

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUBENDE
CIVIL SUIT NO. 17 OF 2017**

BIZIBU WILLIAM

PLAINTIFF

VERSUS

1. KALANGWA EMMY

2. GEORGE LWALI

3. STEPHEN BATUZA

4. COMMISSIONER LAND REGISTRATION

DEFENDANTS

BEFORE HON. JUSTICE MOSES KAZIBWE KAWUMI
JUDGMENT

Introduction

The Plaintiff instituted this suit against the Defendants for recovery of land comprised in Singo Block 753 Plot 2, Kikoloto Estate in Mubende District (herein after referred to as the “**suit land**”), trespass to land, fraud and intermeddling in the estate of the late Kiwanuka Yairo. The Plaintiff seeks cancellation of the Certificate of title, mesne profits, general damages, interest and costs of the suit.

Background

The suit land was initially registered in the name of the late Kiwanuka Yairo who died in 1942. On February 27, 1997 a one Alosiyo Kayondo a grandchild of Kiwanuka obtained letters of administration to Kiwanuka's estate and was registered on the title on May 8, 1997. Later in the same year Kayondo sold and transferred the suit land to the 1st Defendant.

In 2006, a one Paulo Lubega the then surviving son of Kiwanuka and father to the Plaintiff sued Kayondo and the 1st Defendant in the District Land

Tribunal at Mityana vide claim No. 28 of 2006. The 1st Defendant filed a defense to the Claim while Kayondo did not file one. However, the suit was withdrawn by Lubega on 9th April 2007 after entering a consent judgment with Paulo Kayondo.

In the Consent judgment, it was acknowledged by Kayondo that he unlawfully acquired the letters of administration and illegally sold the suit land to the 1st Defendant. Kayondo further undertook to compensate the 1st Defendant or any person claiming under him and to allow Lubega acquire vacant possession of the suit land by 9th May 2007. No evidence was led to show that the 1st defendant was compensated by Kayondo and/or that Lubega acquired possession of the suit land.

It is worth noting that whereas the 1st Defendant had also been sued, he was never a party to the consent Judgment. The land register was however presumably on the basis of the Consent Judgment rectified by the 4th defendant and the suit land reverted to Kiwanuka.

The register was however later on 6th June 2008 amended by the 4th defendant and the suit land transferred back to the 1st Defendant who sold it to the 2nd and 3rd Defendants on 23/9/2008.

When the Plaintiff (Son to Paulo Lubega) acquired letters of administration on 20/01/2017 in respect of the estate of his grandfather Kiwanuka, he instituted this suit pleading fraud against the 1st and 4th defendants. The Plaintiff seeks to recover the suit land and to declare the 2nd and 3rd Defendants as trespassers thereon.

Representation

M/S Kigenyi–Opira & Co. Advocates represents the Plaintiff while M/S Arcadia Advocates represent the 2nd and 3rd Defendants. The 1st and 4th Defendants did not enter appearance, as such the suit proceeded ex-parte as against them.

A joint scheduling memorandum was filed by Counsel with the following issues framed for resolution by the court;-

1. Who owns the land
2. Whether the transfer of the said land into the names of the 1st Defendant was fraudulent? If so whether the 2nd and 3rd Defendants were privy to such fraud.
3. Whether the 2nd and 3rd Defendants are bonafide purchasers for value without notice.
4. Whether the 2nd and 3rd Defendants have any lawful interests in the suit property.
5. Whether the 2nd and 3rd Defendants are trespassers on the suit land
6. Whether the letters of administration to the estate of the late Kiwanuka Yairo were acquired lawfully
7. Whether the suit is barred by limitation
8. What remedies are available to the parties

The hearing proceeded on filed Witness statements the deponents of which were cross examined. Written submissions with supporting authorities were filed by both Counsel and have been considered in the judgments.

Statement of law

It is a general rule of law in civil suits that he who alleges must prove the allegations. The Plaintiff is required to prove his case on a balance of probabilities. **Section 101 (1) and (2) of the Evidence Act.**

The burden of proof as to the existence of a particular fact lies on that person who wishes the Court to believe in the existence of those facts, unless it is provided by any law that the proof of that fact shall lie on any particular person. **Section 103 of the Evidence Act.**

It is also the position of the law that Fraud must be specifically pleaded and proved at a level higher than a mere balance of probabilities. In the case of **J. W. R. Kazoora V M.L.S. Rukuba. SCCA No.13 of 1992** the Court held;-

“As to the standard of proof, the law is that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required,”

It is also a settled principle that in land matters, fraud must be attributed to the transferee. In **Kampala Bottlers LTD V. Damanico (U) LTD . SCCA 22 OF 1992** the court held;-

“The party must prove that fraud was attributed to the transferee .It must be attributable either directly or by necessary implication, that is, the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.”

Resolution of the issues.

I do find that the issues raised by both Counsel are repetitive in that resolution of any of them will result in resolution of the others. This is the very reason Counsel for the Defendants abandoned some while the Plaintiff's Counsel resolved some of them jointly.

Issues 1 and 6 as framed were not seriously canvassed by Counsel both during the hearing and in the submissions.

The suit land is registered in the names of the 2nd and 3rd defendants and under section 59 of the Registration of Titles Act they are the owners of the suit land which answers the 1st issue.

As to whether the Letters of Administration were lawfully acquired regard must be had to the genesis of the Plaintiff's suit. It was the Plaintiff's case that a one Kayondo had illegally acquired Letters of Administration to Kiwanuka's estate which he used to transfer the land to the 1st defendant. The said Kayondo is stated to have '*confessed*' to the illegality of the acquisition of the Letters of Administration.

The Plaintiff adduced no evidence to show that a Renunciation of the Letters of Administration issued to Kayondo was effected and/or an order for revocation of the same was issued by any court.

The Plaintiff did not also prove that Kayondo had died before he applied for the Letters of Administration to the same estate which raises a presumption that the Grant he holds was not validly issued. Under the Law no simultaneous Grants can validly hold in respect of the same estate. The earlier Grant to Kayondo had to be renounced or revoked which was not done.

I thus find that the Letters of Administration flaunted by the Plaintiff were not validly issued and he had no locus standi to lodge the present suit in the capacity of an Administrator of Kiwanuka's estate.

Issue No.7

Whether the suit is barred by Limitation?

I will canvass this issue only for the sake of completeness given the decision relating to the Letters of Administration held by the Plaintiff.

In the Statement of Claim filed by the Plaintiff's father in the District Land Tribunal at Mityana and which is attached to the Plaint, the late Kiwanuka is stated to have died in the 1940's. The Plaintiff's father learnt of the alleged fraudulent registration of the suit land in favor of Kayondo in 2004 and this had been done on 8th May 1997. The 1st defendant was registered on 22nd July 1997.

It is submitted by Counsel for the Plaintiff that the suit was filed within 12 years from 2nd May 2016 when he learnt of the fraudulent registration of the 2nd and 3rd defendants as owners of the suit land. It is further argued that the Plaintiff still filed the suit within the stipulated time even if the Limitation period was to be computed from the second entry on the title in favor of the 1st defendant. Counsel anchors his submissions on section 5 of the Limitation Act.

Section 5 of the Limitation Act provides"-

"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."

The Plaintiff's father learnt of the alleged fraudulent dealings on the register in 2004 and filed a Claim in the Land Tribunal in 2006. The right of action to recover the land had however started running in 1997. The Plaintiff did not take over the Claim filed by his father but filed a new suit in 2017. This was twenty years from when the alleged fraud occurred in

1997 and further came to the knowledge of the family in 2004 which makes the suit statute barred on both fronts.

It is also not tenable for the Plaintiff to lay claim to an estate in respect of which his father through whom he claims entitlement had entered a Consent Judgment on being promised vacant possession of the suit land. Kayondo who entered the consent with the Plaintiff's father was in my opinion the proper party to sue on account of his alleged transgressions and unfulfilled promises in regard to the suit land.

I thus find that the suit was statute barred.

Issue No.2

Whether the transfer of the suit land into the name of the 1st defendant was fraudulent and if so whether the 2nd and 3rd defendants are privy to such fraud?

Fraud is the intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right. It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury.

Fredrick J,K Zaabwe v Orient Bank Limited &5 Others. SCCA No.4 of 2006.

The 1st defendant was initially registered on the title after buying the suit land from Kayondo and this was acknowledged by the latter who undertook to compensate him and/or any others claiming from him. It was nowhere imputed that the 1st defendant was privy to the unlawful acquisition of the Letters of Administration based on which Kayondo sold the land to him.

The particulars of fraud in the Plaintiff are couched to point to the entries on the land register that occurred after the consent judgment was executed between the Plaintiff's father and Kayondo. It is undisputed that acting on the Consent Judgment the 4th defendant cancelled the 1st defendant's registration and the land reverted back to Kiwanuka only later to amend the register to reinstate the 1st defendant as the registered proprietor.

I have noted above that the 1st defendant was not a party to the Consent Judgment and he cannot be bound by what he was not a party to. Fraud can be attributed to him on account of that document. It is trite that a binding consent order must be made in the presence of and with the consent of counsel and the parties which was not the case for the 1st defendant.

Hirani V Kassam(1952)EA 131;Brooke Bond Liebig V Mallya(1975)EA 266;Attorney General &Another V James Mark Kamoga &Another. SCCA No.8 of 2004.

The Consent judgment did not also provide for the cancellation of the 1st defendant's name from the certificate of title which power is vested in the High Court under **section 177 of the Registration of Titles Act**. The import of the grant of the jurisdiction to cancel entries on titles to the High Court is that fraud merits investigation through the due process.

In Hilda Wilson Namusoke &Others V Owalla's Home Investment Trust (EA)Ltd &Another. SCCA No,15 of 2017 the court held :-

'That the enactors of the Land Amendment Act 2004 took away the authority of the Commissioner Land Registration to cancel a certificate of title on the basis of fraud. The Commissioner's action is rightly limited to

actions for errors or illegalities that do not need the rigours of a full trial...."

It was thus unlawful for the 4th defendant to cancel the 1st defendant's name from the title to the suit land on account of the fact that he was not a party to the Consent judgment and the lack of jurisdiction to execute the purported cancellation. Even if it was to be argued that the 4th defendant had the jurisdiction to do what was done, the 1st defendant as the affected party should have been accorded a hearing following the dictates of the Law of Natural justice.

The 2nd and 3rd defendants acquired their interest in the land from the 1st defendant when he was registered as the proprietor following the purported amendment of the Register by the 4th defendant. The 2nd and 3rd defendants are faulted for not having noted the entries and cancellation on the register prior to the purchase, for using the same address with the 1st defendant and for not having executed a transfer form to impute fraud on their part.

Fraud must be **specifically pleaded and proved**. The Plaintiff did not specifically attribute any fraud on the 2nd and 3rd defendants but the 1st and 4th defendants. It is also the view of this court that what the 2nd and 3rd defendants are faulted for do not amount to fraud as defined under the Law.

Fraud involves an actual act of dishonesty and cannot merely be inferred which explains why the burden to prove it is a little above the usual balance of probabilities. The 2nd defendant told court that he did not know the land transfer procedures and just gave money to the 1st defendant who in fact handed him the title after eight years while he was in Prison.



At the time the 2nd and 3rd defendants purchased the land the title had no registered encumbrance. I would not fault the 2nd and 3rd defendants for failing to note the previous entries to conclude that the 1st defendant had fraudulently acquired the land to attribute the fraud to them too. In any case the cancellation and re-instatement of the 1st defendant's name from the title was done outside the Law.

Even if it were to be held that the 1st defendant was fraudulently registered on the title the fraud had to be brought home to the 2nd and 3rd defendants for their title to be impeached. The Plaintiff had to show in the pleadings that the 2nd and 3rd defendants had knowledge of any fraud by the 1st defendant and that their suspicions were aroused but abstained from making any inquiries for fear of learning the truth for the fraud to be ascribed to them.

David Sejakka Nalima V Rebecca Musoke. SCCA No.12/1985.

I therefore hold that the transfer of the suit land to the 1st defendant was not tainted with fraud. The 2nd and 3rd defendants were also not privy to any fraud.

Issues No.3.

Whether the 2nd and 3rd defendants are bona fide purchasers?

A decision to the effect that the 2nd and 3rd defendants are bona fide purchasers of the suit land suffices to answer the 4th and 5th issues.

A bona fide purchaser has an unqualified and answerable defense against the claims by an equitable owner and the burden to prove the plea lies on the person who sets it up.



It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can.

A bona fide purchaser has been described as one who honestly intended to purchase the property offered for sale and does not to acquire it wrongly. The bona fide purchaser must prove :-

1. That he holds a certificate of title
2. That he purchased the property in good faith
3. That he had no knowledge of the fraud
4. That he purchased for valuable consideration
5. That the vendor had apparent title
6. That he purchased without any knowledge of fraud
7. That the vendor was not a party to any fraud.

Sande Ndimwibo & Others V Allen Peace Ampaire. CACA No.65/2011; Hannington Njuki V William Nyanzi. HCCS No.434/1996.; Daniel Sempa Mbabali V. WK. Kiiza & Ors (1985) HCB 46.

It is not disputed that the 2nd and 3rd defendants hold the certificate of title and purchased the suit land from the registered owner at the time. The consideration was computed in the number of cows given to the 1st defendant in exchange for the land. The 1st defendant was not a party to the fraud attributed to Kayondo and the purported cancellation of his name was not backed by any law.

The Plaintiff did not plead any particulars of fraud against the 2nd and 3rd defendants. Fraud has to be specifically pleaded and proved but not merely inferred from the evidence in court.

I find that the 2nd and 3rd defendants are bona fide purchasers for value of the suit land who have a valid legal interest in the same and are not trespassers.

The suit against the defendants fails and it is dismissed with costs to the 2nd and 3rd defendants who were part of the trial **but not** the 1st and 4th defendants against whom the suit proceeded ex-parte.



Moses Kazibwe Kawumi

Judge

17th October 2023