



EDGAR PHILEMON NYABONGO

VERSUS

COMMISSIONER FOR LAND REGISTRATION

HOIMA DISTRICT LAND BOARD :::::::::::::: DEFENDANTS

RULING

- 1] The Plaintiffs filed this suit as beneficiaries of the estate of the late Herbert Rwakiswaza Kimera and executors to his last Will and testaments seeking inter alia, the following declarations:-
- a) That the land comprised in **LRV 1177, Folio 14, at Kasiro Hoima District** belongs to the estate of the late **Herbert Rwakiswaza Kimera** and that the 1st defendant does not have any interest in the land.
 - b) That the issuance of the special certificate of title to the 1st defendant by the 2nd defendant was illegal, fraudulent, null and void.
 - c) That the lease extension by the 3rd defendant to the 1st defendant was illegal, fraudulent and null and void.

- 2] Counsel for the 1st defendant, **Mr. Rufunya**, at the commencement of the hearing of this suit and later **Mr. Sekitto** for the 2nd Defendant raised certain preliminary objections which are as follows:

a) The Plaintiffs' cause of action against the Defendants;

Both counsel for the 1st and 2nd Defendants submitted that the court has to look at the entire plaint and particulars to establish whether a cause of action exists, rightly so for this plaintiff to succeed in this action premised on recovery of land and be successful in impeaching title of the 1st defendant. Relying on the authorities of **Tororo Cement versus Frokina SCCA No. 2/2001 and Kampala Bottlers versus Damanico Co. (U) Ltd SCCA No. 22/1992**, Counsel argued that the plaintiffs' alleged fraud was not attributed to the 1st defendant as the transferee and that the plaintiffs were neither the registered proprietors in title nor has the 1st defendant ever dispossessed them of their registerable interest.

- 3] Counsel submitted further that as per **paragraph 6 (a)** of the plaint, in 1972, the late **Herbert Rwakiswaza Kimera** and the 1st defendant with 2 others were registered joint tenants on the suit land. That since the 3 only tenants have since passed away leaving the 1st defendant as the surviving tenant, under **S.56 RTA** and the right of survivorship, *jus accrescendi* upon the death of any of the joint tenants, the entire co-owned estate survived to the living joint tenant. The deceased **Herbert Rwakiswaza Kimera** could not therefore have passed on his rights to the nominated beneficiaries in a Will. That therefore, when the suit property lease expired, it reverted to the 3rd

defendant who, upon application by the 1st defendant, it was extended.

- 4] Counsel concluded that the deceased **Rwakiswaza Kimera** owned the suit land as a joint tenant and it passed automatically to the surviving tenant and therefore does not form part of his estate. That the 1st Defendant in the premises acquired the certificate of title from the 2nd defendant as of right through the right of survivorship.

b) Fraud not being available to the plaintiffs against the 1st defendant;

- 5] Counsel for the 1st defendant submitted that the plaintiffs seek for cancellation or rectification of title of the 1st defendant on account of fraud in the transaction, that the alleged fraud must be attributable to the transferee; **FJK Zaabwe versus Orient Bank & others SCCA No. 4 of 2006**. That in **paragraph 14 (a) of the plaint**, it is alleged that the 1st defendant lied that the duplicate certificate of title was lost whereas not. That under **S.70 RTA**, it is the Commissioner who has powers to issue a special certificate of title where the duplicate certificate of title is lost or destroyed or becomes so obliterated as to be useless. That therefore, the Plaintiffs' complaints are in regard to the 2nd defendant's issuance of a special certificate of title, of which the Commissioner has powers to do, and the 3rd defendant's procedures while extending the 1st defendant's lease, of which the 1st defendant cannot be faulted.

c) The plaintiffs suing as beneficiaries of late Herbert Rwakiswaza Kimera without Letters of Administration.

- 6] Counsel submitted that under **S.191 of the Succession Act**, the plaintiffs who have not been granted any Letters of Administration to the estate of the late **Herbert Rwakiswaza Kimera** do not have any right to claim against the defendant.
- 7] Counsel for the plaintiffs **Mr. Maxim Mutabingwa** on the other hand submitted that the plaint discloses a cause of action against the defendants and that the Defendants' preliminary objections merely raised matters of evidence which can only be adjudicated upon after hearing evidence.
1. **Whether the plaint discloses a cause of action against the 1st defendant.**
- 8] In **Kebirungi Justine versus Road Tainers Ltd & 2 Others (2008) HCB 72**, it was held that;
- a) There are three essential elements to support a cause of action in a plaint, firstly that the plaintiff enjoyed a right, secondly that the right has been violated and thirdly, that the defendant is liable.
- b) The question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of fact in it are true.

See also **Kapeka Coffee Works Ltd versus NPART CACA No. 3/2000 & Tororo Cement Co. Limited versus Frokina (Supra)**.

9] In the instant case, the plaintiffs pleaded as follows:-

Paragraph 6 (a) *"In or about 1972, Herbert Rwakiswaza Kimera and his brother Sylvester Rwakiswaza Nyabongo bought land. The land was registered into the names of Herbert Rwakiswaza Kimera, Sylvester Nyabongo, Eseza Nyabongo and Margaret Elizabeth Kabateso Ndahura Kimera as joint tenants and the certificate of title was issued in 1974.*

Paragraph 7 (a) *"In 1990.... Herbert Rwakiswaza bought the shares of Sylvester Rwakiswaza Nyabongo and Eseza Nyabongo in the land aforesaid who after selling and transferring their interest to Herbert Rwakiswaza Kimera left the land to only Herbert Rwakiswaza Kimera who remained in sole occupation of the land and established a modern farm which he run until his death in 2015."*

(b) *"The plaintiff shall therefore aver that by buying shares of the co-joint tenants who left ownership and possession of the land to Herbert Rwakiswaza Kimera and also by the fact that Margaret Elizabeth Kimera left the possession of the land to Herbert Rwakiswaza solely, the unities that make up a joint tenancy were broken and the land was therefore no longer owned under the joint tenancy and belongs to Herbert Rwakiswaza Kimera solely*

as he remained in sole occupation/possession thereof till his death in 2015."

Paragraph 8 *"... Herbert Rwakiswaza Kimera made a Will wherein the plaintiffs are appointed executors of the Will and were also charged with a duty of managing the farm land aforesaid."*

Paragraph 9 *"Upon the death of Herbert Rwakiswaza Kimera, the plaintiffs who are the executors of the Will applied for probate but the 1st defendant lodged a caveat against the grant which resulted in Civil Suit No. 15 of 2015" (which was consolidated with Civil Suit No. 17 of 2014 both in regard to the suit property LRV 1177 Folio 14 land at Kasiro).*

Paragraph 13 (c) *"... unknown to the plaintiffs and with intent to defeat the plaintiffs' interest in the land on 7/2/2018, the 2nd defendant issued a special certificate of title in favor of the 1st defendant without notice to the plaintiffs and without following the law and fraudulently."*

Paragraph 15 *"The plaintiffs shall aver that the lease expired on 11/1/2019 but the 1st defendant connived with the 3rd defendant and stealthily fraudulently and illegally extended the lease for more 20 years without following the law..."*

10] Clearly, in my view, I find that the above pleadings show that the plaintiffs have a right in the suit land as beneficiaries of the estate of the late **Herbert Rwakiswaza Kimera** as established by the deceased's pleaded transactions on the suit land and the deceased's Will. The plaint shows that the plaintiffs' right was violated by **firstly**, the caveat lodged on their application for probate in respect of the estate of the late **Herbert Rwakiswaza Kimera**, **secondly**, the fraudulent extension of the lease of the suit land and **thirdly**, the fraudulent issuance of a special certificate of title thereof. The plaintiffs hold the defendants liable since the extension of the lease was by the 3rd defendant and the issuance of the special certificate of title was by the 2nd defendant for the benefit of the 1st defendant.

11] Secondly, the pleadings of the plaintiffs as highlighted above disclose extremely serious issues that have to be adjudicated upon through trial. These issues include:-

- a) Whether the joint tenancy over the suit property was severed and or,
- b) Whether the suit land form part of the estate of the late Herbert Rwakiswaza Kimera and or,
- c) Whether the 1st defendant has an interest in the suit land.
- d) Whether the 3rd defendant extended the lease of the suit land fraudulently in favor of the 1st defendant.
- e) Whether the 2nd defendant issued a special certificate of title fraudulently in favor of the 1st defendant's sole names.

12] In **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distribution Ltd (1969) E.A 696**, Sir Newbold made the following observations about preliminary objections:

"A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought in the exercise of judicial discretion..."

13] I have carefully considered all the arguments of counsel for the 1st defendant both in his main submissions and in rejoinder. They raise a mixture of issues of law and fact. They are not purely points of law for resolving as preliminary objections and therefore capable of disposing off the suit. The issue I have highlighted above as deduced from the plaint require parties to adduce evidence for their adjudication, they are matters of evidence.

14] In the premises, I find that the instant plaint discloses a cause of action against the 3rd defendant and I agree with counsel for the plaintiffs that the 1st and 2nd defendants' preliminary objections are misconceived because the objections raised are matters of evidence which can only be adjudicated upon a full trial.

2. Whether fraud is available to the plaintiffs against the 1st defendant:

15] In their pleadings, the plaintiffs having pleaded that they are beneficiaries to the estate of the late **Herbert Rwakiswaza Kimera**,

any action or transaction on the said estate without their knowledge and consent intended to defeat their interest entitles them to sue for fraud against the defendants. Upon pleading fraud, the plaintiffs bear the onus to strictly prove it and attribute it to the transferee, and this is a matter that is for a trial.

3. Whether the plaintiffs as beneficiaries of the late Herbert Rwakiswaza Kimera can sue over the estate without Letters of Administration:

16] As per the plaint, the plaintiffs are suing as beneficiaries to the estate of the late **Herbert Rwakiswaza Kimera** and executors of his last Will and testament. They averred that the suit land comprised in **LRV 1177, Folio 14 at Kasiro** belongs to the deceased. A beneficiary and an executor of the Will of the deceased has a right over the estate of the deceased and a right to sue in respect of the estate to protect the interest of the beneficiaries; **Israel Kabwa versus Martin Banoba Musoga SCCA No. 52 of 1995.**

17] All in all, I find the 1st and 2nd defendants' preliminary objections devoid of any merit and I do accordingly dismiss the objections with costs to the plaintiffs. The matter is to proceed for hearing of the merits of the suit.

Order accordingly.

Dated at Hoima this.....15th.....day of September, 2023.

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Byaruhanga Jesse Rugyema.

JUDGE