

UGANDA / JUDGMENT

Namutebi v Nabisere (Originating Summons 4 of 2023) [2024] UGHCLD 65 (13 March 2024)

[2024] UGHCLD 65

COURT

HC: Land Division (Uganda)

BEFORE

Naluzze Aisha Batala, J

CASE / FILE NUMBER

Originating Summons 4 of 2023

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****LAND DIVISON****ORIGINATING SUMMON NO 004 OF 2023****NAMUTEBI MARIAM BITALO ::::::::::::::::::::PLAINTIFF VERSUS****NABISERE JALIA :::::::::::::::::::: DEFENDANT BEFORE; HON JUSTICE
NALUZZE AISHA BATALA JUDGEMENT*****Background***

- 1. The Plaintiff, the former registered proprietor of Block 29 Plot 1010 Mulago brought a suit by Originating summons for the determination of the following questions;
- i) Whether the Plaintiff had a right to sell land comprised on Block 29 Plot 1010 Mulago.
- ii) Whether the Defendant has a claim of right as a Kibanja owner of land comprised on Block 29 Palot 1010 Mulago?
- iii) Whether the Plaintiff should continue staying on the land until the grant of letters of administration?

Plaintiff's evidence;

- 2. The summons was supported with an Affidavit sworn by the Plaintiff **Namutebi Mariam Bitalo** which briefly stated that;
- 3. It is averred by the Plaintiff that she has always been the registered proprietor of land comprised on Block 29 Plot 1010 land at Mulago.
- 4. That the Plaintiff bought the suit land and built a house where she brought her father to stay but later discovered that her late father had transferred the land into his names without the Plaintiff's consent.
- 5. That her late father admitted to the transfer and agreed to transfer the land into the name of the Plaintiff through a memorandum of understanding.
- 6. That it was further agreed that the Plaintiff would compensate the beneficiaries of her late father.
- 7. The Plaintiff then went ahead and sold the land to the Munezero Co-Operative Savings and Credit Society. However, before the Plaintiff could settle the beneficiaries, the Defendant went ahead and made a complaint against her to the Office of the Deputy RCC.
- 8. That the defendant is now claiming that she's a Kibanja holder and that the Plaintiff had no right to sell the suit land without her consent.

Defendant's evidence;

- 9. The Defendant filed an affidavit in reply and raised 4 preliminary objections that is;
 - i) The procedure elected by the Plaintiff is not appropriate.
 - ii) That the dispute is in respect of validity of the transactions touching the subject matter.
 - iii) The matter is frivolous and vexations, an abuse of court process.
 - iv) The matter and the supporting affidavit are tainted with falsehoods.
- 10. She further contends that she was bought onto the suit land by her late Husband and the same became their matrimonial home.
- 11. That she found developments which had been effected by her late Husband and the certificate of title in the respect of the same property was transferred into her husband's names
in 2007. That she is not aware of any forgery made by her husband.
- 10. She further contends that at the time of the alleged agreement between the late Haruna Bitalo (her husband) and the Plaintiff, the certificate of title was in the names of the late Haruna Bitalo, her husband and that no consent was sought from her.

11. She contends that on the 7th day of July, 2023, she received a notice informing her that the tenants on the suit land should pay their rent to MUNEZERO SACCO LIMITED alleging that the said institution is the new owner of the suit land having acquired the same on the 7th day of November, 2022.
12. She avers that when she heard the Plaintiff was intending to sell the property, she lodged a caveat on the land. She further avers that she has never agreed to do any valuation of the developments on the suit-land and compensation in that regard.
13. That the mortgaging of the suit-land to Housing Finance Bank was illegal. The Defendant contends that she has never consented to any distribution of any amount advanced by the Plaintiff towards compensation.
14. The Plaintiff filed an affidavit in rejoinder sworn by Birikinde Abubaker the son to the Plaintiff who confirmed that the Originating summons is the proper procedure for the determination of questions raised. The Affidavit in rejoinder further confirmed the averments of the Affidavit in Support.

Representation;

15. The plaintiff was represented by Sophia Nakandi of Fides Legal Associates whereas Mr. Layimbazi Nalukoola of Ms. Nalukoola Advocates & Solicitors represented the Defendants. Both parties filed their pleadings and submissions which I have considered in the determination of this suit.

Preliminary Objections.

16. The Defendant in her Affidavit in Reply raised Preliminary objections and counsel for the Defendant further raised three objections which will determine the direction of this matter and especially as to whether it is competently before this Court. These are;

i) Whether the matter is competently before Court?

ii) Whether the Application is supported by defective Affidavits? iii) Whether the Purported sale/ Transfer of land comprised on Block 29 Plot 2010 at Mulago should be set aside for lack of spousal consent?

Resolution and determination of the objections;

Whether the matter is competently before court?

17. I have read the Originating Summons and the Affidavit in support filed by the Plaintiff. I have also considered the Affidavit in Reply filed by the Defendant and the Plaintiff's Affidavit in Rejoinder.

18. It is trite law that a preliminary objection can be raised any time before judgement. A preliminary objection is a point of law that should be pleaded or arise by clear implications from the pleadings.
19. Court shall proceed to resolve objection one that relates to whether this matter is competently before court.
20. This issue puts into question the procedure adopted for bringing this suit; **Order 37 rule 3 of the CPR** provides that:-

"A vendor or purchaser of immovable property or their

representatives may, at any time or times, take out an originating summons returnable before a Judge sitting in chambers, for determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale, not being a question affecting the existence or validity of the contract."

20. Counsel for the Defendants submitted and cited **Kalusumbai Vs Abdul Hussein (1975) EA 708**, where it was held that the procedure by Originating summons was intended to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to have court determine matters which involve a serious question.
21. The Facts in this case show that the Plaintiff the late Haruna Bitalo entered into a Memorandum of Understanding to transfer the suit land into the name of the Plaintiff. However, the Defendant claims that as the wife to the late Haruna Bitalo, she did not give any spousal consent for the land to be transferred to the Plaintiff.
22. In my opinion, this matter dwells on the validity of the sale of the suit land, the validity of transactions touching the subject matter and validity of the memorandum of Understanding.
23. The issues raised in this matter are contentious and not simple matters. In **JP Nagemi T/a Nagemi and Co. Advocates vs. Ismail Semakula OS 8/13** it was held that originating summons should be limited to straight forward matters and that originating summons is not a procedure by which decisions on disputed questions of fact can be obtained and that it is not appropriate where disputes involve considerable amount of evidence.
24. Order 37 of the Civil Procedure Rules is intended to solve simple matters which do not require investigations and that should only be used in situations where there are no substantial disputes as to facts but rather on legal consequences of the set of facts.
25. The affidavit in support deponed by Namutebi Mariam Bitalo then delves into the details of the dispute that culminated into the Defendant claiming that the suit-land

was sold without her consent and her claims as a Kibanja Holder to the suit land.

26. The Defendant so claims that she lodged a Caveat on the suit property and hence making it impossible for the Plaintiff to make any transactions on the suit property but discovered that the suit land had been mortgaged to Housing Finance Bank despite of the caveat lodged hence resulting into an illegal transaction.
27. In the case of **Nakabugo Vs. Serunjogi (1981) HCB 58**, it was held that it is trite law that when disputed facts are complex and involve a considerable amount of oral evidence, an Originating Summons is not the proper procedure to take.
28. From the Pleadings and submissions by both parties, this matter is a contentious matter that requires this Honorable Court to look at a number of considerable evidence before its determination.
29. The procedure adopted cannot be sustained by this Honorable Court as it's not a matter that is straight forward or simple in accordance with Order 37 of the Civil Procedure Act
30. I therefore do not find the procedure adopted by the Plaintiff appropriate to determine the questions raised and therefore not necessary to deal with the other objections or dwell into the merits of the questions sought to be determined here in.
31. The originating Summons is accordingly dismissed under Order 37 rule 11 Civil Procedure Rules.
32. The suit is dismissed with no orders as to costs

I SO ORDER.

NALUZZE AISHA BATALA

JUDGE

13/03/2024

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