

CIVIL SUIT NO. 186-2012-MICHEAL LUTALO VS STANBIC BANK (U) LTD & ANOR (JUDGMENT)

- v) An injunction restraining the Defendants,
- vi) General damages, punitive, exemplary and aggravated damages and;
- vii) Costs of the suit.

It was the Plaintiff's case that he purchased the suit land and constructed a school on the same land in the year 2003 to date but that he later realized that the certificate of title for the suit land was missing. That on 10th May, 2011, he reported the matter to police and that in 2012, the Plaintiff discovered that the certificate of title was stolen and transferred in the names of the 2nd Defendant who went ahead and obtained a loan of shs.200,000,000/- only (*two hundred million shillings*) from the 1st Defendant, pledged the certificate of title as security to guarantee the repayment but failed to repay the loan.

The Plaintiff avers that since purchase of the suit land, he has never parted with possession and occupation, that the Defendants did not physically survey/visit the land or consult the occupants in the same. That the certificate of title to the suit land was stolen and fraudulently transferred into the names of the 2nd Defendant. That the 1st Defendant did not carry out any due diligence required and expected of any prudent bank.

The 1st Defendant filed his written statement of defence to the Plaintiff's plaint and counter-claim against the 2nd Defendant. However, the 2nd Defendant has not entered his defence even after substituted service of summons unto him. On 1st October 2018, the Plaintiff and the 1st Defendant (Stanbic Bank) entered a consent judgment/decree on specific terms. On 8th December 2018, Counsel for the Plaintiff prayed that an interlocutory judgment against the 2nd Defendant be entered which Court granted and the matter was set down for formal proof.

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O.5 r18 of the Civil Procedure Rules stipulates that where Court is satisfied for any reason that the summons cannot be served in the ordinary way, Court shall order the summons to be served by substituted service in the prescribed manner. Under sub- rule (2) thereof, substituted service shall be as effectual as if it had been made on the Defendant personally. See *Erukana Omuchilo versus Ayub Machiwa [1960] E.A. 229.*

According to the Plaintiff's submissions on Court record, three issues were framed for determination, to wit:-

- i. Whether the 2nd Defendant acquired title in the suit property fraudulently.
- ii. Whether the mortgage created over the suit property in favor of the 1st Defendant was lawful and/or fraudulently procured.
- iii. Whether the parties are entitled to any remedies.

During further submission, the Plaintiff did not submit on issue (ii) and Court will not labour on it, but will deal with the rest of the issues.

Resolutions.

- 1) Whether the 2nd Defendant acquired title in the suit property fraudulently.

The Plaintiff was ordered to file witness statements and through the witness statements, he adduced the following evidence:-

PW1 Michael Lutalo; the Plaintiff herein, testified in cross-examination that he has never dealt with the 2nd Defendant over the suit land and that he has never employed anyone at the school by the names of Mbabazi Tina who gave spousal consent towards getting a mortgage from the 1st Defendant. He also told Court that when he went to the Land Registry to lodge a caveat on his land, he found both the white page and the instrument of transfer from himself to the 2nd Defendant missing.

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PW3 Suuna Francis; a pastor and co-director in the school on the suit land testified that he and PW1 in the early 2000, developed an idea of starting a school for helping the unprivileged children in the society at primary level with a view of establishing a secondary school. That PW1 later looked for the money to buy the land which they found at Bunkabira Village Nsangu parish situate along Nsangu Kitovu Road in Wakiso District in 2004. That they did a search before purchasing but found the land was in the names of the seller. That he witnessed on the sale agreement and immediately PW1 embarked on his project of developing a school in the names of Promise Christian junior Academy which officially started in 2005 without any interruption. He testifies that in 2009, claims arose by Kyalimpa Joseph and Lubega Joseph to the effect that Benedicto Kasozi who sold to them the suit land was not the owner of the property and that the alleged vendor was a mere caretaker.

That PW1 agreed to re-purchase the land and the date of payment was set. That on 6th March 2009, PW1 left him with shs. 2.500.000/- only (*two million, five hundred thousand shillings*) to pay the 1st installment and an agreement was executed. That the chairman (PW2) also witnessed the same and that on completing the purchase price, Lubega Joseph signed the transfer forms in favour of PW1 who later transferred the suit land into his names in 2009.

That Nyombi Phillip (PW5) developed the plan for the school prior to repurchasing the suit land. That in 2011, PW1 discovered that the certificate of title was missing and he, and PW1 went to Ngobe Police to report the loss. That in 2012, he was informed on phone by PW1 that the area chairman(PW2) had informed him that Stanbic Bank officials were looking for the suit land comprised in Block 369 plot 92 at Bunkabira but the chairman sent them back for other documents concerning the land. That later, again PW1 informed him that the documents brought by the bank to PW2, indicated that the duplicate certificate of title is in the names of the 2nd Defendant, having got it from PW1 and that the bank officials never carried out any due diligence.

Further, that according to the bank documents left at PW2's place (chairman), the bank by 14th February 2012, did not know the physical property pledged to it in 2011 and that the suit land is

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more than 7 kilometers from Natete and not 1.6 kilometers as alleged by the bank. In addition to that, the suit land has a school and not developed with a main house and a pit latrine. The school is not neighboring any small private housing estate as the bank survey report portrayed and that the suit land has no storied main house on a flat open plot as portrayed by the bank survey report as everything on the suit land is on a hill.

That on 4th April 2011 when the survey report was made by the bank purportedly on the suit land, it had no electricity and metal conduits as the bank portrayed, the suit land had not connected water through an overhead reservoir tank distributed by galvanized metal pipes as portrayed by the bank and that to date, the said tank is not there, that there is no septic tank, and that the suit land is not in a distance of 1.4 kilometers from Islamic university in Uganda Kabojja as portrayed by bank location sketch.

PW5 Nyombi Phillip; a pastor as well as a Civil Engineer, collaborated PW3's testimony when he told Court that he designed the building plans of the school on the suit land. He further collaborated by stating that the suit land has no storied building/ residential house. He states that the description and the nature of the land which the 2nd Defendant gave to the bank is not the suit property because it does not resemble it in any way.

PW4 Kasoga Mary Mutumba; an administrator of the school thereon, in collaboration with the evidence already adduced, told Court that she has a permanent office at the school and she attends the office on a daily basis. She states that the 2nd Defendant has never been her boss but the Plaintiff and PW3.

PW2 Nsereko Mike the area LCI chairman claims to have signed on the sale agreement between the Plaintiff and the then vendors. He also collaborated with PW3 when he stated that he was given a survey report which talked about land in Kyagame yet the suit land is at Bunkabira. That the photos which were showed to him had buildings, yet the suit land has schools not houses.

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Section 59 of the Registration of Titles Act effects that possession of a certificate of title is conclusive evidence of ownership of the land described there in. Under Section 64 (1) of the Registration of Titles Act Cap 230, the title of a registered proprietor is indefeasible except in case of fraud.

Justice Katureebe in *Fredrick Zaabwe vs. Orient Bank Limited SCCA No. 4 of 2006* defined fraud according to **Black's Law Dictionary** to mean;

“To act with intent to defraud means to act unlawfully, and with specific intent to deceive or cheat; ordinarily for the purpose of either causing financial loss to another, or bringing about some financial gain to oneself.”

In *J W R Kazoora versus M.L.S Rukuba SCCA NO. 13 OF 1992*, it was noted that an allegation of fraud must be specifically pleaded and proved and the standard is higher than a mere balance of probabilities but not beyond reasonable doubt.

The particulars of fraud on the part of the 2nd Defendant were particularized in paragraph 8 of the plaint to include;-

- i) *Stealing and or illegally obtaining the certificate of title to the disputed property from the Plaintiff's possession and custody.*
- ii) *Retaining the certificate of title after stealing it and subsequently forging a sale agreement and a transfer of the said land into his names.*
- iii) *Submitting the certificate of title to the property and other forged forms to the valuer for valuation and subsequently paying stamp duty on the said forged documents.*
- iv) *Obtaining, taking and using the money pursuant to the forged documents and a fraudulent transaction.*
- v) *Giving the certificate of title of the property to the 1st Defendant without authority of the Plaintiff.*
- vi) *Deliberately refusing to pay back the loan illegally obtained.*

vii) *Representing that the Plaintiff sold him the land whereas not.*

viii) *Mortgaging the certificate of title to the property to the 1st Defendant without the consent of the Plaintiff and with knowledge that the transaction was fraudulent.*

According to the photographs which were admitted as PE2, they are in conflict with photocopies of photographs at page 13 of the trail bundle which were alleged to be on the suit land by the 1st Defendant. Whereas PE2 shows a hilly land with a school on it, photographs on page 13 portray a storied building. The location of the suit property was also misconceived by the 1st Defendant. The Plaintiff went ahead and reported his lost land titles at Ngobe police as seen in PE1. PW3 confirmed to have escorted the Plaintiff to report the missing title to police, the Plaintiff also intended to lodge a caveat to stop further transfers. These are all acts by the 2nd Defendant to deceive or cheat the Plaintiff and or the 1st Defendant and cause them financial loss as he receives a financial gain.

I agree with Counsel's submission that the 2nd Defendant got registered on the suit land fraudulently because, had he obtained the said title lawfully, he would not have taken bank officials to a property with different particulars, developments. I find that the Plaintiff has pleaded and proved fraud against the 2nd Defendant.

Issue 2.

Remedies.

Fraud once proved can invalidate a certificate of title. The fraud must be by the person whose title is being impeached. In ***Musisi versus Grindlays Bank and Others (1983) HCB 39***. Court held that;

“A person registered through fraud is one who becomes a registered proprietor through a fraudulent act by him or to which he is a party or with full knowledge of the fraud”.

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Any act done to deliberately cheat another of a known existing right is fraud. Like in this case, there has been a school on the suit land since 2005 and the 2nd Defendant was entered on the title on 11th March 2011. Having a school on the suit land is a known interest which this Court has to protect. Moreover, the 2nd Defendant even through numerous substituted service has not come out to defend himself.

In *Kampala District Land Brand & Another Vs National Housing and Construction Corporation SCCA 2/2004*, it was held that;

“A party who had been in possession of the suit land for a long time and utilized it was entitled to have its interests recognized and protected”.

I therefore find that the 2nd Defendant, at the time of acquisition of the certificate of title, acted fraudulently with an intention to defeat and deprive the Plaintiff of his interests in the suit land.

The plaintiff therefore succeeds with the following orders:-

- i. In accordance with Section 177 of The Registration of Titles Act a certificate of Title for the Suit land shall be cancelled.
- ii. An order that the 1st Defendant delivers the certificate of title of the suit property to the Plaintiff
- iii. An injunction restraining the Defendants
- iv. The Plaintiff is entitled to costs incurred in this suit.
- v. General damages.

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The Plaintiff prayed for shs. 150,000,000/- only (*one hundred fifty million shilling*). However, given the facts, he is allowed shs. 50,000,000/- as damages

I so order.

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Henry I. Kawesa

JUDGE

7/05/2019

7/5/2019:

Mpagi Sande for the Plaintiff.

Plaintiff absent.

2nd Defendant absent. (*Exparte*).

1st Defendant (Matter) Settled).

Court: Judgment delivered to parties.

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Henry I. Kawesa

JUDGE

7/05/2019