

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
HCCS. NO. 2124 OF 2015
(FORMERLY HCCS. NO. 124 OF 2015 AT NAKAWA)

HABIB JUMA

(As interim Administrator of the estate of the late HABIB ALI
vide Misc. Applic. No. 926 of 2021)

PLAINTIFF

V

KIGGUNDU MOHAMMED

DEFENDANT

BEFORE: HON. LADY JUSTICE P. BASAZA – WASSWA

J U D G M E N T

Representation:

Mr. Isotah Suleiman for the Plaintiff.

Mr. Muwonge Hamza for the Defendant.

Introduction:

[1] Through his son; Habib Juma, vide a Powers of Attorney¹, Mr. Habib Ali (now deceased) brought the present suit against Mr. Kiggundu Mohammed for

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¹ Powers of Attorney dated July 1, 2012, registered as No. 901 of 2013 (PE 1).

alleged trespass on land comprised in **Kyadondo Block 223 Plot 135 at Namugongo - Kyaliwajjala, measuring 0.12 hectares (0.296 acres)**. (Hereinafter referred to as '**the suit land**'))

- [2] Regrettably, during the pendency of the suit Habib Ali (the deceased) passed on. Consequently Mr. Habib Juma applied for, and was appointed by court² as an interim Administrator of the deceased's estate, limited only to the purpose of this suit.

Background:

- [3] As per certified copies of the certificate of title to the suit land; Habib Ali (the deceased) was registered as proprietor thereof on 30/12/1976. After him a one Zaccharia Kasa Sajabi Bukenya (Z.K.S.B) was registered as proprietor on 19/02/1982. Later Mr. Kiggundu (the defendant) was registered as proprietor on 20/10/95.
- [4] In a prior suit; **HCCS No. 2038 of 1997**, Habib Ali (the deceased) sued the said Z.K.S.B over ownership of the suit land. The duo settled that suit by consent by which they agreed that Habib Ali was the rightful owner of the suit land. (The Consent Judgment is dated 27/01/2003 (**EXB PE 4**)). Consequent thereupon, the name of Habib Ali was re-instated on the certificate of title to the suit land on

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² Pursuant to a consent Order vide HCMA No. 926 of 2021

27/05/2008. Mr. Kiggundu (the defendant herein) was not a party to that suit
No. 2038 of 1997.

The Plaintiff's case:

[5] In the present suit Mr. Habib contends that Mr. Kiggundu is a trespasser on the suit land. He further contends that Mr. Kiggundu knew that the suit land was fraudulently transferred into the names of Z.K.S.B when the deceased was in exile, and that Z.K.S.B later connived with Mr. Kiggundu to fraudulently transfer the suit land into Mr. Kiggundu's names. He also contends that Mr. Kiggundu forcefully entered onto the suit land.

[6] He seeks for the following declarations and orders;

- i) That he is the lawful owner of the suit land.
- ii) That Mr. Kiggundu is a trespasser on the suit land.
- iii) That Mr. Kiggundu be evicted from the suit land,
- iv) That the Commissioner Land Registration (CLR) be directed to vacate Mr. Kiggundu's caveat lodged on the suit land.
- v) That a permanent injunction be issued against Mr. Kiggundu.
- vii) That he be awarded mesne profits, general damages and costs of the suit.

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The Defendant's case:

[7] In his written statement of defence, Mr. Kiggundu denies the allegations in the plaint and contends;

- i) That the suit against him is time barred
- ii) That he is the rightful owner of the suit land.
- iii) That he bought the suit land *bona fide* from Z.K.S.B and transferred the same into his names in 1997, and has since then been in occupation and possession thereof.
- iv) That he was not a party to the said consent judgment vide **HCCS No. 2038 of 1997** and therefore the same is of no legal effect.
- v) That his caveat on the suit land is as of right.

Issues for determination:

[8] At the scheduling taken in court on October 18, 2021 the following issues were agreed upon:

1. **Whether the Defendant is a trespasser on the suit land?**
2. **What remedies, if any, are available to the parties?**

Determination of issues:

Issue No. 1: Whether the Defendant is a trespasser on the suit land?

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[9] The Plaintiff had two (2) witnesses; the deceased (before his passing) who testified as PW2, and Mr. Habib Juma (PW1). The Defendant also had two (2) witnesses; Mr. Kiggundu (DW1) and a one Mr. Abdul Kasule Bagenda (DW2).

The full testimonies of all witnesses are on the court record. It was not necessary to reproduce their testimonies, save for the relevant parts that I have referred to in this judgment.

Submissions of Counsel:

[10] Learned Counsel for each party filed written submissions. For brevity, I have also not reproduced their full arguments here, but I have made reference to them only where and when it was necessary. See paragraphs [27] – [30] below.

Analysis by this Court:

[11] I will begin by defining the concept of trespass.

The concept of 'Trespass' is defined in Black's Law Dictionary³ as;

'An unlawful act committed against the person or property of another; esp. wrongful entry on another's real property'

[12] The concept of trespass was also well enunciated by Mulenga, J.S.C., (as he then was) (R.I.P), in the celebrated case of Justine E.M.N Lutaya v Stirling Civil Engineering Company Ltd⁴, that;

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³ 9th ed. at page 1642

⁴ SCCA No. 11 of 2002 UGSC 39

'Trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere with another person's lawful possession of that land. The tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land'.

(Underlining added for emphasis).

- [13] Possession and Constructive Possession are also defined respectively, in **Black's Law Dictionary**⁵ as:

'The fact of having or holding property in one's power; the exercise of dominion over property'...'Something that a person owns or controls; property'

'Control or dominion over property without actual possession or custody of it'

- [14] Guided by the above definitions, the question to be determined is; '**whether the entry upon the suit land by Mr. Kiggundu was lawful / authorized**'?
- [15] PW1 and PW2 told court that the deceased bought the suit land in 1976 and constructed a house thereon. That owing to the war in 1979 he fled the country and went into exile in Congo, and that he only returned from exile in 1988, after H.E. Y.K Museveni had taken over power. That on his return, he found that the suit land had been registered in the names of Z.K.S.B in 1982, and that Z.K.S.B told him that he had bought the same from a one Damiano, who was since dead.
- [16] That the deceased filed the matter in court against Z.K.S.B vide **HCCS No. 2038 of 1997**, whereupon Z.K.S.B suggested to him (the deceased) that since he (Z.K.S.B) had already sold off the suit land, he would give to the deceased an

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⁵ " " at pages 1281 & 1282

alternative piece of land. That the deceased rejected the said alternative piece of land on the basis that the same was not good. That the deceased and Z.K.S.B then entered into a consent judgment dated 27/01/03 (**EXB PE. 4**) and Z.K.S.B returned the suit land back to the deceased.

[17] PW1 and PW2 further told court that following the consent Judgment (**EXB PE. 4**), PW2 (the deceased) and Z.K.S.B went to the suit land to introduce Mr. Kiggundu to PW2 as the person to whom Z.K.S.B had sold the suit land. That while there, they shared (*sic*) the consent Judgment with Mr. Kiggundu, but Mr. Kiggundu refused to vacate the suit land and is still in possession thereof.

[18] That in 2010 pursuant to the consent Judgment, the name of the deceased (Habib Ali) was re-instated on the certificate of title to the suit land, and that by that time, Mr. Kiggundu had possession of the owner's copy of the certificate of title to the suit land, which he refused to yield up to PW1 & PW2 when they asked him for it.

[19] The duo also testified that the deceased consequently applied for, and in 2017 obtained a special certificate of title (**EXB PE 3**) to the suit land after Mr. Kiggundu refused to surrender the duplicate title (owner's copy) thereof, and that the deceased had never regained possession of the suit land.

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- [20] That the matter was reported to the Police at Kibuli and Mr. Kiggundu handed over the certificate of title to the Police, which made investigations and a Police report dated 1/08/2014 (**EXB DE 5**) was made.
- [21] In defence, DW1 testified that he came to know the deceased in the year 2000 when the latter went to his (DW1) home in the company of Z.K.S. B. That Z.K.S.B introduced DW1 to the deceased as the person to whom he (Z.K.S.B) had sold the suit land. That he (DW1) stays at Plot 136 which is adjacent to the suit land (Plot 135), and that he was registered on the title to Plot 136 (**EXB DE 2**) on 20/8/97. That around 1995 he (DW1) paid to Z.K.S.B, who was then the registered owner, the price of 2.1M/= for the suit land. That no sale agreement was made between him and Z.K.S.B, and that Z.K.S.B gave him signed transfer forms and the certificate of title (**EXB DE 1**), whereupon he (DW1) got the suit land transferred into his names.
- [22] He (DW1) further told court that before purchasing the suit land, the certificate of title had no encumbrance, and that the deceased (PW2) at the time appeared on the title as a previous proprietor.
- [23] That he (DW1) cultivated crops and did poultry farming on the suit land and later in 1998 – 1999 constructed thereon a commercial block of five (5) shops. That his boy's quarters and poultry house are also on the suit land, and that he is currently constructing a residential house thereon. That he stays on Plot 136,

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the neighboring plot, that he purchased in 1997, which is in his names (EXB. DE 2).

[24] That ever since he purchased the suit land, there were no issues until 2010 when PW1 came claiming the suit land. That in November 2011 he saw a notice in the gazette showing that the deceased (PW2) had applied for a special certificate of title, to which he objected by lodging a caveat by a letter dated 25/11/2011 (EXB. DE 3).

[25] That upon carrying out a search (EXB DE 4), it revealed that the deceased had been registered on the certificate of title to the suit land around 2008 pursuant to a consent judgment with Z.K.S.B.

[26] That he (DW1) filed a suit vide HCCS No. 114 of 2012 against the deceased jointly with Z.K.S.B, which suit was dismissed as shown by a dismissal order (EXB PE 2). That he tried to reinstate the suit and found that the deceased had filed the present suit, so he did not pursue the reinstatement.

[27] Learned Counsel; Mr. Isotah argued for Mr. Habib that the terms of the consent Judgment in **HCCS No. 2038 of 1997** were executed by having the name of Habib Ali, reinstated on the white page as registered proprietor thereof on May 27, 2008. That the continued occupation of the suit land by Mr. Kiggundu is contrary to the orders of this Honorable court and contrary to **sec. 59 of the RTA**.

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[28] Mr. Isotah further argued that the attempt by Mr. Kiggundu to legitimize his fraud through a conduit suit vide **HCCS No. 144 of 2012**, that was dismissed, pointed to one possible conclusion that Mr. Kiggundu's testimony is inconsistent with being a *bona fide* purchaser. That Mr. Kiggundu was an active participant with actual knowledge of fraud in transferring the suit land, being the immediate neighbor to the suit land. For his argument, learned Counsel relied on EXB PE 6 and EXB DE 6B and *inter alia* on the decision in **Turinawe & 4 Ors v Eng. Turinawe & Anor**⁶

[29] In rebuttal, Learned Counsel; Mr. Muwonge argued for Mr. Kiggundu that Mr. Habib failed to prove any fraudulent acts against Mr. Kiggundu in order to hold him liable in trespass. That Mr. Habib neither pleaded fraud, nor proved any act of fraud against Mr. Kiggundu, and that therefore Mr. Kiggundu cannot be held liable in trespass.

He argued further that Mr. Kiggundu acquired a good title irrespective of Z.K.S.B's defective title. For his proposition, learned Counsel cited **Simon Kato Bugoba v S. Kigozi and M. Mbabali**⁷ and **Hannington Njuki v. George William Musisi**⁸

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⁶ SCCA No. 10 of 2018

⁷ HCCS No. 0543 of 2004

⁸ HCCS No. 434 of 1996

[30] By way of rejoinder, learned Counsel Mr. Isotah argued for Mr. Habib that Mr. Kiggundu who claims to have purchased the suit land, admitted to never having possessed any agreement relating to the suit land. That indeed, a perusal of the transfer form for the suit land from Z.K.S.B in favour of Mr. Kiggundu, dated October 4, 1995 (EXB PE 6) reveals fraud by Mr. Kiggundu who never acquired the suit land by way of a gift or under a will and never paid a shilling in consideration. That the moment that Mr. Kiggundu's proprietorship was cancelled, he became a trespasser trying to obtain title under a non-existent agreement and for no consideration. For his propositions, learned Counsel cited **Samuel Kizito Mubiru v Byensiba & Anor⁹**, **Kanoonya David v Kivumbi & 2 Ors¹⁰** and **Moya Drift Farm Ltd v Theuri¹¹**.

[31] I have very carefully evaluated the evidence adduced by each party, and also very carefully considered the arguments of their respective Counsel and the authorities they rely on, and the law. I accordingly find as follows;

- i) That by the time the deceased and Z.K.S.B entered into the consent judgment in January 2003, vide HCCS No. 2038 of 1997 (EXB PE 4), Z.K.S.B had long since sold the suit land to Mr. Kiggundu in 1995, and Mr.

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⁹ (1985) HCB at page 106

¹⁰ HCCS No. 616 of 2003

¹¹ (1973) E.A at page 114

Kiggundu) had already been registered as proprietor thereof and he was in possession. See the certificate of title to the suit land (EXB DE 1).

(Refer to the evidence of PW1 & PW2 to the effect that; 'Z.K.S.B suggested that since he (Z.K.S.B) had already sold the suit land, he would give to the deceased an alternative piece of land, which the deceased rejected'). (Also refer to the testimony of DW1.)

- ii) As already stated in this Ruling¹², Mr. Kiggundu was neither a party to, nor was he a participant in the negotiations leading up to the consent Judgment vide HCCS No. 2038 of 1997.

I therefore agree with the submissions of Mr. Muwonge that the consent judgment in HCCS No. 2038 of 1997 to which Mr. Kiggundu was not a party, could not have legally deprived him of the suit land which was in his names at the time it was entered into in January 2003. Refer to sections 176 and 181 of the RTA¹³ to the effect that except for *inter alia* fraud, a person registered as proprietor cannot be deprived of his interest in land under the Act.

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¹² See paragraph [4] of this Ruling.

¹³ Registration of Titles Act, Cap 230

- iii) The Plaintiff's evidence fails to point out, nor to describe any irregular or illegal actions by Mr. Kiggundu in respect of his purchase and conveyance of the suit land into his names.

The allegation that 'Z.K.S.B connived with Mr. Kiggundu to fraudulently transfer the suit land into Mr. Kiggundu's names' is not supported and is therefore baseless. Similarly, the argument by Mr. Isotah that 'the transfer from Z. K.S.B to Mr. Kiggundu was a fraudulent transfer because the transfer form dated October 4, 1995 (EXB PE 6) does not show that Mr. Kiggundu paid a shilling in consideration', is also an argument without merit.

In the Appeal case; Mohammed Abdallah Garelnabi v Diana Irene Naiga¹⁴, the court of Appeal held that 'for as long as the purchaser pays a duty assessed by the Chief Government Valuer, it cannot be evidence of fraud attributed to a purchaser whether or not the purchaser states a lesser value on the transfer form'.

In that case the COA took cognizance of the fact that the Appellant had not disputed the fact that the Respondent paid a consideration of UGX. 30,000,000/= in purchasing the suit land and that she obtained title and took possession.

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¹⁴ COA Civil Appeal No. 231 of 2019

Likewise, in the present case, I too take cognizance that Mr. Habib did not dispute Mr. Kiggundu's evidence that he paid UGX. 2.1M/= for the suit land, obtained title, and took possession.

I also take guidance from the decision in that Mohammed Abdallah Garelnabi case (supra), and find that the omission to state the consideration in the transfer form (EXB PE 6) cannot be evidence of fraud. I have carefully considered first, that it was not shown to court by either party whether any stamp duty was paid in respect of this transaction, and whether it was adequate and in conformity to the value assessed by the Chief Government Valuer. Second, I have considered that fraud was not pleaded in this case, and Mr. Kiggundu was never given an opportunity to respond to such an allegation. As it were, fraud was not a matter under investigation in this suit. Had it been, this court would have interrogated the questions; how much was paid as stamp duty, if at all, and if so, whether it was in accordance with the assessment of the Chief Government Valuer.

I hasten to point out that the Justices of the Court of Appeal in their decision in Mohammed Abdallah Garelnabi case (supra) distinguished the facts in that case, from the facts and the decision by the Supreme Court in Betty Kizito v David Kizito Kanonya and 7 Ors¹⁵, by which the Supreme

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¹⁵ SCCA No. 8 of 2018

Court approved and applied the case; Samuel Kizito Mubiru & Anor v G. W Byensiba & Anor (supra), that was cited herein by learned Counsel Mr. Isotah.

In both the Betty Kizito case (supra) and the Samuel Kizito Mubiru case (supra), lesser figures than the amount actually paid as consideration for the suit land were inserted in the transfer forms, and less money was actually paid as stamp duty. That is not the scenario in the present case.

- iv) From a reading of the encumbrance page on the suit land title (see **EXB PE 3 and EXB DE 1**), there was no encumbrance on the suit land at the time Mr. Kiggundu purchased the suit land in 1995. The encumbrances that appear on the certificate of title are dated 11/12/1996 and 10/01/2011, and were lodged by Habib Ali (the deceased) and Mohammed Kiggundu, respectively.
- v) The allegation that Mr. Kiggundu 'knew of the fraud of Z.K.S.B' because he was the owner of Plot 136 that is adjacent to the suit land, is also an allegation that is also not supported.

The evidence shows (see **EXB DE 1** and the certified copies of the suit land title) that Z.K.S.B was the registered as proprietor of the suit land in 1982.

No evidence was adduced by the Plaintiff's witnesses that connects or

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relates Mr. Kiggundu to the registration of Z.K.S.B as proprietor of the suit land in 1982.

In converse, the defence evidence that Mr. Kiggundu bought the suit land (plot 135) *bona fide* from Z.K.S.B, and transferred it into his names in 1995 prior to his purchase and registration as proprietor of the adjacent plot (136) in 1997, was not rebutted. (See EXB. DE 1 and (EXB DE 2).

- vi) I agree with the submissions by Mr. Muwonge, and I have already opined, that Mr. Habib neither pleaded fraud, nor has he proved fraud against Mr. Kiggundu.

It is well settled that allegations of fraud must not only be pleaded in the plaint with specificity¹⁶, but must also be strictly proved, and that the burden of proof is heavier than on a balance of probabilities that is applied in ordinary civil cases. To prove fraud, one must prove actual fraud or some act of dishonesty on the part of the person against whom the allegation is made. Per Wambuzi, C.J. (as he then was), in Kampala Bottlers Ltd v Domanico (U) Ltd¹⁷ applied in Frederick Zaabwe v Orient Bank Ltd & 5 Ors¹⁸

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¹⁶ Order 6 Rule 3 of the CPR requires that where a party relied on fraud, misrepresentation, breach of trust, wilful default or undue influence, and all other like cases, particulars with dates must be stated in the pleadings.

¹⁷ SCCA No. 22/92

¹⁸ SCCA No. 4 of 2006

- vii) The Plaintiff's evidence also fails to support the allegation that Mr. Kiggundu (DW1) forcefully entered upon the suit land. Except for the defence evidence, no evidence was adduced by the Plaintiff as to how, or in what manner Mr. Kiggundu entered upon the suit land. The defence evidence is that Mr. Kiggundu has been in uninterrupted occupation and possession of the suit land from 1995 when he purchased it, until 2010 when Mr. Habib laid claim to its ownership. That evidence was not controverted.

Decision of this Court under issue No. 1

- [32] For the reasons I have given in paragraphs [31] (i) – (vii) above, I hold that Mr. Kiggundu's entry upon the suit land was lawful and he is not a trespasser thereon.

Issue No. 1 is accordingly answered in the Negative.

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

- [33] Having found and held as I have under issue No. 1, it follows that Mr. Habib's suit fails. It also follows that the re-instatement of the name; Habib Ali as the registered proprietor on the certificate of title to the suit land was erroneous.



[34] It is trite that a *bona fide* purchaser is protected under sec. 189 (now sec. 181) of the RTA. In the celebrated case; David Seijaaka Nalima v. Rebecca Musoke¹⁹, B. J Odoki, J.A., (as he then was), referring to sec. 181 of the RTA, and citing his own decision in Robert Lusweswe v G.W Kasule & Anor²⁰, stated thus;

'the effect of that section is that once a registered proprietor has purchased the property in good faith, his title cannot be impeached on account of the fraud of the previous registered proprietor...a *bona fide* purchaser therefore obtains good title even if he purchases from a proprietor who previously obtained it by fraud'

'...Before a purchaser can claim the protection of the section, he must act in good faith. If he is guilty of fraud or sharp practice, he will cease to be innocent and therefore lose the protection'

[35] Be that as it may, since the erroneous re-instatement of the name of Habib Ali on the suit land title was made pursuant to the Consent Judgment in **HCCS No. 2038 of 1997**, this court is not clothed with the power to correct and reverse that erroneous entry. That is the preserve of the Court of Appeal, except where the matter is brought to this court by way of review proceedings under Sec. 82 of the CPA and Order 46 of the CPR.

[36] Similarly, the procurement of a special certificate of title (**EXB PE 3**) on the basis of a false declaration made by Mr. Habib Juma (PW1)²¹ that the duplicate title to the suit land was lost, whereas he knew that it was in the hands of DW1, was illegal and erroneous.

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¹⁹ SCCA No. 12 of 1995 – reported in [1992] KALR 132 at page 149

²⁰ C/S No. 1010 of 1983 [1987] HCB page 65

²¹ See PW1's admission on this during his cross-examination.

[37] In the final result, Judgment is hereby entered for the Defendant (Mr. Kiggundu) against the Plaintiff (Mr. Habib), in the following terms;

1. A Declaration is hereby made that the Defendant; Mr. Kiggundu is not a trespasser on the suit land comprised in **Kyadondo Block 223 plot 135 at Namugongo – Kyaliwajjala.**
2. The Commissioner Land Registration is hereby directed to cancel the special certificate of title to the suit land (EXB P. 3) that was obtained on the basis of deliberate false information that is contrary to the existence of the Duplicate (owner's) copy that is not lost.

(For the avoidance of any doubt, this order does not cancel the entries of proprietorship and or any other entries on the white page).

3. The costs of this suit are awarded to the Defendant against the Plaintiff.

I so Order,

A handwritten signature in blue ink, appearing to read 'P. Basaza - Wasswa' followed by a date '29/5'.

P. BASAZA - WASSWA
JUDGE

May 25, 2022

Judgment delivered via email to the parties and uploaded on the ECCMIS system.