

UGANDA / JUDGMENT

Uganda v Bamwise (HCT-00-SC 2 of 2015) [2015] UGHACAD 12 (18 June 2015)

[2015] UGHACAD 12

COURT

HC: Anti corruption Division (Uganda)

CASE / FILE NUMBER

HCT-00-SC 2 of 2015

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA****SESSION CASE NO. HCT-00-SC 0002/2015****UGANDA :::PROSECUTOR****VERSUS****BAMWISE PATRICK KAKAIRE ::ACCUSED****JUDGMENT****18th JUNE 2015**

Bamwise Patrick Kakaire is indicted on four counts. In count 1 and count 2 he is charged with fraudulent disposal of trust property, contrary to section 21 of the Anti-Corruption Act. In the subsequent counts he is charged with fraudulent procurement of a certificate of title, contrary to section 190 of the Registration of Titles Act. Thirteen witnesses were called by the prosecution to prove its case. In his defense accused made a sworn statement and called two witnesses. Those who testified for the prosecution were Wilberforce Kaluya (PW1), Kazindula David (PW2), Kakaire James (PW3), Kakaire Bess (PW4), Jafari Bawuba (PW5), Bamulesewa Kaluya Godfrey (PW6), Nakayima Florence (PW7), Kalya James (PW8), Kabi Kaizire Stephen (PW9), Martin Engem (PW10), Waiswa Fred (PW11), D/Sgt Mulegi Tom (PW12) and D/Sgt Okwaja Robert as PW13. For the defence accused testified as DW1, Mbawaki Monica Kakaire testified as DW2, while George Bamulesewa gave his testimony as DW3.

Briefly the prosecution case is that all the land in issue was first claimed by Kazindula Joshua, grandfather to accused and those siblings of the accused. They all claim to be beneficiaries. In his day the patriarch apportioned off 47 acres of the land and gifted it to PW1. When the same patriarch died the remaining land in customary tenure rested in his son Wilberforce Kakaire, father to accused, PW1 and other siblings who now claim as beneficiaries. The said Wilberforce

Kakaire continued to hold the land under customary tenure but gifted some of it to certain of his children to develop. Needless to say those who got those lands held them under customary tenure also. In 1987 Wilberforce Kakaire departed this life intestate. No heir was appointed by him. But on 11th May 1988 accused was granted letters of administration for the estate of Wilberforce Kakaire following his application for the same to the High Court of Uganda at Jinja. Subsequently accused applied for a leasehold for land at Mbaale, Iziru Parish, Buyego sub county, Jinja district. On 4th February 2000 accused was granted a leasehold over 227.6 acres. It was under Leasehold Register Volume 2781 Folio 25. The land was registered in his names. Later in March 2007 accused went a step further when the leasehold was converted into freehold. In the freehold register it was under Volume 448 Folio 5. His names were registered. However it is alleged by the prosecution that throughout the proceedings already chronicled, in the wake of the death of Wilberforce Kakaire, the accused did not seek the consent of his siblings who had interest in the land. It is contended that the land that came to be registered under his names includes that occupied by his siblings. This indictment is a result of that discontent.

It behoves the prosecution to prove the charges preferred against the accused person beyond reasonable doubt. Where any doubt arises in the prosecution case such doubt will be resolved in favour of the accused person. It is not the duty of the accused to prove his innocence in this case.

To prove the offences in count one and count two against the accused it is necessary to prove that accused was a trustee, that accused converted trust property and that accused had intentions to defraud.

That accused obtained letters of administration for the estate of Late Wilberforce Kakaire is a fact agreed on both sides. The letters of administration required him to administer the estate, make the necessary distribution of the assets, deal with the liabilities if any, and file an inventory with court as required by law. Section 278 of the Succession Act is relevant to this. The accused became a trustee for the estate of his late father relating to the beneficiaries when he secured letters of administration. This ingredient is proved by the prosecution beyond reasonable doubt. It is applicable to count 1 as well as count 2. I shall apply the next ingredient to count 1 only first. It is alleged accused converted trust property and had 227.6 acres of land registered in his personal name in LRV2781 Folio 25 without getting authorisation from other beneficiaries. Accused represented to those processing the leasehold title that the land he applied for belonged to him whereas it was customarily used by the family of late Wilberforce Kakaire. **Black's Law Dictionary**, 8th Edition, describes conversion as the act of changing from one form to another. Therefore when the impugned land was changed from being land which was customarily used by the family members to a leasehold granted solely to accused, it was converted. It changed form. When it ceased, at least in appearance on paper, being part of the estate of Wilberforce Kakaire and went on to bear names of accused it changed form. It was argued in defence that some members of the family were agreeable to the arrangement in order to avoid the land being encroached upon by wealthier people. Indeed some signatures were exhibited in court to underscore the argument that some members of the family were agreed to the arrangement that accused first secures a title so that later he would be in a position to distribute the land

accordingly. It is evident few of the beneficiaries participated in that exercise. Most were left out. Secondly accused could have proceeded to register the land as leasehold in view of the alleged threat provided he got himself registered as administrator of the estate of the late Wilberforce Kakaire. Be that as it may a big body of the beneficiaries were not aware of the conversion into leasehold. I am satisfied that prosecution has proved beyond reasonable doubt that there was conversion. Accused was instrumental in the exercise.

The third ingredient the prosecution must prove in count 1 is the intention to defraud. Fraudulent conversion is done with fraud either in obtaining the use of property or in withholding it, according to **Black's Law Dictionary** already cited. The same dictionary describes fraud as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. I have already related to the fact that accused did not disclose to most of the beneficiaries his intention to register the impugned land into a leasehold in his names. Evidence was adduced also showing that for over ten years accused did not, as administrator of the estate of Wilberforce Kakaire, furnish court with an inventory of how he had administered the estate. Add to all that evidence given on behalf of the prosecution that accused presented a form showing he had the endorsement of all members of the sub county land committee preparatory to being granted a lease. One person who purportedly appended her signature on the form testified she never did. Accused was alive to all the above queries but took advantage of them to the detriment of the beneficiaries. I am satisfied the prosecution has proved beyond reasonable doubt that accused had intentions to defraud.

The assessors gave me a joint opinion regarding count 1. They advised me to find accused guilty of the charge. I agree with that opinion and convict accused on that count.

The first ingredient in count 2 is similar to that in count 1 where it is settled accused was a trustee by virtue of the letters of administration he obtained in relation to the estate of Wilberforce Kakaire.

The next ingredient the prosecution must prove in count 2 is that accused converted the land in issue into freehold land in his names without authorisation by the other beneficiaries. It is agreed the land in issue had other beneficiaries besides accused. Accused never consulted them when he proceeded to change it from leasehold to freehold. They did not give their consent to the change in form. He went ahead and registered the land as Freehold Register Volume 448 Folio 5. It comprised 227.6 acres. This evidence is not controverted. I find this ingredient proved beyond reasonable doubt.

Prosecution must prove also that accused had the intention to defraud. In count 1 we have considered fraud as well as what attends intention to defraud. Respecting count 2 no evidence was led to show that there was any beneficiary, besides accused of course, who consented to the impugned land being registered under freehold, let alone in the sole name of the accused. Evidence was given also of the accused surreptitiously having the land in issue mortgaged to Tropical Bank Limited for ends best known to himself. Of course the beneficiaries became aware of the transaction much later when accused defaulted in his payment of the loan. That is when

they were put on inquiry. This is classic fraud. I am satisfied the prosecution has proved beyond reasonable doubt that accused had intention to defraud.

In their verdict the assessors jointly advised me to find accused guilty on count 2. I agree with their opinion. I find the accused guilty of the charge in count 2 and convict him accordingly.

In count 3 and count 4 accused is charged with fraudulent procurement of a certificate of title. For the sake of clarity I should specify that in count 3 it is alleged that accused with intent to defraud unlawfully procured the registration of a certificate of title, to wit Leasehold Register Volume 2781 Folio 25, in his own name. The land involved are the impugned 227.6acres. As concerns count 4 it is alleged that accused with intent to defraud unlawfully procured registration of a certificate of title, to wit freehold register volume 448 folio 5, in his own name. Here again the same 227.6acres earlier referred to is the land in issue.

It is not contested that accused himself procured the processes of registration, both into leasehold and into freehold.

The next consideration should be whether the registration was done unlawfully. We take the first registration charged in count 3 first. It was from customary holding to leasehold. Evidence on record shows that accused did not own or occupy all the 227.6acres of land he transferred into the registered leasehold under his name. That land included that of PW1 and holdings of other beneficiaries who did not consent to the land being registered the way it was. The lack of consent doubtless rendered registration of the land as a leasehold unlawful. We need not speculate on what those who processed the registration would have done if they had been made wise on what accused was doing behind the backs of the other beneficiaries.

Regarding the subsequent registration from leasehold to freehold, the conversion is equally untenable legally given that the necessary steps were not taken initially when registration into leasehold was done. The process was tainted ab initio. Both registrations under Registration of Titles Act were procured unlawfully since the beneficiaries were not involved in the process.

Intent to defraud has been denied by the defence. They led evidence to the effect that some of the beneficiaries agreed with accused on the need to have the land registered under the Registration of Titles Act as there was a threat of it being encroached upon. A document showing signatures was exhibited. It was defence evidence registration would initially be done in the names of the accused as he had the wherewithal to finance the process. Later the beneficiaries would have their interests apportioned off the lease hold and released to them as and when they got sufficient funds to enable the subsequent process. On the face of it the intent appears noble. However a few questions attend the transactions. A select few of the beneficiaries were made privy to the arrangement. The majority of the beneficiaries with interest in the land were kept in the dark despite the fact that their holdings and interests were included in the land registered. Secondly the land was registered in the name of the accused. Even if it is conceded he was granted letters of administration to the estate of the late Wilberforce Kakaire, good intentions would have led the accused have the land registered in his name, but showing him as administrator to the estate of Wilberforce Kakaire. It can be added for good measure that throughout the stages of

registration beneficiaries were not made aware but what made them aware was when the mortgage arrangement went sour. It is noteworthy that on 30th March 2008 accused had all that land mortgaged to Tropical Bank Limited. Needless to say PW1 and other beneficiaries were not aware until there was threatened foreclosure. All those stratagems involving registration of the land under whatever title took accused's fancy were aimed at taking land away from those with interest and vesting it in the accused. He did all this with intent to defraud.

The assessors have advised me to find accused guilty of the charges in count 3 and count 4. I agree with their joint opinion. I find the accused guilty on count 3 and convict him accordingly. I find accused guilty also on count 4 and convict him accordingly.

In sum accused is convicted on all four counts.

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Paul K Mugamba

Judge

18TH JUNE 2015

SENTENCE

18th JUNE 2015

I have considered the submission of the learned State Attorney regarding what suitable sentence to hand down to the convict. I have considered also the submission of the learned counsel for the defence regarding the issue. The former calls for a severe sentence while the latter says that it is a family matter that should call for leniency. The convict also asks for a lenient sentence. But the complainant (PW1) says Court should find a fitting penalty.

It is not lost on me that this is a case that concerns a family. I appreciate the attributes of family reconciliation and harmony in the home. At the same time I should mete out punishment where it is due upon conviction. I have taken all this into account.

I have considered the fact that the convict breached trust, being a luminary in the family and an administrator of the estate when he applied those attributes to his selfish ends. I note that it was not a one off affair but that it was done for over a long period and it was well thought out albeit negatively.

I have considered also that the convict is a first offender and that there is provision for an alternative to custodial sentence which can be imposed as sentence to serve the ends of justice. In this respect I take into account also the fact that the convict is 64 years old and that he is willing to pay a fine instead of serving a custodial sentence.

Consequently the convict is sentenced to a fine of Shs. 1,500,000/= each on count 1 and count 2. In default of any of the fines he is to serve 3years' imprisonment. He is sentenced also to a fine of Shs.750,000/= on each of counts 3 and count 4. In default of payment of such fine on any of the counts he is to serve 1 ½ years imprisonment. The total amount of fine is Shs. 4,500,000/=. In the event of failure to pay the fines imposed the sentences are to run concurrently.

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Paul K Mugamba

Judge

18TH JUNE 2015

ORDER

It is ordered also that the Registrar of Titles cancels the leasehold title and the freehold title related to in this case.

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Paul K Mugamba

Judge

18TH JUNE 2015

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