

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

CIVIL SUIT NO.180 OF 2005

1. MUSIIME JAMES

2. KASULE SAMUEL:.....PLAINTIFFS

VERSUS

1. MUBEZI JAMES

2. NTUNGIRE STEVEN

3. MISAKI KAVIGI:.....DEFENDANTS

JUDGMENT

BEFORE: HON. MR. JUSTICE HENRY 1. KAWESA

Introduction

The brief facts of this suit are that the two Plaintiffs' late fathers, one other deceased person, and the 1st Defendant were registered as tenants in common in equal shares (being four tenants in common) on land comprised in Bulemezi Block 98 Plot 4, Register Volume 1482 Folio 7 situate at Ndalagi-Ngoma (hereinafter the suit land). The suit land covered 900 hectares of land and the lease was for an initial period of five years. The three proprietors died around 1984, leaving the 1st Defendant as the only surviving proprietors. In 1986, the lease was given a full term of 49 years in the names of the four proprietors. The deceased persons did not execute the full term agreement in 1986 since they had died around 1981-1984 during the NRA bush war in Luwero.

In 1988, an agreement was purportedly executed between the three deceased proprietors as vendors and the 2nd and 3rd Defendants as purchasers for the 900 hectares, while the surviving 1st Defendant attested the agreement as a witness.

The Plaintiffs herein, sons of the deceased registered proprietors of the suit land state, in their amended plaint, that in 1999, they discovered that all the deceased persons' shares in the land had been fraudulently transferred to the Defendants on separate certificates of titles at the instance of the 1st Defendant who had remained with the duplicate certificate of title. That the three Defendants applied for preparation of two separate certificates of title and were registered as such in 1991, say for Plot 6 for 385 hectares in the name of the 1st Defendant, and Plot 5 for 510 hectares in the names of the 2nd and 3rd Defendants; and the 1st Defendant transferred his 385 hectares of land to third parties, say Yokana Karuru and Efesi Rwebibunda.

Further, that in 2002 and 2003, the 2nd and 3rd Defendants were respectively registered as separate proprietors on titles of Plot 16 and 17 for 255 hectares each.

The Plaintiffs applied for and obtained letters of administration for their respective fathers' estates in 2000 and 2004. In 2005, they filed this suit against the Defendants to recover the estates' land, mesne profits and general damages.

The 2nd and 3rd Defendants pleaded that they were bonafide purchasers of the suit land from persons purporting to be the "deceased proprietors" who signed the agreement of 1988 in that

capacity and in the immediate presence of their families. The 1st Defendant however denied the sale of his share to the 2nd and 3rd Defendants but admitted to signing on the agreement as a witness.

Before hearing of the suit commenced, the 1st Plaintiff entered into a consent judgment with the Defendant wherein he was paid Ugshs. 10,000,000/- (*ten million shillings only*) and the hearing of the suit proceeded in respect of the 2nd Plaintiff only. The 1st Plaintiff however later successfully challenged the consent judgment in Misc. Appln. No.673 of 2009 and the same was set aside.

Through Misc. Appln. No.210 of 2010, the Defendants applied to Court to review the order setting aside the consent judgment but this was dismissed. The 1st Plaintiff was added afresh in the suit proceedings and before the suit could be concluded, the Defendants applied for leave to appeal against the ruling in Misc. Appln 210 of 2010 and leave was granted but no appeal was instituted. In the meantime, judgment in the suit was, among others, delivered in favour of the 2nd Plaintiff alone. On 19th of August 2011, the Defendants were held to have acquired the suit land fraudulently. Court also ordered that a certificate of land be issued in the name of the 2nd Plaintiff for 255 hectares his deceased father owned and that this was to be carved out of the land in Plots 16 and 17.

The Defendants lodged an appeal in the Court of Appeal against the decision of this Court in respect of the 2nd Plaintiff but lost it; and lodged another in the Supreme Court and was also dismissed. This judgment is therefore limited to the 1st Plaintiff only.

Triable Issues

At trial of the matter between the Plaintiff and the Defendants, the parties agreed on the following issues and these were endorsed by Court:

- 1. Whether the transaction of the Defendants on the initial suit land (Bulemezi Block 981 Plot I/LRV 1482 Folio 7) was fraudulent and illegal.**
- 2. Whether the Plaintiff has a cause of action against the 3rd Defendant when the 3rd Defendant purchased/bought from the estate of the late Gerosome Rwakishaya/whether the Plaintiff can claim/benefit from the estate of the late Gerosome Rwakishaya.**
- 3. Whether the Plaintiff can maintain a suit against the Defendant when he was paid Ugshs.10,000,000 in settlement of the matter**
- 4. What remedies are available to the parties**

Only the Plaintiff testified as a witness in support of his case and is hereinafter coded as PW1. On the other hand, the Defendants called Misaki Kavigi (DW1), Ntungire Stephen (DW2), and Atamba Arthur (DW3).

Only Counsel for the Plaintiff and the 3rd Defendant filed written submissions; and Court shall consider them in resolving the issues above.

It suffices to note that the Plaintiff's Counsel still maintained in his submissions the issues that had been initially raised when the suit was still between all of the parties. As Counsel for the 3rd Defendant alluded in his submissions, these were abandoned when the Plaintiff and Defendants raised the issues above. They cannot therefore suffice. For that reason, Court determine the suit basing on the issues reproduced above.

Determination of Issues

Court shall begin with issue 2, and 3, given their overall importance on issue one and four.

Issue 2:

Whether the Plaintiff has a cause of action against the 3rd Defendant when the 3rd Defendant purchased/ bought from the estate of the late Gerosome Rwakishaya/whether the Plaintiff can claim/benefit from the estate of the late Gerosome Rwakishaya

Counsel for the 3rd Defendant properly submitted that in determining a matter of cause of action, the Court does not have to look for evidence other than the plaint and its annexures. This position is supported by the case of **Kapeka Coffee Works Ltd versus NPART CACA No.3 of 2000.**

Counsel for the 3rd Defendant cited the case of **Tororo Cement Co. Ltd versus Frokina International Ltd SCCA No.2 of 2001** where, concerning the same matter, *the Supreme Court* well stated that and I would summarise the position as I see it by saying that;

“If a plaintiff show that the Plaintiff enjoyed a right, that that right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment”.

Counsel for the 3rd Defendant also submitted that the 1st Plaintiff did not amend the amended plaint to bring out a case against the 3rd Defendant, which amendment would have probably cured the concern of cause of action.

Resolution

I have looked at the amended plaint filed on 29th of August 2007. Under paragraph

4(a) to (g) and paragraph 5, it is stated that:

a) On the 4th day of August 1986, the late Gerosome Rwekishaya, Zekyeri Lubenika father of the 1st Plaintiff Christopher Kasula father of; the 2nd Plaintiff and the 1st Defendant were registered owners as tenants in common in equal shares of land measuring 900 hectares comprised **in Block 981 Plot 4 Bulemezi** as per photocopy *copy of certificate of title here of annexed and marked "A '.* The Proprietors had five-year term initially and was made full term after deceased proprietors ' demise.

a) On the 4th day of August 1986, the late Gerosome Rwekishaya, Zekyeri Lubenika father of the 1st Plaintiff, Christopher Kasula father of the 2nd Plaintiff and the 1st Defendant were registered owners as tenants in common in

equal shares of land measuring 900 hectares comprised in Block 981 Plot 4 Bulemezi as per photocopy copy of certificate of title hereof annexed and marked "A". Proprietors had five-year term initially and was made full term after deceased proprietors' demise.

b) The 1st three above named registered land proprietors died during the NRA 1981-1984 Luwero Triangle bush war, leaving the 1st Defendant as the sole registered survivor.

c) On 30th December 1998, the 2nd and 3rd Defendants purported to enter into a sales agreement buying all the said land from the first three registered proprietors (deceased) omitting the alive 1st Defendant from the transaction, though also a registered proprietor. A sale agreement is annexed and marked "B" purportedly witnessed by the 1st Defendant.

d) On 6th September 1989, the three Defendants were registered as proprietors of the same entire land as tenants in common in equal shares also annexure "A" above.

e) On 4th September 1989, the three Defendants applied for preparation of two separate certificates of titles, Plot 6 for 385 hectares in the names of the 1st Defendant and Plot 5 for 510 hectares in the names of the 2nd and 3rd Defendants. The application is annexed and marked "C".

f) On 25th October 1991, the 2nd and 3rd Defendants were registered as proprietors for Plot 5 in common in equal shares and 1st Defendant for Plot 6. Both certificates are hereof annexed as "D" and "E" respectively.

g) On 12th December 2002 and 23rd July 2003 the 3rd and 2nd Defendants were respectively and separately registered on titles Plot 16 and 17 for 255 hectares each as per annexures "F" and "D" in the above order.

5) On 11th April 2000 and 9th November 2004, the 1st and 2nd Plaintiffs respectively obtained Letters of Administration for the estate of their respective deceased fathers; Zekyeri Rubeinika and Christopher Kasula and having earlier in/or about 1999 known of a fraud depriving them of their deceased father's estate in the land, sued the Defendants. The Letters of Administration are attached and marked "T" and "J" in the Plaintiffs' order.

The above statements show that the 1st Plaintiff claims under the estate of the late Zekyeri Rubainika who owned a share of the suit land. That alone establishes the 1st Plaintiffs right. The statements also show that the 1st Plaintiff was allegedly fraudulently deprived of the suit land by the Defendants, including the 3rd Defendants. Some paragraphs in fact point to the 3rd Defendant specifically. This demonstrates that the Plaintiff's right was violated, and that the violation was by the 3rd Defendant, among others.

Therefore, the issue should not be about from whom the 3rd Defendant bought the suit land from, but whether the plaintiff meets the legal criteria for disclosing a cause of action. In view of the above, the Court finds that the plaintiff meets that legal criteria.

A sub-issue to this issue is whether the Plaintiff can claim/benefit from the estate of the late Gerosome Rwakishaya.

Obviously the Plaintiff cannot claim/benefit from the estate of the late Gerosome Rwakishaya. He is not in fact claiming from that estate. As noted already, the Plaintiff is claiming under the estate of the late Zekyeri Rubainika, his father. As such, this sub-issue cannot arise given the circumstances of the case. The same is therefore misplaced.

Issue 3:

Whether the 1st Plaintiff can maintain a suit against the Defendants when he was paid shs. 10,000,000/- in settlement of the matter.

Court already noted that the Plaintiff entered into a consent judgment with the Defendants. That pursuant to the said consent judgment, he was paid Ugshs. 10,000,000/- (*ten million shillings only*).

Further, that the same judgment was set aside by the Court's order upon an application by the 1st Defendant, which order remains valid. PW I acknowledged receiving Ugshs. 10,000,000/- (*ten million shillings*) from the Defendants and referred to DEXHI, *a copy of a receipt, for that fact*. That the said money was paid as damages and costs not for his father's share in the suit land.

It is the Defendants' Counsel that the 1st Plaintiff cannot sustain this suit on ground that he was paid Ugshs. 10,000,000/- (*ten million shillings*) by the Defendant, which he has never refunded.

Ultimately, Counsel argued that the 1st Plaintiff's claim against the Defendants be dismissed.

Resolution

I have looked at DEXHI. This shows that the money was paid in settlement of the 1st Plaintiff's claim in this suit. But since the consent judgment was set aside, that claim can legally resurface. The receipt of money and failure to refund it to the payer by the Plaintiff is something else, and the Defendants' claim to it is a different matter that can be looked into in another way. It cannot be a basis for saying that it extinguished the 1st Plaintiff's claim against them. In view of the circumstances, Court finds that the 1st Plaintiff can maintain this suit against the Defendant. This issue therefore fails.

Issue 1:

Whether the transaction of the Defendants on the initial suit land (Bulemezi Block 98 Plot 4/LRV 1482 Folio 7) was fraudulent and illegal

In his witness statement, PW1 reiterated what is already reproduced in the introduction as his testimony. Court shall not therefore reproduce his testimony, but shall be mindful of the revelations in the introduction.

For the Defendants, DWI testified that they (2nd and 3rd Defendants) bought the suit land from three people, say; Rwashaya, Ezekiel Rubeinika, and Kasula Christopher. That the said people took him to a Lawyer called Rugumayo who gave him a transfer form and

land title. That they also made an agreement at the Lawyer's place, which was exhibited as DEXH3. That they left the transfer form and title with the said Lawyer who processed their titles.

During cross examination, DW1 denied any knowledge that the three predecessors of the suit land died in 1986, and also denied what was contained in the written statement of defence and scheduling memorandum, saying that he did not write what is contained therein. He also testified that the original proprietors of the suit land were still alive when they bought the suit land and that they thumb printed on DEXH3 and also signed the transfer form in his favour. That in DEXH3, he bought 640 acres as his share, among others. Similarly, DW2 testified as DW1 reiterating the latter's testimony.

DW3 testified that he is a son of Rwakishaya Geresom and Jovia Komungaro. That his father was a tenant in common with James Mubeezi, Christopher Kasula and Ezekiel Rubeinika owning the suit land. That in the 1980s, three of the four families (except the 1st Defendant) sold their shares in the suit land to the 2nd and 3rd Defendants and shifted to other areas. That because the suit land had a certificate of title, their parents informed them that negotiations could not be concluded without Lawyers in Kampala, and that they went to Kampala where they concluded the sale transaction. During cross examination, DW3 testified that he was 12 years when his parents executed DEXH3 with the Defendants.

Resolution

Court has considered and appreciated the parties' evidence and the circumstances of the case.

It finds it appropriate to start with the Defendants' amended joint written statement of Defence. Under paragraphs 5(b), (j), and 8 of the same, they pleaded that:

b) That the 2nd and 3rd Defendants by an agreement dated 30th December 1998 purchased the said land from persons purporting to be Gerosome Lwakisaya, Ezekiel Rubeinika and Christopher Kasula who signed in that capacity and in the immediate presence of their families. The 2nd and 3rd Defendants paid three million shillings as the purchase price of the said land.

j) That it has come to the knowledge of the Defendants that the persons who purported to sign the sale agreement as Gerosome Lwakisaya, Ezekiel Rubeinika and Christopher Kasula were a one Kakubo, Kakaiyire a brother to Plaintiff and Mwesigye respectively.

8) The 1st, 2nd and 3rd Defendants shall aver that Kakubo, Kakaiyire and Mwesigye were acting as executors of the estate of the late Gerosome Lwakisaya, Ezekiel Rubeinika ⁹ and Christopher Kasula respectively even though they had not been granted letters of administration. The said Kakubo Kakaiyire and Mwesigye were therefore executors dis on tort and are liable in that capacity for their own.

The above statements are in sharp contrast with the evidence given by DW1, DW2, and DW3. DW1 denied the above statements, stating that he did not write them. But he is informed of a legal principle that parties are bound by their pleadings, which Counsel for the 1st Plaintiff also echoed in his submissions (0.6 r. 7 of the Civil Procedure Rules and this principle was re-affirmed in the cases of **Jani Properties Ltd versus Dar-es-Salaam City Council [1966/ EA 281]**; and **Struggle Ltd versus Pan African Insurance Co. Ltd. (1990) ALR 46 47**, wherein Court observed that;

“the parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record and moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings”

(See also Semalulu versus Nakitto High Court Civil Appeal No.4 of 2008).

It is always unconventional to depart from pleadings, and any evidence given in departure of pleadings attracts a very strong suspicion. In **Kasifa Namusisi & Others versus MK Ntabazi, SCCA No. 4 of 2005** in which the Supreme Court held that;

“A testimony given in departure of pleading is tantamount to a falsehood”.

Facing a like situation, the Court observed that:

*“The decision of this Court, in **Akisoferi W. Biteremo versus Damascus Munyanda Situma (SCC Appeal No. 15 of 1991)** (unreported) supports the view that a party*

who departs from his pleadings and gives evidence contrary to his pleadings would be lying”.

Similarly, in this case also, I find that the Defendants evidence is full of deliberate lies.

It suffices to state that in their defence against the 2nd Plaintiff, the Defendants exclusively defended themselves basing on what is contained in their pleadings, and Court refers to page 9 paragraph 2 of its judgment in respect of the 2nd Plaintiff. Setting up another answer to the 1st Plaintiff's claim and departing from their pleadings is just simply another attempt to blur the truth.

It is also the case of law that deliberate falsehoods lead to a rejection of the evidence of a witness (**Odur David versus Ocaya Alphonse & 3 Ors HCCA No. 34 of 2018**).

For that reason, therefore, I find it wise discard the whole evidence of DW1, DW2 and DW3. Accordingly, the Court shall determine the 1st Plaintiff's claim basing on the Defendant's defence.

The 1st Plaintiff's evidence has demonstrated that the suit land belonged to 4 persons as tenants in common, including his late father, the 1st Defendant, and 2 other deceased persons. It also showed that the said people were registered as proprietors of the suit land and that the 1st Defendant kept the certificate of title for the suit land.

The fact that the Defendants admitted in their written statement of defence that they bought from persons purporting as the 3 registered proprietors of the suit land (that predeceased the

tenancy in common), alone points to prima facie fraud. This view is further inflated by the fact that the surviving tenant in common, the 1st Defendant, witnessed the execution of the land sale agreement.

On a further note, what is interesting is that the sale agreement (DEXH3), shows that the 2nd and 3rd Defendants bought all the 900 hectares of the suit land, and yet it is only between them and the 3 deceased proprietors. But whereas the 1st Defendant's interest was part of the 900 hectares bought by the 2nd and 3rd Defendant in DEXH3, it happens that the 1st Defendant later got 385 hectares out of 9000 hectares.

Further, Court cannot forget the fact that the suit land was held by its initial proprietors as tenants in common with equal shares. The fact that the 2nd and 3rd Defendants bought the entire chunk of 900 hectares of the suit land from only 3 tenants in common, who legally had only 675 hectares as their share in the same also leaves a lot to be desired, especially when the other proprietor was simply a witness to the transaction.

In view of the above, the 2nd and 3rd Defendants' defence that they bought 900 hectares of the suit land, while at the same time maintaining that one of the co-owners never sold his interest is self-defeating and a grave contradiction. The sequence and circumstances of the case only indicate that each of the Defendants played a role, and they acted collectively to deprive the 3 other tenants in common of their interests in suit land.

Fraud, according to **Fredrick J.K. Zaabwe vs Orient Bank Ltd and 5 Others SCCA No. 4/2005**, Court stated that:

“means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprised, trick, cunning, dissembling, and any unfair way by which another is cheated...”

Considering the lies and contradictions of the Defendants, the 1st Plaintiff's evidence, and definition above, this Court is convinced, to the required standard, that each of the Defendants committed acts of fraud. It therefore, disagrees with Counsel for the 3rd Defendant that the 1st Plaintiff has not proved any claim of fraud against the Defendants.

Counsel for the 3rd Defendant also insinuated that the Defendants bought the suit land bonafide, and are therefore bonafide purchasers.

With due respect to Counsel, the Court is sure that such a claim cannot suffice following attribution of fraud on the Defendants. On that ground alone, Counsel's argument fails. It needs to be added that the same fate follows in respect to the Defendants' defence that those that purportedly sold the suit land to them were executors dis on tort and thus liable for their own wrongs. Reference on the latter point is made to the Court's reasoning in the judgment between the 2nd Plaintiff and the Defendants, which remains valid and standing.

In the circumstances therefore, Court finds this issue in the affirmative.

Issue 4:

What remedies are available to the parties

I have perused the amended plaint and confirmed, as Counsel for the 3rd Defendant argued, that the 1st Plaintiff never pleaded any prayer for reliefs. The only prayer in the said plaint are in respect of the 2nd Plaintiff. That notwithstanding, Court believes that there are consequential reliefs that naturally flow from the finding on issue I above, regardless of whether they are pleaded or not. As far as this point is concerned, the Court refers to Section 176(c) and 177 of the Registration of Titles Act Cap. 230.

In view of the above, the Court grants the 1st Plaintiff the following consequential reliefs:

1. A declaration that the Defendants fraudulently acquired for themselves certificates of land titles arising out of formerly **Plot 4 Bulemezi Block 981** partly belonging to the I Plaintiff deceased father's estate.
2. A declaration that the 1st Plaintiff, as Administrators of his father's estate, is entitled to 255 out of 900 hectares formerly in Bulemezi 981 Plot 4 and now to be curved out of the 2nd and 3rd Defendant's Plots 16 and 17 respectively.
3. A certificate of title in the name of the 1st Plaintiff, as

Administrator of the estate of the late Zekyeri Lubenika,
be prepared and issued by the Registrar of Titles from
the sub-division of the above Plots 16 and 17.

Further in light of the observations on issue 3, Court acts pursuant
to Section 98 of the Civil Procedure Act Cap. 17, and orders that
the 1st Plaintiff refunds to the Defendants the Ugshs. 10,000,000/-
(*ten million shillings only*) received by him within 30 (*thirty*) days
of this judgment.

The 1st Plaintiff is also awarded the costs of the suit.

I so order.

.....
Henry I. Kawesa

JUDGE

30/03/2022

30/03/2022

Atwine Muhwezi for the 1st Plaintiff.

Denis Atwijukire for the 3rd Defendant;
holding brief for Kandebe Ntambirweki for
the 1st and 2nd Defendants.

Both parties absent.

Lydia – Court clerk.

Counsel for the Judgment:

Court:

Ruling read to the parties present.

Sgd:

Ayo Miriam Okello

DEPUTY REGISTRAR

30/03/2022