

UGANDA / JUDGMENT

Ddamurila & Ors v Nassuna

(Civil Suit No. 321 of 2004) [2013]

UGHCLD 88 (29 November 2013)

[2013] UGHCLD 88

COURT

HC: Land Division (Uganda)

BEFORE

Bashaija, J

CASE / FILE NUMBER

Civil Suit No. 321 of 2004

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 321 OF 2004

1. DDAMULIRA MUSA
2. MADINA NASSEJJE
3. LUTWAMA JUMA ::::::::::::::::::::::::::::::::::: PLAINTIFFS
4. SULAIMAN NSIMBE
5. SSEBUGWAWO ISMAIL

VERSUS

HAJATI NASSUNA HANIFA ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW***JUDGMENT:******Background.***

The Plaintiffs brought this suit for recovery of land comprised in ***Kibuga Block 18 Plot 234 at Nateete*** (hereinafter referred to as the “suit land”). Originally, the suit was brought against Shaban Zizinga and Mustafa Muyingo as the 1st and 2nd Defendants respectively (hereinafter called the “original Defendants”) in their capacity as Administrators of the estate of late Ali

Nsimbe Kikuuno. They are both now deceased. The two were jointly sued with the Commissioner for Land Registration as the 3rd Defendant, who did not file a defence despite being duly served with summons. The matter proceeded **ex parte** under ***Order 9 r.8*** of the ***Civil Procedure Rules (CPR)***.

On 5/7/2006 court was notified that the 2nd Defendant had passed away. The suit was thus maintained against the surviving Administrator as the sole Defendant. Due to her very advanced age, she also appointed an Attorney (DW1) and the hearing commenced. The surviving Defendant also later passed away. By consent order of 8/05/2012 Hajat Nassuna Hanifah **(hereinafter referred to as the “current Defendant”)** was substituted as Defendant upon being appointed Administrator of the estate of Ali Nsimbe Kikuuno on 15/11/2011.

The Plaintiffs’ case is that they are the Administrators of the Estate of their late father, Asuman Numba Ddamulira, having been duly appointed by the High Court at Kampala on 26/11/2001. The said late Asuman Numba Ddamulira was brother to the late Ali Nsimbe Kikuuno who owned the suit land herein, which was leased to Mengo Municipal Council (later Kampala City Council). They aver that by way of donation, the late Ali Nsimbe Kikuuno gifted the said land to their father, who then transferred it into his names in 1967 vide **Instrument No. K48339**. That since then their father received rent there from until his death, and that the Plaintiffs continued to do the same after their father’s death. On being appointed Administrators, the Plaintiffs proceeded to get registered as proprietors of the suit land, but only to find from the Land Office that the original Defendants had been registered thereon as proprietors in their capacity as Administrators of the estate of Ali Nsimbe Kikuuno; yet Ali Nsimbe Kikuuno was not the immediate previous registered proprietor, hence this suit.

The Defendants’ case, on the other hand, is that the registration of Asuman Numba Ddamulira as proprietor in 1967 was fraudulent. The Defendant is daughter of the late Ali Nsimbe Kikuuno, and the current administrator of his estate by virtue of ***High court* *Administration Cause No. 672 of 2011.*** The Defendants aver that Ali Nsimbe passed on in December 1966, and that prior to his demise he was the registered proprietor of the suit land. That on 7/05/1964, he executed a power of attorney to Asuman Numba Ddamulira, father to now the Plaintiffs, granting him authority to lease the suit land on his behalf. In accordance with this power of attorney, the Plaintiffs’ father leased out the suit land to Mengo Municipal Council for a period of 99 years, and that the lease still subsists to date. That after Ali Nsimbe’s demise in 1966, the Plaintiffs’ father obtained letters of administration to his estate ostensibly with a Will annexed. However, that this was later challenged by the original Defendants who instituted a suit against him for revocation of the grant, vide ***Originating Summons No. 568 of 1997(hereinafter referred to as* *“(Civil Suit No 568 of 1997”)***.*^{***} The letters of administration were revoked in favour of the two original Defendants, who subsequently became Administrators of the estate of the late Ali Nsimbe Kikuuno.

The Defendants aver that they then looked for the Duplicate Certificate of Title to the suit land to no avail. They applied for a Special Certificate of Title in 2002. After their application was gazetted, a Special Certificate of Title was issued in their names as joint administrators of the estate of the late Ali Nsimbe. That shortly thereafter, however, the Plaintiffs showed up with the Duplicate Certificate of Title claiming that the suit land was given to their late father as a gift by Ali Nsimbe in 1966. The original Defendants disputed this claim, hence this suit.

The agreed issues as per the parties' joint Scheduling Memorandum are;

1. ***Whether the suit land formed part of the estate of Ali Nsimbe Kikuuno or the late Asuman Numba Ddamulira.***
2. ***Whether the 1st and 2nd Defendant (original Defendants) got registered as proprietors of the suit land by fraud.***
3. ***Remedies available to the parties.***

M/s Sseguya & Co. Advocates represented the Plaintiffs, while *M/s. DN Kabugo Advocates* the Defendants. Both Counsel argued the case by filing written submissions which I have taken into account in arriving at the decision. I will, however, not reproduce them in detail but I will constantly refer to them in this judgment.

Resolution.

Issue No.1

This issue is essentially the fulcrum of the entire case in that it seeks the determination as to whether the suit land forms part of the estate of late Ali Nsimbe Kikuuno or of late Asuman Numba Ddamulira. There are two Certificates of Title on court record in respect of the same suit land, that is; *Exhibit P2* a Duplicate Certificate of Title in names of Asuman Numba Ddamulira, the original Plaintiff, and *Exhibit D1* a Special Certificate of Title in names of the original Defendants. Both titles have documented history of ownership, and clearly Asuman Numba Ddamulira, was registered as proprietor on 19/09/1967. A 99 - year lease of Mengo Municipal Council was also registered thereon as an encumbrance on 14/12/1964. It is, therefore, necessary to investigate the propriety of how the suit land came to be in the names of the Plaintiffs' father, and how the original Defendants came to be registered as Administrators on Exhibit D1 the Special Certificate of Title.

PW1, Juma Lutwama testified that the late Ali Nsimbe gave the suit land as a gift to the Plaintiffs' father. To support this claim PW1 produced a copy of a document of the said gift which was marked as *Exhibit P.2.* He further testified that Asuman Numba Ddamulira then transferred the suit land into his names on 14/09/1966 in the presence of, among others, one K. Wagaba the then Gombolola Chief, who duly signed and stamped with the official stamp the same as can be seen on the flip-side of *Exhibit P2*. That from then the suit land became part of the Plaintiffs' father's estate.

The Defendants strongly contested the Plaintiffs' claim, and averred, in paragraph 3 of the Written Statement of Defence, that the late Asuman Numba Ddamulira criminally and fraudulently acquired the suit land, and that late Ali Nsimbe never gave the land to him as a gift or at all. DW1, Bulega Muhamudu, testified that the thumb marks of late Ali Kikuno Nsimbe on the purported document of a gift and transfer were forged. That a finger print expert examined the thumb prints on *Exhibit P2* and found them to have been forged. The Defendants attached a document of thumb print comparison to their pleadings as *Annexure" Z",* which was identified by DW1 and marked as **"*ID5"**. Based on the findings in **"*ID5"** the Defendants maintained that the suit land is part of late Nsimbe's estate, and not of late Asuman Numba Ddamulira's estate.

A cursory reading of **"*Annexure Z"** easily shows that it is a document authored by the *Identification Bureau of the Police* at the Police Headquarters, Kampala dated 11/11/1994. It was signed for Detective Assistant Commissioner of Police one Mubiru – Mukasa, Chief of Identification Bureau. The said document was put on court record only for identification through DW1, but it was never admitted in evidence as an exhibit. Neither the author nor any person from the Identification Bureau of the Police was ever called to testify upon its contents.

Counsel for the Defendants then, Mr. P. Ayigihugu, tendered in the document for identification by DW1, and indicated that they would be calling the author to be examined on the contents and to tender it in evidence as exhibit, but throughout the trial no author of the document or any other person was called to be examined on or tender it in evidence an exhibit. It remained purely a document only for identification.

It is the established law, as was held in the cases of ***Des Raj Sharma v. Reginam (1953) 20 EACA 310; Amer v. Republic (1972) EA 324,*** which were cited with approval by the Supreme Court in the case of ***Okwonga Anthony v. Uganda S. C. Crim Appeal No. 20 of 2000,*** that there is a distinction between exhibits and articles for identification. The term exhibits should be confined to articles which have been formally proved and admitted in evidence. Articles for identification cannot be relied upon as evidence.

Going by the same principles above, it would follow that that the document **"*ID5"** in the instant case is purely an "article" for identification and not an exhibit, and hence cannot be relied upon by court as evidence. It was not formally proved nor was it admitted as exhibit. In absence of any evidence to impeach the authenticity of *Exhibit P2* which is a gift document in which the suit land is said to have been donated to the Plaintiffs' father by the late Ali Nsimbe was forged, the allegations of fraud on part of late Asuman Numba Ddamulira do not hold, and the suit land is regarded as lawfully being part of Asuman Numba Ddamulira's estate, and remains so.

Issue 2.

The Plaintiffs allege that the 1st and 2nd Defendant (original Defendants) got registered as proprietors of the suit land by fraud. It is called for to restate the position of the law as to what amounts to fraud. The Supreme Court in **Kampala Bottlers Ltd. v Damanico (U) Ltd. S. C. Civ. Appeal No.22 of 1992,** quoting with approval the case of **Wainiha Saw Milling Co. Ltd v. Waione Timber Co. Ltd (1926) AC 101 at 108** held that*;*

“Now fraud implies some act of dishonesty... Fraud in these cases, i.e., actions seeking to affect a registered title means actual fraud, dishonesty of some sort, but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud.”*

Osborn Concise Dictionary 8th Edition, which was also relied upon by Counsel for the Plaintiff defines fraud as follows;

“...the obtaining of a material advantage by unfair or wrongful means. It involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth or reckless. If the fraud causes injury, the deceived party may claim damages for the sort of deceit *.”

Similarly, it was held in **John Katarikawe v. Katwiremu and another [1977] HCB 153** that fraud though not defined in the RTA covers dishonest dealing in land. See also: **David Sejjaka v. Rebecca Musoke, Civ. Appeal No. 12 of 1985.**

In the instant case, to prove fraud, PW1 Juma Lutwama adduced in evidence a copy of the disputed Certificate of Title for the suit land, **Exhibit P2**, which shows that the same is still registered in the names of Asuman Numba Ddamulira, as from 19/09/1967, vide **Instrument No. K48339**. PW1 testified that in spite of that, the original Defendants had applied for and obtained a Special Certificate of Title, **Exhibit D1**, for the same land, yet at the time of their application the land was not in names of Ali Nsimbe Kikuuno, whose estate they were administering.

PW1 further testified that he inquired from the Registrar of Titles as to how that could have occurred, but was not assisted. The Plaintiffs contend that legally and practically it would only be the Administrators of the Estate of Asuman Numba Ddamulira who would have been registered as proprietors, or in event of loss of the title, who would have applied for a Special Certificate of Title. That it is strange and abnormal that the entry on the Special Certificate of Title , **Exhibit D1** reflects the Administrators of estate of Ali Nsimbe Kikuuno instead of those Asuman Numba Ddamulira, and that there is no explanation how this could have been done, other than through fraud.

The Defendants vehemently deny the Plaintiffs’ claims, and contend that they rightfully got registered as proprietors of the suit land. DW1 testified that the reason the original Defendants applied for a Special Certificate of Title is because they were convinced that the Duplicate Certificate of Title to the suit land was lost. Further, that the chronology of events shows that the title went missing during the time the late Asuman Ddamulira was Administrator of the estate of the late Ali Nsimbe, and that he was so secretive in his duties as Administrator that he

deliberately refused to disclose the size of Ali Nsimbe's estate; a fact that was confirmed by the court in its judgment in ***Civil Suit No. 568 of 1987* (*EX B8)***. That it is hardly surprising that the original Defendants were convinced that the Duplicate Certificate of Title had got lost.

The Defendants contend that they took steps in accordance with ***Section 70 of the Registration of Tittles Act,*** which lays out the procedure for obtaining a Special Certificate of Title. That they made an application to the Land Office, and the Registrar of Titles gazetted the application as per ***Exhibit D6,*** and after the specified period, issued the Special Certificate of Title, ***Exhibit D1*.** DW1 maintained that no one responded to the gazette notice, and the Defendants were thus rightfully registered on the title.

I have had the benefit of reading and appreciating the contents of ***Exhibit D8,*** the judgment by Justice Mukanza (R. I. P.) in ***Civil Suit No. 568 of 1987.*** There is not anywhere in the judgment an order for the cancellation of late Asuman Ddamulira as a registered proprietor of the suit land nor any finding by the court that he used forged documents; as was claimed in the testimony of DW1. ***Civil Suit No. 568 of 1987*** was instituted for the revocation of the 1969 grant of letters of administration to Asuman Numba Ddamulira. It was not challenging his registration of as proprietor on the suit land.

The registration Asuman Numba Ddamulira as proprietor on the title could not have been as a result of his being the Administrator. He got registered way back in 1967 before the grant, which was issued later in 1969. It is only logical that by that time the suit land had long ceased being part of the estate late Ali Nsimbe to be administered, and was a personal estate of Asuman Numba Ddamulira. Therefore, ***Civil Suit No. 568 of 1987*** had no bearing on the suit land.

The above being the position, there was no court order upon which the Registrar of Titles would act to register the original Defendants on the Special Certificate of Title. The suit land had long been transferred into the names for Asuman Numba Ddamulira in 1967, as per the transfer and gift in ***Exhibit D2*.** The remaining options are that the Registrar of titles either deliberately misconstrued, or was misled as to the contents of ***Civil Suit No. 568 of 1987*.** Otherwise, there is no logical explanation as to how an application by the original Defendants could have been allowed and they get registered on the Special Certificate of Title which was not in names of the estate they were administering. It should have been quite obvious to the Registrar of titles from the Notice and the gazette, ***Exhibit. D2*,** prior to the issuance of the Special Certificate of Title that the Defendants were described as ***"Administrators of the Estate of Ali Nsimbe Kikuuno".*** Since the suit land did not form part of or in the names of Ali Nsimbe Kikuuno, the Registrar ought not to have entered it.

The remaining issue is whether the registration of the original Defendants as Administrators of the estate of Ali Nsimbe Kikuuno on the suit land was procured through fraud, and if so to whom would the fraud be attributable as between the Registrar of Titles and the original Defendants?

In paragraph 8 of the amended plaint, the Plaintiffs pleaded specifically the particulars of fraud, that the original Defendants held out that the suit land was part and parcel of the estate of late Ali Nsimbe whereas not; and that they have beneficial interest whereas not. Further, that they

applied to be registered as proprietors of the suit land with the knowledge that they had no interest in it, and procured registration as proprietors of the suit land. That they applied for a Special Certificate of Title to land registered in the names of Asuman Numba Ddamulira when they were not the Administrators of his estate, and that as a result they converted the suit land to themselves resulting in damage and loss to the Plaintiffs. PW1 adduced evidence to prove these particulars.

For their part, the Defendants deny these particulars, and strongly contend and assert their claim in paragraph 8 of the Written Statement of Defence that the suit land was part of late Ali Nsimbe's estate. They insist that they had beneficial interest in the suit land as sons of late Ali Nsimbe, and that they registered the suit land knowing that they had interest.

After carefully appraising the pleadings, the evidence and submissions of Counsel for the parties, it is evident that the actions of the original Defendants as Administrators of estate of Ali Nsimbe Kikuuno in applying for a Special Certificate of Title over suit land which was already registered in names Asuman Numba Ddamulira, was tainted with fraud. As earlier observed, there was no court order arising out of ***Civil Suit No. 568 of 1987*** which either cancelled Asuman Numba Ddamulira as registered proprietor or conferred proprietorship of the suit land on to the Defendants.

Further, the original Defendants in their application for Special Certificate of Title, deposed a Statutory Declaration, and executed the Application for Registration as Administrators, in which they obviously misrepresented that the Duplicate Certificate of Title had got lost. These misrepresentations were carried over to ***Exhibit D6,*** the Notice in the gazette. It would also appear from the evidence, as demonstrated in letter by KCC ***(Annexure T)*** that the Defendants have since their registration, continued to hold out as the legitimate proprietors, hence frustrating rental payments to the Plaintiff from the lessee on the suit land. To my mind these actions of the Defendants were done knowingly and dishonestly in order to deprive the Plaintiffs of the suit land and rentals there from. The Defendants admit that much in paragraph 8(iii) of the WSD that they knowingly registered the land. These actions prove the fraud, which the Plaintiffs had pleaded in the particulars in the plaint.

Certainly, the action of the Registrar of Titles in honoring the Defendants' application tells a lot in itself. It could not have been just an innocent act wrongly done by mistake. The Registrar was a better placed person to have known that the actions of the Defendants were; and or amounted to fraud. The Registrar had at his or her disposal all the information on the original Certificate of Title (White Page) which clearly reflects the history of ownership and the registered proprietor as Asuman Numba Ddamulira. He or she could not have just been misled by the Defendants or by any court order in ***Civil Suit No. 568 of 1987;*** because it never conferred proprietorship of the suit land on to the Defendants.

In addition, any entries on to the Register as regards the Special Certificate of Title ought to have been issued in the names of the person immediately last registered on the Original Certificate of Title (White page) or the Administrator of that person's estate, and not of a different person whose estate is not part of the estate being administered. It must be that the Registrar either abated or was complicit in the Defendants' fraud, and should therefore be faulted.

Before taking leave of this matter, I wish to point out that original Defendants filed a counter – claim on 20/02/2007, but never followed through with it. There is no evidence that it was ever served on the Plaintiffs or that it was responded to. It was filed out of time and never complied with provisions of ***Order 8 rr.2, 7 & 8 CPR*** both in form and content. It was never addressed by Counsel for the parties. It seems to have been abandoned altogether; and that is its fate.

Issue No.3

This issue concerns the remedies available to the parties. The Plaintiffs prayed for general and exemplary damages against the Defendants. ***Section 178 of the RTA*** stipulates that a person fraudulently deprived of his land is entitled to damages. It is also established law that the award of general damages is at the discretion of court, and always as the law will presume to be the natural consequence of the defendant's act or omission. See: ***James Fredrick Nsubuga v. Attorney General, H. C. C. S No. 13 of 1993***. Further, a plaintiff who suffers damage due to the wrongful act of a defendant must be put in the position he or she would have been in had she or he not suffered the wrong. See: ***Charles Acire v. Myaana Engola, H. C. C. S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S. C. Civ. Appeal No.17 of 1992.***

The Plaintiffs led evidence showing that they no longer receive the rental accruing from lease on the suit land ever since the Defendants got fraudulently registered thereon. However, the rentals ought to have been claimed as special damages, and needed to be specifically pleaded and proved by the Plaintiffs; which was not done. It follows that the rentals cannot form the basis for the award of general damages in this case. Court, nonetheless, presumes that as a natural consequence of the Defendants' fraudulent acts the Plaintiffs occasioned general loss which ought to be atoned for. Taking the circumstances of this particular case, and the evidence adduced as to what the Plaintiffs have been put through as a result of Defendants' fraud, the Plaintiffs are awarded general damages of U. Shs. 30 million.

Having found that the Defendants were fraudulently registered, it is also declared and ordered as follows;

1. ***The registration of the original Defendants as proprietors of the suit land was unlawful and fraudulent.***
2. ***The Certificate of Title be rectified by cancelling the Special Certificate of Title issued to the original Defendants, and the Plaintiffs be registered as Administrators of the Estate of Asuman Numba Ddamulira, as the lawful and rightful proprietors.***

3. ***The 3rd Defendant, the Commissioner of Land Registration, cancels the entry of the Defendants from the Register, and enters/registers thereon the Plaintiffs as Administrators to the Estate of the Late Asuman Numba Ddamulira, in the respect of the suit land.***
4. ***The cancellation of the Special Certificate of title held by the Defendants and entry on the Duplicate Certificate of title for suit land held by the Plaintiffs as Administrators thereof.***
5. ***The Plaintiffs are awarded costs of this suit.***

BASHAIJA K. ANDREW

JUDGE

29/11/2013.

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