaration that the Plaintiff is the rightful owner of the Suitland **comprised in the suit land described as Kyadondo Block 229 plots198,199,200 and 201 formerly Kyadondo Block 229 FC 9842.**
- ii. An order of cancellation of Defendant's name from a certificate of title for land comprised in Kyadondo Block 229 plot 198,199,200,
- iii. An order for vacant possession,
- iv. An eviction order,
- v. A permanent injunction,
- vi. General damages
- vii. Mesne profits,
- viii. Costs of the suit,
- ix. Any other relief.
- x.

Facts

The pleadings as filed by Plaintiff claim that the Plaintiff is a grandson and Administrator of the estate of the late Erika Serunkuma who owned three acres on Mailo Register Volume 24 Folio 14 at Kamuli Ssabaddu, Mengo which belonged to Tomas Sajjabi. The Plaintiff sued Defendant who got registered as the proprietor purporting to have acquired the same from the wife of Y. B. Sempa, a person who is unknown to the estate of Erika Serunkuma. Plaintiff avers that the registration was tainted with fraud and is illegal.

On the other hand it was pleaded by the defence that the suit does not disclose a cause of action as against each one of them. Defendant asserted in the defence that the suit land was bought by her biological father Mukasa Twaha and later registered in her names in 1977. She was a minor by then and this was done vide instrument No KLA83007 of 22/3/1977, the Defendant further pleaded that their family has been since having possession of the said land. She denied the allegations of fraud and illegality’.

Evidence adduced in Court

The Plaintiff called a total of four witnesses who testified as PW1-Muyomba Simon Peter, PW2-Kiguli Edwin William (The Plaintiff), PW3 –Jonathan Mutumba Kaddu and Pw4-Lumu Charles. The Plaintiff also relied on exhibits received and marked in Court as PEX1-PEX5.

The defence called only one witness; Twaha Abu Mukasa who testified as DW1. The defence also relied on exhibits received and marked as DEX-DEX. The totality of this evidence is noted and discussed as per the details herein.

Submissions

The Court directed parties to file written submissions. I noted that on record are submissions titled Plaintiff’s written submissions filed on 19th October 2020, co-signed by Baale & Lubega & Co. Advocates and Wakabala & Co. Advocates, as Counsel for Plaintiffs. There is also a set of submissions dated 6th November 2020, also titled submissions for the Plaintiff, drawn and filed by Mukiibi Sentamu and Co Advocates, signing as Counsel for Plaintiffs. Another set of submissions is dated 16th November, 2020 and titled Plaintiff’s submissions in

rejoinder signed by Baale Lubega & Co, Wakabala & Co. Advocates and Kajeke & Co. Advocates.

This apparent mix up shows that Defendants either have no submissions on record or can Court assign submissions titled as foe Plaintiffs by Counsel Mukiibi as the submissions for Defendants? This error was never corrected and Court chose to read all submissions as they are on record and make its own conclusions therefrom guided by the pleadings and the evidence as adduced by the parties.

Preliminary objection.

Limitation:

The defence in paragraph 4 of the amended written statement of defence, raised an issue by a preliminary point of law to the effect that the Plaintiffs' suit is barred by Limitation.

The defence referred to Section 5 & 6 of the Limitation Act.

Arising from the submissions by Ms. Mukiibi Sentamu & Co. Advocates, under section 5 of the Limitation Act, that;

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."

Counsel also expounds section 6 thereof which provides in essence that;-

1. *"Where the person bringing the action to recover the land ,or some other person through whom he or she claims has been in possession of the land and has while entitled to it been dispossessed or discontinued his or her possession,th right of action shall be deemed to have accrued on the date of dispossession or dis continuance.*
2. *Where any person brings an action to recover any land of a deceased person, whether under a will or on intestacy and the deceased person was, on the date of his or her death, in possession of the land, or in the case of rent charge created by will or taking effect upon his or her death, in possession of the charged and was the last person entitle to the land to the land to be in possession of it, the right of action shall be deemed to have accrued on the date of his or her death."*

Counsel then contended that since the Defendant got registered on the land in **Block 229 plots 198, 199, 200, 201, on 22ND February 1977**, and the land was by then in possession of his father then, Plaintiffs cannot turn around and circumvent this fact and claim that their case is grounded in trespass when in actual fact their suing for vacant possession.

Counsel referred to the case of **Eriyasafu versus Wilberforce Kuluse (1944)111 KALR 10** which held that;

“Whereas trespass to land is a continuous tort and the law of Limitation will not apply to it in the strict sense, maintenance of that action is available to a person in possession”.

He also referred to **Nakabega and two others v Masaka District growers (HCB) 38** that;

“Only a party in possession can sue for trespass 1985)”

He faults the Plaintiff’s argument that the cause of action is in trespass; yet his intent is for recovery of land, not trespass. The argument that only a party in possession can sue for trespass. Counsel distinguished possessory rights from proprietary rights. Citing **Amina Aroga versus Hajji Muhammad Arule**, he argued that the Plaintiff’s claim is for recovery of land, and not for trespass. In conclusion he argues that though the plaint is brought as a suit for trespass it is actually for recovery of land and is not sustainable in lieu of the bars impose by the law of Limitation.

The Plaintiffs in rejoinder to this preliminary objection, argue that the Plaintiff is a registered owner. That the Plaintiff and the Defendants are partly in possession. That the suit aims at enforcement of possessory rights. They referred to **Justine E M N Lutaaya, versus Sterling Civil Engineering company ltd. (CA NO 110F 2002)** where Legal possession is recognised and Court held that;

“That a person having legal possession can sue in trespass”.

I do find that with due respect, the Plaintiff’s claim in DEX5 – which is first in time, meant that they had legal possession and it was not until 2013, that he came to know of the Defendant’s entry thereon. As put by Counsel once Plaintiff sought the Defendant to vacate in 2013 and he refused, that was the time he got notice of the Defendant’s trespass and hence time began running in 2013.

As per the decision in *Dima Dominic Pono vs Inyani Godfrey and Apiku Martin (CA NO 0017 OF 2016)*, I agree that an action in trespass is technically maintainable by one whose rights to possess have been violated. Therefore, trespass being a continuous Tort, this preliminary objection fails.

Issues:

At scheduling, the following issues were agreed on:

1. Whether the Defendant's acquisition and Registration to the suit land was procured by fraud.
2. Whether the Defendant is a trespasser on the suit land.
3. Whether the Plaintiff has a claim over the suit land.
4. What remedies are available

DETERMINATION OF ISSUES:

The Plaintiff's Counsel in submission argued issues 1 and 3 together and I will follow the same order as below:

- i) Whether the Defendant's acquisition and Registration to the suit land was procured by fraud.
- iii) Whether the Plaintiff has a claim over the suit land.

According to the evidence on record, the Plaintiff's claim is based on PW2's testimony that the suit land belonged to his grandfather; the late Erika Serunkuma who purchased it from the late Tomasi Sajjabi on 29th September 1920. The land measured three acres and an agreement was executed which Court received as PID. The Plaintiff further relied on the Letters of Administration; (PEX2) showing that the Plaintiff is the sole surviving Administration of the estate of the late Erika Serunkuma following the death of Sentumbwe Israel; PEX2.

The Succession Register containing the inheritance of Tomasi Sajjabi shows that he sold 3 acres of part of his land at Kamuli in Ssabaddu to Erika Serunkuma. Evidences of PW3 corroborate this evidence, Jonathan Mukasa Kaddu; son of Yovani Mukasa; son of the late Tomasi Sajjabi. He said that his father was a caretaker of Erika Serunkuma. Exhibits; PEX3, PEX1, PEX4 and PEX5, all contain information in support of the Plaintiff's averments that the Defendant's registration was obtained by fraud. Counsel's argument was because, according to the evidence of Jonathan Mutumba Kaddu; (PW3) from the AG's office as it detailed the historical chronology of this land relating it to the Succession Register No.5B/487 (and verified) by him showed that the late Serunkuma had purchased there three acres and that all official records had no other person as having any interests therein. The evidence of PW4; Lumu is that the Defendant trespassed on this land while claiming to have bought from the wife of Y. B. Sempa.

The witness indicates that this was fraudulent and the inquiries conducted by police and on the area schedule. He referred to the police report which showed that Ssempa never owned any land there.

On the other hand, the defence case was conducted through the evidence of Twaha Abu Mukasa; DW1 who said that h bought the land in 1977 from Mrs Sempa; a wife to Reverend Sempa who gave him transfers to the suit land. He alos gave it to his daughter Takia Night (*a minor*), until August 24, 1981 when the land got registered into her names and she took possession. He denied the Plaintiff's interest thereon, but acknowledged the fact of police inquiries having been done.

The defence relied on documents annexed on DW1's statement as DID-1; Certificates of Title, DID-3; photos, DID-4; Letters requesting police intervention, DID-5; Letter from Commissioner Land Registration.

All the evidence above however, does not sufficiently explain how the Defendant came to own this land. There is glaring missing link in the defence evidence regarding how the land came to be owned by the Defendant. I have failed to find the *nexus* between the Defendant and DW1's claims regarding the facts alluded to a one Sempa. The said Sempa never

testified and it is a puzzling quiz as to whether he ever existed. This gap meant that the evidence of purchase of the land by the Defendants as claimed is unsatisfactory and is not proved.

Under Section 103 of the Evidence Act, the evidential burden falls upon whoever wants the Court to believe his fact, must lead evidence to prove the same. The existence of a sale transaction between DW1 and Mrs. Sempa was never proved by the evidence and this created a *lacuna* in the chain of events that the defence alleged to have led to their current interest in the alleged purchase. When this *lacuna* is examined alongside the Plaintiff's Register, it beefs up the Plaintiff's case that the acquisition of the land DW1 is unexplained since it is not traceable on the Succession Register.

The submissions by both Counsel on this and Case law as to the standard of proof for fraud cases is noted. I find that, the evidence on record satisfies the evidential burden in fraud cases as per **F. Zaabwe versus Orient Bank** defined *inter alia* as;

“As an intentional perversion of truth or false representation of a matter of fact by words, a conduct aimed at deceiving another, or to unfairly cheat another”.

In reaching this decision, I take cognisance of the fact that the plaintiff has Kiguli Edwin William as the Plaintiff in his own right. DEX2 shows he holds Letters of Administration to the estate of Serunkuma Erika. He is therefore not a stranger as argued by the defence. The allegations of fraud as against this estate contained under paragraph 4 of the plaint, are all articulated and proved in view of the evidence on record.

I therefore disagree with the defence that this is not so, and I accordingly terminate the above issues in the affirmative.

Issue No.2

Whether the Defendant is a trespasser on the suit land.

Following the findings by this Court under issues 1 and 3 above, and on the strength of the evidence on record, and having shown that Sempa from whom the root of claim by DW1 is premised, is a mysterious entity, left the title claims by the Defendant unfounded and incapable of explaining the presence of the Defendant's name on the title in question. This renders their presence on the land to be tainted with fraud and illegality. DW1's evidence is not convincing in the absence of collaboration from the alleged Mrs Sempa. The Defendant could not explain their presence and cannot run away from the Plaintiff's indictments against them in the absence of this very vital piece of evidence. In view of all the evidence, I have reviewed on record, I hold that the Defendant's entry on this land was unlawful, fraudulent and amounts to trespass.

I so find.

Issue No. 4

What remedies are available to the parties.

Having found the issues above in favour of the Plaintiff, she is entitled to the following remedies:

- a) Fraud renders title *void* and under Section 177 of Registration of Titles Act ought to be cancelled. It is therefore ordered that the Title for the suit land should be rectified to reflect the names of the Plaintiff therein as the rightful owner and reverted to the estate of the late Erukana Serunkuma.
- b) There was evidence at *locus* of constructions and activities on the land inspite of the Court orders and injunctions on the same. The Defendant defied the same as was clearly witnessed at the *locus*. This will be taken into account in the assessment of the general damages and will definitely serve to escalate the award so that the Defendants are punished for disobeying this Court's order.

General damages are discretionary. Given the pain and suffering for the 7 years and the disobedience to this Court of injunctive orders, the Defendants will pay shs. 35,000,000/- (*thirty five million shillings*) in general damages.

c) The Plaintiff is allowed costs of the suit.

Judgment entered in favour of the Plaintiff.

I so order.

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Henry I. Kawesa

JUDGE

26/2/2021

26/2/2021:

Nalumu for Plaintiff.

Baale Lubega and Co. Advocates

Asaph Agaba for the Defendants from C. Mukiibi Sentamu Advocates.

Plaintiff present.

Abdul Aziz: Attorney for Defendant present.

Court: For Judgment communicated to parties above.

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Henry I. Kawesa

JUDGE

26/2/2021

Right of Appeal explained.

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Henry I. Kawesa

JUDGE

26/2/2021