THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0124-2012

(Arising from TOR-00-LD-CS-0047-2008)

HAJI ZAIDI WASIGE :::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. **MRS. IMMACULATE OPENDI**
2. **TITO OPENDI :::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant appealed to the High Court against the judgment of his worship **Charles Emuria** the Chief Magistrate Tororo, citing 3 grounds of error attributable to the findings of court. His prayer was that the appellate court sets aside the judgment and makes a finding that the suit property belongs to appellant.

It is to be noted that all parties to Tororo civil Suit No. LDCS.47 of 2012 were dissatisfied with the judgment of the court and had filed separate appeals. Both were later on consolidated by maintaining **Haji Zaidi Wasige** as appellant and **Mrs. Opendi** and **Tito Opendi** as respondents.

The Respondents, in their memorandum of appeal listed 3 grounds of appeal, which they argued together. They contested in essence the finding that appellant had an equitable interest in the suit land.

The matter was very involving in the lower court. However as a first appellate court, this court has the duty to review all the evidence, scrutinize it afresh and reach its own conclusion thereon. See *Pandya v. R (1957) E.A.336, and Kifamute Henri v. Uganda Cr. Appeal 10/97*.

I have carefully perused the submissions, and gone through the evidence on record. I make the following observations regarding the issues raised by appellant.

Grounds 1, 2, 3 and 7 raise issues related to how appellant handled his pleadings. He complains that the learned trial Magistrate erred to infer that the defendants' written statement of defence was a general denial to the counter claim, and that the finding by the learned trial Magistrate that when appellant withdrew his suit then he ceased to challenge plaintiff's entry on the land. That if plaintiff wanted to challenge Departed Asians Property Custodian Board's activities he ought to have sued them, and that appellant had departed from his pleadings.

Appellant referred to the case of *Mohan Musisi Kiwanuka versus Asha Chand* arguing that;

> "*When appellant withdrew his suit, his claim in the withdrawn suit only ceased to be a sword but became a shield*."

It was not a mere denial but complete defence. They argued that the written statement of defence strongly contested the Respondents remain on the premises, and never departed from his pleadings; as seen in paragraph 3, 4, and 5 of his

plaint. The appellant stated that the real controversy was on ownership of the suit property and court ought to have adjudicated wholly on the matter without excluding any part of the appellant's defence; or would have ordered that Departed Asians Property Custodian Board be added as a party. Appellants further faulted court's failure to consider the fact that whereas the bid forms for the premises were in the names of **Tom Family Stores**, the title is in the names of **Immaculate Opendi**. They therefore concluded that the learned trial Magistrate failed to correctly evaluate the evidence before him.

Learned counsel for the Respondent replied that the plaint having been withdrawn, it ceased to have any meaning and could not have been referred to in the written statement of defence as that was superfluous and meaningless. Counsel agreed with learned trial Magistrate that the written statement of defence was indeed a mere denial.

The lower court record shows that on 09.01.2009, the plaintiff withdrew the civil suit from court which was granted, and the counter claim was allowed to subsist. The hearing was commenced on 15.01.2010. Two witnesses testified for plaintiff (**PW.1- Opendi T**.) and PW.2 (**Immaculate Opendi**), defendants called DW.1 (**Zaid Wasige**) **DW.2 Haji Maliki, DW.3** (**Kamunywamire Rukuka**), DW.4 (**Samuel M. Hashaka**).

Both the counter claim filed on 02nd November 2005 and the written statement of defence filed on 01/2006, contain general denials of the allegations with no specific pleadings thereon. It has been held in *Pushpa v. Fleet Transport Co. [1960] EA 1025 and Joshi v. Uganda Sugar Factory [1960] EA 570* followed in *Talituka v. Nakendo (1979) HCB 275*, that:

> "*Bare denial in a written statement of defence is not enough. Allegations in the plaint must be specifically or by necessary implication denied*."

The finding by the learned trial Magistrate that the written statement of defence contained general denials was therefore not erroneous. In his judgment the learned trial Magistrate nonetheless went at length to review the evidence and the law, and facts before court and concluded that matter as he did.

He considered the evidence as a whole and in his discussion he considered the following:

- The fact that the written statement of defence did not disclose the allegations of fraud necessary to be relied on to impeach the plaintiff's title.
- That the attempt to deviate from the pleadings was not correct at law.
- The fact that a certificate of title was lawful evidence of ownership unless impeached for fraud or other lawful reasons.

The learned trial Magistrate finally found that the plaintiff held a legal interest over the land as against the defendant's equitable interest thereon.

The position of the law is that a written statement of defence which is a bare denial is not enough. This must have created the problem of failing to bring out the issue of the Departed Asians Property Custodian Board in the pleadings and to specifically show in the written statement of defence the offensive actions of the Departed Asians Property Custodian Board, so that the plaintiff could answer them specifically and prepare a defence thereon.

In the case of *Attorney General v. Musisi [1972] EA 217* it was held that;

> "Material *facts must be pleaded and a plaint failing to do so must be struck out though court may use its discretion in the matter to adjudicate on it*."

In this particular case the written statement of defence never brought out any material particulars of the fraud complained of and could not be used as a basis to call for the inclusion of "Departed Asians Property Custodian Board" as a party as alleged by appellant.

I therefore agree with **Counsel Majanga** that the learned trial Magistrate could not have stood in the gap to reinstate the case since the appellant, had himself withdrawn it, and agreed to defend himself under the counter claim raised against him by the Respondents.

It is my finding therefore that grounds 1, 2, 3 and 7 above fail.

Grounds 4, 9 and 10

Under these grounds the appellant argues that the learned trial Magistrate was wrong to hold that respondent had a cause of action against him because the property was never expropriated by the Departed Asians Property Custodian Board.

The appellant then gave the history and the origin of these property rights as between the parties.

I find that all the evidence as reviewed by the appellant indeed is brought about by Exhibit 2, to which he makes reference. I find that the learned trial Magistrate referred to these same matters at pages 7 and 8 of his judgment which relied heavily on the submissions before court made by both counsel. I have gone through the evidence, and the submissions the basis of that finding and I tend to agree that the respondents by virtue of their certificate of title (exhibit 2) could maintain a suit against the appellants. The title is by law prima facie evidence of ownership.

David Acar and 3 Ors vrs. Alfred Acar- Aliro [1982] HCB 60 held,

> "*A certificate of title was conclusive evidence that the person named therein was the proprietor*."

In a scenario like the one described by appellant where there is survey of land with intention of titling, which is brought to the attention of another claimant, the law requires the other party to lodge a caveat on the land to stop the process. In the *David Acar* case above, it was observed that;

> "*Any person claiming any estate or interest in land which is being surveyed with a view to being brought under the operation of the RTA must lodge a caveat. The fact that the appellant complained to the Parish Chief instead did not absolve them from complying with the requirements of the law because ignorance of the law is no defence*."

From the above, it's clear that in the zeal to seek redress the appellants instead of maintaining a suit, withdrew it and complained to the RDC. They also took various administrative interventions which had no force of law and could not stop the commissioner for Land Registration from issuing the title to respondents.

There was therefore no basis for faulting the conclusions of the court on this ground. It also fails.

Grounds 5, 6, and 8

These grounds basically complain that the learned trial Magistrate was wrong not to impeach the respondents' certificate of title on grounds of bad faith and dishonesty alleging that the written statement of defence did not specifically plead fraud. In the submission counsel agreed that fraud had to be pleaded but wasn't. he relied on *Israel Kabwa v. Martin Banoba Musigwa CA 52 of 1995* where the Supreme Court approved the trial Judge's decision to consider the issue of fraud though it was not pleaded.

That be as it may, each case must be taken on its own facts. The general rule is that fraud must be specifically pleaded and proved. In land matters under the RTA, proof of fraud is a strict liability requirement. See *Ronald Kanyora v. Hassan Ali Ahmed (1993) VI KALR, David Sejjaka Nalna v. Rebecca Musoke (1992) KLR 132*,

> "*that fraud must relate to actual dishonesty*…."

The standard for proof of fraud is high and cannot be substituted. See holding in *M. Kibalya v. Kibalya [1994-5] HCB 80*. This standard cannot be substituted by a mere reference to fraud at the bar during the hearing or at submissions. The nature of the allegations, the documentations involved and extent of dishonesty which counsel alluded to, should have been in all fairness pleaded. This would give the respondents the chance to prepare and provide adequate responses. Court would then investigate and make an informed decision. All civil disputes are determined on a balance of probability. Evidence must always be led to prove a fact. The

record indicates that there was insufficient information before court to enable it make a conclusive finding as to whether fraud did take place. I do not therefore find the Magistrate in error to conclude the way he did on the evidence available before court.

I find these grounds not proved as well.

I now turn to the grounds of appeal raised by respondents under grounds 1, 2, and 3 of their memorandum of appeal.

In a nutshell they complain that the learned trial magistrate was wrong to conclude that appellant acquired an equitable interest in the suit property.

Respondents argue that as holders of certificate of title their title should be freed from the alleged equitable interests of appellant as found by the learned trial magistrate. They rely on section 56 RTA and asserted that no fraud was proved against them.

The evidence on record gives a very detailed narration of how appellant came to lay claim to this property. Even if fraud has not been proved as against the respondents, it is also a fact that evidence was laid before court showing that appellant's title to that land is traceable to some Indian owners who had executed certain documentary transactions with the appellant. The trial court however never had opportunity to test and check the authenticity of these documents (which was an omission on part of the parties who alleged so). He "who asserts must prove". However courts have held in cases of a similar nature that legal and equitable rights on land are recognizable on the same estate under certain circumstances.

In *JWR Kazzora v. MLS Rukiba (1994-95) HCB*, the Supreme Court observed that;

> "*there is no pendency legal rule to the effect that transfer of other dealings in land should not be registered before a suit contesting such transfer or delaying it is disposed off. Therefore the Registrar of titles can transfer land while a suit is still pending in court*."

This means that the rights of the other party will be held subject to the title whose legality is under challenge in a court of law. That is exactly the situation here.

The lower court record is full of information showing how each party struggled to legalize their title and of the role of government as a third party. The observations made by the trial Magistrate in this case in my view are justifiable and legal and not erroneous. Both parties must submit themselves to further scrutiny of their respective documents either through mediation or by other lawful means so as to further iron out the allegations of fraud labeled against each other.

I do not find merit in the grounds raised against the entire findings of court by both appellants and respondents. I uphold the decision and judgment of the lower court. The appeal is dismissed.

Each party to bear its own costs of appeal. I so order

Henry I. Kawesa

JUDGE

06.11.2014