

UGANDA / JUDGMENT

Nakiryowa v Masembe & Ors (High Court Civil Suit No.37 of 2006.)

[2015] UGHCLD 59 (22 October 2015)

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COURT

HC: Land Division (Uganda)

BEFORE

Bashaija, J

CASE / FILE NUMBER

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

HIGH COURT CIVIL SUIT NO.37 OF 2006.

MANJERI NAKIRYOWA=====PLAINTIFF

VERSUS

1. MASEMBE. P

2. NABULIME. P =====DEFENDANTS

3. NALWANGA . F

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

MANJERI NAKIRYOWA (hereinafter referred to as the “plaintiff”) brought this suit against *MASEMBE. P, NABULIME. P, and NALWANGA. F** (hereinafter referred to as the “1st 2nd and 3rd “defendants” respectively)* jointly and severally, for a declaration that the late Maria Antonia Namugenyi, the defendants’ mother, was not a beneficiary of the estate of the late Sidona Nakiryowa, that land formerly described as *Kibuga Block 217 Plot 37 (hereinafter referred to as the “suit land”)* land belongs to the beneficiaries of the estate of the late Sidona Nakiryowa whom the plaintiff is part, an order for cancellation of the defendants’ certificate of title, a permanent injunction, general damages, and costs of the suit.

Brief facts:

The plaintiff's claim is premised on her being a granddaughter and beneficiary of the estate of the late Sidona Nakiryowa who was as at 1987 the registered proprietor of the suit land formerly described as *Kibuga Block 217 Plot 37*. Late Sidona Nakiryowa was bequeathed the suit land by Will of her son the late Maurice Kiddu who was the plaintiff's father, who died sometime in 1958. Late Sidona Nakiryowa also died in 1960 after transferring and registering the suit land into her own names. Before her demise, she named Maria Antonia Namugenyi, mother to the defendants, as her customary heir. However, after Sidona Nakiryowa died, Maria Antonia Namugenyi declined the position as customary heir and instead clan elders installed one Maria Lwiza Nasimbwa customary heir.

In 1986 Maria Antonia Namugenyi also died. In August, 1987 the defendants obtained certificate of succession for their late mother and indicated in it that the suit land belonged to late Maria Antonia Namugenyi. They used the said certificate to transfer the suit land into the names of their deceased mother. The defendants as administrators of their late mother's estate got registered as proprietors on the suit land.

In 1997 after a family meeting was called to review the late Sidona Nakiryowa's estate, the plaintiff and the family of late Sidona Nakiryowa discovered that the suit land had been transferred by the defendants into their names. The plaintiff thus filed this suit alleging fraud against the defendants seeking the remedies outlined above.

The defendants denied the plaintiff's allegations contending that by the time Maria Lwiza Nasimbwa was installed customary heir by clan elders, the property had already passed by bequest to their mother late Maria Antonia Namugenyi. Further, that the clan elders had no powers to pass on the property, and that the said Maria Lwiza Nasimbwa has never claimed to have inherited the suit land.

The defendants also denied fraud in obtaining succession certificate for their late mother and transferring the suit land into her names. They contended that the suit land has been subdivided and shared by the squatters who have occupied it through the support of the plaintiff. The defendants prayed that the suit be dismissed with costs.

Prior to the commencement of the hearing of the case, the defendants were served with hearing notices through their lawyers, *M/s. Mugisha Musoke & Co. Advocates.* The said lawyers, however, noted on the copy of the hearing notice that they had lost touch with their clients. This being an old case of 2006 which had been adjourned several times before due to the absence of the defendants, court proceeded *ex parte* under provisions of ***Order 9 r. 20(1) of the Civil Procedure Rules.***

The plaintiff was represented by Ms Betty Munabi of *M/s Munabi & Co. Advocates,* and adduced evidence of three witnesses to wit; the plaintiff as PW1, Victoria Namulwadde as PW2, and Joseph Kiryowa as PW3. In scheduling memorandum singularly filed by the plaintiff the following issues were raised for determination;

1. ***Whether the defendants fraudulently acquired registration of the suit land in favour of their late mother late Maria Antonia Namugenyi and subsequently in their favour.***
2. ***Whether the plaintiff is entitled to the remedies sought.***

Resolution of the issues:

Issue No.1: Whether the defendants fraudulently acquired registration of the suit land in favour of their late mother Maria Antonia Namugenyi and subsequently in their favour.

Fraud was defined in the case of *Fredrick J. K. Zaabwe vs. Orient Bank & 5 Or's*, S. C. C. A No. 4 of 2006 (at page 28 of the lead judgment) per Katureebe JSC, as he then was, relying on the definition taken from *Black's Law Dictionary*, (6th Ed) at page 660, as follows;

“An intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. 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 shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture... A generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestion or by suppression of truth and includes all surprise, trick, cunning dissembling and any unfair way by which another is cheated. “Bad faith” and fraud are synonymous and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness etc... As distinguished from negligence, it is always positive intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo by speech, or by silence by word of mouth or by look or gesture.”

Also in the case of *Assets Co. vs. Mere Roihi* (1905) A. C 176, it was held that;

“Fraud in actions seeking to affect a registered title means actual fraud, dishonesty of some sort not what is called constructive fraud; an unfortunate expression and one may opt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud”.

Section 176(c) of the Registration of Titles Act (Cap 230)(RTA)provides that a registered proprietor's interest is protected and is indefeasible unless it is shown that such a person obtained registration by fraud or that he is not a bona fide purchaser. It is also trite law that fraud must be strictly pleaded and proved the burden being heavier than on a balance of probabilities. See: ***J. W. R. Kazzora vs. M. L. S Rukuba SCCA No.13 of 1992.*** In the case of ***Kampala Bottlers Ltd vs. Damanico (U) Ltd (1990-1994) EA 141*** it was held that;

“The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is 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.”

In the instant case, the plaintiff pleaded fraud in paragraph (g) of the plaint and set out the particulars of fraud as follows;

1. *The defendants fraudulently obtained a succession certificate of their deceased mother as purported heir of the said Sidona Nakiryowa yet they were fully aware that their mother was not heir of Sidona Nakiryowa and thus not entitled to the estate.*
2. *Intensely subdividing the suit land in a bid to conceal.*

The plaintiff adduced evidence that the defendants, children of late Maria Antonia Namugenyi, fraudulently obtained transfer of the suit land into their deceased mother's names, and later into their names as administrators of their late mother's estate. The plaintiff further adduced evidence that the defendants first got their mother's names registered on the title without any transfer instruments from late Sidona Nakiryowa who was the registered owner, and /or also without first obtaining letters of administration for the estate of the late Sidona Nakiryowa. The plaintiff's evidence also shows that at the time of their registration on the suit land using the certificate of succession dated 05.08.1987, Maria Antonia Namugenyi through whom they claimed had died in 1986.

After carefully evaluating the evidence in relation to pleadings of the parties, it is evidently clear that the defendants acted dishonestly in a series of transactions leading to their registration on the suit land and it amounted to fraud. For instance, the defendants obtained the certificate of succession for the late Maria Antonia Namugenyi in which they misrepresented the suit land as belonging to their late mother, whereas not. There could be no doubt that they were acutely aware that the suit land was not bequeathed to their late mother in any way whatsoever by late Nakiryowa. Their late mother declined being customary heir to the late Sidona Nakiryowa and another person was instead installed. Therefore, the suit land could not have passed on to their late mother as customary heir to entitle her to acquire it by certificate of succession.

It is therefore not true as averred by the defendants, in paragraph 6 of their written statement of defence that by the time Maria Lwiza Nasimbwa was installed customary heir by clan elders, property had already passed by bequeathment to Namugenyi the defendants' late mother. Even assuming that the suit land had been bequeathed to Namugenyi as customary heir by late Sidona Nakiryowa, it would be tied to her being customary heir. Having declined the responsibility being customary heir therefore, Namugenyi could come up only to claim the benefit of the suit land. Even then, she would be required to obtain letters of administration first for her to deal with the estate. In the case of **Onesforo Ngaaga & An'or vs. Matovu & A' nor* HCCS No. 107 of 2003,* it was held that;

“*It needs no emphasis that being customary heir is a cultural function which does not bestow legal authority on a person to deal with property of deceased, but is essentially meant for someone to “step into the shoes” of the deceased, as it were, solely for cultural functions. However, when it comes to the deceased's property and its administration the customary heir must first obtain the legal authority even if he or she may be a beneficiary; in absence of which he or she invariably becomes an intermeddler in the estate of the deceased”*.

Furthermore, **Section 25 of the Succession Act, (supra)** provides that;

“All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property.”

In the instant case, it is clear that the late Sidona Nakiryowa had beneficiaries of whom the plaintiff is one. These are the persons who sat in the meeting of 1997 to review matters of the estate. It would mean that the heir would only be required to distribute the estate to the beneficiaries; and in absence of a valid Will as in this case, in accordance with **Section 27**of the Succession**Act (supra)**

The fraud of the defendants is more manifested by the fact that at the time they sought to have their late mother registered on the suit land by virtue of the succession certificate, the defendants were aware that the estate of late Sidona Nakiryowa had an heir, Maria Lwiza Nasimbwa, different from their late mother. By the defendants by – passing the heir, it meant that they procured registration of their mother on to the title to the suit land through dishonest means and deceit. As such they could not themselves acquire good title. In the case of **Mash Investment Co. Ltd. vs. Kachra Investment Co. Ltd*, HCCS No. 8 of 2012,* it was held, inter alia, that;

“*What amounts to fraud in land dealings includes where there is some act of dishonesty or actual fraud.if there are a series of transactions, fraud at one stage is enough to vitiate the transaction....”*

The above holding applies with full force to facts of the instant case. The registration of the defendants' mother as proprietor of the suit land when she was not the administrator of late Sidona Nakiryowa's estate was illegal and an act of fraud since it was accompanied with full knowledge of the true facts by the defendants. ***Section 191 of the Succession Act (Cap.162)*** provides as follows;

“Except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.”*

Section 92 RTA also provides that it is only the registered proprietor of land that may transfer the same by executing a transfer. In this case, the registered proprietor late Sidona Nakiryowa never signed any transfer to the defendants' late mother. Therefore, the transfer into the defendant's mother's name of the suit land and the subsequent transfer to the defendants as administrators of their late mother's estate was illegal and fraudulent.

The plaintiff's evidence further demonstrates that the defendants were at all times aware of the fact that the customary heir of the late Sidona Nakiryowa was Maria Lwiza Nasimbwa and not their late mother Maria Antonia Namugenyi. Despite this knowledge the defendants went ahead to obtain succession certificate for their late mother and falsely misrepresented therein that the suit land belonged to her. It was on basis of the succession certificate that the defendants' late mother was registered on the title and as administrators of her estate the defendants got registered as proprietors. This was nothing short of fraud given such gross intentional misrepresentation by the defendants. Since fraud was the basis and the root of the defendants' registration on the certificate of title as proprietors, such title cannot be left to stand. I find that the plaintiff has discharged the burden of proof of fraud to the required standard.

Issue No. 2: Whether the plaintiff is entitled to the remedies claimed.

Having found that defendants procured registration of their mother and themselves on the suit land through fraud, it would inevitably entitle the plaintiff to remedies prayed for. This court therefore finds that the late Maria Antonia Namugenyi, the defendant's mother, was not a beneficiary of the estate of the late Sidona Nakiryowa, and declares so. This inevitably means that the suit land belongs to the beneficiaries of Sidona Nakiryowa of whom the plaintiff is one, and it also declared so.

The plaintiff also prayed for an order of cancellation of the defendant's certificate of title, permanent injunction, general damages and costs of the suit. ***Section 77 RTA*** provides that any certificate of title, entry, removal of incumbrance, or cancellation, in the register book, procured or made by fraud, shall be void as against all parties or privies to the fraud. In ***Kigozi Mayambala vs. Sentamu & A'nor** (1987) HCB 68,*** it was also held that once it is proved that a certificate of title is null and void, it must be cancelled under ***Section 177 of the Registration of Titles Act.***

On strength of the above authorities and the evidence adduced in this case, the defendants' title is cancelled on grounds of illegality and fraud

The plaintiff also prayed for general damages as a result of the defendants unlawfully interfering with her inheritance from the late Sidona Nakiryowa. The position of the law is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the defendant's acts. See: ***James Fredrick Nsubuga vs. Attorney General, HCCS No. 13 of 1993; Erukan Kuwe vs. Isaac Patrick Matovu & A' nor HCCS. No. 177 of 2003.*** Further, in the case of ***Dr. Dennis Lwamafa vs. Attorney General [1992] KALR 21,*** it was held that the plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he would have been had he not suffered the wrong.

In the instant case, the plaintiff adduced evidence establishing her right over the suit land as beneficiary which she was denied enjoyment of from the time the fraud was committed in 1987. I find that she merits recompense commensurate to the inconvenience she has suffered. Taking the facts of this particular case, I would consider UGX 5 Million to be fair and adequate general damages and award the same to the plaintiff.

Regarding the issue of costs, the established law, under ***Section 27(2) CPA (supra)*** is that costs are awarded at the discretion of court and shall follow the event unless for good reasons the court directs otherwise. See: ***Jennifer Rwanyindo Aurelia & A' nor vs. School Outfitters (U) Ltd., C. A. CA No.53 of 1999; National Pharmacy Ltd. vs. Kampala City Council [1979] HCB 25.*** In the instant case, the plaintiff has succeeded in his suit and I find no justifiable reason to deny her costs of the suit. The plaintiff is awarded costs of this suit. It is accordingly declared and ordered as follows;

1. ***The late Maria Antonia Namugenyi, the defendants' mother, was not a beneficiary of the late Sidona Nakiryowa,***
2. ***Land formerly described as Kibuga Block 217 Plot 37 belongs to beneficiaries of late Sidona Nakiryowa whom the plaintiff is part.***
3. ***The certificate of title in the names of the defendants and any subsequent subdivision arising from the same is hereby cancelled and restored to the original Block 217 Plot 37 in the names of Sidona Nakiryowa.***
4. ***A permanent injunction doth issue restraining the defendants, their agents or any one claiming under them from further interfering or in any way whatsoever dealing with the suit land.***
5. ***The plaintiff is awarded general damages of UGX 5,000,000=***
6. ***The amount in (5) above shall attract interest of 8% per annum from the date of this judgment until payment in full.***
7. ***The Plaintiff is awarded costs of the suit.***

BASHAIJA K. ANDREW

JUDGE

22/10/2015

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