

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO.391 OF 2010

ELIZABETH NANTEZA NABETA :::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

DR. ANTHONY KONDE ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR.JUSTICE BATEMA N.D.A. JUDGE

JUDGMENT

The Plaintiff brought this case against the Defendant praying for orders for cancellation of the two titles **comprised in Kyagwe Block 190 Plots 7 and 9 Elizabeth Nanteza Road**, an order for vacant possession and eviction order, a permanent injunction against the Defendant and or his agents/servants/employees, general damages for trespass and costs of the suit.;

Brief facts:

The brief facts of this case are that, the Plaintiff is the beneficiary and administrator of the estate of the late James H.B.S.K Mukasa from whom she inherited property at **Gulu and Nasuuti registered as Kyagwe Block 190 Plot 254**. However, in 2008 she discovered that the Defendant had entered the said land and made two titles out of it to wit Kyagwe Block 190 Plots 7 and 9.

On the other hand, the Defendant who is now the registered proprietor of the above plots, claims to have purchased it as a kibanja from one Kikomeko Samuel on the 18th day of August, 2002. That he obtained registerable interests from the Plaintiff on the 24th day of January, 2005 having been issued with mutation and transfer forms duly signed by the Plaintiff. He processed and obtained a duplicate certificate of title.

Issues

The following issues were framed in the joint scheduling memorandum:

1. Whether or not the Defendant got himself registered on the suit land fraudulently.
2. Whether the Defendant is a trespasser on the suit land.
3. Whether the Defendant committed any fraud against the Defendant.
4. What remedies are available to the parties?

Issues 1 & 3:

Whether or not the Defendant got himself registered on the suit land fraudulently and whether the Plaintiff committed any fraud against the Defendant:

The Defendant is currently registered as the proprietor of the suitland. He claims that he is a bonafide purchaser for value. Section 59 of the Registration of Titles Act (RTA) is to the effect that a registered proprietor of the land is protected and his title is indefeasible except in cases of fraud. (See the case of *Katarikawe vs John Katwiremu & Anor (1977) HCB 187 and Section 176 (c) of the RTA*)

For a title of a bonafide purchaser for value to be impeached, it must be fraud of the transferee and the transferor.

The Court in the case of **Fredrick Zaabwe Vs Orient Bank & Others SCCA No, 4 of 2006**, defined fraud to mean the intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right. It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury.

In **Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992**, it was held that;

“ fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters, it was further held that;

‘The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.’

In her evidence in chief, PW1 Elizabeth Nanteza, states that upon finding out that the Defendant was claiming registered interests on the suit land she asked him to show her the documents he used to register but he refused. She went to the land offices where she found mutation and transfer forms having her name and forged signature as transferor and the Defendant being the transferee. The documents were tendered in Court as exhibits. D1 is the transfer form for plot 9 and 8, Block 190, Kyagwe. D2 is a consent, D3, is a mutation form to subdivide Plot 254 Block 190, Kyagwe. The Plaintiff denies being the person who signed all the above documents in respect of any sale transaction with the Defendant.

Court was interested in knowing whether Nanteza sold this land as the landlord and signed the mutation and transfer forms for the Defendant. There is Exhibit D4, the sales agreement but it is between the Defendant, his wife and Samuel Kikomeko, a kibanja holder on Plot 254. The Plaintiff was not a party to this sales agreement. The evidence on record shows that a one Mayengo W.A, a distant cousin of hers signed on her behalf as the landlord.

The said Mayengo who was carrying out transactions on her behalf did not have any powers of attorney from Nanteza. The closest relationship Mayengo had was being her agent collecting busulu and reporting to her on issues relating to kibanja holders but not conducting sales and transfers on her behalf. The evidence we heard shows that her land agents could identify buyers for specific pieces of land but not sell and transfer the lands on her behalf. Even if Mayengo was a beneficiary in the estate of the late Ham Mukasa, a fact not proved at this trial, he could not sign as the landlord for lands not yet transferred to him by the administrator of the estate. It was also DW2 Buye Martin's, evidence that the Plaintiff never handed him any signed mutation forms in favour of the Defendant and or her so-called agent.

DW2, during cross-examination by Court denied ever helping the Defendant to process his 3 titles. The Defendant cannot convince this Court that he believed in the signed transfer forms when he never saw the landlord signing them. The trust he put in the people he was dealing with was unjustified.

The Plaintiff admitted that she gave her agents blank transfer forms. But her coded practise to seal any transfer was a personally signed authorisation. Whenever she made a sale and transfer on her land, she always made and signed an authorisation copy authorising that person to make the transfer. That practice was confirmed by DW2 that the Plaintiff would issue him with a copy of mutation

forms whenever she issued out land to someone. He also admitted during examination in chief that he did not receive any authorisation document from the Plaintiff in favour of the Defendant.

The Defendant failed to produce and tender that authorisation copy written by the Plaintiff to Court. It is evident that the Defendant got himself registered on the land fraudulently. The Plaintiff is the original owner and registered proprietor of the land was never involved in the sale and transfer transaction. There is believable evidence proving that her signature was forged. Chelangat Sylvia who is a specialised in document analysis adduced evidence in Court and tendered a report exhibit PE2 concluding that Nanteza did not sign the documents in issue.

If the Defendant bought anything he bought an unregistered kibanja interest from one **Samuel Kikomeko** who was a recognised kibanja owner on the suit land. He is yet to acquire registerable legal interest from the Plaintiff. Mr. Kikomeko did not have authority to sell the land to the Defendant and hence did not have a good title to pass over to the Defendant. The Defendant did not make a proper search in the Land registry before buying the said land from Mayengo and Kikomeko yet he was told and knew that the Plaintiff was the true landlord.

The failure to make reasonable inquiries as in due diligence or the purchaser's ignorance or negligence to do so amounted to fraud in the circumstances of the case. Land is never bought from unknown sellers like buying tomatoes or bread. Land is valuable property and all buyers are expected to make exhaustive investigations about both the land and the sellers before buying. I find that the Defendant fraudulently registered his interest in the Suitland and with prior knowledge of the Plaintiff's registered interest in the land. He deliberately refused to carry out due diligence.

I find issues 1 and 3 answered in the affirmative.

Issue 2:

Whether the Defendant is a trespasser on the suit land:

Trespass to land was defined by **E. Vetch** in his book **The East African Cases on the Law of Tort (1st Edition, 1972, Suet and Maxwell London at page 229)**, to mean, unauthorised entry on the person's soil with no right.

That trespass to land is actionable *per se*, that it does not require proof of additional facts to constitute a cause of action in trespass to land. That it follows the Latin maxim *cuius est solum, eius est usque atque ad coelum et ad infernos*, which means that whoever owns land, owns it all the way from the heavens up to hell. The right of enjoyment of property discussed by the above mentioned legal author is jealously guarded by the law. It is an absolute right and any interference or invasion in tort which is actionable.

A tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land.

For a tort of trespass to be sustained, an element of entry without permission of the owner must be proved.

In resolving this issue I will take into consideration the case of **E.M.N Lutaya versus Stirling Civil Engineering Civil Appeal No.11 of 2012**, where it was held that trespass to land occurs when people make unauthorised entry upon the land and thereby interfere with another person's lawful possession of the land. The standard of proof according to Section 101, 102 and 103 of the Evidence Act, is that he who alleges a fact must prove it.

As already resolved in the 1st and 2nd issues above, the Defendant did not lawfully acquire a land title from the original land owner. The kibanja holder who purported to sell to him got no blessings from the landlord and hence his equitable interests were unlawfully acquired.

Secondly, the circumstances under which the Defendant got registered on the suit land were fraudulent.

In conclusion, I find sufficient evidence proving that the Plaintiff is the lawful owner of the suit land and did not authorise the Defendant to enter on it. The Defendant has no legal claim over the same, his occupation of the suit land amounts to trespass.

Issue 4:

What remedies are available to the parties?

The Plaintiff prayed for Cancellation of titles as per section 177 of the Registration of Titles Act, eviction and vacant possession of the suit property, general damages and costs.

All those prayers are granted. But there was not much spoken about or in proof of what the landlord suffered except general inconveniences. She is awarded nominal damages of Shs.900,000/= (*nine hundred thousand only*).

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Batema N.D.A

JUDGE

18/03/2020