

UGANDA / JUDGMENT

Serunjogi v Asiimwe and Others (Civil Suit 575 of 2019) [2023] UGCommC 96 (22 September 2023) [2023] UGCommC 96

COURT

Commercial Court of Uganda

BEFORE

Abinyo, J

CASE / FILE NUMBER

Civil Suit 575 of 2019

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5 THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(COMMERCIAL DIVISION)****CIVIL SUIT No. 0575 OF 2019****10 SERUNJOGI FREDRICK PLAINTIFF****VERSUS**

- **1. ASIIMWE MOSES**
- **2. LETSHEGO UGANDA LIMITED**
- **3. THE COMMISSIONER LANDS REGISTRATION DEFENDANTS**

BEFORE: HON. LADY JUSTICE SUSAN ABINYO**JUDGMENT****Introduction**

The Plaintiff brought this suit against the Defendants jointly, and or severally seeking the following:- declarations that the proprietorship of land comprised in Mailo Register, Kyadondo Block 170 Plot No. 1000 at Kijabijo measuring 0.0470 hectares (hereinafter referred to as "the suit land ") was unlawfully, and fraudulently transferred into the 1st Defendant's name; that the

registration of the 1st Defendant as the proprietor of the suit land is null ,and void; that the mortgage 25 created by the 1st Defendant for his benefit in favour of the 2nd Defendant on the suit land is illegal, null and void, and orders that the 3rd Defendant cancels the entry in the Register of the 1st Defendant as the registered proprietor of the suit land; that the 3rd Defendant registers , and or reinstates the Plaintiff as the owner of the suit land; that the 3rd Defendant cancels the entry of the mortgage in 30 favour of the 2nd Defendant from the register and or certificate of title to the suit land; that the 2nd Defendant delivers up the certificate of title to the suit land to

- the 3rd Defendant for cancellation of the 1st Defendant's entry in the register as the proprietor of the suit land, registration of the Plaintiff as the owner, and deregistration of the mortgage in favour of the 2nd Defendant; that the 1st and 2nd
- 35 Defendants deliver, and hand over to the Plaintiff the certificate of title to the suit land; a permanent injunction restraining the 1st and 2nd Defendants by themselves

5 and or by their respective servants, employees, agents, and others claiming under them from trespassing, auctioning, selling, and alienating or purporting to alienate the suit land or part thereof, damages for fraud, and costs of the suit.

Facts

The brief facts giving rise to the Plaintiff's cause of action against the Defendants 10 are that he was at all material times the registered proprietor of the suit land, and has been using it as family land (matrimonial home) for more than 10 years. That he presented to the 1st Defendant land transfer documents duly signed by Semakula Enock in his favor to facilitate the registration of his name on the Certificate of Title for the suit land, and that indeed, the 1st Defendant effected 15 the transfer and registration of his name on the Certificate of Title for the suit land.

That between the Months of August 2017, and April 2018, the 1st Defendant presented the Certificate of Title for the suit land in the name of the Plaintiff, and demanded that the Plaintiff and his wife pay him for the services rendered, unfortunately the Plaintiff and his wife did not have money to instantly clear the

20 monies owed to the 1st Defendant, as such the Certificate of Title remained in custody of the 1st Defendant as security for the monies he was demanding from the Plaintiff and his wife.

That on 2nd May, 2018, the 1st Defendant fraudulently caused the registration of his name on the Certificate of Title for the suit land without the knowledge, 25 consent, and authorization of the Plaintiff and his wife. That on 2nd November, 2018, the Plaintiff discovered that the suit land was mortgaged by the 1st Defendant to the 2nd Defendant to secure a loan in favour of the 1st Defendant. That the 1st Defendant defaulted on his loan obligations with the 2nd Defendant, and the 2nd Defendant has despite the Plaintiff's contestation of mortgaging the

30 suit land, advertised the suit land for sale, and that the Plaintiff and his wife have never signed any documentation to transfer the suit land to the 1st Defendant or at all.

That the registration of the 1st Defendant's name on the Certificate of Title for the suit land is illegal, null, and void.

35 The 2nd Defendant denied the above allegations made by the Plaintiff, and contended that it dealt with Asiimwe Amos, who pledged and or mortgaged the suit property as security for the payment of Ugx 25,000,000(Uganda Shillings Twenty-Five Million Shillings only), and never dealt with Asiimwe Moses, the 1st Defendant.

5 That this suit is frivolous, vexatious, and misconceived, as it discloses no cause of action against the 2nd Defendant. That the 2nd Defendant shall pray to this Honourable Court that the suit be dismissed with costs.

The 1st, and 3rd Defendants were served with summons however, the 1st and 3rd Defendants failed, refused, and or ignored to file a defence. This Court looked at

10 the affidavits of service on record, and was satisfied that proper service was effected upon the 1st, and 3rd Defendants. Consequently, a default judgment was entered against the 1st, and 3rd Defendants.

There were no agreed facts during the scheduling proceedings.

Representation

15 The Plaintiff was represented by Counsel Osma Kayanja jointly with Counsel Sseguya Ismail of United Advocates while the 2nd Defendant was represented by Counsel Frank Tumusiime of M/S Frank Tumusiime & Co. Advocates.

Issues for determination

The issues for Court's determination were agreed upon during the scheduling 20 proceedings as below.

- 1. Whether the Plaintiff has a cause of action against the 2nd Defendant?
- 2. Whether the transfer of title to the 1st Defendant was illegal?
- 3. Whether the mortgage of the suit land by the 1st Defendant to the 2nd Defendant was illegal?
- 25 4. What are the remedies available to the parties?

Counsel for the parties herein filed witness statements, which the Court adopted during the hearing proceedings as the evidence in chief of the witnesses for the respective parties. The said evidence will be evaluated hereunder.

Resolution of issues

30 Counsel for the 2nd Defendant, raised a preliminary objection on whether there is a cause of action disclosed by the Plaintiff against the 2nd Defendant, which was agreed, and framed as the first issue. Counsel for the 2nd Defendant opted to argue issues 1, 2, and 3 above concurrently, and the last issue separately.

Counsel for the Plaintiff merged issues 2, and 3 above, and argued the last issue 35 also separately. The first issue was not considered by Counsel in his written submissions.

This Court will consider the first, and 4th issues separately; the 2nd, and 3rd 5 issues will be resolved concurrently.

Issue No.1: Whether the Plaintiff has a cause of action against the 2nd Defendant?

Submissions of Counsel for the 2nd Defendant

Counsel for the 2nd Defendant submitted that the 2nd Defendant did not participate in processing of the title by the 1st Defendant, neither did the 2nd 10 Defendant invite the 1st Defendant for a loan, rather Asiimwe Amos the registered proprietor to the suit property applied for a loan, and mortgaged his land as security.

Counsel contended that the 2nd Defendant neither dealt with the 1st Defendant, 15 nor did it transact with the Plaintiff in any way, and that if there is any fraud, it cannot be attributed to the 2nd Defendant - a stranger to the Plaintiff, and 1st Defendant. That the 2nd Defendant was not under duty to investigate ownership beyond what appears on the land register. That the Plaintiff has failed to adduce evidence to prove that the 2nd Defendant was involved in the transfer of the

- 20 property or knew of the fraud but continued to act on it, and that cancellation of the name of Asiimwe Moses to Asiimwe Amos is a matter beyond the 2nd Defendants' authority, and means to explain, the 3rd Defendant would have explained this.
- 25 Counsel further submitted that the Plaintiff has the evidential burden to explain the linkage between the 1st Defendant Asiimwe Moses, and Asiimwe Amos, then further link this relation to the 2nd Defendant, but he failed to discharge this burden, and relied on section 102 of the Evidence Act on the proposition that a person would fail if no evidence at all was given on either side, and that there is 30 no cause of action linking the Plaintiff to the 2nd Defendant.

Counsel contended further that in allegations of fraud, the burden of proof is much higher and strict, and that the Plaintiff has failed to meet the standard of proof required in fraud cases, and relied on the case of *Fredrick J. K Zaabwe Vs* 35 *Orient Bank*, in support of his submissions.

Counsel for the Plaintiff did not make any reply to the submissions of Counsel for the 2nd Defendant on this preliminary objection.

5 Determination of the preliminary objection

The well-established principles to be considered in determining whether there is a cause of action, has been decided in a plethora of cases. *(See *Tororo Cement Co. Limited Vs Frokina International Limited* SC. Civil Appeal No. 2 of 2001,* which cited with approval the case of **Auto Garage Vs Motokov* No.3 (1971) EA 514, at*

10 *519*; where a cause of action was defined to mean every fact which is material to be proved to enable the Plaintiff to succeed or every fact which if denied, the Plaintiff must prove in order to obtain judgment.

The following questions as guided in the case of **Auto Garage Vs Motokov* No.3* (supra), on whether a cause of action has been disclosed by the Plaintiff are that:

- 1. Whether the Plaintiff enjoyed a right?
- 2. Whether that right has been violated? and
- 3. Whether the Defendant is liable?

The settled position of the law is that, in determining whether a plaintiff discloses a cause of action, the Court must look only at the plaint, and its annexures if any, and nowhere else upon the assumption that any express or implied allegations of fact in it are true. *(See *Narottam Bhatia & Anor Vs Boutique Shazimi Ltd* S. C Civil Appeal No. 6 of 2009,* and **Jeraf Sharif & Co. Vs Chotai Fancy Stores* [1960] E. A 374)*

I have taken into consideration the pleadings, the evidence adduced by the parties herein, and the submissions of Counsel for the 2nd Defendant, to find as

follows:

In the instant case, the Plaintiff's assertions in the plaint indicate that on 2nd May, 2018, the 1st Defendant fraudulently caused the registration of his name on the Certificate of Title for the suit land without the knowledge, consent, and authorization of the Plaintiff and his wife. That on 2nd November, 2018, the Plaintiff

discovered that the suit land was mortgaged by the 1st Defendant to the 2nd Defendant to secure a loan in favour of the 1st Defendant.

That the 1st Defendant defaulted on his loan obligations with the 2nd Defendant, and the 2nd Defendant has despite the Plaintiff's contestation on the mortgage for the suit land, advertised the suit land for sale, and that the Plaintiff and his wife have never signed any documentation to transfer the suit land to the 1st Defendant or at all. That the registration of the 1st Defendant's name on the Certificate of Title for the suit land is illegal, null, and void.

5 The 2nd Defendant in its written statement of defence denied the above allegations made by the Plaintiff, and contended that it dealt with Asiimwe Amos, who pledged and or mortgaged the suit property as security for the payment of Ugx 25,000,000(Uganda Shillings Twenty-Five Million Shillings only), and never dealt with Asiimwe Moses, the 1st Defendant.

10 Evidence

It was the Plaintiff's evidence that the suit land was originally part, and parcel of the bigger piece of land, which was formerly comprised in Mailo Register, Kyadondo Block 170, Plot No. 219 at Kijabijo, and that it was originally registered in the name of Semakula Enock.

- 15 That the suit land initially belonged to Kawungu Vicent, who had Kibanja interest, having bought the suit land from Semakula Enock. That Kawungu Vicent sold the suit land to the Plaintiff, and his wife, and signed transfer forms in favour of the Plaintiff in order to effect the transfer of the said suit land into the Plaintiff's name. A copy of the Sale Agreement (PE3) between Kawungu Vicent (seller), and
- 20 Serunjogi F and Serunjogi Getrude(Buyers), and the Certificate of Title(PE2) in respect of the suit land, and in the name of Serunjogi Fredrick as the registered proprietor, was adduced by the Plaintiff.

The Plaintiff further stated that because he and his wife were financially constrained to quickly effect the registration of his name on the land title to the

- suit land, he and the 1st Defendant entered into an oral contract, in which the 1st 25 Defendant was to use his resources to effect the registration of his name on the Certificate of Title for the suit land, and in turn he was to pay Ugx 800,000(Uganda Shillings Eight Hundred Thousand only) to the 1st Defendant for the services rendered.
- 30 That the Plaintiff presented to the 1st Defendant the land transfer forms duly signed by Semakula Enock in favour of the Plaintiff, to facilitate the transfer of the suit land into the name of the Plaintiff, which indeed the 1st Defendant effected into the Plaintiff's name.

That between the months of August, 2017, and April, 2018, the 1st Defendant 35 presented to the Plaintiff a Certificate of Title for the suit land, and demanded that the Plaintiff, and his wife pay to him the money for the services he rendered but the Plaintiff and his wife did not have the money. That as a result, the 1st Defendant remained with the Certificate of Title as security for the monies owed to him by the Plaintiff and his wife.

- 5 That on 2nd May, 2018, the 1st Defendant fraudulently caused the registration of his name on the Certificate of Title for the suit land without the knowledge, consent or authorization by the Plaintiff. That on 28th November, 2018, the suit land was mortgaged by the 1st Defendant to the 2nd Defendant to secure a loan in favour of the 1st Defendant. That the 1st Defendant defaulted on his loan

- 10 obligations with the 2nd Defendant, and the 2nd Defendant despite the contestation of the mortgage of the suit land, advertised the suit land for sale. That the registration of the 1st Defendant's name on the Certificate of Title is illegal, null and void, for which the Plaintiff has suffered mental anguish, and inconvenience.
- 15 The 2nd Defendant's evidence was that in the month of October, 2018, a one Asiimwe Amos approached the 2nd Defendant's branch at Nansana, and applied for a loan of Ugx 45,000,000(Uganda Shillings Forty-Five Million Shillings only) to boost his business.

That the said Amos Asiimwe informed the 2nd Defendant that he was the 20 registered proprietor of land comprised in Block 170, Plot 1000 at Kijabijo, and was willing to pledge the land title as security for the loan facility. That Asiimwe Amos availed a copy of the Certificate of Title(DE2) in his name in respect of land situate at Kijabijo Block 170, Plot No. 1000.

- That 2nd Defendant's officials visited the suit property to verify whether Asiimwe 25 Amos was the rightful owner of the suit property, and that they confirmed that Asiimwe Amos was indeed the registered proprietor. That the 2nd Defendant then entered into a loan agreement(DE1) with Asiimwe Amos for the sum of Ugx 25,000,000(Uganda Shillings Twenty-Five Million only), which was secured by the mortgage created on 28th November, 2018.
- 30 That Asiimwe Amos only paid two instalments, and defaulted on his loan, leaving an outstanding balance of Ugx 29,813,633.48(Uganda Shillings Twenty-Nine Million Eight Hundred Thirteen Six Hundred Thirty-Three only) according to the loan statement. That they called upon Asiimwe Amos to rectify his default by serving him with demand notices, and notice of default (DE3 and DE4 respectively) 35 however, no payment was ever made by Asiimwe Amos.
- That the Plaintiff's allegations that the 2nd Defendant acted fraudulently, and negligently is not true, as they did all that was physically and legally possible to ascertain the true ownership of the pledged security, and upon a legal search in the registry, there was no indication that any person other than Asiimwe Amos
- 40 was the lawful owner of the suit property.

5 The proposition of the law is that, whoever alleges a given fact, and desires the Court to give judgment on any legal right or liability dependent on the existence of any fact, has the burden to prove that fact unless, it is provided by law that the proof of that fact shall lie on another person.

(See sections 101 and 103 of the Evidence Act, Cap 6, and *Jovelyn Barugahare Vs Attorney General SC Civil*

10 *Appeal No. 28 of 1993[1994] KALR 190)*

Its trite law that fraud must be particularly pleaded and strictly proved. *(See Kampala Bottlers Vs Damanico (U) Ltd S. C. C. A No. 22 of 1992)*

In the instant case, the Plaintiff has the burden to prove fraud against the 1st, and 2nd Defendants to a heavier standard than on a balance of probabilities generally

15 applied in civil cases. *(See Fredrick J. K Zaabwe Vs Orient Bank & others S. C. C. A No. 4 of 2006)*

I have carefully looked at the pleadings, and the evidence above adduced by the parties, and in particular the statement of search dated 12 June, 2019(PE1), 20 and the Certificate of Title (DE2), to find that the said documents have contradictions however, the Plaintiff who had the burden to prove fraud against the 1st, and 2nd Defendants failed to link the 1st Defendant with the 2nd Defendant.

In the given circumstances of this case, I find that the Plaintiff has failed to adduce evidence to prove that he enjoyed a right, which was violated by the 2nd 25 Defendant, and that the 2nd Defendant is liable.

For reasons above, this Court finds that Plaintiff has failed to discharge the evidential burden of proof on the allegations of fraud against the 2nd Defendant to the required standard.

Accordingly, I find that there is merit in the preliminary objection raised by Counsel 30 for the 2nd Defendant. The preliminary objection is hereby upheld.

Consequently, this Court finds that the Plaintiff has failed to disclose a cause of action against the 2nd Defendant.

Issue No.2: Whether the transfer of title to the 1st Defendant was illegal? and issue No.3: Whether the mortgage of the suit land by the 1st Defendant to the 2nd

35 Defendant was illegal?

Counsel for the Plaintiff submitted that the transfer, and registration of the Plaintiff's name in the Certificate of Title(PE2), was unchallenged, and that this explains how the 1st and 3rd Defendants connived to have the mortgage 5 purportedly registered on the suit land, even when the alleged mortgagor (Amos) was not the registered proprietor.

Decision

The meaning of the term illegal is not according to or forbidden by law. *(See Black's Law Dictionary 9th Edition pg. 815)*

10 The evidence adduced by the Plaintiff in particular, the search statement(PE1), and the Certificate of Title(PE2) reveals that the Plaintiff is the registered proprietor of the suit land comprised in Block 170, Plot 1000 at Kijabijo.

The evidence adduced by the 2nd Defendant in a Certificate of Title(DW2), indicates that the name of the 1st Defendant was entered in error, and that the

- 15 name of Asiimwe Amos was entered as the registered proprietor however, the circumstances in which the name of Asiimwe Moses was deleted, and the name of Asiimwe Amos was entered, is a process that this Court would be keen to understand, and this remains obscure as neither the 1st Defendant nor the 3rd Defendant adduced any evidence to explain this anomaly.
- 20 It is noteworthy that the 1st Defendant failed, refused, and or ignored to file a defence, and the 3rd Defendant filed a defence out of the prescribed time without leave of this Court however, the burden of proof still lies with the Plaintiff to prove his case on a balance of probabilities.

For the foregoing reasons, I find that the Plaintiff has proved on a balance of 25 probabilities that the transfer of title to the 1st Defendant was illegal, and that the mortgage of the suit land by the 1st Defendant to the 2nd Defendant was illegal?

Issues (2) and (3) are therefore answered in the affirmative.

Issue No.4: What are the remedies available to the parties?

This Court having found as above on issue (1), further finds that the remedies sought for by the Plaintiff as against the 2nd Defendant are not available. This suit is dismissed against the 2nd Defendant with costs.

In addition, issues (2) and (3) having been answered in the affirmative, this Court finds that the remedies sought for by the Plaintiff as against the 1st and 3rd Defendants are available hereunder.

5 General damages are the direct natural or probable consequence of the wrongful act complained of, and includes damages for pain, suffering, inconvenience and anticipated future loss. *(See *Storms Vs Hutchinson* [1905] A. C 515)*

It is settled law that an award of general damages is granted at the discretion of

10 Court. (*See *Crown Beverages Ltd Vs Sendu Edward S. C Civil Appeal No. 1 of 2005*)*, and **Uganda Commercial Bank Vs Kigozi* [2002] 1 EA 305)*

Following the guidance in **Uganda Commercial Bank Vs Kigozi*(supra)* on the factors to be considered by the Courts when assessing the quantum of general damages which are as follows: - the value of the subject matter, the economic

15 inconvenience that the Plaintiff may have been put through, and the nature and extent of the injury suffered.

This Court having found issues (2) and (3) above in the affirmative, further finds that the Plaintiff has proved that he suffered mental anguish, and inconvenience, for which the 1st, and 3rd Defendants are held liable in general damages.

20 In the result, this Court finds that the Plaintiff is entitled to Ugx 60,000,000(Uganda Shillings Sixty Million only) in general damages, considering the inconvenience suffered by the Plaintiff.

The Courts have decided in a plethora of cases that where no interest rate has been provided, the rate is fixed at Court's discretion. *(See Crescent Transportation*

25 *Co Ltd Vs Bin Technical Services Ltd CACA 25 of 2000)*

This Court has taken into account the fact that the 1st and 3rd Defendants have caused the Plaintiff mental anguish and inconvenience, and finds that an award of interest on general damages at the rate of 6% per annum from the date of judgment until payment in full, will suffice.

30 In respect of costs, section 27(1) of the Civil Procedure Act, Cap 71 provides as follows:

"subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall

35 have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."

- 5 Taking into consideration the above provision on costs, and that costs follow the event unless for justified reasons the Court otherwise orders *(See section 27(2) of the Civil Procedure Act, Cap 71)*, and the decision in *Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) H. C. B 35* where Justice Manyindo (as he then was) held that:
- 10 *"A successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit."*

I find no reason to deny the Plaintiff costs, and accordingly the Plaintiff is awarded costs of this suit.

- Accordingly, Judgment is entered for the Plaintiff against the 1st and 3rd 15 Defendants in the following terms: -
- 1. A declaration that the registration of the 1st Defendant as the proprietor of the suit land is illegal.
- 2. A declaration that the mortgage created by the 1st Defendant on the suit 20 land is illegal.
- 3. An order that the 3rd Defendant cancels the entry of the mortgage in favour of the 2nd Defendant from the register and or certificate of title to the suit land.
- 4. An order that the 3rd Defendant registers, and or reinstates the Plaintiff as 25 the owner of the suit land.

- 5. A permanent injunction issues to restrain the 1st, and 3rd Defendants and or their respective servants, employees, agents, and others claiming under them from trespassing, selling, alienating or purporting to alienate the suit land.
- 30 6. General damages of Ugx 60,000,000(Uganda Shillings Sixty Million only).
- 7. costs of the suit.
- 8. This suit is dismissed against the 2nd Defendant with costs.

Delivered electronically this 22nd day of September, 2023.

SUSAN ABINYO JUDGE 22/09/2023

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