

UGANDA / JUDGMENT

Allen Nsubuga v Kimbugwe & 4 Ors (Civil Suit No. 670 of 2006) [2018] UGHCLD 40 (2 May 2018) [2018] UGHCLD 40

COURT

HC: Land Division (Uganda)

BEFORE

Kawesa, J

CASE / FILE NUMBER

Civil Suit No. 670 of 2006

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL SUIT NO. 670 OF 2006

ALLEN NSUBUGA NTANANGA:..... PLAINTIFF

VERSUS

1. KIMBUGWE JEMBA JACKSON
2. UGANDA FINANCE LTD.
3. SSEGWA RONALD GYAGENDA
4. RONA INVESTMENT (U) LTD.:.....DEFENDANTS
5. THE REGISTRAR OF TITLES

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff filed this suit seeking recovery of the property described as Kyadondo Block 232 Plot 1306 land at Kireka Banda. She challenged the mortgaging of the suit property by the 1st Defendant to the 2nd Defendant and the subsequent sale of the same by the 2nd Defendant to the 3rd Defendant, and later to the 4th Defendant.

The Plaintiff in her pleadings claimed that the suit property comprised of a semi finished house at the time of her acquisition of the same from the 1st Defendant, and that she got registered on the 10th day of March 2003, whereafter she took possession and began redeveloping the same. The Plaintiff alleges that the property was demolished by the Defendants and seeks declaration of ownership and recovery of the replacement value of the house which was demolished.

The other pertinent facts that are noteworthy are that in the course of the hearing, a consent was executed between the Plaintiff and the 3rd and 4th Defendants. It is also undisputed that there had been proceedings in the Commercial Court vide Misc. Application No. 426 of 2006 arising from Misc. Application No. 399 of 2006 challenging the attachment of the suit property by the 2nd Defendant and 3rd Defendants; Court set aside the said sale; and vested the property back to the Plaintiff.

The question of ascertaining the quantum of damages and the replacement value of the suit property was left to the Plaintiff to pursue for which this present case was filed. This suit was later consolidated with HCT CS NO. 586 of 2007.

The Defendants filed defenses in the respective suits denying liability to indemnify the Plaintiff's loss.

Arising from all the pleadings as stated herein, the parties led evidence in Court which in summary is as follows:

The Plaintiff brought four witnesses alongside documentary evidence. PW1, the Plaintiff told Court that she purchased the property and got registered as owner in 2003 and she took possession. PW3, confirmed that the land belonged to PW1 who bought it and developed it, but had not finalized the entire house.

PW2 gave evidence related to the valuation he had done following the demolition of the property.

In defence, 2nd Defendant (Uganda Micro finance Ltd) filed written statement of defence for each suit. The 2nd Defendant filed submissions in their defence; in which they challenged the evidence and assertions of the Plaintiff and other Co-defendants.

The 3rd Defendant filed submissions in which they argued that they are not liable to indemnify the 2nd Defendant with regard to the Plaintiffs' claim.

The 4th Defendant filed submissions in which they denied any liability to compensate the Plaintiff.

Given the above summary, this consolidation had a number of issues earlier on agreed on, in each suit for determination.

I will list all issues formulated for determination as herebelow;

1. Whether the Plaintiff is entitled to compensation from any of the parties.

2. Whether either of the Defendants is entitled to indemnification against the other and by who?
3. Remedies available

I will resolve the above issues as follows:

[1] Whether the Plaintiff is entitled to compensation and by who.

Arising from all the submissions on record, and the evidence as reviewed, I do find that the major contention between the Plaintiff and the Defendants is in respect of the damages accruing to her as a result of the sales and takeover of her land.

I am in agreement with Counsel for the Plaintiffs contention in his submissions that the partial consent which was executed between the parties shows that the Plaintiff; the 3rd Defendant and the 4th Defendant resolved that;

1. The duplicate certificate of title together with the substitute white page for Kyadondo Block 232 Plot 1306; land at Kireka Banda registered in the names of the 4th Defendant; Rona Investments (U) Ltd., be cancelled by the 5th Defendant.
2. That the 3rd Defendant surrenders to the Plaintiff the duplicate certificate of title for land comprised in Kyadondo Block 232 Plot 1306 land at Kireka Banda registered in the names of the 4th Defendant in possession to the Plaintiff for purposes of delivering the same to the 5th Defendant for cancellation.
3. That the special certificate of title and the original Land Registry white page in the Land Office for Kyadondo Block 232 Plot 1306; Kireka Banda registered in the names of Allen Nsubuga Ntananga; the Plaintiff is the only true and correct record in respect of the land.

Arising from the above, the only question left for my determination is whether the Plaintiff is entitled to compensation for the alleged damages to her property as pleaded.

The evidence which the Plaintiff led in Court to prove the question of the loss, in the terms of compensation for the cost of damage, is contained in the evidence of PW1, PW2 and PW3. The evidence of PW2 which was of vital importance in proving the alleged values was grossly challenged by the defence. PW2 was found not qualified to give those values. The burden of proof is upon the Plaintiff to prove his/her case on a balance of probabilities. Section 101, 102, and 103 of the Evidence Act provides that he who asserts a fact must prove it. The Plaintiff had the burden to prove that she is actually entitled to compensation of the replacement value of shs. 90,600,000/- only (*ninety million, six hundred thousand)*. The Plaintiff failed to prove this value on account of the fact that the valuation report was generated by an unregistered surveyor.

It is my finding that by virtue of the consent as entered, and the facts as agreed, the Plaintiff lost her property by virtue of the chain of causation running from the 1st Defendants' actions, who pledged the title to the 2nd Defendant, after having sold it earlier to the Plaintiff. The 2nd Defendant accepted the title and registered a mortgage on it. The 1st Defendant defaulted to pay the 2nd Defendant who attached and sold to the 3rd Defendant, who also transferred to the 4th Defendant.

The Plaintiff filed Misc. Cause No. 406 of 2006 in objector proceedings, and the Commercial Court released the property from attachment and set aside the attachment and sale. From PW1, PW2 and PW3's evidence by the time of the release for the attachment, the property had been demolished partially and in need of replacement.

There is no evidence from the Defendants that challenges this fact; apart from a contestation of the qualifications of PW2 and his valuation report.

In their submissions on this point, the second Defendant claims that it had no direct dealing with the Plaintiff. They put the blame on the 3rd Defendant who hurriedly sold the house.

In their defence submissions, the 3rd Defendant on the other hand is stated that he bought the property legally. He argues that at the time the damage occurred, he was the registered proprietor of the suit property and was free to renovate it as he deemed fit. He denied any damage to the property. He also denied any liability to the Plaintiff and also referred to the failure by the Plaintiff to prove the assessed damages and the rentals claimed as fatal to his claims herein.

The 4th Defendant in defence and submissions also claims that by the time of nullification, the property was in the names if the 4th Defendant and the Plaintiff was not in possession. The 4th Defendant also argued that there was no proof of damage, since the valuer; (PW2) called to testify on them was discredited.

With all the above, it is clear that the chain of causation is running from the 1st Defendant to the 2nd Defendant to the 3rd Defendant and the 4th Defendant. All these parties took part in changing the *status quo* regarding the property by the time of the nullification. It is not therefore doubttable (as confessed by the 3rd Defendant), that the property was dealt with by the 3rd Defendant who even attempted to have it renovated.

It is therefore not in doubt that the *status quo* of the property as at the time of handing back to the Plaintiff was altered. I do find that the Plaintiff is therefore right to sue for compensation for damages arising from the damage/demolition occasioned to her property at the time it was held by the Defendants. It is however my finding that the Plaintiff did not prove the amount of compensation she had claimed and put as shs. 90,600,000/- only (*ninety million, six hundred thousand)*, since the valuation report was found unreliable.

The next question to determine, is who should compensate the Plaintiff?

From the evidence and facts as enumerated above, it is obvious that this is a case of *vicarious liabilities* as between the Plaintiff and the Defendants.

The actions of the 1st Defendant led to the 2nd Defendants' action, which in turn gave rise to the 3rd Defendants' dealings on the land. The 3rd and 4th Defendant are related and from the evidence on record the chain of causation is so closely interwoven to such an extent that all these Defendants take blame for the resultant damage to the Plaintiffs' land/house.

I therefore agree with the Plaintiffs' submissions that the Defendants are jointly and severally liable for the loss occasioned to the Plaintiff.

While addressing this issue, Counsel moved this Court to invoke Section 26 of the Judicature Act and also to invoke Article 126 (1) (c) and (e) of the Constitution so and I order for adequate compensation to be assessed by a special referee.

I do not agree that this case requires a special referee. The parties are at liberty to lead evidence in proof of their respective case. The Plaintiff filed evidence of PW2 who even submitted values. It is the defence who vigorously cross examined PW2 and hence successfully discredited his evidence. The Plaintiff was left with no evidence in proof of the actual figure of loss on this point. It is therefore an afterthought to resort to Section 26 of the Judicature Act.

Having failed to prove the actual amount of shs. 90,600,000/- only (*ninety million, six hundred thousand)*, as the loss before Court, the Law of Evidence under Section 101 and 102 came into play and the Plaintiff failed to prove this fact. Therefore Section 26 of the Judicature Act is not available to her.

In conclusion on this issue, I hold that the Plaintiff has proved that there was damage to her property and all the Defendants are liable.

[2] Whether either of the Defendants is entitled to indemnification against the other and by who

From the facts herein, the facts and evidence show that the key culprit is the 1st Defendant. As held in Civil suit No. 426 of 2006, arising from Misc. Cause No. 399/2006 and Civil Suit No. 662 of 2005 by the Commercial Court, there was lack of doing due diligence by the 2nd Defendant to ascertain the title presented to it by the 1st Defendant was authentic. However, the 1st Defendant acted with impunity and he is therefore liable to make good the 2nd Defendants' loss.

As between the 2nd and the 3rd Defendant, there was rush behavior by the 3rd Defendant. As it is clear from the pleadings that the 3rd Defendant was made aware of the objector proceedings, but he went ahead to deal with the property thereby escalating the losses occasioned. The actions of the 3rd Defendant in selling the property to the 4th Defendant was a voluntary assumption of risk; since Court had already begun hearing the objector proceedings to which he was a party.

From the facts as they are presented by the parties, the sale had been nullified by Court. The 2nd Defendant bears the blame as the one who advertised the property which it dealt with without establishing the proper facts regarding its ownership as between the 1st Defendant and the Plaintiff and caused the response to its adverts by the 3rd Defendant. Therefore the 2nd Defendant has the burden to indemnify the 3rd Defendant for their losses and pay back the monies they received from the 3rd Defendant.

Similarly, the 3rd Defendant bears the burden to indemnify the 4th Defendant for their losses to the extent of the expenditures incurred in the foiled purchase.

[3] What remedies are available

Having found that all the Defendants are liable to make good the Plaintiffs' loss/damage arising from this transaction, I hold as follows;

1. Compensation

The figure of shs. 90,000,000/- only (*ninety million, six hundred thousand*) was not proved.

1. Damages

The Plaintiff prayed for damages for lost earnings. She claimed that the house was aimed at being rented at shs. 1,000,000/- only (*one million)* per month. This amount is claimed as a future loss, claimed among the genre of general damages.

Being general damages, it is trite law that it ought not to be specifically pleaded as is the case with special damages.

In assessing future lost earnings, Courts are normally guided by the evidence adduced, past awards and general judicial consideration. I do agree with the principle in ***Robert Cuossens V AG. Civil Appeal NO. 8/1999*** where **Order JSC** held that;

“In practice, since the future loss cannot usually be provided, the Court has to make broad estimate taking into account all proved facts and probabilities of the particular case”

I do therefore agree with Counsel for the Plaintiff that the Plaintiff is entitled to this prayer. For the said loss, this Court considers that given the commercial value of such plots in Uganda, the least the Plaintiff would earn is about shs. 100,000/- only (*one hundred thousand)* per month, hence shs. 1,200,000/- (*one million, two hundred thousand)* per annum.

From the year 2006, to the year 2018 (April) is about 11 years. Hence shs. 1,200,000/- x 11 = shs. 13,200,000/- (*thirteen million, two hundred thousand*) only. I grant the Plaintiff shs. 13,200,000/- (*thirteen million, two hundred thousand*) only as damages for lost earning.

The Plaintiff also suffered pain, and psychological torture, which she testified to. This Court will grant her shs. 2,000,000/- (*two million)* per year for 11 years = 22,000,000/- only (*twenty two million)*.

The general damages allowable to the Plaintiff as against all the Defendants jointly and severally are;

1. Shs. 13,200,000/- for lost earning
2. Shs. 22,000,000/- for pain and suffering

The total is shs. 35,200,000/- (*thirty five million, two hundred thousand)* only.

Costs

It is trite law that costs follow the event. The Plaintiff is granted costs against the 1st, 2nd, 3rd 4th and 5th Defendants as prayed.

Interest

Interest is discretionary; (*See*[*Harbutt's Plasticine* *Ltd versus* Wayne Tank *and* Pump Co Ltd: *CA [1970] 1 QB*](<http://swarb.co.uk/harbutts-plasticine-ltd-v-wayne-tank-and-pump-co-ltd-ca-1970/>)

The position of the law is that interest on special damages is awarded from the date of filing the suit until payment in full while interest on general damages is awarded from the date of Judgment until payment.

I will therefore grant interest at Court rate on the general damages from the date of Judgment, till payment in full.

What are the individual liabilities between the Defendants?

During scheduling, after consolidation, a number of facts were agreed upon showing basically that there were agreed responsibilities as between the Defendants towards each other on the one hand and between them and the Plaintiff.

Evidence for the Defendants in Court was given through the evidence led by DW1; Ssegawa Ronald Gyagenda (for Civil Suit No. 003/2013) *Ssegawa versus Uganda Micro Finance* now (D3) and (D2). Evidence was also received from the exhibits D3; (a)-Agreement, D3(b)-Memorandum of understanding, D3 (c)-Receipts D3 (d)-letter of demand for money, D3(e); acknowledgement of money received from the High Court. DW2; Kyewalabye Dennis, testified for the 1st Defendant; Kimbugwe Jemba.

From the evidence and pleadings on record in this case, there was proof of the following facts;

The sale of the Plaintiffs' land was master minded by the 1st Defendant; Kimbugwe Jemba Jackson. When the 1st Defendant pledged the title for the suit property to D2; Uganda Micro Finance Ltd, they accepted this security without conducting a due diligence test.

As a banking or money lending institution, which is fully fledged, the processing of mortgages includes carrying out of searches on properties before they are secured. A mortgagor and mortgagee are deemed to be in fiducial relationship while conducting their transactions. This

Defendant therefore owed a duty of care to those who would respond to its intended use of this title, to ensure that it is good and fit for the purpose. This did not happen and in the long run, the advertised sale, was nullified in Court, vide Misc. Application No. 406/2006; and Court released the property from attachment.

Arising from the evidence of DW1, DW2 and exhibits before Court, including the findings under Misc. Application No. 406/2006, where after a lengthy deliberation, court faulted both the 2nd and 3rd Defendant's role in the saga and condemned them to costs.

I do find that on the facts as they stand, by the time this sale was vacated, the 3rd Defendant had acted on the same and parted with shs. 60,000,000/- *(sixty million)* as payment for the land.

This evidence shows that shs. 25,000,000/- (*twenty five million*) was paid to the bailiff and shs. 35,000,000/- (*thirty five million*) paid in the High Court. Of the said shs. 35,000,000/-, shs. 22,206,000/- was recovered leaving a balance of shs.12,800,000/-. This therefore means that in respect of this transaction, the outstanding amount is shs. 25,000,000/- + shs. 12,800,000/- = shs. 37,800,000/-. This outstanding claim is the money recoverable by the 3rd Defendant from the 2nd Defendant since it was paid towards fulfilling the 2nd Defendants' advertisement and subsequent foiled sales transaction.

The rest of the claims that the 3rd Defendant pleaded for are not recoverable because he undertook them in bad faith. He was aware that the sale was already being challenged, but went ahead to deal with the property; and even resold it. His actions are not those of a bonafide purchaser for value without notice. The law is that a bonafide purchaser for value is the one who buys property for value without notice of another's' claim to the property and without actual constructive notice of any defects in or infirmities, claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claim.

A bonafide purchaser does all that is reasonably possible and necessary in his or her power to find out about all material facts pertaining to property before he or she could commit himself or herself to purchase the same. A bonafide purchaser must conduct due diligence and exercise all reasonable caution before sealing the transaction that will be binding on him.

The above postulates were re-echoed by J. A Bashaija in ***Amartlal Purshott Bhinji & Narmadben Purshottam versus Gian Sing Bhambra & Ors; Civil Suit No. 239/2009***.

Arising from the above findings, I hold that since D3 had been notified of the objector proceedings, all other subsequent steps taken in lieu of this property by him including selling to 4th Defendant, were irregular and in bad faith. He cannot recover anything from his illegal activities from the 2nd Defendant or any of the parties herein.

I therefore find as an answer to this issue of remedies as between the defendants under Civil Suit No. 0036/2013, (now Civil Suit No. 670/2006 as consolidated), that the 2nd Defendant is entitled to a refund of shs. 37,800,000/- only from the 2nd Defendant being the outstanding refund of funds remitted to the 2nd Defendant for the purchase of the suitland before the transaction was nullified by Court.

I do find in favour of the 3rd Defendant as against the 2nd Defendant in terms as above. Also given the nature of the transaction, each Defendant under this consolidated suit will bear their own costs.

Having found as above I do enter Judgment in terms as above for the Plaintiff as against all the Defendants herein, and for the 3rd Defendant as against the 2nd Defendant and for the 2nd Defendant as against the 1st Defendant in the terms discussed herein.

I so order.

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Henry I. Kawesa

JUDGE

2/5/2018

NB: Interest for the 3rd Defendant from the 2nd Defendant on the shs. 37,800,000/- (*thirty seven million, eight hundred thousand)* will be at court rate from the date of filing the suit to payment in full.

Right of Appeal communicated.

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Henry I. Kawesa

JUDGE

2/5/2018

02/05/2018

Kawesa Abubaker for 3rd and 4th Defendant.

Semakula for the 4th Defendant present

Kabega for the Plaintiff present.

Other Defendants absent.

Applicants absent.

Court: Judgment delivered.

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Henry I. Kawesa

JUDGE

02/05/2018

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