

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS CAUSE NO 40 OF 2018

MUTYABA TOM:.....APPLICANT

VERSUS

- 1. JAMES KAYIMBYE SEBINENE MUSAJJALUMBWA**
- 2. COMMISSIONER OF LAND REGISTRATION:.....RESPONDENTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This application was brought by notice of motion under Article 139(1) of the Constitution of the Republic of Uganda, 1995, Section 14(1) of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71, Section 167, 70 and 71 of the Registration of Titles Act Cap 230, Order 52 Rules 1 and 2 of the Civil Procedure Rules SI 71-1 seeking for orders that;

1. A vesting order be granted in favour of the Applicant in respect of land at Nalumunye comprised in Busiro Block 347, Plot 364 (hereinafter the suit land),
2. The 2nd Respondent enters the Applicant's name in the Register Book in respect of the suit land;
3. The 2nd Respondent issues a special certificate of title in respect of the suit land in the name of the Applicant;
4. The costs of this matter be borne by the 1st Respondent.

The grounds of this application briefly are;

1. That the suit land is registered under the provisions of the Registration of Titles Act, Cap 230.

2. That the Applicant purchased the whole of the land from the 1st Respondent and he paid the whole purchase price to the 1st Respondent.
3. That the Applicant is in possession of the land.
4. That the entry into possession of the land by the Applicant has been acquiesced by the 1st Respondent.
5. That the transfer of the land has not yet been executed because the Applicant cannot find the 1st Respondent to sign a transfer instrument in favour of the Applicant and that it is the 1st Respondent who is still in possession of the duplicate certificate of title for the suit land,
6. That this Honourable court has unlimited original jurisdiction in all matters, including the granting of all the above sought orders.
7. That it is in the best interest of substantive justice that this Honourable Court grants all of the above sought orders.

The application is supported by affidavit sworn by the Applicant. He averred therein that he bought the suit land from the 1st Respondent on the 23rd November, 2004, at a consideration of Ugx.4,000,000/- only (*four million shillings*) whereupon the latter signed in his favour a consent form to transfer the suit land with a promise that he (the 1st Respondent) would also sign a transfer instrument in his favour the next day. That the 1st Respondent also delivered to him the duplicate certificate of title to the suit land. A copy of the said consent form and duplicate certificate of title thereof were attached as **“A” and “B”**.

He deponed further that since the 23rd November, 2004, he has never seen the 1st Respondent and; that consequently, the transfer of the suit land from the 1st Respondent to him has not yet been executed. Further, that he is in possession of the suit land, which is registered under the Registration Titles Act, Cap 230, which possession has been acquiesced by the 1st Respondent. Further, that the suit land has no encumbrances affecting it. The Applicant also filed a supplementary affidavit but later his Counsel suggested to Court that this should be abandoned.

Both the 1st and 2nd Respondents were served with summons to file their respective defence only that the 1st Respondent was served by way of substituted service.

Only the 2nd Respondent opposed this application on ground that it ought to have been made to the Commissioner for Land Registration before coming to Court. Further, that the Applicant's affidavit is fatally defective as it contains deliberate falsehoods and contradicting averments on its face. It is also averred that this is a case of specific performance as against the 1st Respondent who is alleged to have not signed transfer forms, and; that the Applicant's affidavit contains mere averments without proof of the same allegations.

The Applicant filed an affidavit in rejoinder to the 2nd Respondent's averments. He averred in this affidavit that it is not mandatory to make an application of such a nature to the 2nd Respondent before making the same to Court on ground that this Court has unlimited jurisdiction. Further, that the order of specific performance is impossible in the instant case where the 1st Respondent's whereabouts are unknown to him.

He also averred that he did not attach the land sale agreement on the previous affidavit because it was misplaced at the time of filing but; that he managed to find the same, which was attached as annexure "A". Further, that it is on the 24th September, 2004 when he purchased the suit land and not 23rd November, 2004 as he earlier on mistakenly, albeit honestly, averred. His explanation for this inconsistency was that he mistook it for the date on the consent to transfer form which he possessed at the time of filing. This was dated 23rd November, 2004.

The Applicant's and 2nd Respondent's Counsel filed submissions which I shall not reproduce but consider them in the determination of this application.

Resolution

Section 167 of the Registration of Titles Act Cap 230 under which this application was brought provides that;

If it is proved to the satisfaction of the registrar that land under this Act has been sold by the proprietor and the whole of the purchase money paid, and that the purchaser has or those claiming under the purchaser have entered and taken possession under the purchase, and that entry and possession have been acquiesced in by the vendor or his or her representatives, but that a transfer has never been executed by the vendor and cannot be obtained by reason that the vendor is dead or residing out of the jurisdiction or cannot be found, the registrar may make a vesting order in the premises and may include in the order a direction for the payment of such an additional fee in respect of assurance of title as he or she may think fit, and the registrar upon the payment of that additional fee, if

any, shall effect the registration directed to be made by section 166 in the case of the vesting orders mentioned there, and the effecting or the omission to effect that registration shall be attended by the same results as declared by section 166 in respect of the vesting orders mentioned there.

I shall firstly determine whether this application is properly before Court before dwelling on the merits of the application. It is trite law that before an Applicant invokes the inherent jurisdiction of Court under Section 98 Civil Procedure Act, Cap 71 in applications of this nature; he or she must have applied first for a vesting order to the Commissioner for Land Registration/Registrar, who for some reason must have declined to exercise his or her powers under Section 167 of the Registration of titles Act Cap 230.

It is undisputed that the Applicant did not apply to the Registrar before bringing his application to Court as required by the above Section. He averred that he was advised by his Counsel that this was not mandatory because this Court has unlimited original jurisdiction. His Counsel cited Article 139(1) Constitution, Section 14 of Judicature Act Cap 13 and Section 98 Civil Procedure Act Cap 71 to submit that the afore said laws confer upon this Court power to make vesting orders in cases of completed purchases of land. He also further supported his view with the case of *Aida Najjemba v. Ester Mpagi Civil Appeal No. 74 of 2005*. All this disputed by 2nd Respondent and his/ her Counsel who argued that this application ought to have been made to the 2nd Respondent before coming to Court.

I do agree with Counsel for the Applicant that the afore said provisions of the law confer unlimited jurisdiction to this Court. Whereas this is true, I am doubtful whether this is the case in the instant application. It appears to me that Section 167 Registration of Titles Act makes it a procedural prerequisite that applications of this nature must be made to the Commissioner for Land Registration before coming to Court. Most of the cases I have reviewed are to the same effect. See: *Edward Babigumira vs. Commissioner for Land Registration, HCT Misc. Cause No. 76 of 2012; Ronald Oine versus Commissioner Land Registration Miscellaneous Cause No. 90 of 2013*.

Counsel for the Applicant seemed to suggest that this Court also has power to grant this application regardless of the procedural requirement under the said provision. He premised his suggestion on the aforesaid provisions of law he cited and the observations made by

Byamugisha JA, in Aida Najjemba v. Ester Mpagi Civil Appeal No. 74 of 2005, wherein she observed that the High Court has unlimited original jurisdiction. That case was also concerned with grant of a vesting order where no application was made to the Commissioner for Land Registration although the facts of it appear to me distinguishable from the instant application.

According to that case, the Respondent together with her late husband purchased an equitable interest on mailo land from one Tera Kiwoma and took possession of the same. Thereafter Tera Kiwoma passed away and one, Sepiranta Namusisi applied for and was granted letters of administration of her estate. In her capacity as the administrator of the estate, Namusisi sold the mailo interest to the Respondent and her husband. Several sale agreements were executed. The Respondent and her husband become registered proprietors but in 2004 the said registration was cancelled by the land registry citing defects in the registration.

The instrument that was used to register the Respondent with her husband was found to belong to another transaction altogether and the transfer forms could not be traced. Having lost her husband who knew the existence of the transfer forms and Namusisi, the seller, having also passed away, the Respondent through her Advocates wrote to the Commissioner Land Registration requesting for the removal of the caveat from the suit property which had been lodged by the Appellant. The Commissioner declined to grant the request and advised the said advocates to consider the option of obtaining a vesting order from court. Consequently, the Respondent as the Administratrix to the estate of her late husband filed the application for a vesting order which was granted by the High Court, and judgment upheld by the Court of Appeal. In answering whether the application was properly before Court, **Byamugisha JA.**, observed that;

"I agree with counsel for the appellant that an application for a vesting order must be made to the registrar of titles. However, the High Court has unlimited jurisdiction in all matters. The Commissioner for Land Registration on 16th August 2004 wrote to counsel for the appellant suggesting to them the option of obtaining a vesting order from court. The counsel seems to have accepted this advice when he filed the application in the High Court.

In the same letter the Commissioner for Land Registration informed counsel that no transfer in favour of the respondent and her late husband could be traced and the

instrument number under which their registration was purportedly effected related to a different land transaction. The loss of the transfer instrument and the use of an instrument of a different land transaction to register the respondent and her late husband raise some suspicion but it cannot be evidence of fraud on her part. In any case the respondent was not responsible for safe-keeping of documents in the land registry and cannot be blamed for the loss of the transfer instrument. I consider this to have been a unique case in which the vendor had sold the property and received the whole of the purchase price and the purchaser was in possession with the full knowledge and consent of the vendor. The vendor was dead and no representative was available to sign fresh transfer forms. The learned judge was right to grant a vesting order under section 167” (supra).

It then appears to me from the above that the results of that case would be different had the Commissioner for Lands Registration not suggested to the Respondent the option of obtaining a vesting order. By suggesting that the Respondent obtains a vesting order from Court, it in my view; meant that the Commissioner was disinterested in granting the vesting order under Section 167 Registration of Titles Act Cap 230, in any case such application was made to him, which rendered Court’s intervention necessary. This is unlike in the instant application.

The Applicant’s Counsel now suggests to this Court to grant, at its pleasure, this application in total disregard of the clear procedure provided under Section 167 Registration of Titles. This in my view is unacceptable regardless of whether this Court has unlimited jurisdiction in all matters. To hold otherwise would be contrary to the intention of the drafters of the said Section and would also divest the 2nd Respondent of his or her powers. Consequently, this would encourage noncompliance with the said Section.

Given the above, I need not proceed to determine the merits of this application. Having noted that, I am of the opinion that this application should be dismissed with costs to the 2nd Respondent.

I do order that the Applicant follows Section 167 of the Registration of Titles Act and has the matter determined by the Registrar within 60 days of this order.

If the Registrar declines or fails so to do, and evidence of such failure is provided, this Court shall be pleased to automatically grant the said orders upon such proof. I so order.

Costs to be borne by the Applicant.

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Henry I. Kawesa

JUDGE

5/03/2019

5/03/2016:

Kiryowa Jonathan for Applicant.

Applicant present.

Respondents absent.

Court:

Ruling delivered in open court in the presence of the parties above.

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Henry I. Kawesa

JUDGE

5/03/2019