

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA
LAND DIVISION
ORIGINATING SUMMONS NO. 11 OF 2012

MICHAEL KAGGWA

[Suing through his Attorney JOHN

KAGGWA.....**APPLICANT**

VERSUS

PAULINA NAMPISO.....**DEFENDANT**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This suit was brought by way of Originating Summons (OS) under Order 37 rule 3, 8 & 9 of the Civil Procedure Rules (CPR). The plaintiff is suing the defendant through his Attorney John Kaggwa who also represented him as his Counsel. The OS, which is supported by an affidavit deposed to by **Michael Kaggwa** the plaintiff, is for determination of the following questions:-

- (a) *Whether it is just and equitable in the circumstances that a vesting order be issued and a special certificate of title for land comprised in Busiro Block 598 plot 75 be processed in favour of the plaintiff.*
- (b) *Whether it is just that the defendant pays the costs of this suit.*

The grounds of the application are contained in the supporting affidavit of **Michael Kaggwa** the defendant.

When the OS was called for hearing, the defendant was not in court. There is an affidavit of service on the court record indicating that she was served and she accepted service by appending her right thumb print on the summons. The matter proceeded *ex parte* under Order 9 rule 20 of the CPR.

In his written submissions, learned Counsel for the plaintiff relied mainly on the affidavit evidence of **Michael Kaggwa**. The applicant's evidence, as deduced from the said affidavit and its annexures, is that in 1995 he instructed his sister Regina Nakiwala to negotiate and purchase land comprised in Busiro Block 598 Plot 75 (suit land) from the defendant on his behalf. After the negotiations were concluded, he advanced various amounts of money to Regina Nakiwala who paid it to the defendant as consideration for the suit land. This is evidenced by the defendant's acknowledgements of the payments attached to the plaintiff's affidavit and marked **A1, A2, A3 & A4** respectively, while the translations of the same

acknowledgements are marked **B1, B2, B3 & B4** respectively. When all instalments had been paid, Nakiwala organised a meeting between the plaintiff and the defendant. The defendant executed the relevant transfer deeds and undertook to hand over the certificate of title to the defendant as soon as possible. This is evidenced by a copy of the signed deed print attached as annexure **C** to the plaintiff's affidavit. On 10th October 2001 the plaintiff met the defendant at Buwaya Busiro in the presence of his son and Attorney John Kaggwa. She promised to hand over the title before December 2001. Since 2001, the defendant has demanded for the certificate of title and the defendant's passport from the defendant to enable him transfer the land in vain. Counsel for the plaintiff submitted that the suit was properly filed by way of OS. He prayed for an order to be issued vesting the suit property in the plaintiff's name, and that a special certificate of title be processed to enable the said transfer.

Though this matter proceeded *ex parte*, the law is that whether a matter proceeds *ex parte* or not, the burden of the plaintiff to prove his/her case to the required standards remains.

Order 37 rule 3 of the CPR provides as follows:-

“A vendor or purchaser of immovable property or their representatives respectively, may, at any time or times, take out an originating summons returnable before a judge sitting in chambers for the determination of any question which may arise in respect of any requisitions, or objections or any claim for compensation; or any other question arising out of or connected with the contract of sale, not being a question affecting the existence or validity of the contract.”

In light of the foregoing provision, the suit was properly filed by way of OS. The more pertinent question to address however is whether the prayer for a vesting order and processing of a special certificate of title to the suit property in the plaintiff's name is appropriate in the circumstances.

Section 167 of the Registration of Titles Act empowers a registrar of titles to make a vesting order in cases of a completed purchase. The following conditions must however be fulfilled:-

- i) The land must be registered under the Registration of Titles Act and the purchaser must have paid the whole of the price of the vendor.
- ii) The purchaser or those claiming under him/her have taken possession of the purchased land.
- iii) The entry into possession by the purchaser has been acquiesced by the vendor or his/her representative.
- iv) The transfer of the property has not been executed because the vendor is dead, or is residing out of jurisdiction, or cannot be found.

Also see **Aida Najjemba V Esther Mpagi Civil Appeal No. 74/2005, COA & Re Ivan Mutaka [1980] HCB 27.**

In **Aida Najjemba V Esther Mpagi**, cited above, Byamugisha JA noted that even though an application for a vesting order must be made to the registrar of titles, the High Court has unlimited jurisdiction in all matters and the trial judge was right to grant a vesting order under section 167 of the Registration of Titles Act.

In the instant case, it is evident from the plaintiff's affidavit evidence that the suit land is registered under the Registration of Titles Act, comprised in Busiro Block 598 Plot 75. The purchase price was wholly

paid by the plaintiff (purchaser). However the plaintiff/purchaser has in his affidavit evidence not indicated whether or not he has taken possession of the purchased land, yet this is one of the vital aspects to consider when deciding whether or not a vesting order should be issued in his favour. Secondly, it is evident that the vendor (defendant) in this case is neither dead, nor residing out of jurisdiction, nor is it true that she cannot be found. It is apparent from the evidence and the circumstances surrounding the case that the vendor (defendant) is alive and within jurisdiction. She accepted service of the originating summons by appending her thumbprint on the summons, though she neither filed a reply nor appeared in court to defend herself.

Thus not all the circumstances outlined in section 167 of the Registration of Titles Act and the cases cited above are present in the instant case.

I consider this suit to be misconceived. The plaintiff has not fulfilled the grounds set out under section 167 of the Registration of Titles Act to justify issuance of a vesting order. The plaintiff is instead advised to file a civil suit for recovery of land against the registered proprietor and pray for a vesting order as a consequential order under section 177 of the RTA in the same suit. Such an order follows a successful action and proceedings to recover land from the person registered as proprietor and it normally directs the registrar to cancel a certificate of title or entry or memorial in the register book.

The suit is accordingly dismissed. Since the defendant neither filed a reply nor attended court, I make no orders as to costs.

Dated at Kampala this 30th day of May 2013.

Percy Night Tuhaise

JUDGE.