

UGANDA / JUDGMENT

Alokit v Turinomuji and Others (Civil Suit 150 of 2019) [2023] UGCommC 82 (27 September 2023) [2023] UGCommC 82

COURT

Commercial Court of Uganda

BEFORE

Abinyo, J

CASE / FILE NUMBER

Civil Suit 150 of 2019

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5 THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(COMMERCIAL DIVISION)****CIVIL SUIT No. 0150 OF 2019****10 ALOKIT ANN RACHEL PLAINTIFF****VERSUS**

- **1. TURINOMUJUNI NARCICIO**
- **2. KYARIKUNDA ANNET T/A ST. ANNA NURSERY AND PRIMARY DAY & BOARDING SCHOOL**
- **15 3. POST BANK UGANDA LIMITED DEFENDANTS**

BEFORE: HON. LADY JUSTICE SUSAN ABINYO**JUDGMENT****Introduction**

- 20 The Plaintiff brought this suit against the Defendants jointly, and severally for recovery of land, seeking the following reliefs: - declarations of joint ownership of land; that the suit land constitutes part of the family land; that the 1st Defendant's sale of the suit land to the 2nd Defendant is illegal; that the 2nd Defendant is a trespasser; that the 2nd and 3rd Defendants illegally and fraudulently mortgaged
- 25 the suit land to the 3rd Defendant; and orders for damages, vacant possession and or eviction, a permanent injunction to restrain the Defendants, and their agents from further trespassing on the suit land or in any other way interrupting the Plaintiff's use, and enjoyment of the suit land, interest, and costs of the suit.

Facts

The brief facts are that on the 19th day of July, 2008, the Plaintiff and the 1st 30 Defendant celebrated, and solemnised their church marriage at St Augustine Chapel Makerere, where the two later had three issues(Children). That on 4th October, 2011, the Plaintiff and the 1st Defendant jointly acquired land measuring approximately 15 acres situate at Nyairongo Village, Kaseeta Parish, Kabwoya 5 Sub County, Hoima District (now Kikube District) by way of purchase from Mr. Adidas Asimwe with clearly known neighbours.

That upon purchase, the Plaintiff and the 1st Defendant took immediate possession, cultivated and planted crops, bananas, trees, constructed a residential house thereon, enjoyed quiet use without interference from anyone

10 until 2013, when the Plaintiff found a school in the name of St Anna Nursery and Primary Day and Boarding School, being operated on land measuring approximately 5 acres, which formed part of the family land without her consent.

That the Plaintiff also found out in 2017, that the 1st Defendant had sold off the suit land measuring 5 acres to the 2nd Defendant without her consent. That the 2nd

- Defendant was informed of the illegal occupation of the suit land but the 2nd 15 Defendant refused or neglected to heed to the request. That later, the Plaintiff discovered that the suit land had been fraudulently and illegally mortgaged by the 1st and 2nd Defendants to the 3rd Defendant, who had advanced a loan to them.
- 20 The 1st and 2nd Defendants were served with summons however, they failed, and or refused to file a defence within the prescribed time, and upon an application by the Plaintiff, a default judgment was entered by the Learned Deputy Registrar on 24th June, 2019 against the 1st and 2nd Defendants.

- The 3rd Defendant filed its written statement of defence, and later entered into a 25 settlement with the Plaintiff, upon which a consent judgment was entered between the Plaintiff and the 3rd Defendant by the Learned Deputy Registrar on 19th September, 2019.

Representation

The Plaintiff was represented by Counsel James Kiiza of M/S Mugisa, Namutale & 30 Co. Advocates. The 3rd Defendant was represented by M/S Crimson Associated Advocates.

Issues for determination

The issues for Court's determination were set out in the Plaintiff's scheduling notes however, in accordance with Order 15 Rule 5(1) of the Civil Procedure Rules SI 71-

- 35 1, this Court amended the issues as follows:
- 1. Whether the suit property constituted family land? If so whether the sale of the suit property to the 2nd Defendant by the 1st Defendant was unlawful?
- 2. Whether the 2nd Defendant is a trespasser on the suit land?
- 3. Whether the mortgage of the suit property to the 3rd Defendant by the 1st 5 and 2nd Defendants was unlawful?
- 4. What are the remedies available to the parties?

Counsel for the Plaintiff filed the Plaintiff's witness statement, which was adopted by this Court during the hearing proceedings as the evidence in chief for the 10 Plaintiff. The said evidence will be evaluated hereunder.

Issues 1, 2, and 3 will be resolved concurrently, and issue 4 separately as below.

- 1. Whether the suit property constituted family land? If so whether the sale of the suit property to the 2nd Defendant by the 1st Defendant was unlawful?
- 2. Whether the 2nd Defendant is a trespasser on the suit land?
- 3. Whether the mortgage of the suit property to the 3rd Defendant by the 1st 15 and 2nd Defendants was unlawful?

Counsel for the Plaintiff submitted that under Article 31 of the Constitution of Uganda, married couples enjoy equal rights therefore, their interests in land are protected especially when they have jointly acquired the land.

20 Counsel relied on the definition of the phrase "family land" under section 38A of the Land Act, Cap 227 (as amended), to submit that the suit property constitutes family land.

Counsel argued that the sale of the suit property by the 1st Defendant to the 2nd Defendant was void for lack of spousal consent by the Plaintiff, and that the 25 subsequent mortgage of the suit land to the 3rd Defendant by the 2nd Defendant

Evidence

was fraudulent, and illegal.

Alokit Ann Rachel (PW1) stated that on the 19th day of July, 2008, the 1st Defendant and herself celebrated, and solemnised their church marriage at St

30 Augustine Chapel Makerere, where the two later had three issues(Children). A certificate of marriage(PE6) was adduced by the Plaintiff to prove the said marriage.

PW1 further stated that on 4th October, 2011, the Defendant and the Plaintiff jointly acquired land measuring approximately 15 acres situate at Nyairongo 35 Village, Kassite Parish, Kabwoya Sub County, Hoima District (now Kikube District)

by way of purchase from Mr. Adidas Asiimwe with clearly known neighbours.

5 A copy of the purchase Agreement dated 4th October, 2011(PE7) was adduced by the Plaintiff to prove that the suit property was purchased jointly by the Plaintiff, and the 1st Defendant.

In addition, that upon purchase, the Plaintiff and the 1st Defendant took immediate possession, cultivated and planted crops, bananas, trees, constructed

- 10 a residential house thereon (photographs were exhibited, and marked as "PE1"), enjoyed quiet use without interference from anyone until 2013, when the Plaintiff found a school in the name of St Anna Nursery and Primary Day and Boarding School, being operated on land measuring approximately 5 acres, which forms part of the family land without her consent.
- 15 PW1 contended that she also found out in 2017, that the 1st Defendant had sold the suit land measuring 5 acres to the 2nd Defendant without her consent. That the 2nd Defendant was informed of the illegal occupation of the suit land (letter was marked as "PE2") but the 2nd Defendant failed or refused to heed to the request. That later, the Plaintiff discovered that the suit land had been fraudulently
- 20 and illegally mortgaged by the 1st and 2nd Defendants to the 3rd Defendant, who had advanced a loan to them. That the Plaintiff, and the 3rd Defendant entered into a settlement, upon which a consent judgment was entered.

PW1 further contended that the she has suffered untold anguish, discomfort, inconvenience, and economic loss for which, she seeks general damages.

25 Decision

The term unlawful means not authorised by law. *(See Black's Law Dictionary 9th Edition pg. 1678)*

Article 31(1) (b) of the Constitution of the Republic of Uganda (as amended) provides for equal rights of spouses at and in marriage, during marriage, and at its dissolution.

The proposition of the law is that, whoever alleges a given fact, and desires the Court to give judgment on any legal right or liability dependent on the existence of any fact, has the burden to prove that fact unless, it is provided by law that the

proof of that fact shall lie on another person. *(See sections 101 and 103 of the Evidence Act, Cap 6*, and *Jovelyn Barugahare Vs Attorney General SC Civil Appeal No. 28 of 1993[1994] KALR 190)*

- 5 It's a well-established principle that even when the Plaintiff either proceeds *ex parte* or in default of the Defendant to file a defence, the burden of proof still remains on the Plaintiff to prove his or her case to the required standard, which is on a balance of probabilities. *(See *Yoswa Kityo Vs Eriya Kaddu* [1982] HCB 58)*
- 10 Section 39 of the Land Act, Cap 227(as amended) provides for restrictions on transfer of family land as follows: -
 - (1) No person shall—
 - (a) sell, exchange, transfer, pledge, mortgage or lease any family land;
 - (b) enter into any contract for the sale, exchange, transfer, pledging, mortgage

15 or lease of any family land; or (c) give away any family land, inter vivos, or enter into any other transaction in respect of family land; except with the prior consent of his or her spouse. [Emphasis is mine]

In the instant case, the Plaintiff's evidence that she found out in 2017, that the 1st Defendant had sold the suit property measuring 5 acres to the 2nd Defendant without her consent as a spouse, and that the mortgage of the suit property to the 3rd Defendant by the 1st, and 2nd Defendants with the purported consent of the 2nd Defendant as a spouse to the 1st Defendant whereas not, was uncontroverted by the 1st and 2nd Defendants.

For the foregoing reasons, I find that the Plaintiff has discharged the burden of proof to the required standard, which is on a balance of probabilities against the 1st and 2nd Defendants that their acts are unlawful.

Accordingly, I find issues 1, and 3 in the affirmative, and further find that the 2nd Defendant is a trespasser on the suit property.

Issue No. 4: What are the remedies available to the parties?

Having found issues 1, 2, and 3 above in the affirmative, this Court further finds that the following remedies sought for by the Plaintiff are available.

It's settled law that an award of general damages is at the discretion of Court 35 which, should be exercised judiciously. (*See Crown Beverages Vs Sendi S. C. C. A No. 1 of 2005*).

- 5 In the case of *Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305,* the factors to be considered by the Courts when assessing the quantum of general damages are enunciated as follows: - the value of the subject matter; the economic inconvenience that the Plaintiff may have been put through, and the nature and extent of the injury suffered.
- 10 Following the guidance in *Uganda Commercial Bank Vs Kigozi* above, I find that the sum of UGX 30,000,000 (Uganda Shillings Thirty Million only) in general damages, will suffice for the Plaintiff, who has proved that she has suffered economic loss, untold anguish, discomfort, and inconvenience, as a result of the 1st and 2nd Defendants unlawful acts.
- 15 Its trite law that interest should be awarded on damages from the date of Judgment until payment in full. (*See M*ukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd No.2 [1970] EA 469)*

Accordingly, interest is awarded on the sum of UGX 30,000,000(Uganda Shillings Thirty Million only) in general damages to the Plaintiffs as above at the rate of 6% 20 per annum from the date of judgment till payment in full.

This Court has taken into consideration the provision of the law under subsection 1 of section 27 of the Civil Procedure Act, Cap 71 on costs and the decision in *Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) HCB 35* where Justice Manyindo (as he then was) held that:

25 "A successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit"

I find no reason to deny the Plaintiff costs and accordingly, the Plaintiff is awarded costs of this suit.

- Accordingly, Judgment is hereby entered for the Plaintiff against the 1st and 2nd 30 Defendants in the following terms:
- 1. A declaration of joint ownership of land by the Plaintiff, and the 1st Defendant, and that the suit property constitutes part of the family land.
- 2. A declaration that the 1st Defendant's sale of the suit property to the 2nd 35 Defendant was unlawful.
- 3. A declaration that the mortgage of the suit property to the 3rd Defendant by the 1st and 2nd Defendants was unlawful.

- 4. A declaration that the 2nd Defendant is a trespasser.
- 5. An order for vacant possession, and or eviction.
- 5 6. An order for a permanent injunction to restrain the Defendants, and their agents from further trespassing on the suit property.
- 7. An order for delivery of the original sale agreement in possession of the 3rd Defendant, in accordance with the consent judgment.
- 8. General damages of UGX 30,000,000(Uganda Shillings Thirty Million only)
- 10 9. Interest on (8) above at the rate of 6% per annum from the date of judgment till payment in full.
- 10. Costs of the suit.

Delivered electronically this 27th day of September, 2023.

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| | SUSAN ABINYO |

| | JUDGE |

| | 27/09/2023 |

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