

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO.2604 OF 2016

1. DICK KINTU ----- PLAINTIFFS

2. FLAVIA KINTU

VERSUS

1. KASUMBA MUTEBI EMMANUEL

2. MUTEBI FRANK

3. KIYAGA EDWARD

4. BAKALUBA FRED

5. ROSE NAMUTEBI-----DEFENDANTS

6. NALWOGA CHRISTINE

7. NAMAYANJA CAROLINE

8. NANKYA NOERINA

9. NALUMANSI RITA

JUDGMENT

BEFORE AG. HON. LADY JUSTICE KANYANGE SUSAN

The plaintiffs claim against the defendants as for declarations that the defendants are trespassers on the plaintiffs' land situate at Gayaza Road at Lutete and specifically known as Block 187 plot 783, an eviction order against the defendants, permanent injunction, general damages, interest and costs.

The plaintiffs averred that on 4th day of November 2007 they purchased the said land from the late Nalumansi Sarah Namuleme and she wrote to the Secretary Uganda Land commission requesting for transfer and subdivision of land in their favour in 2010.

After her death the 1st defendant claimed he was to collect compensation from the said land for his children. In 2012 the defendants without any claim descended on the plaintiffs' land and started establishing a day-time make-shift market thereby trespassing on the land. They uprooted barbed wire and fencing poles and matter was reported to police.

In their written statement of the defendants wherein they also counterclaimed, the 1st defendant averred that the late Nalumansi Sarah Namuleme had only orally agreed to sell 12 decimals of her land to the plaintiffs in 2007 but did not sign written contract of sale as she did not know English and did not understand the contents of the written agreement.

Further to this that the plaintiffs forged her signature and transferred land in their names after her death. The 1st defendant averred that he was the husband to the said Nalumansi Sarah Namuleme and other defendants are her children. That she did not obtain his consent in 2007 when selling the family land. They prayed sale is declared null and void for lack of statutory consent by spouse, transfer to the plaintiffs be declared null and void, the plaintiffs be declared trespassers on the defendants land, certificate of title be cancelled by the Registrar of Titles, eviction order and demolish of structures issue, permanent injunction, general damages and costs of the suit to be awarded.

In reply to the written statement of defence the plaintiffs denied the contents in the written statement of defence and counterclaim. They averred that the late Nalumansi Sarah Namuleme was a seller and absolute owner having inherited the said land from her father the late Serukwaya Fred and therefore the 1st defendant's consent was not necessary.

That it is false that the deceased demanded for re-drafting of the agreement.

Representation

M/s M. Kamanzi & Co. Advocates represented the plaintiffs while **M/s Kasiisa & Co. Advocates** represented the defendants.

Issues

1. Whether the plaintiffs are the lawful owners of the suit land
2. Whether the defendants are trespassers on the suit land
3. Whether the parties are entitled to the reliefs sought

Resolution

1. **Whether the plaintiffs are the lawful owners of the suit land.**

The 1st plaintiff Dick Kintu testified that on the 4th day of November 2007 he purchased land measuring approximately 0.101 hectares off 0.420 hectares comprised in Kyadondo Block 187 plot No.043 lease hold Register Volume 3378 folio 21 at Gayaza road Luteete from the former owner the late Nalumansi Sarah Namuleme. The said Sarah had inherited the same from her late father Serukwaya Fred in form of a kibanja. Transfer documents were executed and the plaintiffs were registered on the land.

After her death the 1st defendant husband and the defendants her relatives asked for his documents which he handed over. Previously he had also bought Block 187 plot 641 from the late Nalumansi Sarah Namuleme. He enjoyed quiet possession of suit land from 2007 until September 2012 when the defendants trespassed on his land and he reported to police.

PW2- Andrew Kisitu a neighbor and close friend to Nalumansi Sarah Namuleme testified that the deceased had family challenges and requested him to keep her certificate of title for Block 187 plot 643. She requested him in 2007 to call the 1st plaintiff and she informed him she wanted to sell part of her land and also needed her title. A sales agreement was made for purchase of 0.101 hectares off 0.42 hectares between her and the plaintiffs. He witnessed the plaintiffs' handing over the money to the deceased and the title for subdivision. The residue title was returned to him which he later handed over to the children after the death of Namuleme.

DW-1- Nankya Noelina a daughter to the deceased Nalumansi Sarah Namuleme testified that her mother was illiterate and did not know how to read and write. That she called her on the 4th day of November 2007 to interpret the agreement but she had already signed it. She said she had agreed to sell only 12 decimals of family land to the plaintiffs but not 25 decimals.

They assured her that Land Commission did not allow title of 12 decimals and they do not intend to take more of that and promised to correct the mistake. That she was the only child consulted on the purchase, but other family members were not consulted and there was no spousal consent.

DW-2- Kasumba Mutebi Emmanuel the husband to the deceased and father to the 2nd, 3rd, 4th, 5th, 7th, 8th and 9th defendants, testified that the wife was illiterate and unable to communicate in any other language apart from Luganda. That after her death he learnt of the plaintiffs and had no knowledge that his wife had sold part of the family land without his consent and consent of his adult children.

The 1st plaintiff gave him documents for proof of purchase and sale was null and void.

Counsel for the plaintiffs submitted that the plaintiffs are in possession of certificate of title and its conclusive proof of ownership as exceptions have not been proved. That DW-1-Nankya witnessed sale and told the 1st defendant when her mother was still in hospital. He did not dispute the sale.

Further to this that land is not family land as she inherited it from her late father and sold it in her own right. That area sold was 25 decimals and not 12 decimals.

In reply counsel for the defendants submitted that the deceased was illiterate and that this was family land and no spousal consent was obtained from the 1st defendant. That the 1st defendant conceded to sale of 12 decimals but not the 13 decimals which he learnt about after death of the wife. Further to this that the 2nd, 3rd, 4th, 5th and 8th defendants were carrying on farming on the suit land which gardens were destroyed by the plaintiffs.

Under **S.59 of the Registration of Titles Act** possession of a certificate of title by a registered person is conclusive evidence of ownership of the land.

Further under **S.176(c)** a registered proprietor of land is protected against an action for ejectment except on ground of fraud.

See **Kampala Bottlers versus Damanico (U) Ltd SC Civil Appeal No. 22 of 1992** and **Katarikawe versus Katuramu & Anor 1977 HCB pg.187**. Therefore the plaintiff can only be

impeached on grounds of illegality or fraud attributable to the transferee.

Fraud should be specifically pleaded and strictly proved as per the case of **G. M Combined Limited versus A. K Detergents (U) Limited Civil Appeal No.7 of 1998 (2000) UG SC 9 14 February 2000.**

The defendants in this case did not plead fraud but alleged that the area sold to the plaintiffs was not 25 decimals but 12 decimals and that the deceased signed the agreement without understanding it as she was illiterate and there was no spousal consent and children consent as it was family land.

The term illiterate is defined under S.1(b) of the Illiterates Protection Act to mean in relation to any document a person who is unable to read and understand the script or language in which the documents is written and printed.

S.2 thereof provides for verification of the illiterate's mark or any document and that prior to the illiterate appending his or her mark on the document it must be read over and explained to him or her.

S.3 thereof requires that the document written at the request on behalf or in the name of any illiterate must bear certification that it fully and correctly represents his or her instructions and was read over and explained to him or her.

The purpose of these provisions were considered in the case of **Tikens Frances and Another versus The Electoral Commission & 2 Others HC Election Petition No.1 of 2012** where it was held that the input of S.3 of the Act is to ensure that documents which are purportedly written for and on

instructions of illiterate persons are understood by such persons if they are to be bound by their content.

These stringent requirements were intended to protect illiterate persons from manipulation or any oppressive acts of literate persons.

In instant case, the agreement of sale of land dated 4th November 2007 was signed by Nalumansi Sarah Namuleme. She appended her names. It indicates that she sold off approximately 25 decimals at shs 10,000,000 and was witnessed by DW1 Nankya her daughter. Her letter to the secretary to Uganda land commission was written on 14th November 2007 requesting to transfer 25 decimals to plaintiffs and she wrote her name on it. The plaintiffs were registered on the land on 25th August 2008

I do not believe the defendants version that the deceased did not understand the document she signed or that she was illiterate. She was able to write her name and sold off 25 decimals and not 12 decimals as they claim. The agreement was witnessed by DW1 Nankya Noeline her daughter. She claimed she was only called by mother on 4th November to interpret the agreement. I wonder why after she read it she did not ensure it was corrected. She claims that plaintiff told them, they would not issue title of that acreage but this did not stop their agreement reflecting the correct area sold.

In cross examination she claimed she signed to acknowledge receipt of money and did not interpret agreement apart from letter to Uganda land commission.

I find that the deceased Nalumansi Sarah Namuleme was not illiterate and she sold off 25 decimals to the plaintiff and not 12 decimals as the defendants claim and she understood what she was signing.

Spousal consent

S.39(1) (c) of the Land Act provides that no person may sell or enter into any other transaction in respect of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance except with prior consent of his or her spouse.

In the case of **Alice Okiror & Anor versus Global Capital Save And Another.**

It was held that the Land Act provides for security

of occupancy of the family land which means land where the residence of the family is situate. Before such land is sold or mortgaged there must be a clear spousal consent. While in case of **Muwonge versus Kintu High Court Divorce Appeal No.135 of 1997 (Unreported)** Justice Bbosa observed "Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view be considered differently.

The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute.

In this case it's not in dispute that the deceased Nalumansi Sarah Namuleme inherited the land in issue from late Serukwaya Fred her father. She first sold off part of the kibanja to the plaintiffs measuring 72 feet by 10 metres of road reserve

by 212 feet along Gayaza road for 12 million on the 1st day of march 2004. That agreement was not witnessed by the 1st defendant and does not indicate he consented to the sale.

In regards to the land in issue the deceased was selling off a portion of land approximately 0.01 hectares off 0.420 hectares and PW2 Kisitu who kept for her land title said it was because she had family challenges. The 1st defendant from his evidence was not only residing at Luteete but says he resides in different places ,Kasunga,Kalungu, Luteete, Matugga and Migadde and has another wife in Masaka. He also says he does not dispute the 12 decimals but only the additional 13 decimals.

Its trite that even in marriage the right to own property individually is constitutionally preserved in **Article 26(1) of the constitution.**

The deceased inherited the land from her father and it was her individual land. She was residing on part of it with her family and cultivating on it. I find that she had a right to sell off portion of the land as she had challenges and she did not need spousal consent of the 1st defendant who has different residences elsewhere and did not derive his sustenance from there. When court visited the land at locus in quo, it was vacant land and it had been fenced off by the plaintiffs. There were no signs of graves as the defendants had claimed. Court was shown the remaining portion that had remained and it had been divided by defendants and most had been sold off. The 1st defendant was not residing near the suit land.

I thereby find there was no need for spousal consent and deceased sold land to plaintiffs so they are the rightful owners of the suit land

2)Whether the defendants are trespassers on the suit land.

In the case of **Justus E M N Lutaaya versus Sterling Civil Engineering Co. SCCA No.11 of 2002** relied on by both counsel trespass was stated to occur when a person makes unauthorized entry upon land thereby interfering or pretends to interfere with another person's lawful possession of land. in order to succeed on trespass the Court of Appeal in **Sheik Muhammed Kitaka Enterprises Ltd CA No.04 of 1987** observed that one must prove;

- i. That the disputed land belonged to the plaintiff
- ii. That the defendant entered upon it
- iii. That the entry was unlawful in that it was made without permission or that the defendant has no claim or right or interest in the disputed land.

The 1st plaintiff Kintu Dick testified that he bought the land on the 4th day of November 2007 and fenced it off to protect his interest. That on the 3rd day of September 2012 the defendants descended upon the land uprooted his barbed wire and established a day-time make-shift market. He reported to police and opened up civil suit. They were removed after a court injunction had been given to him.

DW-1- Nankya testified that the market was set upon their land and not that of the plaintiff.

DW-2- Kasumba Mutebi Emmanuel testified that they had a plantation on that land and graves and that the market was established outside the 25 decimals.

Counsel for the plaintiff submitted that the actions of the defendants in trying to build a market thereon as admitted in their evidence amounted to trespass.

Counsel for the defendants submitted that it was the defendants' evidence that they were on land prior to its illegal acquisition by the plaintiffs until it was graded and they were forcefully evicted. That the status was altered and all crops plantations and structures erased down. He prayed that I find that the defendants are not trespassers on the land.

It's evident that the plaintiff took over possession of the land in 2007 after purchase and fenced it off. This was during the lifetime of Nalumansi the seller who died in 2008. The act of the defendants removing the barbed wires and erecting a market on that portion of the land amounted to trespass.

I thereby find that the defendants trespassed on the plaintiffs' land.

3) Whether the parties are entitled to the reliefs sought.

Having found that the plaintiffs are the rightful owners of the suit land and that the defendants trespassed thereon, Judgment is found in favour of the plaintiff with the following orders prayed for,

- 1) A declaration that the defendants are trespassers on land situate at Gayaza road Luteete on Block 187 plot 783.
- 2) A permanent injunction hereby issues against the defendants restraining them from trespassing on the land.
- 3) **General damages and interest**

General damages are compensatory in nature. They should restore some satisfaction as far as money can do to the



injured plaintiff. see case of **Takye Kushwahire and another versus Kayongo Denis CACA 85 OF 2011**

In **Uganda Commercial Bank versus Kigozi 2002 1 EA pg 35**, court gave guidance on how to assess the quantum of damages. That the consideration should mainly be the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered.

When court visited the locus in quo it found plaintiff had fenced off the land and planted grass. 1st plaintiff testified that when he got the interim order and injunction, the makeshift market was removed. Though he has not yet developed that portion of the land as he is waiting for this case to end. Considering the fact that defendants were removed from the land after the injunction, I do not find it necessary to grant general damages and interest.

4) The plaintiffs are awarded costs of the suit.

DATED AT KAMPALA THIS 24th **DAY OF** August **2023**

KANYANGE SUSAN
AG JUDGE LAND DIVISION.