

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL SUIT NO. 421 OF 2012

1. HAJJATI HADIJA NAJJEMBA:.....PLAINTIFFS

2. KIBUUKA ERNEST

VERSUS

1. MARY LUBEGA MASAANA NANSUBUGA

2. KIZITO NSUBUGA:.....DEFENDANTS

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

HAIJATI HADIJA NAJJEMBA and KIBUUKA ERNEST (hereinafter referred to as the 1st and 2nd plaintiffs respectively) brought this suit against MARY LUBEGA MASAANA NANSUBUGA and KIZITO NSUBUGA hereinafter referred to as the 1st and 2nd defendants respectively) jointly and severally. The plaintiffs seek orders of a permanent injunction, general damages, specific performance, a declaration that the plaintiffs are the lawful/ rightful owners of the suit land, cancellation of the 2nd defendant's name on the certificate of title, and costs of the suit.

Background:

The 1st defendant entered into sale agreement for land with the 1st plaintiff on 05.02.2004. The land is situated at Kyebando in Kyadondo Block 210 Plot 1880 (*hereinafter referred to as the "suit land"*). She similarly entered into sale agreement for land with the 2nd plaintiff on 04.11.2006 for a portion of land also comprised in the same suit land. The 1st defendant then handed over signed transfer and consent to transfer forms and mutation forms to the plaintiffs. In January, 2012, the 1st defendant made yet another agreement before the LCs of the area

confirming the sale of land to the 1st plaintiff which occurred in 1967 since the earlier copy of the sale agreement got soaked in water and was damaged.

On 19.07.2010 the 1st defendant wrote a letter to the 2nd defendant requesting him to handover documents to the 1st plaintiff to enable the latter transfer the land into the 1st plaintiff's names. Instead, 1st defendant went ahead and sold the whole of the suit land to the 2nd defendant before the plaintiffs could get off their respective portions. The 2nd defendant purchased and registered the entire suit land apparently without physically inspecting and inquiring from the plaintiffs and he later mortgaged the suit land with a micro finance company despite the 2nd plaintiff having lodged a caveat thereon.

The 2nd defendant denied the allegations of fraud against him and contended that in early 1970s the 1st plaintiff and a one Sulaiman Kikwaku bought a Kibanja at Kyebando from the 1st defendant (suit land) which they shared, and that both families stay on the said Kibanja. That by the time the late Kikwaku died, neither of the two had bought mailo interest. He denied that the 1st plaintiff has ever bought mailo interest from the 1st defendant. Further, he contended that in an attempt to defraud the 1st defendant and Kikwaku's estate, the 1st plaintiff in 2005 approached the 1st defendant taking advantage of her old age and persuaded her to sign transfer forms in respect of the suit land, but that the 1st defendant rejected saying she had never sold her mailo interest. Further, that the 2nd plaintiff was sold only two rooms on the 1st defendant's houses and not land to entitle him to a claim of a transferable interest.

The 2nd defendant claimed to have proof that the 2nd plaintiff has always had intentions to illegally grab land from the 1st defendant by uttering deceitful and false documents claiming that the 1st defendant had sold to him land whereas not. The 2nd defendant maintained that he bought land from the 1st defendant on 08.02.2008, and that all Bibanja holders on the land were

summoned, including the plaintiffs, to prove their interest on the land, but that the plaintiffs did not turn up. That the other Bibanja holders turned up and witnessed the purchase.

The 1st defendant on her part acknowledged that each of the plaintiffs purchased their respective pieces of land from her, and that they had not yet transferred their pieces. That about four years ago she entrusted her son, the 2nd defendant, with her land title so that he could use it to borrow money, and that she transferred the title into his names and that he went ahead with the loan processing. That her son the 2nd defendant was supposed to allow all the person she had sold the respective pieces of land to transfer from their pieces into their names, and that her son but that the son only did so for the M/s. Christians of Impact Church in Kyebando, but refused to transfer for the rest including the plaintiffs. At scheduling, the following facts were agreed upon;

- 1. The 1st and 2nd plaintiffs and the 2nd defendant claim interest as purchasers from the 1st defendant.**
- 2. The suit land is registered in the names of the 2nd defendant.**

The following issues were agreed and framed for resolution;

- 1. Whether the 2nd defendant is guilty of fraud in acquisition of his title.**
- 2. Whether the 2nd defendant lawfully acquired ownership and registration of the suit land.**
- 3. What remedies are available to the parties?**

The plaintiffs were represented by M/s. Kajeke, Maguru & Co Advocates, the 1st defendant, the 2nd defendant was unrepresented, while the 2nd defendant was represented by M/s. Makera & Co. Advocates. Counsel for the plaintiffs and 2nd defendant filed written submissions which I have taken into account in arriving at the decision.

The plaintiffs adduced evidence of five witnesses to wit; PW1 Hajjati Hadija Najjemba (the 1st plaintiff), PW2 Kaboggoza Twaha, PW3 Musa Wasswa, PW4 Esutu Andrew and PW5 Kibuuka

Ernest (the 2nd plaintiff). The 2nd defendants on the other hand adduced evidence of four witnesses to wit; DW1 Nsubuga Ernest (the 2nd defendant), DW2 Kirabira Daniel, DW3 Ssonko Ramathan, and DW4 Ssemwanga Hassan Kida. The evidence of all witnesses is on court record and I will not reproduce it in detail, but I will subject it to evaluation in this judgment. The first two issues above are interrelated and I will resolve them simultaneously.

Submissions:

Counsel for the plaintiffs submitted that the evidence shows that the 1st and 2nd plaintiffs first acquired the Bibanja interest in the suit land, and that it is not in dispute that the plaintiffs and their agents are in occupation of the suit land, but that what is in dispute is whether the plaintiffs acquired registerable interests in the suit land. Counsel further submitted that the 2nd defendant admits that he resides in Kyebando, Nsooba Zone, where the suit property is situated and that the plaintiffs and their agents are resident on the suit land. Counsel noted that the 2nd defendant's decision to only inspect the White Page at the Land Office but ignoring to inquire from the plaintiffs who are his neighbors about their interests in the suit land and the receipt of *Exhibit P4* (letter written to him by the 1st defendant requesting him to give authority to the 1st plaintiff to cut off her portion from the suit land) were all not actions of an innocent man. Counsel also noted that the 1st defendant is guilty of fraud in acquisition and registration of the suit land into his names. Counsel relied on ***Black's Law Dictionary 6th Edition***, and the case of ***Kampala Bottlers Ltd vs. Damanico (U) Ltd, SCCA No. 22 of 1992*** on the definition of what constitutes fraud

In reply, Counsel for the 2nd defendant submitted that there is nothing in the evidence to show that the 2nd defendant acted fraudulently or dishonestly. Counsel argued that the 2nd defendant did not know of the plaintiffs' alleged interests since the 1st defendant had told him that the plaintiffs

and the other tenants were only Bibanja holders whom she had invited to witness his purchase. Counsel further contended that the plaintiffs never lodged a caveat on the land and as such could be no way the 2nd defendant would have known about their alleged interest, if any. Counsel cited a plethora of cases of ***Fredrick K. J Zaabwe vs. Orient B Ltd & Others, SCCA No. 4 of 2006; Kampala Bottlers Ltd vs. Damanico (U) Ltd (supra), David Sejjaka vs. Rebecca Musoke, CA No. 12 of 1985; and J.W.R Kazzora vs. M.L.S Rukuba, SCCA No. 13 of 1992; Ratilala Gordhanbhai Makanji [1957] EA 314, Sebuliba vs. Cooperative Bank Ltd [1987] HCB 130; and Boyes vs. Gathure [1969] EA 385.***

Counsel went on to submit that the 2nd defendant proved that he never participated in any fraud, and that the plaintiffs failed to prove that the 2nd defendant knew of their interests in the suit land and /or took advantage of any fraud. Further, that the 1st plaintiff's allegations claiming that the 2nd defendant was present when she bought the suit land are not believable since none of her alleged documents proves so. Counsel relied on ***Sections 101, 102 and 103 Evidence Act (Cap 6)*** regarding on whom the burden of proof lies.

Regarding the legality of the acquisition and registration of the suit land by the 2nd defendant, Counsel for the plaintiffs submitted that the 2nd defendant did not lawfully acquire the suit land free from defects in title. Counsel argued that the 2nd defendant being a grandson of the 1st defendant knew the plaintiffs as sitting tenants on the suit land. Further, that even if the plaintiffs had not purchased registerable interests, which is denied, still they ought to have been given the option of being the first to purchase the registerable interest, and that the said land would not only be available for sale after the plaintiffs failed to exercise that option. Counsel noted that the 2nd defendant is not a bona fide purchaser for value without notice. Counsel backed this proposition with the case of ***Fredrick K.J Zaabwe vs. Orient Bank Ltd and Others, (supra)***

In reply, Counsel for the 2nd defendant submitted that the evidence of 2nd defendant that he purchased the suit land was supported by that of DW2 Kirabira Daniel and DW3 Ssonko Ramathan, that that he paid the 1st defendant Shs.10 million and that he later went to the Land Office together with the 1st defendant and she signed transfer forms for him and the title was transferred into his names. Counsel submitted that there is also evidence to show that the 1st defendant told the 2nd defendant that the plaintiffs were just Bibanja owners who did not have any other interest in the land.

Counsel disputed the claim that the plaintiffs bought registerable since, in any case, they were not given the first option to buy off their interests before selling to the 2nd defendant. Counsel also relied on the evidence of DW4 Ssemwanga Hassan Kida that when his brother Kirabira Daniel (DW3) told him that the 1st defendant had sold her land to the 2nd defendant, DW4 approached her and she confirmed the sale and further told him that she gave the plaintiffs the chance to buy registerable interest of their Bibanja, but that they failed yet she wanted money. That she assured DW4 that she had not sold the plaintiffs' Bibanja but only her land and that the 2nd defendant is their new landlord.

Counsel went on to argue that even if it were true that the plaintiffs bought registerable interests before the 2nd defendant as they claim, they never registered their claims, and that the 2nd defendant bought without notice of their claim and registered the land into his names, and that his estate and interest gained priority over the plaintiffs' interest and that his estate as a registered proprietor is paramount. To back this position, Counsel cited **Section 64 RTA**; and the cases of ***Katarikawe vs. Katwiremu and Another [1977] HCB 187***; ***Daniel Sempa Mbabali vs. W.K. Kidza and Others [1985] HCB 46***.

Resolution of the issues:

Issue No.1: Whether the 2nd defendant is guilty of fraud in acquisition of his title.

The evidence of the 1st plaintiff (PW1) Hajjati Hadija Najjemba is that she purchased the suit property from the 1st defendant in 1967, but that the copy of the agreement was destroyed during the war which prompted them to renew it on 28.01.2012 as per *Exhibit P3*. PW4 Esutu Andrew testified confirming that he witnessed the sale agreement. In the renewed agreement it was however stated that the earlier agreement which was made in the year 1967 got soaked in water and was damaged which contradicts that it was destroyed during the war. PW1 nevertheless clarified that all her documents got lost at Kalerwe when her house got flooded, which was again corroborated by evidence of PW4 that the original agreement was destroyed by water.

The 1st plaintiff went on to state that she bought a Kibanja where she constructed her house, but she could not describe its size and the exact year when she bought it. She also stated that she pays Busulu to court at Nabweru, but could not support this with any evidence of receipts which issued to her. She also stated that immediately after purchase, she took possession and developed the suit land by constructing residential houses, and that she later brought her brother Kikwaku Sulaiman to occupy some of the houses. This particular evidence was corroborated by that of PW3 Musa Wasswa a resident of the same area in Kyebando.

The 1st plaintiff also stated that on 05.02.2004, she executed a sale agreement, *Exhibit P1*, with the 1st defendant in respect of the suit land and was paid Shs.100,000/= leaving a balance of 110,000/=. This evidence was also corroborated by PW2 Kaboggoza Twaha a resident of Kalerwe who stated that he is the one who drafted the sale agreement which identified as *Exhibit P1*. The 1st plaintiff further gave evidence that the 1st defendant gave her signed transfer forms, *Exhibit P2*, and that on 19.07.2010 the 1st defendant wrote a letter, *Exhibit P4*, to the 2nd

defendant requesting him to give authority to the 1st plaintiff to cut off her land from the suit land.

Furthermore, it is the evidence of (PW5) Kibuuka Ernest the 2nd plaintiff that on 04.11.2006 he entered into a sale of land agreement, *Exhibit P5*, with the 1st defendant for land on which were two rooms, and that he took possession of the said land and rooms. The 2nd plaintiff also stated that the 1st defendant gave him, *Exhibit P6*, the transfer and mutation forms. This evidence was corroborated by that of Esutu Andrew (PW4) who testified that he witnessed the said sale.

Evidently, the particular testimony of the 1st plaintiff contains some inconsistencies particularly on how the earlier sale agreement was destroyed and the aspect of payment of Busulu whose receipts could not be produced. The inconsistencies are however minor and do neither go to the root of the case nor point at deliberate falsehoods. In that case they are ignored. See: ***Alfred Tajar vs. Uganda [1969] EACA (Cr. Appeal No. 167 of 1969)***.

A careful evaluation of the evidence as a whole easily reveals the 2nd defendant's failure to rebut the crucial facts in the allegations that the plaintiffs had possession of the land. The 2nd defendant was also unable to rebut the fact that the 1st defendant had sold land to the plaintiffs and handed over to them signed transfer and mutation forms. The 2nd defendant also acknowledges having bought land from the 1st defendant on 08.02.2008, which was long after the plaintiffs had also bought the same land from the 1st defendant and taken possession. The plaintiffs' evidence in that regard was amply corroborated by the respective testimonies of the plaintiffs' witnesses as well as the witnesses of the defence; particularly DW2 Kirabira Daniel, DW3 Ssonko Ramathan, and DW4 Ssemwanga Hassan Kida.

It is also clear that 2nd defendant conducted a search in respect of the suit land only at the Land Registry and found that it was not encumbered. He claims to have invited all the sitting tenants to

witness him buying and surveying the suit land. The 2nd defendant however had nothing which could show that indeed the sitting tenants who included the plaintiffs were invited to witness his alleged purchase and survey.

Also to consider id the 2nd defendant's evidence that there were people with houses on the suit land, and that they told him that the 2nd plaintiff had sold Bibanja to them. The 2nd defendant also stated that before buying the suit land he never talked to the 1st plaintiff or any other person, and that the 1st defendant invited the plaintiffs to witness the survey of the land, but that they never turned up. He further stated that he got to know about the 1st plaintiff in 2010, but in the same breath stated that he has known the 1st plaintiff as a longtime resident on the land.

Apart from the above, DW3 Ssonko Ramathan and DW4 Ssemwanga Hassan Kida both of whom testified for the 2nd defendant claimed that their father the late Kikwaku had bought land together with the 1st plaintiff. They however could not show any proof of the sale agreement or otherwise, but only alleged that their late father had informed them of the same.

It should be noted that in her defence the 1st defendant never rebutted the plaintiffs' claim nor did she adduce any evidence challenging the plaintiffs' claim. In the case of *Habre International Co. Ltd vs. Ebrahim Alakaria Kassam and Others, SCCA No. 4 of 1999*, it was held, inter alia, that;

“Whenever an opponent declines to avail himself of the opportunity to put his essential and material case in cross examination, it follows that they believed that the testimony given could not be disputed.”

It would follow logically therefore that the plaintiffs' testimony passes the standard required in civil cases.

Section 64 Registration of Titles Act (Supra), to which Counsel for the 2nd defendant referred, is to the effect that the title of a registered proprietor is indefeasible except in cases of fraud. Furthermore, the fraud which should be proved to nullify a registered title must be the fraud of the person whose title it is designed to impeach. In **Kampala Bottlers Ltd vs. Damanico (U) Ltd (supra)** Wambuzi CJ (as he then was) held that;

“The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.”

Also in **David Sekajja Nalima vs. Rebecca Musoke (supra)** it was held that:

“...It is well settled that fraud means the actual or some act of dishonesty. Where there are a series of subsequent transfers, for the title of the incumbent registered proprietor to be impeachable, the fraud of the previous proprietors must be brought home to him...A fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out the fraud had he been more vigilant and had made further inquiries which he omitted to make does not itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be ascribed to him...”

In the instant case the 2nd defendant lays claim to the suit land as a bona fide purchaser. It was held in the case of **David Sekajja Nalima vs. Rebecca Musoke (supra)** that a bona fide purchaser is that person who purchased the land without the notice of any equitable interest or claim

therein. Basing on the facts in the evidence and in the agreed facts in the scheduling memorandum, the 1st and 2nd plaintiffs and the 2nd defendant all claim interest as purchasers from the 1st defendant. The 2nd defendant does not dispute the fact that the plaintiffs had an interest in the suit land having purchased the same from the 1st defendant earlier than him and taken possession. Clearly, the 2nd defendant purchased the suit land well aware that the plaintiffs were sitting tenants thereon, and he never bothered to inquire from them as to their interest in the suit land. This amounts to fraud in the process of acquiring ownership and the registration of the suit land in his names.

The 2nd defendant's own evidence confirms the above finding, when he stated that he never talked to anyone prior to purchasing the land, even though he claimed that he called the tenants to witness his purchase of the land. Other than being obviously a glaring and unexplained contradiction, it could only show that the 2nd defendant never inquired from the tenants as to what their interest was in the suit land before buying the same. The position of the law in such circumstances is articulated in the case of *Nabanoba Desiranta & Another vs. Kayiwa Joseph & Another*, HCCS No. 497 of 2005, where it was held that;

“I would like to point out that before one enters into a transaction involving purchase of land very serious inquiries should be done to establish what is on the ground. This is so because our land tenure system is full of controversies. In most cases it would involve using the area local authorities to help establish who are in occupation of the land and their interests...As the law stands a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a bona fide purchaser without notice...” (emphasis mine).

Similarly, in the instant case, where the 2nd defendant bought land which was occupied by the plaintiffs in the same area where the 2nd defendant resides, the 2nd defendant knew or ought to have known that the plaintiffs were in possession and occupation and had interest in the suit land. This fact alone would suffice to have served as a physical encumbrance which the 2nd defendant ought to have unfailingly taken notice of. The search which the 2nd defendant claims to have made at the Land Registry was thus not sufficient due diligence. The failure to make proper inquiry as to the status of the land which was in occupation of the plaintiffs and going ahead to obtain registration over the whole of the suit land constituted actual fraud committed by the 2nd defendant.

Apart from the above, the fraud of the 2nd defendant is clearly compounded by his futile denial of the knowledge of *Exhibit P4*. This is the letter that the 1st defendant wrote to the 2nd defendant requesting him to give authority to the 1st plaintiff to cut off her portion of the land, which he refused to do. It goes to show that the 2nd defendant was only bent on dispossessing the plaintiffs of their land. This was not helped by the fact that the 2nd defendant was unable to rebut the evidence that the 1st defendant actually sold land to the plaintiffs and signed transfer forms in their favour. This shifted the burden on the 2nd defendant to demonstrate that *Exhibit P4* was unknown to him, and that the transfer forms were perhaps a forgery. The 2nd defendant miserably failed to discharge that burden.

The other evidence bearing on the fraud of both defendants is the fact that the same suit land had already been sold to the plaintiffs by the 1st defendant. Even if the 2nd defendant were to argue that the plaintiffs were Bibanja holders, still this would not change anything since the plaintiffs would in that case be protected by **Section 31 and 36** of the **Land Act (Cap 227)** under which they enjoy security of tenancy. The law under the said provisions would require that the

plaintiffs, who are tenants by occupancy, be give the first option to purchase the legal interests before selling to the 2nd defendant. There is no evidence to suggest even remotely that this was done hence the selling of the suit land by the 1st defendant to the 2nd defendant was also illegal. Clearly, the 2nd defendant obtained registration with the intention of defeating the unregistered interest of the plaintiffs in the suit land. He did not lawfully acquire ownership and registration of the suit land in his names. The 2nd defendant therefore does not qualify as a bona fide purchaser for value without notice.

Issue No.3: What remedies are available to the parties?

Having found that the 2nd defendant obtained registration by fraud, it would follow logically that the plaintiffs are entitled to the reliefs prayed for in that regard. The title of the 2nd defendant shall be canceled on grounds of fraud.

The plaintiff prayed for general damages. The position of the law on the award of general damages is that it is in the discretion of court and is always as the law will presume to be the natural consequences of the defendant's act or omission. See: ***James Fredrick Nsubuga vs. Attorney General HCCS 13 of 1993.*** In the instant case the plaintiffs have shown that they have suffered a lot of inconvenience owing to the actions of the defendants. The plaintiffs are therefore entitled to general damages. I find that in the circumstances of this case, Shs 10,000,000/= is fair and adequate. Accordingly, it is declared and ordered and declared as follows;

- a) The plaintiffs are lawful owners of the suit land.***
- b) The registration of the land comprised in Kyadondo Block 210 Plot 1880 in the names of the 2nd defendants name was fraudulent.***
- c) An order doth issue cancelling the 2nd defendant's names on the certificate of title for the suit land.***

- d) An order doth issue to the Registrar of Titles for the registration of the plaintiffs onto the land in accordance with the sale agreements.*
- e) A permanent injunction doth issue against the defendants, their agents or any other person claiming from them from interfering with the plaintiffs' use and occupation of the land.*
- f) The defendants pay general damages of Shs.10,000,000/= to the plaintiffs at a rate of 8% per annum from the date of judgment till payment in full.*
- g) The plaintiffs are awarded costs of the suit.*



BASHAIJA K. ANDREW
JUDGE.
30/11/2015