

UGANDA / JUDGMENT

Ntorinwe v Muramuzi

(HCT-01-CV-LD-CA 2 of 2014) [2023]

UGHCLD 165 (31 January 2023)

[2023] UGHCLD 165

COURT

HC: Land Division (Uganda)

BEFORE

Mugabo, J

CASE / FILE NUMBER

HCT-01-CV-LD-CA 2 of 2014

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT FORT PORTAL****HCT-01-CV-LD-002 OF 2014****JULIET NTORINWE ::::::::::::::::::::::::::::::::::: PLAINTIFF****VERSUS****MURAMUZI LAUBEN :::::::::::::::::::::::::::::::::::DEFENDANT****BEFORE: HON. JUSTICE VINCENT EMMY MUGABO****JUDGMENT**

The Plaintiff brought this suit against the defendant for a declaration that the plaintiff is a trespasser on land comprised in FRV 1411 Folio 8 Kibale Block 35 Plots 6 & 7 at Rushenyi (suit land), general damages for trespass, exemplary damages, compensation for lost crops and other developments, a permanent injunction and costs of the suit. The case for the plaintiff is that she purchased the suit land from Charles Mugarura in 1997, built on the same and stated staying there. She claims that she developed the land with an animal farm, fish ponds, banana plantation, other crops and eucalyptus trees. That the defendant trespassed on the suit land in 2013 and destroyed the fish ponds, cut down the plaintiff's trees and caused loss to the plaintiff. The suit land is registered in the names of the plaintiff vide instrument dated 28th May 2013.

The case for the defendant is that he is the rightful owner of the suit land which formerly belonged to his parents. He litigated with his brother Elidad Byagagaire (husband to the plaintiff) in the Magistrate's court of Kamwenge over the suit land in Civil Suit No. 024 of 2011 and was successful. The said Eldad appealed to this court and the appeal was dismissed. The resultant execution saw the land below the road headed to Nkona being divided into three portions in 2013 as ordered by the trial magistrate, for the three children of the late Yosamu Ndyanabangyi. That is to say, the defendant, the plaintiff's husband and one Bonabana Sarah. The defendant then took possession of his share. Later, Eldad Byagagaire sold his portion to the defendant and that the defendant has been in possession of the same ever since.

In his counterclaim, the defendant avers that the plaintiff obtained the certificate of title to the suit land by fraud when she knowingly included the part of the land belonging to the defendant. He further avers that the plaintiff's actions have greatly inconvenienced him for which he should be compensated in general damages. He further prays for cancellation of the certificate of title to the suit land, a declaration that the defendant is the rightful owner of the land enclosed in the certificate of title, general damages for trespass, a permanent injunction and costs of the counterclaim and the suit.

It is important to note that the suit land is comprised of two plots as indicated in the deed plan. The two plots are separated by the road to Nkoma in Kamwenge. It appears that one plot is currently occupied by the plaintiff and the other occupied by the defendant. The part occupied by the defendant is the one in dispute.

Representation and hearing

The plaintiff is represented by Mr. Muhumuza Samuel. Mr. Wahinda Enock of Ahabwe James & Co. Advocates represents that defendant. The hearing proceeded by way of witness statements. The plaintiff led evidence of four witnesses. Kalegyeya Vincent as PW1, Natukunda Jackline as PW2, the Plaintiff as PW3 and Bagagaire Eldad as PW4. The defendant led evidence of three witness, Christopher Mugarura as DW1, Mbweke Kes as DW2 and the defendant as DW3.

Court then conducted a locus visit on 11th July 2022 and recorded evidence of some of the witnesses and made several observations which have also been considered in the judgment.

In their Joint Scheduling Memorandum, the parties raised the following issues for determination by court:-

- *1. Whether the plaintiff is the lawful owner of the suit land*
- *2. Whether the defendant trespassed on the suit land*
- *3. Whether the plaintiff's certificate of title was fraudulently obtained*
- 4. *What remedies are available to the parties?*

I choose to resolve issues 1, 2 & 3 together, issue 4 separately.

Burden and Standard of proof

The burden of proof is upon the Plaintiff to prove his case on a balance of probabilities. **Section 101, 102 and 103 of the Evidence Act** provide that he who asserts a fact must prove it. Whoever desires any court to give the judgment as to any legal rights or liability dependent on the existence of the fact which he or she asserts must prove that fact exists.

The court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that, the more probable conclusion is that for which the Plaintiff contends, since the standards of proof is on the balance of probabilities /preponderance of evidence (see *Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345* and *Sebuliba Vs Cooperative Bank Ltd (1982) HCB130*)

Court's determination

Issues 1, 2 & 3

The suit now seeks to determine lawful owner of the suit land and whether either party is guilty of trespass to the same.

The plaintiff (PW3) testified that she bought the suit land from Charles Mugarura in 1997 using the money she had acquired from the sale of her share of the her father's estate in Bushenyi. That she developed the suit land with a home, fish ponds, banana plantation, eucalyptus trees and crop gardens. She noted that about 2014, the defendant fist caused the arrest of her husband, then trespassed on the suit land by building on the same, harvesting the plaintiff's crops and trees. Further that she had started the process to obtain the certificate of title to the suit land before the defendant filed a case against her husband in the magistrate's court. She relied on the certificate of title to the suit land in her name (Pexh1) and a copy of the agreement on which she purports to have bought the suit land was tendered for identification as **P ID1**.

During cross examination, **PW3** was not sure whether she bought the land from Christopher Mugarura or Charles Mugarura. She also exhibited several inconsistencies after stating that at the time of purchase, she was in Bushenyi on her husband's land. At one time she states that she did not attend the locus visit by the magistrate and at another point she states that she attended the same. She confirms that the land in dispute is below the road (to Nkoma) and her house is on the upper side of the same road.

The plaintiff also testified that her husband, Bagagaire Eldad sold part of her land to the defendant and she signed on the agreement unwillingly because her husband was in prison. She also testified that when the court bailiff went to divide the land, her husband got a share which he later sold to the defendant. That but the time the bailiff divided the land, she had acquired the certificate of title. She then contradicted herself when she

stated that she doesn't remember when the bailiff went to the land. During reexamination, she testified that she was not present when the suit land was purchased but that they left for her space to sign. That she provided the funds used in the purchase.

At the locus in quo, PW3 testified that the court bailiff divided the land occupied by the defendant. She showed court the banana plantation and the eucalyptus that she planted on the land. She also confirmed that the 3rd share on the suit land belongs to Bonabana, sister to the defendant and Eldad.

PW4 is the plaintiff's husband and brother to the defendant. He testified that the suit land belongs to the plaintiff. He noted that when his and the defendant's mother passed on, he divided the land she left behind and gave the defendant a portion and the same was documented in **Pexh3** and that he later sold his own portion to the defendant. He notes that the land that was left by their late mother is different from the suit land.

During cross examination, PW4 stated that he purchased the suit land but the money was provided by the plaintiff. He also exhibited a set of contradictions. He stated that the true agreement that was executed when the suit land was bought is dated 20/01/1998 and not 25/10/1997 as in **P ID1**. Further that the agreement of 1997 was used by the plaintiff to obtain a loan from a money lender which she used to purchase the land. He also admits that the while she applied for the letters of administration to the estate of the agreement of 1997 was forged and that the land was actually bought from Christopher Mugarura and not Charles Mugarura. He also confirms that the land in dispute is the one below the road and the defendant is in occupation.

PW4 confirmed that he sold his share from his mother's estate to the defendant.

PW1 stated that he is the Chairperson LC1 of Rushenyi cell where the suit land is located. That when he came to that village in 2000, the plaintiff was staying on the suit land. That when the defendant's mother died, her land was divided amongst her children including the defendant and Eldad, husband to the plaintiff. Further that the defendant constructed in the portion he was given. During cross examination, PW1 stated that the plaintiff is on the upper side if the road and the defendant is utilizing the lower side. Also that the bailiff divided the land in dispute into three portions. Both the lower (in dispute) and the upper parts of the land are in the same title.

The defendant, DW3 stated in his witness statement that when his late mother died, PW4 wanted to grab the entire land that belonged to his mother. The defendant then sued PW4 in the Magistrates' court at Kamwenge and the trial magistrate ordered that the land left by his and PW4's mother be divided in three portions for the three siblings including the defendant, PW4 and Bonabana Sarah (**Dexh1**). PW4's appeal in the High Court failed (**Dexh2**) and the part below the road was divided by the bailiff as ordered by court. On 6th August 2013, after realizing that the plaintiff was in the process of obtaining a certificate of title to the suit land, the trial magistrate wrote to the Chief Administrative Officer of Kamwenge asking that the process should be halted (**Dexh3**). PW1 then sold his share from their late mother's estate to the defendant (**Dexh5**).

During cross examination, DW3 stated that the land on the upper end of the road belongs to the plaintiff and that his claim is on the lower end.

DW1 was the owner of the suit land immediately preceding the plaintiff. He stated that he sold the land to PW4 and not the plaintiff in 1997. He denied ever selling land to the plaintiff. DW2 stated that he witnessed the sale of the land to PW4 and not to the plaintiff.

In his submissions, counsel for the plaintiff argues a certificate of title is conclusive evidence of the particulars contained therein in accordance with **Section 56 of the Registration of Titles Act (RTA)**. I suppose counsel intended to rely on Section 59 of the RTA as the section he quoted deals with co-ownership of land. Counsel noted that the defendant has not led any evidence to challenge the plaintiff's certificate of title and the plaintiff should be maintained as the rightful owner of the land as contained in the certificate.

It is the plaintiff's submission that much as the defendant claims to have acquired the suit land out of a court decree, the defendant hoodwinked the grade one magistrate to believe that the suit land belonged to the defendant's late parents whereas not. Counsel argues that by 1995 when the defendant's father passed on, the suit land had not yet come into existence in the hands of either party to the suit. As such, the defendant could not claim the land before the magistrate's court. Further that the defendant's father did not own the suit land and it was wrong for the Magistrate to order a division of the suit land on the premise that it belonged to the estate of the defendant's late father.

Counsel for the plaintiff also argued that after the Magistrate's court stating that the suit before it was res judicata, it was illegal for it to ahead and adjudicate on the suit. Counsel referred to the case of **Makula International Ltd Vs His Eminence Cardinal Wamala (1982) HCB 11** to support the argument that once an illegality is brought to the court's

attention, it overrides questions of pleadings and admissions. It is further argued for the plaintiff that fraud must be strictly proved in line with the decision in **Kampala Bottlers Ltd Vs Damanico (U) Ltd SCCA No. 22 of 1992** and that the defendant has fallen far from proving any fraud on the part of the plaintiff.

The submissions of the defendant are to the effect that the plaintiff has failed to prove that she ever purchased the suit land. That she also relied on a forged agreement to process the certificate of title. Counsel noted that the magistrate court ordered for a division of the part of the suit land below the road which the defendant now occupies having gotten a share and bought the share of the plaintiff's husband.

Counsel for the defendant argued that the plaintiff forged an agreement of a purported purchase when her husband and the defendant were already litigating over the suit land and that the findings of the trial magistrate in ordering for a division of the suit land cannot be faulted at this time since the appeal over the same was also already decided.

It is also argued for the defendant that the plaintiff has at all material times known about the defendant's interest in the suit land, even before she acquired the certificate of title to the same. Counsel argues that the circumstances under which the plaintiff includes several other people who include minors as co-owners on the title are not known. Counsel relied on the case of **Kampala Bottlers (supra)** to define fraud as an act of dishonesty or sharp practice intended to deprive someone of an interest in land.

I have carefully studied the parties' pleadings, evidence as well as the submissions of their respective counsel. From the onset I need to mention that the findings of Grade One Magistrate of Kamwenge in Civil Suit No.

024 of 2011 may not be challenged at this time. If this court allowed either party to challenge them, the court would be sitting in an appeal not raised by the parties. If either party was dissatisfied or aggrieved by the said findings, they had a remedy in an appeal, an application for review before the magistrate or revision before this court. PW4 exercised his right of appeal and the same was dismissed. As such, the argument by counsel for the plaintiff that the magistrate's decision was erroneous is misplaced as the same ought to have been raised in Civil Appeal No. 038 of 2012.

Be that as it may, for present purposes, the crux of the matter is whether or not the plaintiff's legal interests in the suit land were obtained with fraud. **Section 59 of the RTA** does stipulate that a certificate of title is conclusive evidence of ownership and its indefeasibility cannot be impeached on account of any informality or irregularity in the process leading up to its issuance. However, **section 176(c) of the RTA** does mandate an action to impeach the indefeasibility of a registered proprietor's interest in land on account of the deprivation of another person's interest in the same land by fraud. For ease of reference I reproduce the said legal provision below:

"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 in any of the following cases—

(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."

Fraud has been defined to include dishonest dealing in land or sharp practice intended to deprive a person of an interest in land, including an unregistered interest (see **Kampala Bottlers Ltd (supra)**.) To procure registration of title in order to defeat an unregistered interest also amounts to fraud (see **Katarakawe v. Katwiremu [1977] H. C. B 187** where it was held that: *"Although mere knowledge of unregistered interest cannot be imported as fraud under the Act, it is my view that where such knowledge is accompanied by a wrongful intention to defeat such existing interest that would amount to fraud"**)

A person becomes privy to a fraudulent transaction either by being an active participant in its perpetration by action or omission, or when having acquired knowledge of its perpetration by others or third parties, knowingly and wilfully seeks to take benefit from it.

The particulars of fraud as pleaded by the defendant include;

- i. The plaintiff conniving with her husband to include the defendant's land in the certificate of title
- ii. Inspecting and surveying the defendant's land without his consent
- iii. Bring the defendant's land under the operation of the RTA to defeat the defendant's unregistered interest.

The plaintiff's evidence clearly points to the fact that she did not buy the suit land from anyone. In her evidence, she stated that she was not present when her husband was purchasing the suit land. She was in Bushenyi at the time. In one statement she claims to have bought the land from one Charles Mugarura in 1997, yet PW4 stated that the agreement of 1997 (P ID1) was a forgery intended to be used by the plaintiff to obtain a loan of UGX 2,000,000/= from a money lender, which loan was used to buy the suit land. In her evidence she stated that the money she used to buy the suit land was actually from a sale of her land in Bushenyi. PW4 confirmed that the person from whom the suit land was bought was actually Christopher Mugarura and not Charles and in 1998. The said Christopher appeared as DW1 and confirmed that he sold the suit land to PW4 and not the plaintiff.

I find trouble to believe the plaintiff's evidence on her acquisition of the suit land as the same is marred by inconsistencies and contradictions. I also note that the certificate of title also bears the names of Tumwekwatse Olivia, Anyongireho Samuel, Ssasirabo Deborah and Kyompaire Jenena as co-owners of the suit land with the plaintiff. The circumstances under which these other persons acquire an interest in the suit land are not clear. They are not even mentioned in the forged agreement.

The plaintiff's argument that she claims an interest from the fact that she provided the funds for the purchase of the suit land is also unbelievable. It is known that in situations where a party is not in position to transact in land by themselves, they are at liberty to appoint an attorney through a properly executed power of attorney. Even if court were to close an eye to this, the plaintiff sat back watching her husband litigate over the suit land, the same was divided, her husband sold his share to the defendant and she witnessed the sale. She cannot now turn back and claim that the defendant is a trespasser on the land.

The point at which the plaintiff started to apply for registration is not clear. But what is clear from the evidence of PW1 is that the defendant's contention over the suit land began as far back as 2010. This would imply that she was going through the process of registration while the defendant and her husband were litigating over the suit land until she acquired her

title in May 2013 when the magistrate had already made a decision over the same close to a year prior.

During the locus visit, the plaintiff showed court the land on which her home sits and the land in dispute which is occupied by the defendant. The two pieces of land are separated by the road to Nkoma. She also showed court the portion which had been left for Bonanana, the sister to her husband. The actions of the plaintiff in claiming the entire suit land and registering herself as proprietor cannot be considered to be bona fide. She applied for registration to defeat the defendant's unregistered interest. Better for her sharpness that she included the names of her children as coproprietors of the land. There is no better explanation of fraud than this.

As stated earlier, the land in dispute is actually only part of the suit land. The part of the land currently occupied by the plaintiff is not in dispute although it is embodied in the same certificate of title. As such, the plaintiff may not be deprived of this part. It is my finding that the defendant owns a part of the suit land which he currently occupies. It is fortunate for the parties that the two pieces of land that form the suit land have distinct plots on the certificate of title and easy for severance.

Having found as above, the defendant cannot be said to have trespassed on land that he owns. The plaintiff's suit fails.

With respect to the defendant's counterclaim, he partly succeeds owing to the fact that he claims the entire suit land whereas he owns only a part. The defendant has also not led evidence to prove trespass against the plaintiff.

From the foregoing discussion, issues 1 & 2 are answered in the negative and issue 3 in the affirmative.

With respect to remedies, the plaintiff's suit has failed and as such she is not entitled to the remedies sought. The defendant prayed for cancellation of the plaintiff's certificate of title, a declaration that the defendant is the rightful owner of the suit land enclosed in the certificate of title, a permanent injunction, general damages for trespass and costs.

Cancellation of title

Section 77 of the RTA provides that a certificate of title is void for fraud. I have already found earlier that the plaintiff's certificate of title was procured by fraud on her part. **Section 177 of the RTA** empowers this court to order for a cancellation of a certificate of title upon recovery of land by any proceeding. The circumstances of this case point to a possibility of a severance rather than cancellation of the entire title. The plaintiff and the defendant own distinct and severable pieces and plots of land although they are embodied in the same certificate. This calls for a severance and rectification of the register rather than a cancellation.

General damages

General damages are usually awarded at the discretion of the court.

In the case of **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305** court held that;

"In assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered".

Decision of Hon. Justice Vincent Emmy Mugabo Page 13 of 15 The award of general damages is normally in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission see *James Fredrick Nsubuga v. Attorney General, H. C.* *Civil Suit No. 13 of 1993.* In the present case, I note that the defendant did not plead particulars of trespass in his counterclaim as required by law. Counsel for the defendant prayed for UGX 50,000,000/- in general damages. he based on the fact that the defendant suffered inconvenience as a result of the plaintiff's fraudulent actions and as such, he ought to be place back in the position he would have been if the plaintiff did not do her fraudulent acts.

I have earlier noted that the defendant did not plead particulars of the trespass. Also, apart from the entry into the land by the plaintiff to survey the same, I don't see any other inconvenience suffered by the defendant. As such, I opine that general damages in the sum of UGX 500,000/= would be sufficient.

In the ultimate result, the plaintiff's suit fails. Each party shall bear its own costs. The defendant counterclaim partly succeeds and I make the following orders;

- a. The defendant is the rightful owner of part of the suit land. That is, the part occupied by the defendant that excludes Bonabana Sarah's portion
- b. The defendant's land should be severed off the certificate of title for FRV 1411 Folio 8 Kibale Block 35 Plots 6 & 7 at Rushenyi and the plaintiff is ordered to produce the duplicate certificate of title to the Registrar of titles for this purpose
- c. The defendant is awarded UGX 500,000/= in general damages
- d. Each party shall bear its own costs.

It is so ordered

Dated at Fort Portal this 31st day of January 2023. .

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties

Vincent Emmy Mugabo

Judge

31st January 2023.

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