

UGANDA / JUDGMENT

Akankwasa v Registrar of Titles (Miscellaneous Cause No. 33 of 2008) [2012] UGHC 222 (1 November 2012)

[2012] UGHC 222

COURT

High Court of Uganda

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Miscellaneous Cause No. 33 of 2008

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE NO. 33 OF 2008

WILLIAM AKANKWASA.....APPLICANT

VERSUS

REGISTRAR OF TITLES.....RESPONDENT

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application by notice of motion brought under section 98 of the Civil Procedure Act, section 182 of the Registration of Titles Act, and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) for orders that:-

1. The applicant is the rightful owner to be registered as proprietor of land comprised in LRV 1291 Folio 20 Plot no. 13 at Mackenzie Valley Road, Kololo, Kampala.
2. An order directing the respondent to cancel Golden Trust International Ltd from the certificate of title comprised in LRV 1291 Folio 20 Plot no. 13 at Mackenzie Valley Road, Kololo, Kampala and reinstate the applicant on the same as registered proprietor by correction and or re execution of the transfer form into the applicant's name does issue.
3. Provision be made for costs of this application.

The application is supported by the affidavit of **William Akankwasa** the applicant.

The respondent was absent on all the dates that this matter was first called for hearing. This court accorded two opportunities to the respondent to have him/her respond to this application by directing fresh service of the application and adjourning the hearing. However he/she neither filed an affidavit in reply to the application nor attended the hearing. There is an affidavit of service on the court record showing that the respondent was effectively served. The hearing therefore proceeded **ex parte** against the respondent after which the applicant's Counsel was requested to file written submissions on the matter.

In his submissions, Counsel for the applicant relied on the affidavit in support of the application sworn by the applicant **William Akankwasa**. The applicant's evidence, as deduced from his supporting affidavit, is that he was the registered proprietor of land comprised in LRV 1291 Folio 20 Plot no. 13 at Mackenzie Valley Road, Kololo, Kampala. He obtained vacant possession of the said land having purchased the same for value on 21st October 2006. He avers that his title was wrongfully cancelled by the respondent on 14th March 2008 on false grounds that his name was entered in error, and the alleged notice of cancellation was never brought to his attention until much later. The applicant had executed a sale of the said land to Vora Ltd but the transfer was halted by the said cancellation with the result that Golden Trust International remains proprietor.

Counsel for the applicant submitted that the procedure leading to the cancellation of the applicant's registration on the suit land was illegal in that the applicant was denied a fair hearing contrary to the rules of natural justice. He submitted that the applicant was served with the notice of a hearing much later, and that he was never summoned by the Registrar of Titles to bring his duplicate title as mandatorily required under the law.

I have carefully looked at the application and its supporting affidavit, together with the submissions of learned Counsel on the matter.

On the issue of not filing a defence, in this case, an affidavit in reply to the application and its supporting affidavit, Order 9 rule 11(2) of the CPR provides that:-

“Where the time allowed for filing a defence...has expired and the Defendant...has...failed to file his or her defence(s), the Plaintiff may set down the suit for hearing ex parte.”

There are court decisions to the effect that in such circumstances, the defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37**, court held that since the appellant had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no **locus standi**. Also see **Musoke V Kaye [1976] HCB 171**. This was the reason why the case proceeded **ex parte**. However, whether a suit proceeds **ex parte** or not, the burden of the plaintiff to prove his or her case on the balance of probabilities remains. Order 9 rule 10 of the CPR is to the effect that where the defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he has filed a defence.

On the question of whether the cancellation of the applicant's registration on the suit land was illegal Section 91(2) of the Land Act states as follows:-

“The registrar* *shall*, where a certificate of title or instrument---*

1. ***is issued in error;***
2. ***contains a misdescription of land or boundaries;***
3. ***contains an entry or endorsement made in error;***
4. ***contains an illegal endorsement;***
5. ***is illegally or wrongfully obtained; or***
6. ***is illegally or wrongfully retained;***

call for the duplicate certificate of title or instrument* *for cancellation, or correction or delivery to the proper party.” (emphasis mine).

Section 91(8) & (9) of the same Act requires the Registrar of Titles, while exercising the said functions, to give due notice to the party likely to be affected by the decision, to provide such party with an opportunity to be heard, to conduct the hearing within the rules of natural justice, to give reasons for any decision, and to communicate the decision in writing to the parties and the Committee. Section 91(10) accords a right of appeal to the District Land Tribunal by the party aggrieved by the Registrar's decision.

A cursory examination of the affidavit evidence and the court record reveals that the respondent by a notice dated 6th February 2008 (annexture C to the supporting affidavit) informed the applicant of the intention to correct and amend the register by cancelling his registration on the suit property. The same notice requested the applicant to let the respondent know if there was any objection to the proposed action. In response, M/S Tumwesigye, Baingana & Co Advocates wrote to the Registrar in a letter dated 25th March 2008 (annexture D) which partly read as follows:-

“In the exercise of his right to be heard, we now forward sworn testimony from the sellers. Kindly set a date for the formal hearing”

The respondent responded in a letter dated 27th March 2008 as follows:-

“You are requesting for a right to be heard, before cancellation is done. You attach sworn affidavits by a one John Muwonge and Asma Nabukenya claiming as Managing Director and Director respectively* *of M/s Golden Trust International respectively.

When I peruse and compare the signatures of the affidavits you have attached with those on the documents on the register book, they are marked differences in the two, they obviously do not tally.

Further, the notice dated 14/3/2008...was informing you that the register book has been amended; that your entry as a registered proprietor had been cancelled. Earlier, notice was duly served on you, of the intention to amend the register. The earlier notice was giving you an opportunity to be heard. So the decision to cancel your registry was done after giving you an opportunity to be heard.

You were also requested then, and now are being reminded to bring back the special certificate of title in your custody for endorsing the amendment.”

The applicant's affidavit evidence has not been rebutted by the respondent who, despite being accorded opportunity to respond to this application, chose not to file any affidavit in reply or appear in court during the hearing of this application. Case decisions are that a party who has not filed a defence is deemed to have admitted the allegations. In the instant application, the facts as stated on oath by the Applicant have neither been denied nor rebutted by the respondents. On the authority of **Samwiri Masa V Rose Achieng [1978] HCB 297**, the facts as adduced in the affidavit evidence of **William Akankwasa** the applicant which are neither denied nor rebutted are presumed to be admitted.

Sections 73, 74 and 75 of the Registration of Titles Act (RTA) together with section 91 of the Land Act accord special powers to the Registrar of Titles. In particular, section 73 of the RTA and section 90 of the Land Act empower the Registrar of Titles to call in duplicate certificates of title for the purposes of, among other things, rectifying or cancellation as the case requires. In exercising the said powers the Registrar of Titles is bound to give the required notices of the intention to take an appropriate action to any party likely to be affected by any decision. The said Registrar is also bound to conduct a hearing in accordance with the principles of natural justice and to communicate the decision in writing to the affected parties before executing the decision he/she may have reached. Section 91(10) & (11) of the Land Act also provides for a right of appeal and a transfer is not to be effected until the determination of the appeal.

In the instant case, it is clear that much as the Registrar was exercising the statutory special powers accorded to him/her in cancelling the applicant from the title in respect of land comprised in LRV 1291 Folio 20 Plot no. 13 at Mackenzie Valley Road, Kololo, Kampala, he/she did not conduct the hearing within the rules of natural justice as mandatorily required by section 91 of the Land Act. Exhibit D shows that even the applicant's lawyers requested for such hearing in their letter of dated 25th March 2008 where they forwarded sworn testimony from the sellers. It is evident from the letter he/she wrote to the applicant dated 27th March 2008 quoted above that instead of conducting the said hearing and hearing from the other side, the Registrar chose to act as witness and Judge at the same time. She/he apparently analyzed the sworn testimonies, concluded that they did not tally with other documents in the registry, and then cancelled the applicant's name from the certificate of title. She/he clearly did not observe the statutory requirements of first conducting a hearing yet the provisions are mandatory. The same letter of 27th March 2008 shows that even his/her demand to bring the special certificate of title in the applicant's custody was made after she had cancelled the applicant's name yet the law requires that it be done before the cancellation.

In the premises, and on the foregoing authorities, I would allow this application. I grant against the respondent the following declarations and/or orders:-

1. The cancellation of the applicant's name from the certificate of title of land comprised in LRV 12391 Folio 20 Plot. No. 13 at Mackenzie Valley Road, Kololo, Kampala, was unlawful and hence void.
2. The respondent should re instate the applicant on the register in respect of land comprised in LRV 12391 Folio 20 Plot. No. 13 at Mackenzie Valley Road, Kololo, Kampala,
3. The applicant will bear his own costs of the application.

It is so ordered.

Dated at Kampala this 1st day of November 2012.

Percy Night Tuhaise.

JUDGE.

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