

UGANDA / JUDGMENT

Nabisere v Nsamba and Another (Civil Suit 124 of 2016) [2023] UGHCLD 219 (27 July 2023)

[2023] UGHCLD 219

COURT

HC: Land Division (Uganda)

BEFORE

Nkonge, J

CASE / FILE NUMBER

Civil Suit 124 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 0124 OF 2016

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TEREZA NABISERE.....

VERSUS

1. JOHN NSAMBA 2. COMMISSIONER OF LAND REGISTRATION..... DEFENDANTS

\$10\$

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<u> Before: Lady Justice Alexandra Nkonge Rugadya</u>

JUDGMENT

Introduction:

- The plaintiff filed this suit seeking a declaration that the plaintiff is the lawful owner of the land comprised in **Busiro block 429 plot 288 at Bugiri** and that 15 the \$1^{st}\$ defendant fraudulently acquired the same, cancellation of the \$1^{st}\$ defendant's title and registering the plaintiff as owner; a permanent injunction; general damages and costs of this suit.
- The facts of this case are that the plaintiff is the owner of and registered \$20\$ proprietor of the suit land among other plots on the same block

On 14th January 2016 while on the suit land on plot 442 of block 429 in abid to subdivide the same regarding an intended sale on the piece of land the plaintiff discovered that a subdivision was fraudulently conducted and plot 288 created

out of her land without her consent. \$\overline{25}\$

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On conducting a further search the plaintiff discovered thaaaat the land was fraudulently registered in the name of the \$1^{st}\$ defendant with whom she never had any dealings, let alone transferring the land to him.

The plaintiff further discovered that the plaintiff had used the land to acquire a mortgage with Tropical Bank Ltd. That she has always been the lawful owner and has never sold, transferred or consented to any transfer of the suit land to \$\mathsf{S}\$ the \$1^{st}\$ defendant.

Representation:

The plaintiffs were represented by *M/s Buwule & Mayiga Advocates*. The defendants were served but did not respond to the summons to file a defence.

A party who does not enter appearance and file WSD is deemed to have admitted the allegations in the plaint (Smith vs Auto Electric Services Ltd (1951) 24 KLR22 K). Such admission is constructive. See: Asuman B Kiwala versus Chief Registrar of Titles HC MA NO. 106/2004 (2004) KALR – pages 518 –

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Issues:

- Whether the plaintiff is a lawful owner of the suit land. \$\Box\$ \$1.\$
- Whether the \$1^{st}\$ defendant fraudulently acquired the suit land. \$2.\$

- Whether the plaintiff is entitled to the remedies prayed for.
- <u>Issue No. 1: Whether the plaintiff is a lawful owner of the suit land:</u>

And

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Issue No. 2: Whether the 1st defendant fraudulently acquired the suit land.

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I will deal with both issues jointly as they are inter connected.

Analysis of the law:

The general principle is that a certificate of title is conclusive evidence of ownership of land. it and takes priority over any adverse claims. (Section 59 of

the Registration of Titles Act, Cap. 230 (RTA). \$\mathsf{S}\$

By virtue of **section 176 of the same Act**), save for fraud possession of a title also an absolute bar and estoppel to an action of ejectment or recovery of any land. (Refer also S. 64 (1) RTA).

In *Patel vs Patel [1992-1993] HCB 137* court declared in reinforcement of that position that no omission or oral evidence can be called to vary the certificate of 10 title, unless fraud, lack of consideration or illegality is proved.

The term fraud has been defined to imply an act of dishonesty. (Kampala Bottlers Ltd. vs. Damaniaco (U) Ltd SCCA No. 2 of 1992.); an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right.

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In F. I. K Zaabwe vs Orient Bank and 5 others SCCA No. 4 of 2002) it was defined as a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he/she shall act upon it to

his legal injury. \$20\$

> It is anything calculated to deceive whether by a single act or combination, or by suppression of truth, a generic term, embracing all multifarious, means which human ingenuity can devise.

Where an allegation of such gravity is made, the person who seeks to rely on fraud must not only specifically pleaded but also strictly prove that fraud was 25 committed, the burden being heavier than on a balance of probabilities generally applied in civil matters.

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It must also be attributed to the transferee, either directly or by necessary implication and the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act". (Kampala Bottlers Limited versus Domanico (U) Ltd (Supra.)

Analysis of the evidence: \$\mathsf{S}\$

The particulars of fraud as pleaded in the present case were therefore that:

- 1) The \$1^{\{st\}}\$ defendant without any colour of right or consent from the plaintiff acquired the suit land and had himself registered as *proprietor over the same;*
- 2) The \$1^{\{st\}}\$ defendant acquiring the suit land from a person not in ownership of the land well knowing and/or having reasonable cause to know that it was a fraudulent transaction because there were *tenants on the suit land with houses thereon.*
- 3) Failing to make a proper search by inquiring about the true ownership of the land from the local authorities in the area where he would have discovered that the plaintiff was the owner of the land.
- 4) Failing to inquire from the plaintiff or agents about ownership of the suit land at the time of acquiring the same and yet it was evident that there were tenants in physical possession of the suit land with *buildings thereon.*
- 5) That the defendants illegal and fraudulent actions have denied her quiet possession and utilization of the suit land.

The plaintiff in this case testifying as a sole witness, **Pw1**, in her witness statement stated at paragraph 3 and 4 that she is the lawful owner and registered proprietor of the suit land.

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She claimed that she had acquired the land from her late paternal aunt Natalia Nakate and upon request by this court, presented a certified copy of the letters of administration vide: Ac No. 1151 of 2003, granted by this court on 15th January, 2004, (attached to the submissions).

- That while conducting a search in the lands' registry on Busiro **Block 429 Plot \$\mathsf{S}\$ 442** (suit land) for purposes of subdividing and conducting a sale of the suit land, she discovered that *plot 288* which was part of the land she had wanted to sell was missing. A further search revealed that it had been transferred into the names of the \$1^{\{st\}}\$ defendant.

- **Pw1** testified at paragraph 14 of her witness statement that upon discovering 10 the transfer she went to *Tropical bank Ltd*. The 1st defendant was called on the phone by a bank official.

He claimed to know the plaintiff but upon discovering that she was present and knew of his fraud, he promptly hung up the phone call. This indicates that the 1st defendant was not only privy but also party to the fraudulent transfer of the suit land.

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Court also noted that the transfer forms *PEXh* 3 presented in court as a certified copy, showed her photograph and her purported signature as the vendor of the land comprised in **Block 429, plot 288**.

From the area schedule dated 2nd February, 2016 from Wakiso Drawing office, 20 nowhere did **plot 288** however appear as one of the plots curved out of the original *plot 2* which belonged to Nataliya Nakate.

Plot 2 measuring a total area of 24.30 hectares is indicated in the area schedule as the original plot. Several titles were created out of the subdivisions made over a period of time.

In another area schedule **PEXh 4**, both **plots 287 and 288** however appeared, having been created out of **plot 266**. Although the name of the plaintiff appears

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on one of the plots, **plot 266** out of which the two plots had been created did not bear any history connecting them to what was originally *plot 2*.

PEXh 2 indicates that on 18th June, 2015 the names of John Nsamba were entered for *plot 288*, covering an area of 1.129 hectares. On the encumbrances page on 1st July, 2015 he had secured a mortgage from Tropical Bank Ltd for a sum of *Ugx.* 135,000,000/=.

PEXh 2 shows that the transfer was made to the plaintiff on 13th May, 2008. It was transferred to the defendant on 18th June 2015. The mother title, **PEXh 1** has plot 66 created out of original **plot 2**, which information tallies with that appearing in the area schedule, showing the history of the various subdivisions made thereon, thus fitting in well with the plaintiff's case.

As at time the area schedule relied on by the plaintiff was made, **plot 476** appeared as the residue by balance and it is not known where **plot 266** out of which *plot 288* (residue) had been created had emanated from, since it does not appear on the area schedule which bears the details for the mother **plot 2**.

It was the plaintiff's contention therefore that the 1^{st} defendant whom she had never met, known or dealt with, without any color of right, and without her consent, fraudulently registered the suit land in his name, after furnishing forged documents of transfer before the 2^{nd} defendant's agents.

In the development of our law, two principles have striven for mastery. The first 20 is for the protection of property: no one can give better title than he himself possesses.

That legal principle was emphasized by the Supreme Court in *Halling Manzoor* vs. Serwan Singh Baram, SCCA No.9 of 2001 that a person cannot pass title that he does not have.

In the case before this court, there had been no sale agreement, no signed mutation forms to show how **plot 288** had been created; and no evidence that

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any consent had been sought and secured as required by law prior to the registration from the person who had sold the land to the 1^{st} defendant; or from the registered owner herself.

It is also not clear how the bank could have given a loan facility for a plot of land that did not exist or that was created over land that was claimed by a person who was not in physical possession.

It can only mean that neither the mortgagee nor the mortgagor ever took the trouble to establish what was on the ground. In *paragraph 17*, of the statement, the plaintiff claimed that the suit land is occupied by residents who know her as the landlady and proprietor and that the 1^{st} defendant had ignored their presence on that land as third parties, which presence clearly indicated competing visible interests.

The assumption is that the 1^{st} defendant had bought the land from Mike Mugerwa. There was however no transfer forms signed by Mike Mugerwa instead what appears is transfer forms from the plaintiff who denied having any relationship with both.

There is nothing besides, to prove that prior inquiries from the neighbours and local area leaders had been made to establish who the owners were.

The Court of Appeal in **Jennifer Nsubuga vs Michael Mukundane and Anor** CACA NO. 208 OF 2018 made it clear that though not in statute law 20 consultations with the leadership of the area where the land is located is very key in establishing that due diligence was carried out. Local leaders cannot be disregarded in any land transaction.

Thus in *Uganda Posts and Telecommunications vs Abraham Kitumba* SCCA No. 36 of 1995), such failure to make reasonable inquiries or ignorance or 25 negligence was held to form particulars of the offence of fraud.

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Counsel in his submissions cited section 176 RTA which provides that no action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except (among others) in a case where the mortgagee is in default against a mortgagor or a case of any person deprived of any land by fraud as against the person registered as proprietor of that land through fraud; or against a person deriving otherwise than as a transferee bona fide for value from; or through a person so registered through fraud.

The plaintiff's claim in effect was that the 1^{st} defendant was not only fraudulent in the transactions that led to the transfer but also that he did not meet the \$10 criteria of a bona fide purchaser.

In Bishopgates Motor Finance vs. Transport Brakes Ltd [1949] 1 KB 332, at page 336-7 it was held that:

A bona fide purchaser for valuable consideration of land derives protection under section 181 of the RTA. The term is defined in Black's Law Dictionary 8th Edition at page 1271 to mean:

> "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."

Whether or not there was fraud and whether or not a party was a bonafide purchaser for value without notice the question that a court would poise is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. (David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985).

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The 1st defendant as established by court did not attempt to look for the plaintiff or her acquaintances. Disregarding the existing interests implied that as transferee he was party to or had constructive knowledge of such fraud.

Proof of such fraud was also based on the fact that the loan facility remained unpaid and the circumstances are such that he clearly had no intention of S paying it back.

He kept out of reach of the plaintiff, hiding under the banker-customer fiduciary relationship and as a result, the suit land was advertised for sale by private treaty.

- Thus by failing to file his defence and appear in court to defend himself the 10 plaintiff, and indeed this court, were denied of an explanation as to how he had obtained the plaintiff's identity documents and other documents of transfer relied on by him to secure the transfer of the suit land into his predecessor's names and later into his, making it more likely than not, that the plaintiff was
- the owner of the land out of which *plot 288* had been purportedly created. 15

In the absence of a valid title from the registered proprietor from whom the interest was purportedly derived; or of such proof that valuable consideration was paid; or that there was good faith in the transaction, the defence of bonafide purchaser for value without notice cannot be applicable. (See: David Sejjaka v

Rebecca Musoke Supreme Court, Civil Appeal No.12 (1985). \$20\$

A person who purchases an estate which he knows to be in occupation of another person other than the vendor is not considered to be a bona fide purchaser for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

The plaintiff succeeded in proving that fraud had been committed by the 1st \$25\$ defendant. However I did not find any evidence of involvement by the 2nd defendant.

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Remedies:

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General damages:

Counsel cited the case of Takiya Kashwahiri & A' nor vs Kajungu Denis, CACA No. 85 of 2011, was held that general damages should be compensatory in nature in that they should restore some satisfaction, as far as money can do it, to the injured plaintiff.

General damages are those that the law presumes to arise from direct, natural or probable consequences of the act complained of by the victim. These follow the ordinary course or relate to all other terms of damages whether pecuniary or

none pecuniary, future loss as well as damages for paid loss and suffering. See; 10 Uganda Commercial Bank Vs Deo Kigozi [2002] EA 293.

Black's Law Dictionary 9th Edn at page 445 defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the direct probable consequence off the act complained of. **Ref: Storms versus Hutchison (1905) \$AC 515.\$**

In the case of Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35 it was held that; the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering'.

The learned counsel for the plaintiff submitted that the advertisement of the sale \$20\$ of land by public auction exposed the suit to the likelihood of its being sold off thus preventing her from enjoying quiet possession.

That unless the title was cancelled and further acts of trespass from any purported successors in title of the 1st defendant are stopped from claiming possession and ownership thereof, the plaintiff will suffer permanent deprivation

\$25\$ of the suit land.

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The plaintiff in the instant case has been in possession of the title to the suit land through the fraudulent acts by the \$1^{st}\$ defendant. She frequented the \$1^{st}\$ defendant's bank in a bid to stop the bank from selling the land by a person who was neither known to her or authorized by her to deal with the suit land and in respect of a loan that she did not even take out.

She has therefore suffered emotional stress inconvenience as a result and entitled to receive compensatory damages. Court taking into consideration the above factors accordingly awards the plaintiff general damages of Ugx \$100,000,000/= \$.

Section 177 of the RTA Cap. 230 provides that upon the recovery of any land, 10 estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land estate or interest and to substitute such certificate of title or entry as the 15 circumstances of the case requires, and the registrar shall give effect to that order.

Accordingly, the following are the declarations and orders of court:

- 1. The title for the land comprised in Busiro block 429 plot 288 at Bugiri was fraudulently acquired by the \$1^{st}\$ defendant and is hereby cancelled.
- 2. The suit land belongs to the plaintiff and is hereby restored to her as the rightful owner.
- 3. A permanent injunction issues, restraining the \$1^{st}\$ defendant, his agents and any of them claiming under him from any further dealing with the suit land;

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- 4. General damages of Ugx. 100,000,000/= (one hundred million) awarded to the plaintiff;
- 5. Interest at commercial rate shall be payable, from the date of delivery of this ruling until payment is made in full.
- 5. Costs of this suit.

Alexandra Nkonge Rugadya

Judge

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27th July, 2023.

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