

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA, AT KAMPALA**

**CIVIL SUIT NO. 103 OF 1992.**

**CONSTANTE BUTAMANYA.....PLAINTIFF**

**VS**

**RWAMATSIBUZA AND OTHERS..... DEFENDANTS.**

**BEFORE: V.F.MUSOKE-.KIBUUKA (JUDGE).**

**JUDGMENT.**

**INTRODUCTION.**

The plaintiff and the defendants are registered proprietors of neighbouring lands. The plaintiff's land is known as plot No. 4, Isingiro Block 89, leasehold Register vol. 1873, Folio 5. The land is approximately 257 hectares. The plaintiff obtained title through purchase from the original leasehold proprietors by the names of Edward Tumusiime and Eric Namanyire. The land is at Bwentare and Nyabugando Kikagati in Mbarara District.

The land for the defendants is known as plot No.7 Isingiro, Block 89, Leasehold Register, Vol. 1178, Folio 14. It measures 130 hectares. The plaintiff was registered on 12<sup>th</sup> September 1991 while the defendants were registered on 20<sup>th</sup> July, 1995.

**THE RESPECTIVE CASES.**

In his plaint, the plaintiff claims that when surveying their land, the defendants encroached upon his Land and subsequently caused the piece of 1 and encroached upon which measures approximately 30 hectares to be included in the defendants' certificate of title.

The plaintiff seeks a host of remedies which are listed in the plaint as follows:

- a) a declaration that the plaintiff is the rightful owner of the Suitland;
- b) vacant possession of the suit land;
- c) a permanent injunction to restrain the defendants from further trespass to the plaintiff's land;
- d) mesne profits to be determined by the court from 1984 till vacant possession and damages of 900,000/=;
- e) general damages for trespass;
- f) interest on the decretal sum at the bank rate of 39% per annum from the date of filing the suit until vacant possession;
- g) costs of the suit; and
- h) such other relief as this honourable court may deem fit to grant.

In their joint defence, the defendants put up a single defence. It was that they bought the land on 3.3.87 and that they were bona fide purchasers for value without notice of any defect in title if any.

The plaintiff gave evidence in person, he appears on the record as PW1. He called two witnesses. PW2, was Mr. Robert Nyombi, a Registrar of Titles in the Registry of Titles at Kampala. PW3 was Mr. Okiring Pascal, the principal staff surveyor at Mbarara. The two witnesses gave technical evidence about the alleged overlapping of the two certificates of title and the circumstances under which the surveys of the two pieces of land were carried out.

For the defendants, the first defendant gave evidence. He is recorded as DW1. He was the only witness for the defence.

#### ISSUES.

There are four issues agreed upon for determination. They are:

- a) whether there is an overlap between the two plots;
- b) whether the defendants are *bona fide* purchasers for value without notice;
- c) whether the plaintiff is entitled to the remedies he is seeking and;
- d) what should be the quantum of awards, if any?

FIRST ISSUE- Whether There Is An Overlap Between The Two Plots.

None of the parties disputes the fact that there exists an overlap of the two titles over an area measuring approximately 30 hectares. The evidence of PW2, Mr. Robert Nyombi, a registrar of titles and that of PW3, Mr. Okiring Pascal, a principal staff surveyor at Mbarara, which has not been disputed, explained how the overlap of the two certificates of title arose. So does Exh. P4, a letter by the commissioner of Survey and mapping dated 6<sup>th</sup> June 1990 addressed to the Deputy Minister of Lands and Surveys, after checking the surveys at Entebbe.

According to these witnesses, instructions, I/S 0880 were issued on 10<sup>th</sup> January, 1977 for a survey of 259 hectares at Bwentare and Nyabugando Kikagati, Isingiro for Mr. Tumusiime and brothers, the predecessors in title of the plaintiff. The survey was completed and processed but the records were among those destroyed during the liberation war at Mbarara in 1999.

However, a certificate of title was issued for a term of 44 years with effect from 1<sup>st</sup> October 1972. The title was registered in the names of the plaintiff on 12<sup>th</sup> September, 1991.

On the other hand, instructions to survey the defendants' land were given on 30<sup>th</sup> March 1978 to survey 259 hectares at Ntundu, Kabuyanda, Isingiro for Mr. J.W.R.Banyu, the predecessor in title to the defendants. The job was submitted to the senior staff surveyor but the records were destroyed during the liberation war. A fresh sheet was reconstructed. The defendants were registered on 20<sup>th</sup> July, 1985, as tenants in common for a term of 49 years with effect from 1<sup>st</sup> July 1981.

The overlap was discovered when the plaintiffs predecessor in title wanted the boundaries re-opened. The land was virtually re-surveyed and when plotted, it was discovered that there was an overlap between plots 4 and 7.

According to both PW2 and PW3, the policy of the department of lands was that when there is an overlap, the holder of the certificate of title arising from a later survey surrenders it for rectification. The defendants in the instant case were asked to surrender their certificate of title to the Commissioner for Land Registration for rectification but refused to do so. The decision was finalized, at policy level, by the Deputy Minister of Lands and Surveys on 7<sup>th</sup> June 1990, when he ordered that the deed plans for Tumusiime, the plaintiffs predecessor in title, be issued to him and that Mr. Banyu, the predecessor in title of the defendants, presents his certificate of title for rectification and after that the Mbarara District land Committee

gives Mr. Banyu an alternative 30 hectares else where on any available public land. See correspondences in (Exh. P.4 & P 5). Apparently that was not followed.

In the circumstances, I find that the evidence before me shows clearly that there exists an overlap between the certificates of title of the plaintiff and that of the defendants. I also find that the overlap arose because the survey of the land of the defendants which was carried out later than that of the land leased to the plaintiff included part of the land already surveyed for the plaintiff. The mistake was committed by the staff surveyor, one Mukasa, because when he carried out the second survey, he did not have appropriate plans of the area following the destruction caused by the liberation war. It was, accordingly, the defendants' title which overlapped that of the plaintiff.

**SECOND ISSUE- Whether The Defendants Are Bona Fide Purchasers For Value Without Notice.**

The defendants pleaded that their certificate of title cannot be rectified because they are *bona fide* purchasers for value without notice of any defect in title of their predecessor if any.

The evidence before this court is that the defendants bought their land from Mr. Rubaramira Banyu who was already a registered proprietor. The defendants were summoned to the department of lands at Kampala to surrender their certificate of title for rectification (exh. PS). What was after they had purchased the land but before their leasehold interest was registered. The defendants did not surrender the certificate of title. Instead, they got themselves registered as proprietors of the land including the overlap in 1995.

The doctrine of a *bona fide* purchaser for value without notice is normally raised as a defence to allegations of fraud. The law being that once fraud is proved on the part of a registered proprietor, the certificate of title may be cancelled. **Nazareth Nassanali Senyan Vs. Edward Mperesse Nsubuga HCCS No. 364 of 1993 (unreported)** But it is also the law that a party relying upon fraud must both plead and particularise it in its pleadings and strictly prove it. **J.W.Kazzora V. Rukuba, SCCA No. 13 of 1992 (unreported)**.

The plaintiff in the instant case, are not relying upon fraud. There is no pleading or particulars of fraud in the plaint. There has also been no evidence proving fraud on the part of the

defendants. Thus, I do not find the claim of being bona fide purchasers for value a good defence in this case. In any case, even if it was an appropriate defence, the evidence does not appear to show that the defendants were bona fide purchasers.

I duly agree with the submission made on behalf of the plaintiff that the defendants in the circumstances of this case cannot be regarded as *bona fide* purchasers for value without notice. The crucial aspect of that negation is that the defendants purchased what was owned by Rubaramira Banyu. He passed over to them the land upon what he had title. Rubaramira could not pass any valid title to the defendants over the 30 hectares of the overlap. For he himself did not have any. No one can give a better title than what he himself or she herself possess. Bishop gate Motor Finance Vs. Transport Brakes (1949) 1 All E.R. 37.

The evidence before me, which I duly accept is that when Banyu got his offer and when instructions to survey were issued in respect of his offer, the plaintiffs predecessor in title had already obtained his offer and had already surveyed off his 257 hectares. The mistake in survey which caused the overlap in title did not create any title over the 30 hectares of overlap for Mr. Rubaramira Banyu. The controlling Authority had already allocated the land to the plaintiffs' predecessor in title. **Livingstone Ssewanyana Vs. Martin Alier, SSCAN o.4 of 1990.** When the plaintiff bought the lease from Mr. Tumusiime, he indeed got a full and valid title to the entire 257 hectares of land which includes the 30 hectares encroached upon by the defendants' title.

The plaintiff's case is thus not based upon fraud for none is either pleaded or particularised. It appears to me that, in essence, the plaintiff's case is simply one for rectification of the defendants' certificate of title under Section 165 of the Registration of Titles Act, Cap.205. That being what appears to be the true position of the case, it is notable that the plaintiff who has brought this case by filing a plaint has made a clear departure from the procedure provided under section 166 of the registration of Titles Act. The correct procedure should have been to proceed by application under section 166 and in the form set out in the nineteenth schedule to the Registration of Titles Act.

However, since the defence never objected to the wrong procedure that was adopted by the plaintiff in this case, it would now be inappropriate for the court, at this late stage to treat the proceedings as a nullity on account of a wrong procedure having been adopted. Suffice it to

invoke the wise words of Spry, J.A, as he then was, in Boyes Vs. Gathure (1969) E.A. 385, to the effect that the adoption of a wrong procedure would not invalidate the proceedings where it did not go to jurisdiction or no prejudice was caused to the opposite party. Also see **Nanjibhai Prabudhas & Co. Ltd. Vs. Standard Bank Ltd. F19681 E.A. 670 (specifically at P.683).**

### **THIRD AND FOURTH ISSUES.**

I will treat the third and forth issues jointly and quite briefly.

On account of the brief analysis which I have set out above, the plaintiff is entitled to the declaration that he is the rightful owner of the 30 hectares (the suit property in this case) as clearly delineated and shaded on the print Exh P4, by the Commissioner of Survey and mapping, Entebbe, but which was, by error made during survey, included in the defendants' certificate of title for plot 7, Isingiro Block 89.

Needless to say, the plaintiff is entitled to vacant possession of the encroached 30 hectares. An order to that effect issues.

I find no evidential justification or basis for orders for a permanent injunction against the defendants or the awarding of mesne profits, special and general damages or interest, which the plaintiff included in his prayers. His prayers appear to me to be quite rich in extravagancy.

As I stated earlier in this judgment, the plaintiff is entitled to an order under section 165 of the Registration of Titles Act, for the rectification of the defendants' certificate of title in order to reduce it by 30 hectares which belong rightly to the plaintiff and which were included in the defendants' title by error made during survey.

The plaintiff will recover his costs for this suit from the defendants.

Accordingly, I enter judgment for the plaintiff against the defendants. I make the following orders:

- a) an order declaring 30 hectares of land included in the defendant's certificate of title to rightfully belong to the plaintiff;
- b) an order requiring the defendants to give vacant possession of the encroached land to the plaintiff;

- c) an order requiring the Commissioner for Land Registration to rectify the certificate of title of the defendants by reducing the acreage by approximately 30 hectares;
- d) an order awarding the costs of this suit to the plaintiff.

**V.F.MUSOKE-KIBUUKA (JUDGE)**

**30.9.2003.**