

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL SUIT NO. 18 OF 2009

PROF. DANIEL DAVID NTANDA NSEREKO ::::::::::: PLAINTIFF

VERSUS

**1. BARCLAYS BANK OF UGANDA LTD. }
2. UMAR SSEBUNYA } ::::::::::: DEFENDANTS
3. WILSON SEBWAMI }**

Before: Hon. Mr. Justice J. W. Kwesiga

This very old case was filed by M/S Ssendege, Senyondo and Company Advocates as far back as January, 2009. For unclear reasons this case remained in the Court up to 23rd June, 2015 when the hearing was closed. Six years of a case unconcluded in my view is too long. I am unable to portion blame for this delay but if the Advocates engaged in the case had given the case the approach that finally resolved it at the end of the trial from the start it would have saved the parties the anxiety and loss they ought to have suffered due to the delayed disposal of this case. After the conclusion of the hearing of the witnesses' evidence it was clear that this matter was proper for amicable settlement by the parties and the opportunity was given to the parties. I am grateful to the

senior Advocates, Mr. Joash Ssendege for the Plaintiff and Mr. James Ssebugenyi Mukasa for 1st Defendant who agreed to negotiate and reach an amicable settlement between the Plaintiff and the first Defendant in this case. It may not have saved the Court from the tedious and expensive trial that it had been indulged in for six years but it saved the Court the burden of Judgment writing saving time for other cases. Secondly the consent Judgment they entered belongs to the parties and the parties ought to have got the satisfaction that it is their own decision fair to both of them.

While I write my decision on the residual of the case because the 3rd Defendant failed to reach an amicable settlement I will restate the facts of this case, incorporate the consent Judgment of the Plaintiff and first Defendant above referred after which I will examine the evidence for or against the third Defendant, Mr. Wilson Ssebwami.

The Plaintiff, an Advocate of Courts of Judicature of Uganda and a Judge of the Appellate Division of International Criminal Court at Hague, Holland (ICC) purchased and became the registered proprietor of land comprised in Kyadondo Block 208 Plot 44 (the suit land) at Keti Falawo, Kawempe Kampala measuring approximately one (1) acre. This was in 1978.

The Plaintiff discovered that while he was out of the country, NILE BANK LIMITED , that was succeeded by BARCLAYS BANK OF UGANDA LTD (the 1st Defendant) basing a forged Power of Attorney created a mortgage for the 2nd Defendant for a loan of Shs.30,000,000/=. The second Defendant defaulted and the Bank sold the suit property to the 3rd Defendant at Shs.105,000,000/=. The Plaintiff contended this was a fraudulent transaction. The Plaintiff specifically set out in the plaint several particulars of fraud that he attributed to the first, second and third Defendants.

I do not find it necessary at this stage to reproduce these pleaded particulars of fraud. The Plaintiff sought the following reliefs:-

- (a) A declaration that the mortgage and subsequent alienation of the land, Kyadondo Block 208 Plot 440 at Kawempe was fraudulent and a nullity.
- (b) Cancellation of the 3rd Defendant's name from the Certificate of Title to the suit land.
- (c) A permanent injunction restraining the Defendants, their servants or agents from interference with the Plaintiff's quiet enjoyment of the suit land.

(d) General damages/Punitive damages.

(e) Interest on the above at 28% p.a.

(f) Costs of the suit.

The Defence of the 1st Defendant averred that the Plaintiff donated the contested Power of Attorney to the second Defendant and that the suit land was properly sold to the 3rd Defendant and denied the particulars of fraud.

The second Defendant filed no Defence. The third Defendant denied the allegations against him and in ALTERNATIVE pleaded:-

“IN FURTHER ALTERNATIVE AND WITHOUT PREJUDICE to the above, if this honourable Court finds for the Plaintiff, the third Defendant as a bona fide purchaser relies on the principle of a total failure of consideration whereof he prays that the honourable Court orders the first and second Defendants to jointly and severally reimburse and/or compensate the third Defendant for the purchase price plus all the other expenses such as the value of compensation to the

licences and other expenses including costs incurred in defending this suit.”

The joint scheduling memorandum contains Agreed facts, which, confirmed that the Plaintiff was the registered proprietor of the suit property since 26th October 1978 and that on 26th April 2006 Nile Bank Limited had a mortgage registered on this land. On 27th April 2007, Dr. Doreen Nsereko lodged a Caveat on the land which was removed on 20th September, 2006 and on 10th October, 2008 WILSON SEBWAMI (3rd Defendant) became registered as a proprietor. The Plaintiff filed this suit to recover the land from the 3rd Defendant.

The following were the Agreed issues:-

1. Whether the Plaintiff mortgaged the suit land to Nile Bank Limited.
2. Whether there was fraud on the part of the Defendants in dealing with the suit land.
3. Whether the transfer of the land by the 1st Defendant to the 3rd Defendant was lawful.
4. Whether the 3rd Defendant is a bona fide purchaser for value.

5. What remedies are available to the parties?

On the 2nd day of June, 2015 the Plaintiff and the first Defendant together with their respective Advocates executed a Consent Judgment which was entered by this Court in the following terms:-

“By the consent of the Plaintiff and the 1st Defendant, it is hereby agreed to have this suit fully and finally settled in the following terms:

- 1. The parties to the suit recognize that the 2nd Defendant, without the Plaintiff’s knowledge, permission or consent, availed to the 1st Defendant the Plaintiff’s title deed for Kyadondo Block 208 Plot 440, land at Kawempe as security for a mortgage, using forged documents on which the Plaintiff’s signature was forged.**
- 2. Therefore the mortgage and subsequent sale of the land under the mortgage are accordingly null and void and could therefore pass no title to the third Defendant.**

- 3. That since the mortgage and subsequent sale under the mortgage cannot stand in Law, the Title and Instruments based on it be cancelled and Title returned to the names of the Plaintiff, without any encumbrances.**
- 4. The 1st Defendant shall compensate the Plaintiff as follows:-**
- (a) The sum of Shs.5,000,000/= (Uganda Shillings five million only) being fees incurred for the handwriting expert and Shs.1,770,000/= being the valuation fees incurred both sums adding up to Shs.6,770,000/=.**
 - (b) The sum of Shs.65,000,000/= being Special damages.**
 - (c) The sum of Shs.85,000,000/= being General damages.**
 - (d) The 1st Defendant settles the Plaintiff's costs of the suit.**

- 5. The second Defendant, though served with Summons to file a defence, did not file a Written Statement of Defence to defend himself against the allegations of fraud including the forgery of the Plaintiff's signature.**

- 6. The 1st Defendant has therefore, the option of seeking relief against the second Defendant for sums paid by the 1st Defendant to the Plaintiff.**

- 7. That the 1st Defendant shall pay this money within (21) twenty one days from the date of receipt the executed and filed Consent Judgment.**

Dated at Kampala this 2nd day of June, 2015.”

Following the above Consent Judgment this case was set for hearing and completion of the remaining issues. On 12th June, 2015 Mr. Banard Mutyaba for the 3rd Defendant told Court that he had no objection to the Consent Judgment above and that he needs time to get instruction from the 3rd Defendant with a view to amicably settle the issues regarding compensation to the third Defendant by the first Defendant.

On 23rd June, 2015 Mr. Mutyaba who had previously conducted the case for the 3rd Defendant did not appear and M/S Denis Kanabi and Alvin Jabo appeared for the 3rd Defendant and only reported that the third Defendant did not accept the sums offered by the 1st Defendant in compensation and they were ready to proceed with further trial.

In line with the pleadings and the alternative relief for compensation reproduced above the Advocates proceeded with the submissions. I must state that at this stage issues Number 1, 2 and 3 were resolved by the Consent Judgment above and there are no more issues to resolve between the Plaintiff and the first Defendant. Secondly the third Defendant does not claim to have taken possession. The sub-issue that now emerges is whether there was total failure of consideration and if so what reliefs does the third Defendant (Purchaser) have against the first Defendant (Seller).

Mr. James Ssebugenyi Mukasa for the first Defendant submitted that the first Defendant acknowledges that there was total failure of consideration and accepted to compensate the third Defendant. He informed Court that this remain unresolved because the parties did not agree on the quantum of compensation. He submitted that a sum of Uganda Shs.105,000,000/= being the sum that the third Defendant paid for the suit land in the nullified transaction is refundable and the 1st

Defendant is agreeable to the sum being paid to the third Defendant. The first Defendant also conceded, in the submissions, to pay the legal costs incurred by the third Defendant.

The third Defendant's submissions received on 23rd June, 2015, submitted that the third Defendant is a bona fide purchaser for valuable consideration and had no notice of fraud in acquisition of the suit land. He submitted that the alleged or committed acts of fraud were attributable to the 1st and 2nd Defendants.

MR. WILSON SEBWAMI, third Defendant testified as the single Defence witness and he told Court that he purchased the suit land at Shs.105,000,000/= and that he paid extra money to the Auctioneer to remove the tenants. This closed the Defence.

The third Defendant's submissions state that payment for the suit land was Shs.105,000,000/= on "AS IS" conditions, he paid to Vincent Kawunde tShs.40,000,000/= to compensate the Licenses which became factored in the purchase price of Shs.105,000,000/= and that the Bank received Shs.65,000,000/=.

The fundermental transaction from which the 3rd Defendant derived his claim is a mortgage of the suit land and the 1st Defendant agrees that the

mortgage was illegal and founded on forgery and fraud. The third Defendant contends that he had nothing to do with the fraud and that he is a bona fide purchaser for value without notice of fraud. However the 3rd Defendant, since the transaction has never taken possession because of the challenges including the pending question of the illegality of the transaction.

The handwriting expert (PW4) established that the Plaintiff's signature on the mortgage deed and Power of Attorney was forged. The execution of the mortgage documents offended the provisions of the Law in Section 147 of the Registration of titles Act.

In my view forgery is an element of fraud. Fraud can be participatory but fraud can also be imputed on the person that ought to have been aware of the fraud and condoned it, or benefited from it or used or accepted to use it to deprive another person of his rights. (See Haji Abdu Nasser Katende Vs Vithalidis Haridas & Co. Ltd. C. A. 84 of 2003 (Court of Appeal))

I have considered the evidence and submissions of the Plaintiff's Advocates. I have found that the third Defendant conceded that he did not carry out due diligence before he entered the Purchase Agreement with first Defendant. He never carried out a Search to establish the

registered proprietor. He never visited the allegedly mortgaged land before payment of the purchase price.

The third Defendant had a duty to satisfy himself through diligent search that the mortgage was proper. If he had taken this essential diligent step he should have found the questionable execution of the mortgage deed. I cannot emphasize this requirement more than Honourable G. Okello J. A. (as he then was) stated in the case of John Bagaire Vs Ausi Matovu C.A. 7 of 1996 (C.A.) where his Lordship stated:

“Lands are not vegetables that are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only the land but also of the seller before purchase.”

The third Defendant omitted the above and proceeded to purchase land on fraud attributable to the 1st and 2nd Defendant. The third Defendant accepted to take advantage of the fraudulent acts of the 1st and 2nd Defendants to deprive the Plaintiff of his proprietary rights/interests in the suit property and therefore I find that he is not a bona fide purchaser for valuable consideration without any notice of fraud in acquisition of the registration of himself on the suit land. On the basis of the above alone would dispose of the third Defendant’s issues raised against the

Plaintiff. However there are other aspects of fraud that have been brought to my attention that I find appropriate to deal with at this state.

The Plaintiff led evidence that established through PW3 Nsamba Gayiya, Property Valuer, that at the time of the alleged sale the value of the suit property was Shs.500,000,000/= on the open market and Shs.350,000,000/= Forced Sale value. The purported purchase for the property said to have been paid by the third Defendant is stated in the Agreement and evidence of third Defendant as Shs.105,000,000/=. On the face of it this is an excessively low price that renders the transaction to be in bad faith. Further deceptions that follow this transaction constitute evidence of series of fraud in the same transaction:-

- (i) Whereas the consideration (See Exhibit P.6) is Shs.105,000,000/= signed by the third party. The application for consent to transfer the consideration is stated as Shs.60,000,000/=.
- (ii) The Application for consent to transfer declares that the suit land is undeveloped and a residential Plot. On the contrary the Valuation Report (P.8) describes the property as commercial, there is a shop building and market stalls.

Therefore the Application to transfer is full of deliberate distortion of the description of the suit property which was fraudulent.

I have held that the third Defendant was not a bona fide purchaser for valuable consideration for the reasons above which shows that he did not purchase the property in good faith.

REMEDIES FOR THE PARTIES:

- (a) The fundamental remedies for the Plaintiff have been settled by the Consent Judgment herein reproduced and shall remain as declared by consent.
- (b) The third Defendant is entitled to reliefs against the 1st Defendant because the 1st Defendant was responsible for the dealings in the suit land that culminated into the Defendant's purchase of the land which has been set aside. It will serve interests of justice to order that the 1st Defendant compensates the 3rd Defendant for the failed transaction and I order as follows:-
 - (a) That the 1st Defendant pays the third Defendant Shs.105,000,000/= being the money that the 3rd Defendant paid under the nullified sale/purchase.

- (b) The 1st Defendant shall pay the 3rd Defendant an interest at 18% per annum on Shs.65,000,000/= the sum proved to have been paid to 1st Defendant, with effect from 7th October, 2008 up to the date of this Judgment.
- (c) The 1st Defendant shall pay the 3rd Defendant 50% of the costs of the 1st Defendant's legal costs in this suit.
- (d) The decretal sum shall attract Interest at 6% per annum from the date of this Judgment until payment in full.

Dated at Kampala this 1st day of July, 2015.

J. W. KWESIGA

JUDGE

In the presence of:

Mr. Joash Ssendege – for Plaintiff.

Mr. James Mukasa Ssebugenyi – for 1st Defendant.

Mr. Mohamed Matovu – for 3rd Defendant.

The parties are absent.

Ms. Miria Naluwende – Court Clerk.