

UGANDA / JUDGMENT

Karabyo v Malavu and Another (HCT-00-LD-CS 1002 of 2020) [2024] UGHCLD 222 (19 September 2024) [2024] UGHCLD 222

COURT

HC: Land Division (Uganda)

BEFORE

Bernard Namanya, J

CASE / FILE NUMBER

HCT-00-LD-CS 1002 of 2020

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA [LAND
DIVISION] CIVIL SUIT NO. HCT-00-LD-CS-1002-2020**

KARABYO MARIA MONICA: PLAINIFF (Suing through her lawful
appointed attorney Samson Karamagi)

VERSUS

1. MALAVU WILLIAM 2. COMMISSIONER LAND REGISTRATION:
DEFENDANTS

BEFORE: HON. JUSTICE BERNARD NAMANYA**JUDGMENT****Background:**

1. The plaintiff claims that the 1st defendant (Malavu William) was fraudulently registered as owner the property comprised in Kyadondo Block 229 Plot 1190 land at Kamuli measuring approximately 0.0460 Hectares. The plaintiff claims that she is a daughter of the late Rosemary Eleanor Karamagi who was the lawful owner of the suit property. She died on the 8 September 2015. Upon her death, the plaintiff took possession of the suit property and placed it in the hands of Kizza Francis as a caretaker. The plaintiff claims that as she was in the process of applying for letters of administration of the estate of her late mother, she discovered that the suit property had been fraudulently transferred into the name of the 1st defendant. In November 2020, the plaintiff received an eviction notice from the 1st

defendant. That although the suit property was auctioned by a court bailiff pursuant to a court order, the sale and attachment of the suit property was later nullified by a Ruling delivered by Hon. Justice Geoffrey Kiryabwire in 2006.

2. The 1st defendant denied any wrong doing, and asserted that he purchased the suit property from a court bailiff pursuant to a court order to sell the suit property, issued in High Court Civil Suit No.1018 of 2004 (Commercial Court): Angolinga Mahmood v. Eleanor Karamagi. He was then entered as the registered owner of the suit property. He denies knowledge of any court order nullifying the sale of the suit property to him. He wants court to declare that he purchased the suit property through a legitimate court process, and that no fraud can be attributed to him.

Representation:

3. The plaintiff was represented by Mr. Muhumuza Milton and Ms. Anita Nyamate. The 1st defendant was represented by Ms. Anne Karungi of M/s Karungi & Partners Advocates.

The plaintiffs' evidence:

- 4. The plaintiff produced two witnesses to prove her case: PW1(Karabyo Maria Monica/ plaintiff); and PW2 (Karamagi Samson). The plaintiff adduced evidence of the following documents that were exhibited:
- i) Exh. P1 A copy of power of attorney dated 20th June 2020, wherein the plaintiff gave powers of attorney to Tendo David;
- ii) Exh. P2 A copy of a certificate of title for the suit property showing the 1st defendant as the registered proprietor;
- iii) Exh. P3 A copy of a death certificate for Rosemary Eleanor Karamagi, issued on the 3rd May 2019;
- iv) Exh. P4 A copy of the statement of search dated 11th August 2020 for the suit property;
- v) Exh. P5 A copy of the application for a caveat dated 10th September 2020, by Tendo David, a donee of powers of attorney;
- vi) Exh. P6 A copy of a notice of eviction from the suit property issued by the 1st defendant;
- vii) Exh. P7 A copy of a power of attorney dated 28th July 2004 wherein the late Rosemary Eleanor Karamagi gave powers of attorney to Angolinga Mahmoud Salim;
- viii) Exh. P8 A copy of a sale agreement dated 28th July 2004 between the late Karamagi Rosemary Eleanor and Angoliga Mahmood Salim for the suit property;
- ix) Exh. P9 A copy of an order of attachment and sale of the suit property dated 23rd May 2005 in respect Civil Suit No.1018 of 2004, addressed to Sam Mutabazi, a court bailiff;

- x) Exh. P10 A copy of the application for a caveat dated 30th August 2005 by Rosemary Eleanor Karamagi;
- xi) Exh. P11 A copy of an order for delivery to purchaser of land after a sale in execution dated 8th November 2005, addressed to Sam Mutabazi a court bailiff;
- xii) Exh. P12 A copy of a Ruling dated 26th October 2006, delivered by the Hon. Justice Geoffrey Kiryabwire in Rosemary Eleanor Karamagi v. Angolinga Mahmoud, Miscellaneous Application No.733 of 2005;
- xiii) Exh. P13 A copy of a birth certificate of Mary Monica Karabyo showing Rosemary Eleanor Karamagi and Bwanika Bbaale as her mother and father respectively;
- xiv) Exh. P14 A copy of statement of search dated 7th December 2020 for the suit property showing Malavu William as the registered proprietor and caveat applications by William Malavu and Tendo David on 30th July 2018 and 16th September 2020 respectively; and
- xv) Exh. P15 A certified true copy of powers of attorney dated 30th October 2021 wherein Maria Monica Karabyo gave powers of attorney to Samson Karamagi.

The defendants' evidence:

- 5. The 1st defendant produced one witness to prove his case: DW1 (William Malavu). The 2nd defendant/counterclaimant adduced evidence of the following documents that were exhibited:
 - i) Exh. D1 A copy of an advertisement of a sale by public auction of the suit property in the Daily Monitor Thursday, June 2, 2005;
 - ii) Exh. D2 A copy of sale agreement of land dated 8th September 2007 between Sam Mutabazi and Malavu William for the suit property;
 - iii) Exh. D3 A copy of photograph of the suit property;
 - iv) Exh. D4 A letter dated 30th November 2020 addressed to all authorities from Busuulwa Kanya Mesach the chairperson of Kamuli B Namugongo Division, Kira Wakiso District, notifying them of the Malavu William' occupation of the suit property;
 - v) Exh. D5 A copy of a statement of search on the suit property dated 2nd March 2018, showing Malavu William as the registered proprietor and no encumbrances; and
 - vi) Exh. D6 A copy of a letter addressed to the Registrar High Court of Uganda, Commercial Division from Sam Mutabazi, a court bailiff of Mighty Agencies (U) Limited, showing a return of warrant of attachment in HCCS No.1018 of 2004.

Locus in quo visit:

6. On 12th June 2024, the court carried out a locus in quo visit to the suit property in the presence of Ms. Karungi Anne, counsel for the 1st defendant; and Mr. Muhumuza Milton and Ms. Anita Nyamate, counsel for the plaintiff. PW2 (Karamagi Samson) and DW1 (William Malavu) gave evidence at the locus, and were cross examined and re-examined.

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Issues to be determined:

- 7. The following issues were framed for court's determination:
- i) Whether the 1st defendant fraudulently acquired the suit property.
- ii) What remedies are available to the parties.

Decision of the Court:

- 8. Let me begin by considering the legal issue raised by the 1st defendant to the effect that there is an illegality on the face of the record, arising from the attempt by the plaintiff to enforce the Ruling of Hon. Justice Geoffrey Kiryabwire delivered in 2006, in form of a fresh suit, 18 years after the Ruling was delivered.
- 9. The Ruling of Hon. Justice Geoffrey Kiryabwire was delivered on the 26 October 2006 (Exh. P12). The learned Judge (as he then was) considered the purchase of the suit property by the 1st defendant through a sale ordered by the court, and held inter alia as follows:

"In this case there is evidence of an irregular execution as rules of court were not followed. I accordingly nullify and set aside the sale. This being a sale by court and not an ordinary sale the rules of court must be followed and where this is [was] not done there is total failure of consideration. In such a situation the purported buyer of the suit property shall be entitled to the refund of his money...and therefore should seek the appropriate remedies."

10. The 1st defendant was entered as the registered owner of the suit property on the 18 August 2005 under Instrument Number KLA278899, pursuant to a court order. After the 1st defendant became registered owner of the suit property, following purchase through a court order, despite the nullification

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of the sale by the Hon. Justice Geoffrey Kiryabwire on the 26 October 2006, the late Eleanor Karamagi did not take action to cancel the registration of the 1st defendant. As of the date of conclusion of hearing of the case, the 1st defendant is still the registered owner of the suit property.

11. It is the 1st defendant's case that the Ruling of the Hon. Justice Geoffrey Kiryabwire, nullifying the court sale, cannot be enforced now, because Section 3(3) of the Limitation Act, bars enforcement of judgments after the expiration of 12 years from the date of judgment. The said section provides that:

> "An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due."

- 12. The general rule is that an action to enforce a judgment shall not be allowed after the expiration of twelve years from the date on which the judgment became enforceable. *Green Pastures Limited v. The Cooperative Bank Ltd (in liquidation)*, Miscellaneous Application No.172 of 2015 (per Hon. Justice Christopher Izama Madrama); *Lowsley and Another v. Forbes (t/a L E Design Services)* [1998] 3 ALL ER 897; *Duer v. Frazer* [2001] ALL ER 249; and *Society of Lloyd's v. Longtin* [2005] EWHC 2491.
- 13. However, under certain circumstances defined by the law, the running of the period of limitation may be postponed. To this effect, Section 25 of the Limitation Act provides for postponement of the limitation of time prescribed by the Act. The said section provides that:

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"25. Postponement of limitation period in case of fraud or mistake

Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

- (a) the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent;
- (b) the right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) of this section; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it; but nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—
- (d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (e) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."

14. Where the action is based upon the fraud of the defendant or his or her agent, and the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence, have discovered it. Time, for purposes of limitation, will only begin to run, when the fraud is discovered

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by the plaintiff. Stanbic Bank Uganda Ltd v. Uganda Crocs Limited [2005] UGSC 16 (per Oder, JSC).

- 15. PW1 (Karabyo Maria Monica) testified that she discovered that the 1st defendant had fraudulently transferred the suit property into his name, when she made a search in the land registry, on the 11 August 2020, in the process of obtaining letters of administration for her late mother, Rosemary Eleanor Karamagi.
- 16. This evidence was not rebutted by the 1st defendant during cross examination. It is the law that if evidence is adduced, and is not rebutted by the opposite party, it is deemed to be credible and probably true. See the cases of Nabagesera & 3 Others v. Attorney General & Anor [2014] UGSC 403; and Brown v. Ojijo (Civil Suit 228 of 2017) [2023] UGHCCD 173. I therefore accept the evidence adduced by PW1 (Karabyo Maria Monica).
- 17. In conclusion therefore, time, for purposes of limitation, began running in the year 2020, when the alleged fraudulent transfer of the suit property into the 1st defendant's name, was discovered by the plaintiff. It is therefore, my decision that the suit is not barred by Section 3(3) of the Limitation Act.

Issue No.1: Whether the 1st defendant fraudulently acquired the suit property

18. It was argued for the plaintiff, that the 1st defendant was fraudulently registered as owner of the suit property. The following particulars of fraud may be pointed out:

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a). Whereas the 1st defendant was registered as owner of the suit property on the 18 August 2005, the sale agreement between the 1st defendant and Sam Mutabazi T/A Mighty Agencies (U) Ltd, Court Bailiffs and Auctioneers, was executed on the 8 September 2007 (Exh. D3).

According to this evidence, the 1st defendant was registered on the certificate of title for the suit property before signing a sale agreement with the court bailiff.

- b). The 1st defendant took possession of the suit property in the year 2020, which was 15 years after he became registered owner of the suit property. The 1st defendant did not satisfactorily explain why it took him this long to take possession of the suit property.
- c). The 1st defendant did not carry out due diligence on the suit property prior to purchase because had he done so, he would have discovered that the Hon. Justice Geoffrey Kiryabwire had set aside the court sale on the 26 October 2006.

- d). The late Rosemary Eleanor Karamagi was in possession of the suit property, and proper due diligence would have led the 1st defendant to discover that the execution by the bailiff had been set aside by Hon. Justice Geoffrey Kiryabwire in 2006, and so the 1st defendant would not have gone ahead to purchase the suit property in 2007.
- 19. In answer to the plaintiff's case, the 1st defendant (DW1) testified as follows:
 - a). That the suit property was advertised for sale by a court bailiff in the Daily Monitor Newspaper of 2 June 2005, pursuant to a court order issued in High Court Civil Suit No.1018 of 2004: Angolinga Mahmood v. Rosemary Eleanor Karamagi.
 - b). That he submitted a bid for purchase of the suit property, and was later contacted by a court bailiff, who informed him that he had emerged the highest bidder.
 - c). That he paid Ushs 34 million for the purchase of the suit property and was then registered on the certificate of title as owner of the suit property.
 - d). That when the court sale was subsequently set aside by a Ruling delivered by Hon. Justice Geoffrey Kiryabwire, in 2006, he was not served with the order, and because of this, he never became aware that the sale had been nullified.
 - e). That the order nullifying the sale by Hon. Justice Geoffrey Kiryabwire, in 2006, was not executed by the plaintiff.
 - f). That fraud has not been attributed to him.
- 20. Upon consideration of the case for both parties, several questions arise, which were not satisfactorily answered by the 1st defendant in his evidence:
 - a). The sale agreement (Exh. D2) was executed on the 8 September 2007 but the 1st defendant had been registered earlier as owner of the suit property on the 18 August 2005. This very glaring discrepancy was not explained by the 1st defendant.
 - b). Whereas the sale agreement (Exh. D2) is dated 8 September 2007, Recital 3 of the agreement states that he became a successful bidder of the suit property on the 3 October 2007 (a future date!). In a report by the court bailiff, Sam Mutabazi to the Registrar, Commercial Court, (Exh. D6), he stated that he had advertised the suit property in the Monitor of 8 September 2007; and yet the sale agreement is also dated 8 September 2007, the very same day! These are not minor inconsistencies; they show that the 1st defendant was fraudulently registered as owner of the suit property.
 - c). The 1st defendant did not explain why he took possession of the suit property in 2020, about 15 years after he became registered owner. The 1st defendant's taking possession occurred conveniently after the death of Rosemary Eleanor Karamagi, on the 8 September 2015.

- d). The 1st defendant's testimony that he allowed the late Rosemary Eleanor Karamagi to stay on the suit property for about 15 years on

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unclear terms, does not simply make sense. Secondly, during the locus in quo visit, it was established that the suit property comprises of two rental units. If the late Rosemary Eleanor Karamagi was allowed to occupy one rental unit on humanitarian grounds, as asserted by the 1st defendant; how come the 1st defendant did not take possession of the remaining one rental unit? I don't believe that the 1st defendant is being honest by making these assertions.

- e). The 1st defendant failed to prove that he conducted due diligence on the suit property prior to purchasing the suit property. For example, there is no evidence that the 1st defendant conducted a physical inspection of the suit property prior to purchase. Had he done so, he would have discovered that the suit property was in possession of the late Rosemary Eleanor Karamagi, who had challenged the court sale and had it set aside. Secondly, had the 1st defendant searched the court file on High Court Civil Suit No.1018 of 2004, he would have discovered that by the time he signed the purchase agreement in 2007, the court sale had long been set aside by a Ruling delivered by the Hon. Justice Geoffrey Kiryabwire in 2006.
- 21. The several unanswered questions in the 1st defendant's testimony as well as the 1st defendant's dishonesty point toward fraudulent actions by the 1st defendant. Fredrick J. K. Zaabwe v. Orient Bank Ltd & 5 others, SCCA No. 04 of 2006 (coram: Tsekooko, Karokora, Mulenga, Kanyeihamba & Katureebe, JJ. SC). And fraud was pleaded and proved by the plaintiff, and is clearly attributable to the 1st defendant. Kampala Bottlers Ltd v. Damanico (U) Ltd, Supreme Court Civil Appeal No.22 of 1992 (coram: S. W. W. Wambuzi, C. J., A. Oder, J. S. C., H. Platt, J. S. C).
- 22. In conclusion, I am satisfied that the 1st defendant was fraudulently registered as the owner of the suit property.

Issue No.2: What remedies are available to the parties?

- 23. Section 177 of the Registration of Titles Act provides for cancellation of a certificate of title obtained fraudulently. In the case of Hilda Wilson Namusoke & 3 Others v. Owalla's Home Investment Trust (E. A) Ltd & Commissioner for Land Registration, Supreme Court Civil Appeal No. 15 of 2017, the Supreme Court of Uganda (per Justice Prof. Tibatemwa-Ekirikubinza) held that the said section "vests powers in the High Court to direct the Commissioner [for Land Registration] to effect any order of cancellation of a certificate of title..."
- 24. In Uganda Post Limited v. Consolate Mukadisi [2023] UGSC 58, the Supreme Court of Uganda held that general damages are the direct natural or probable consequence of the wrongful act complained of, and include damages for pain, suffering, and inconvenience,

and their award is supported by Article 126(2)(c) of the Constitution of Uganda. In this case, there is evidence that the 1st defendant was fraudulently registered as the owner of the suit property in 2005, and wrongfully evicted the plaintiff from the suit property on the 30 November 2020. The 1st defendant has inflicted suffering on the family of the late Rosemary Eleanor Karamagi, and must pay general damages.

- 25. The 1st defendant wrongfully dispossessed the suit property from the plaintiff on the 30 November 2020 (Exh. D4), and is liable to pay mesne profits. Section 2(m) of the Civil Procedure Act defines mesne profits as "those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it,

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together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession." Mesne profits are a mode of compensation that can be claimed against a person in unlawful possession of property. Such person is liable to pay a reasonable sum to the aggrieved party for the wrongful possession of property. *Inverugie Investments Ltd v. Hackett* [1995] 1 WLR 713.

- 26. At the locus in quo visit, the 1st defendant testified that he earns Ushs 400,000 from each rental unit, and that the suit property is comprised on two rental units. That amounts to Uhs 800,000 per month. The 1st defendant took possession of the suit property in November 2020. This means that the 1st defendant has been in possession of the suit property for approximately 45 months. The 1st defendant has so far earned approximately Ushs 36,000,000 (Uganda shillings thirty six million). Accordingly, the 1st defendant is liable to pay a total of Ushs 36,000,000 in mesne profits to the plaintiff.
- 27. The plaintiff is entitled to costs of the suit as well as interest on the sums awarded. Sections 26(2) and 27(1) and of the Civil Procedure Act.
- 28. The 1st defendant's counter claim was not proved and it is accordingly dismissed.

Final order of the Court:

- 29. Judgment is hereby entered in favour of the plaintiff with the following declarations and orders:
- 1). That Rosemary Eleanor Karamagi is the lawful owner of the property comprised in Kyadondo Block 229 Plot 1190 land at Kamuli measuring approximately 0.046 Hectares.
- 2). That the 1st defendant (William Malavu) was fraudulently registered as owner on the certificate of title for the property comprised in

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Kyadondo Block 229 Plot 1190 land at Kamuli measuring approximately 0.046 Hectares vide Instrument Number KLA278899 on the 18.8.05 at 10.40am.

- 3). That the Commissioner for Land Registration is ordered to cancel the registration of the 1st defendant (William Malavu) on the certificate of title for the property comprised in Kyadondo Block 229 Plot 1190 land at Kamuli measuring approximately 0.046.
- 4). That the Commissioner for Land Registration is ordered to register Rosemary Eleanor Karamagi as the owner of the property comprised in Kyadondo Block 229 Plot 1190 land at Kamuli measuring approximately 0.046.
- 5). That the Commissioner for Land Registration is ordered to remove a caveat lodged by the 1st defendant (William Malavu) vide Instrument Number WAK00182845 on 30.7.2018 on property comprised in Kyadondo Block 229 Plot 1190 land at Kamuli measuring approximately 0.046.
- 6). That a permanent injunction is issued restraining the 1st defendant, his agents, servants, workmen and all those claiming under him and/or deriving authority from him, from trespassing, encroaching, interfering and/or in any way dealing with the suit property.
- 7). That the 1st defendant (William Malavu) is a trespasser on the suit property.
- 8). That the 1st defendant (William Malavu) shall vacate the suit property within 10 (ten) days from the date of this judgment, in default of which, he shall be evicted in accordance with The Constitution (Land Evictions) (Practice) Directions, 2021.
- 9). That the 1st defendant (William Malavu) shall pay mesne profits of Ushs 36,000,000 (Uganda shillings thirty six million) to the plaintiff.

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- 10). That the 1st defendant (William Malavu) shall pay general damages of Ushs 30,000,000 (Uganda shillings thirty million only) to the plaintiff.
- 11). That 1st defendant (William Malavu) shall pay interest on mesne profits and general damages at the rate of 25% per year from the date of judgment until payment in full.
- 12). That the 1st defendant (William Malavu) shall pay the costs of the suit.

IT IS SO ORDERED.

BERNARD NAMANYA JUDGE

19 September 2024

Delivered by E-mail & on ECCMIS:

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