THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.52 OF 2009

1. KAMPALA CITY COUNCIL

2. KAMPALA DISTRICT LAND BOARD::::::::::::::::::::::::::::APPELLANTS

VERSUS

JAMES BWOGI & SONS ENTERPRISES LTD::::::::::::::::::::RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE GEOFREY KIRYABWIRE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

JUDGMENT

On 8th September 1995, Kampala City Council the 1st appellant, leased land described as LRV 2432 Folio 1 Plot 38, Nile Avenue, herein referred to as the "suit property" to the respondent. According to the appellants, the respondent was to pay premium of UGX 150,000,000/=, ground rent of UGX 15,000,000/= and UGX 130,000,000/= for replacement of city council house which existed on the property. The respondent was also to contact the Commissioner for Lands for a formal lease offer and pay the specified amounts within 30 days with effect from 11th September 1995.

On his part the respondent, while acknowledging the lease, disputed the terms stated by the appellants and instead asserted that the premium was UGX 45,000,000/= and other expenses amounted to UGX 6,986,000 all totaling to UGX 51,986,000/= which, according to him, he paid and obtained a lease to the suit property for an initial period of 5 years, commencing on 1st November 1995.

On the 8th day of May 1998, the appellants(plaintiffs/counter defendants) sued the respondent vide High Court Civil Suit No.477 of 1998 in which they, among others, sought for cancellation of the respondent's certificate of title comprised in LRV 2432 Folio 1 Plot 38, Nile Avenue, alleging that he had committed fraud in its acquisition. The respondent (defendant /counter claimant) claimed that the appellants denied him vacant possession of the suit property and made it impossible for him to develop the same in accordance with the lease terms. In his defense, the respondent raised a counter claim in which he, inter alia, alleged fraud on the part of the appellants.

Upon expiry of the respondent's lease on the 31st of October 2000, the 2nd appellant leased the suit property to the 1st appellant for a period of 99 years commencing on the 1st of October 2003.

In January 2006, and by consent of the parties, High Court Civil Suit No.477 of 1998 was withdrawn by the appellants against the respondent who still remained pursuing his counter-claim which he then amended. The suit

comprising the counter-claim was set down for hearing and Judgment was entered in favor of the respondent in the following terms;

a. Court ordered cancellation of the 1st plaintiff/counter defendant's certificate of title to the suit property and that;

b. The lease period be extended in favor of the defendant/counter claimant

c. The defendant/ counter claimant was awarded costs.

The appellants were dissatisfied with the above decision and filed this appeal.

The grounds of Appeal as they appear in the amended Memorandum of Appeal are as follows;

1. *That the learned trial Judge erred in law and fact in holding that the burden of proof of fraud rested on the appellants.*

2. *That the learned trial Judge erred in law and fact when he held that the lease/ transfer of the suit property to the 1st appellant was fraudulent.*

3. *That the learned trial Judge erred in law and fact by basing all his findings and orders on a wrong assumption that the respondent / counter claimant was a lawful lessee of the suit property.*

4. *That the learned trial Judge erred in law and fact when he relied on extrinsic evidence and found that the lease terms granted under Min No. MLC/10/172/95 to the respondent / counter claimant was varied or revised.*

5. *That the learned trial Judge erred in law and fact by ordering the 2nd appellant to extend the respondent/ counter claimant's certificate of title*

6. *That the learned trial Judge erred in law and fact when he cancelled the 1st appellant's certificate of title*

7. *That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision.*

At the hearing of the Appeal, Mr. Denis Byaruhanga appeared for the 1st appellant; Mr. Andrew Kibaya together with Mr. Paul Kawesi appeared for the 2nd appellant while Mr. James Katono was for the respondent.

All parties adopted their respective submissions in their conferencing notes and made only highlights. They elected to argue the seven grounds in bundles of 1 and 7, 2 and 6, 3 and 5 and ground 4 singularly.

Counsel for the 2nd appellant submitted that the 1st appellant had made a complaint to the IGG alleging fraud on the part of the respondent. The appellants had then filed High Court Civil Suit No.477 of 1998 against the respondent seeking the cancellation of the respondents' certificate of title on the ground that the same had been obtained by fraud. Counsel further submitted that no final report was ever issued by the IGG and the appellants withdrew the suit against the respondent.

According to counsel, the suit property was at all material times occupied by the 1st appellant's employees and the respondent never took possession of it

because he failed to meet the terms of the lease agreement. He invited Court to look at exhibit D3 at page 151 of the record of appeal where the respondent was notified to remedy his breach before he could take possession of the suit property.

As to the rationale behind the disparity in the amount of premium paid by the respondent and the 1st appellant, counsel attributed it to the developments on the suit property which had been put up by the 1st appellant and were occupied by the 1st appellant's officials thus, the lease to the 1st appellant, had to exclude the value of the developments in issue while the lease to the respondent had to include the value of the developments that had been set up by the 1st appellant.

In his reply, counsel for the respondent submitted that the disparity in the amounts of premium payable by the respondent and the 1st appellant was meant to defeat the proprietary interest of the respondent. To him although the terms of the lease were to maintain the existing structure, the plan for this area was different and required demolition of the existing structure and redevelopment and the respondent had been given permission to go ahead and carry out the redevelopment.

Before we delve into resolution of the issues in this matter, we remind ourselves of the duty of this Court as a first appellate court to re-appraise the evidence of the trial Court, draw inferences of fact and come up with our own conclusion as enunciated in Rule 30(1) of the Court of Appeal Rules. See

Kifamunte Henry v Uganda SCCA No 10 of 1997 and Banco Arabe Espanol V. Bank of Uganda SCCA No. 8 of 1998.

We will resolve the grounds of the Appeal in the order they were argued by counsel for the parties.

In grounds 1 and 7, counsel for the appellants found fault with the decision of the trial Judge that the burden of proof rested on the appellants to prove the existence of fraud. To counsel, the Judge failed to properly evaluate the evidence on record which resulted in him making a wrong decision. He adverted that in January 2006, by consent of the parties, the appellants withdrew HCCS No.477 1998 against the respondent hence their cause of action against the respondent had ceased. Also the appellants having withdrawn the suit, then their cause of action against the respondent had ceased. He referred court to the decision in ***Meera Investments Limited Vs Joshing Potato Shah CACA 56 of 2003*** in support of his contention. Counsel was vehement that since the respondent had filed a counterclaim, the burden of proof shifted to him to prove the particulars of fraud as set out in his counter claim.

While agreeing with the appellants that the effect of withdrawal was that the claims in the plaint were abandoned, the respondent's counsel submitted that it was an admitted fact that the respondent was a registered proprietor of the suit land and the certificate of title had been admitted as evidence. Since the appellants were alleging fraud, the trial Judge was right to hold that the burden of proof rested on them.

The trial court in resolving this issue noted that it is the desire of the plaintiffs/counter defendants that judgment be given against the defendant/counter claimant in respect of the suit property on the ground that they procured the certificate of title by fraud. The Learned trial Judge went on to find that the burden of proof rested on the plaintiffs/counter defendants to prove the existence of fraud.

The record of Appeal on page 8 has the plaint for HCCS No. 477 of 1998 which was filed on 8th May 1998 and in paragraph 12 thereof the appellants pleaded fraud on the part of the respondent. In the written statement of defense, the respondent made a counterclaim and pleaded fraud on the part of the appellants who in turn filed a reply to the counterclaim, inter alia, denying the alleged fraud.

In January 2006 and by consent of the parties HCCS No. 477 of 1998 was withdrawn and the respondent's counterclaim was set down for hearing.

The trial judge allowed the respondents counterclaim and held that the burden of proof rested on the appellants to prove the existence of fraud.

With respect, we are constrained to say that the learned trial Judge appears to have been misled by the pleadings on the issue of fraud. We say so because at page 12 of the judgment, the Judge addressed his mind to only the initial pleading of fraud by the appellants. He did not do so to the fraud pleaded in the counter claim by the respondent and it appears this omission influenced his decision as to whom the burden of proof rested.

It is not in dispute that the main suit in HCCS No.477 of 1998 was withdrawn. It is trite that where parties consent to a withdrawal of a suit then there is nothing that remains for court to decide. This however, did not affect the counter claim filed by the respondent which was an independent and separate action by the respondent against the appellants. The withdrawal of the main suit did not also affect the reply to the counterclaim. It is a principle of law that when a defendant sets up a counterclaim and the plaintiff's suit is discontinued or dismissed, the counter- claim is not affected because it is a cross action.

The question to be answered is, who then had the burden to prove the alleged fraud in the counter claim.

Burden of proof is the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause ref: Black's law Dictionary, 4th edition.

The respondent in his counter claim particularized facts of the alleged fraud by the appellants as follows:

"PARTICULARS OF FRAUD

a. Conniving to lease the suit land well knowing that the issue of ownership was still unresolved before Court

b. Leasing the suit land without notice to the defendant

c. Failure to extend the initial lease period granted to the defendant

d. Leasing the suit property at a price which was so low as to manifest fraud

e. Leasing out the suit land for which the defendant had already paid substantial amount of money."

Sections 101, 102, 103 and 106 of the Evidence Act [CAP 6], place the burden of proof on the party who asserts the affirmative of the question or the issue in dispute. The sections impose the burden of proof upon a person who alleges the facts to exist.

In this case the burden of proof shifted to the respondent to prove the facts as stated in the counter claim as the appellants had withdrawn their suit and as such had no cause of action against the respondent. It is the respondent therefore whose case would fail if no evidence at all was adduced in support of the fraud raised in the counterclaim.

It is inconceivable that the appellants who had turned into defendants in the counter claim would be required to prove allegations of fraud against themselves.

We agree with all counsel that when the appellants withdrew their suit, the reply to the respondent's counter claim was not affected since a counter claim is an independent action in itself regardless of whether or not the plaintiffs' suit is withdrawn or stayed.

We find that the burden of proof shifted to the respondent as the counter claimant to prove the particulars of fraud as set out in his counter claim

against the appellants once the appellants withdrew their suit against him. Therefore grounds 1 and 7 of the Appeal succeed.

The trial Judge is faulted in grounds 2 and 6 for holding that the lease of the suit property to the 1st appellant was fraudulent and for ordering its cancellation. Both appellants maintained that the respondent did not, when prosecuting the counter claim, present sufficient evidence either by witnesses or documents to prove fraud against them. Further, that the exhibits they relied upon did not prove any acts of dishonesty on their part.

The respondent maintained that the appellants were guilty of fraud and illegality because they had knowledge of the respondent's interest in the suit land and went ahead to lease it to the 1st appellant. He further argued that whereas the lease period had expired, the respondent had a right of extension to 99 years on complying with the building covenant.

In the judgment the trial Judge made a finding that the 2nd plaintiff/counter defendant transferred the suit property to the 1st plaintiff without acknowledging the claim of the defendant/counter claimant as a lessee who had been denied possession and by denying the defendant possession and dealing with the suit property with knowledge of the breach and the defendants claim. Thus the transaction smacked of bad faith on the part of the plaintiffs which was a clear qualification of fraud.

Fraud has been defined as 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 that other shall act upon it to his legal injury. [See ***FJK ZAABWE V ORIENT BANK & 5 OTHERS SCCA No.4 of 2006*** at page 28].

It is trite that fraud must be specifically pleaded and strictly proved. O.6 r.3 of the CPR provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings. The Supreme Court restated this position of the law in ***J.W.R Kazoora V M.L.S Rukuba SCCA NO.13 OF 1992***, when it held that fraud must be specifically pleaded and strictly proved and cannot be left to be inferred from the facts. The same court went further in ***Kampala Bottlers Ltd V. Damanico (U) Ltd SCCA No. 22 of 1992*** to hold that the burden of proof in fraud was higher than on a balance of probabilities generally applied in civil matters.

The respondent pleaded fraud in the counterclaim and set forth particulars of fraud and was bound to strictly prove the allegations. He did not call witnesses to testify and prove the alleged fraud. At page 122 of the record of appeal, the trial judge observed that the respondent chose to rely on documents in support of the claim, and none of the appellant's three witnesses alluded to the alleged fraud, forgery or corruption on the side of the respondent. It is thus certain that none of the parties proved fraud against the other. The following documents were admitted;

1.letter from Uganda investment authority

2.certificate of title for plot 38 Nile Avenue in the names of the respondent

3.certificate of title for plot 38 Nile Avenue in the names of the 1st respondent

4.letter from the IGG stopping eviction

5.lease offer for the respondent

Counsel for the respondent has submitted that these documents together with the admitted facts were sufficient to prove fraud having been committed by the appellants.

The agreed facts in brief were that under Minute No. MLC/10/172/95 of 8th September 1995, the 1st appellant leased plot 38 Nile Avenue, the suit land to the respondent who got registered as proprietor on the 6th of December 1995 for an initial term of 5 years. It was also agreed that the 1st appellant denied the respondent possession and the 2nd appellant leased the same land to the 1st appellant in 2003 for 99 years.

We have perused the record of appeal and find that the respondent's lease expired on the 31st of October 2000 and he never applied for renewal or extension of the same prior to the expiry. The 1st appellant obtained a 99 year lease over the suit property on the 1st of October 2003 that is 3 years after the respondent's lease had expired. The respondent would have applied for the extension of the lease which he never did. He therefore, sat on his rights and cannot thereafter fault the 2nd appellant for leasing out the suit land to the 1st appellant.

The admitted documents listed above are public documents. They show what had transpired in respect of the suit property before the 1st appellant was granted a lease. None of the documents was authored by the appellants and therefore cannot be said to be proof of any fraudulent dealing on their part.

The respondent's lease was for a definite term of 5 years and when this period lapsed the lease ended by effluxion of time. The lessee no longer had any legal right on the property. The lessor being the controlling authority had an automatic right of possession.

We do not agree with the trial judge's holding that dealing with the suit property with the knowledge of the alleged breach was in bad faith and a clear qualification of fraud. We have not found any law which prohibits transfers or other dealings in land before a suit contesting such dealing is disposed of. We are backed in this by the decision of the Supreme Court in ***J.W.R Kazoora V M.L.S Rukuba SCCA No.13 OF 1992.***

The respondent contends that he was deprived of his land through fraud despite the fact that he had a certificate of title which he obtained prior to that of the 1st appellant. That the 1st appellant's title was impeachable for fraud and illegality and that these had been proved by the admitted facts and documents. As such there was no need to call oral evidence to prove the said facts.

Under section 59 of the Registration of Titles Act, possession of a certificate of title by a registered person is conclusive evidence of ownership of the land described therein and section 176(c) protects a registered proprietor of land

against any action for ejectment except on grounds of fraud. In ***Kasifa Namusisi and Others V Ntabazi SCCA No.4 of 2005*** Odoki CJ, as he then was, held that the cardinal principle of registration of title is that a certificate of title is conclusive evidence of ownership and is defeatable only in a few instances listed in section 176 of the Registration of Titles Act. This section protects a registered proprietor against ejectment except in cases of fraud, among others.

We have examined exhibits D6 and D11 which are the respondent's certificate of title and the 1st appellant's certificate of title respectively. Exhibit D6 shows that the lease forming the basis of the respondent's certificate of title expired on the 31st of October 2000 and on the 1st October 2003 a lease was granted to the 1st appellant. This Court has not found any form of fraud since the 1st appellant was granted the lease after the expiration of the respondent's lease which had not been renewed or extended.

As already pointed out, for the respondent to impeach the 1st appellant's title who is currently the registered proprietor of the suit land, he had to prove fraud to the required standard on the part of the appellants in obtaining registration, which he did not.

In view of the above, we do not agree with the trial Judge's holding that the respondent is the lawful lessee of the suit property because his legal interest had expired upon expiration of his lease leaving him with neither a legal nor equitable interest in the land.

We therefore find that the respondent having failed to prove fraud against the appellants, it was wrong for the trial judge to order the cancellation of the 1st appellant's certificate of title.

Grounds 2 and 6 of the Appeal thus succeed.

Counsel for the respondent contended in grounds 3 and 5 that the 1st appellant denied the respondent possession of the suit land thereby breaching the lease agreement. The respondent prayed for specific performance of his lease agreement. On their part counsel for the appellants submitted that the denial of vacant possession was justified and did not amount to fraud. That the 1st appellant's servants had been in possession of the suit property before any lease was granted and continued to be in possession pending investigations by the IGG regarding the fraudulent acquisition by the respondent. That when no report was produced by the IGG, the appellants withdrew the suit against the respondent and the respondent's counter claim was set down for hearing.

Specific performance is an equitable relief at the discretion of Court which may be issued against a party to do what was agreed upon in the contract. It is an agreed fact that a 5 year lease was granted to the respondent under Min No.MLC/10/172/95. Annexture A, the letter from the 1st appellant to the respondent clearly stated that the respondent was to contact the commissioner of lands for a formal lease offer after which he was to pay the dues to council by cheque within 30 days from the date of the letter.

DW2 Dennis Karuhanga testified that although a lease agreement was signed, the respondent did not comply with the payment obligations under the lease which were set out in the minutes of the 2nd respondent's lands committee meeting which made the decision to offer the lease to the respondent. The respondent had paid only UGX 30,000,000/= out of the required UGX 300,500,000/= hence leaving an outstanding balance of UGX 270,500,000/. He further testified that the respondent had no right of possession of the suit property until he fully paid the consideration. Exhibits D2 and D3 are evidence of demand letters that were made to the respondent to meet his contractual obligations.

Specific performance is an equitable remedy grounded in the equitable maxim that equity follows the law. It is granted at the discretion of Court and will normally not be granted where a common law remedy, such as damages would be adequate. Courts have for a long time considered damages an inadequate remedy for breach of contract for the sale of land and have instead ordered specific performance. [See ***Manzoor V Baram (2003)2 EA 580.]***

Having found that the respondent only paid part of the consideration and was therefore in breach of the contract, we find that the trial judge erred in granting an order of specific performance to the respondent.

Regarding the extension of the respondent's lease, when the initial term lapsed, the lease also expired. There is no evidence suggesting that the respondent applied for an extension which could only have been possible

when the initial term was still running. There is no evidence suggesting that the respondent's lease was renewed after the expiration of the initial term.

We therefore find that the trial Judge erred in ordering the 2nd appellant to extend the respondent's lease because an expired lease, like in the instant Appeal, cannot be lawfully extended because there is nothing to extend in the first place. Therefore, grounds 3 and 5 of the Appeal also succeed.

Submitting on ground 4 of the appeal, counsel for the appellants contended that the respondent did not produce any evidence to prove that there had been a revision of the lease terms. He further submitted that the respondent's certificate of title (exhibit P2) derived its validity from minute MLC 10/172/95 of 8th September 1995 and the terms of the respondent's lease were those in that minute. These terms were at variance with the terms in the lease. Counsel argued that without proof of variation of the lease terms, premium of shs. 45,000,000/= and ground rent of shs. 4,500,000/= as seen in the lease agreement was not justified.

In reply, counsel for the respondent submitted that the premium and ground rent were varied as evidenced by the lease signed and sealed by the Mayor and Town Clerk who had power to sign documents and contracts on behalf of the Council. According to counsel, the appellants did not rebut the respondent's evidence that the plot was leased to him and that he paid the premium and ground rent as stated in the lease agreement.

In resolving this issue, the trial judge held that the respondent appealed against the terms of the lease offer and requested for reconsideration. That

the 1st appellant offered the respondent revised terms which culminated into a lease offer allocating to him the suit land. That the respondent effected payment fully as required under the lease offer and a Certificate of title was issued to him.

From the evidence on record the Planning and Land Management Committee of the 1st appellant met on 8th September 1995 and under Minute MLC 10/172/95, it was agreed to lease plot 38 Nile Avenue to the respondent who was required to pay premium of 150,000,000/=, ground rent of 15,000,000/ and replacement cost for Council House of 130,000,000/=. Two letters one dated 11th September 1995 and another of 14th November 1996 were written to the respondent informing him of the decision. In the second letter it was clearly stated that the respondent was to take possession of the suit property after payment of the above sums within a period of 30 days.

On the 15th of September 1995, the respondent appealed against the terms of the lease offer requesting for reconsideration and on 29th September 1995 the 1st appellant replied to the respondent's appeal stating that a revaluation had been carried out by the principal valuer and the terms were; Premium shs 45,000,000/= and Ground rent of shs 4,500,000/= p.a. That the lease was for 5 years extendable to 99 years. A lease offer was made to the respondent by the commissioner lands on 3rd October 1997 wherein he was to pay premium of shs 50m/= plus other expenses, together amounting to shs 65,847,500/. A copy of this lease offer is at page 64 of the record of appeal. A lease agreement was signed on 11/11/1995 between the respondent and

the 1st appellant which spelt out the above terms. This lease agreement quoted Min. MLC 10/172/95 of 8th September 1995 as its basis.

Reading the minutes of the Planning and Land Management Committee of the 1st appellant which met on 8th September 1995 and the lease offer and agreement of the respondent, it is clear that the terms and conditions which were set by the 2nd respondents committee were not followed when the lease offer was made to the respondent and when the lease agreement was entered into. The terms in these two documents were said to be based on minute No. MLC.10/172/95 which terms were glaringly different. While the minute talks of premium of shs 150,000,000/=, ground rent of shs 15,000,000/ and replacement cost for Council house of shs 130,000,000/=, the lease agreement mentions premium of shs 45,000,000/= and ground rent of shs 4,500,000/=. We are, as a result, inclined to find that the lease offer and the lease agreement made with the respondent were not based on any lawful decision of the 2nd appellant and the authenticity of the two documents is questionable. It was not a surprise that later, the IGG halted the process by letter dated 4th May 1998. In the premises, we find the two documents not authentic and cannot be relied upon as a basis for a binding contract between the parties. S.92 of the Evidence Act envisages a scenario such as the present by allowing evidence which may, if proved, would invalidate any document for fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law.

As regards the disparity of premium which was to be paid by the respondent and the 1st appellant, though mentioned during submissions, it was not pleaded in the counterclaim. We will therefore not delve into it.

Ground 4 of the Appeal accordingly succeeds

In the result the Appeal succeeds and the orders of the High Court are set aside. We make the following orders;

1. The 2nd appellant is to refund to the respondent the consideration paid by the respondent with interest at the rate of 12% per annum from the date of payment till the date when the 2nd appellant shall refund the same to the respondent.
2. The order cancelling the registration of the 1st appellant as registered proprietor of the suit land is set aside.
3. Given the special circumstances of this appeal, particularly the fact that the trial Court on its own has been responsible for the grounds in this appeal, this Court holds that no party to the appeal be penalized with costs and that each party shall bear its own costs.

Dated this .....1st.....day of .....August.....2017

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HON. MR. JUSTICE REMMY KASULE, JA

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

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HON. MR. JUSTICE CHEBORION BARISHAKI, JA

1st August, 2017

Dennis Byaruhanga for 1st Appellant.

Gimanga Sam for 2nd Appellant

Nabisambi Lwanga for Respondent.

Parties absent.

Nandutu Raeen ~~for~~ CIC

Ct: Judgment read in Court