

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBARARA

CIVIL SUIT NO. 17 OF 2003

1. ELLY AMANI GAMUKAMA
2. ELIZABETH KYASIIMIRE

===== PLAINTIFFS

VERSUS

1. TRIPLE MPUNGU GENERAL TRADING STORE LTD
2. EDWARD KANOTI

===== DEFENDANTS

BEFORE: THE HON JUSTICE LAWRENCE GIDUDU.

JUDGMENT

The plaintiffs and the 2nd defendant were formerly tenants of the now defunct Departed Asians property Custodian Board hereinafter, called the Board, in respect of plot 74 Mbarara High Street hereinafter called the suit property. They are now disputing over its ownership.

It is not in dispute that in 1995, the Board advertised the suit property for sale. The Board later offered the suit property to the sitting tenants styled as Triple Mpungu Traders at a purchase price of Shs. 40,025,150=.

It is the plaintiffs' case that they raised money in installments and paid a total of 36,226,350= while the 2nd defendant contributed a total of 10,650,000=. They were issued with a certificate of purchase on 1st December 2000 as per exhibit "P8" which was issued in the names of the plaintiffs and the 2nd defendant since Triple Mpungu was not a body corporate which could own property, it being a Partnership.

Later after the plaintiffs had detailed the 2nd defendant to process their joint certificate of title, it dawned that the title had been issued in the names of the 1st defendant as proprietor and was in the possession of the 2nd defendant.

The plaintiffs protested to the Board which called a meeting attended by the 2nd defendant. The Board failed to resolve the dispute because the 2nd defendant's position was that the 1st defendant was the proper owner of the suit property and that only the 1st plaintiff was a shareholder while the 2nd plaintiff was not, hence this suit.

The plaintiffs bring this suit seeking a declaration that they together with the 2nd defendant are the legitimate owners of the suit property and that this court should make an order to cancel the registration of the 1st defendant and order that the two plaintiffs and the 2nd defendant be registered as the joint owners of the suit property.

Three issues were framed at the conferencing stage as follows:

- (a) Who was Triple Mpungu Traders that purchased the suit property?
- (b) Whether the 1st defendant was registered as proprietor through fraud.
- (c) What remedies are available to the parties?

I will resolve the issues in the order they were stated.

Who is Triple Mpungu Traders?

Though framed as an issue, both sides to this suit did not, in my view, lead evidence specifically directed at resolving it. If I understand the parties well, I believe this issue was intertwined with the question of whether the 2nd plaintiff was a partner in Triple Mpungu Traders or not. The plaintiffs affirm so while the defense denies she was a partner and evidence tended to concentrate on this question.

Anyhow, both counsel in their written submissions agree that that Triple Mpungu Traders was a partnership but disagree on the membership. While the plaintiffs argue the partnership was for three members comprising the two plaintiffs and the 2nd defendant, the defence on the other hand submits that the partnership comprised 18 members including the 1st but excluding the 2nd plaintiff.

In their testimony, both sides agree that they bid as Triple Mpungu Traders and when they paid for the property, they could not get registered because according to Ruth Namirembe Olijio, PW3, Triple Mpungu Traders was only a registered business name that could not own property. PW3 advised that they form a limited company or get registered as individuals.

All was well until this stage. It was PW3's testimony that she made the decision to advise them to incorporate a company or be registered as individuals after seeing the documents presented by the 1st plaintiff.

PW3, the then legal officer for the Board, during cross examination stated thus:

*" I had asked Gamukama what the business name
Comprised and he gave me the business name
Registration documents that revealed only the
three names. The payments took some time.
I had met the old man Kanoti once. I had advised
that the business name cannot own property after
the full purchase price had been paid. We could
accept the individual names or the company.
Gamukama requested first that they be issued
With a certificate in individual names, I did not
Call the other two partners because I had a copy
Of the document from the registrar of business
Names that revealed only three partners"*

This testimony under cross examination tallied with the evidence adduced by the plaintiffs that from the beginning, the bidders and those who eventually paid the purchase price were three people. That is, the two plaintiffs and the 2nd defendant. The figure of 18 given by the 2nd defendant was a figment of imagination. PW3 is a lawyer, she had the registration papers before her and gave evidence that they revealed three partners and advised that they could register as individuals which was indeed done when on 1st December, 2000, a certificate of purchase was issued in the names of the three and not twenty partners.

It is my conclusion, on the basis of the plaintiffs' evidence as supported by the former Board lawyer (PW3) who handled the paper work, that Triple Mpungu Traders was a trade name which was registered by the two plaintiffs and the 2nd defendant with the intension of bidding and purchasing property at plot 74 Mbarara High Street. These documents also exist on the court record as annexures to the plaint and reveal that the partners were three only as explained by PW3. This disposes of the first issue.

Was the first defendant registered as proprietor through fraud?

It was submitted for the plaintiffs that the 1st defendant was incorporated for purposes of committing a fraud because while the plaintiffs by their evidence, paid a total of 29,601,500= and the 2nd defendant paid only 10,650,000= towards the purchase price, it can only be fraud that the 1st defendant who was not in existence, became a proprietor without the consent or knowledge of the plaintiffs.

The defence contested this allegation submitting that the whole process was clean. It was submitted that the decision to incorporate the 1st defendant was to rectify the mistake earlier done when the individuals were registered yet other members had been left out. That the 1st defendant being, a company owned by members, who include the 1st plaintiff, is the legitimate one to be registered. Further, that the registration of the 1st defendant was done after a meeting of the Divesture Committee which then recommended to the Minister to issue another certificate of purchase to the 1st defendant. This meeting, it was argued, made the deal clean and cancelled the first purchase certificate issued in individual names.

Fraud, though not defined in the Registration of Titles Act, has been defined in case law as dishonest dealings in land such as depriving a purchaser for value in occupation of the land of his unregistered interest. See **J. Katarikawe Vs. W. Katwiremu and another (1977) HCB 187**.

Short of proven fraud, a registration certificate is everything under section 59 of the Registration of Titles Act (RTA). See **Kampala Bottlers Vs Damanico (U) Ltd. Supreme Court Appeal 22 of 1992**. It also trite law that where a party pleads fraud, it must prove it to a standard higher than the balance of probabilities.

I have already observed above, that the plaintiffs and the 2nd defendant had a common objective till the full purchase price was paid. According to the plaintiffs' evidence, they handled the payments to completion and then delegated the 2nd defendant to process the registration. That is when he became illusive until they learnt that the property was his and they were to leave.

In his evidence, the 1st plaintiff who testified as PW2, confronted the 2nd defendant who told him the property was his (2nd defendant). It is then that the plaintiffs protested to the Divesture Committee which failed to resolve the impasse leading to this suit.

The 2nd defendant denied threatening PW2. Further, PW2 denies agreeing to incorporate a company and also denies signing for shares in the 1st defendant. He stated that his signature in the Articles and Memorandum of Association is forged. PW1, who is the second plaintiff, cries foul that she was edged out of ownership by the creation of the 1st

defendant in an act of fraud since she together with PW2 contributed the bigger share of the purchase price.

To resolve this issue, I shall examine the creation and operations of the 1st defendant in relation to the whole transaction. The 1st defendant was incorporated on 16th May 2001. The suit premises had been purchased and a certificate of purchase issued on 1st December 2000. There is uncontroverted evidence by the Plaintiffs that from the time full purchase they often asked the 2nd defendant about the progress of registration but he kept explaining that he was still raising money to pay for registration. PW2 at one time had to travel to Norway for studies while PW1 was busy at her workplace in Kampala. The 2nd defendant being resident in Mbarara where the suit property is, was detailed to handle the registration.

I am inclined to ask the following question to get answers to resolve this case. What property was the 1st defendant incorporated to purchase when plot 74 had already been purchased by the three people who paid the price?

It is on record that the same authority that issued a certificate of purchase to the three persons also issued another certificate of purchase on 20th June 2001 to the 1st defendant purchasing the same property.

I was asked by learned counsel for the defendants to treat the second purchase certificate as cancelling the first one. I would question under what law this was done without first setting aside the first sale. What consideration did the 1st defendant offer to the Board in order to seal what I would refer to as the second sale? What bid did the 1st defendant submit in order to get the offer to buy?

There is no evidence that the 1st defendant paid any price to seal the deed. In fact when the property was offered for sale, the 1st defendant was not in existence. Technically, the 1st defendant could not do business with the Board. It is trite in the law of contract that once the full purchase price was paid, the title passed to the three purchasers. It was only these three who had capacity to transfer title to a third party who is the 1st defendant.

It is in this regard, that I respectfully, consider the advice of the Board that the purchasers should incorporate a company to become the purchaser as being without legal basis. It is my considered view that it is the purchasers who have capacity to transfer title to another entity.

In this case, it is **Elly Amani Gamukama, Elizabeth Kyasiimire and Edwrad Kanoti**, who as principals, had the capacity to transfer title to the 1st defendant which itself required a

company resolution filed with the registrar of Titles before it could be registered. In short, a certificate of title should have been first issued in the names of the three principals who would then transfer to any other party whether by gift or for valuable consideration.

On the basis of this scenario, I find that the presentation of exhibit "P5" by the 2nd defendant purporting that it was the purchaser of property which had already been bought by the three in a completed sale, is an act of fraud and or illegality which has been proven.

By presenting the Memorandum and Articles of Association that were prepared without the knowledge and consent of the plaintiffs that not only excluded the 2nd plaintiff but also included other persons who did not pay any part of the purchase price, was an act intended to deprive the plaintiffs of the land they had not only purchased but were also in possession as former sitting tenants. That is what was defined as fraud in **Katarikawe's case (supra) followed in Matovu and 2 ors Vs Sseviri and anr (1979) 174.**

I find the second defendant culpable for incorporating the ~~second~~ ^{first} defendant and presenting it to the Board to defeat the interests of the plaintiffs. The 1st plaintiff was emphatic that he learnt of the 1st defendant from the Board with his signature forged.

Section 5 of the Companies Act requires that each subscriber to a memorandum shall sign and add his/her full name, occupation and address. A look at the filed memorandum shows the work of an amateur draftsman. No occupation of subscribers is given and all have the same address of box 446, Mbarara, which was used during the original Triple Mpungu Traders transactions. This address also appears on the first certificate of purchase issued on 1st December 2000. One Betty Katende recorded as a witness to these signatures was not called to dispute PW2's denial that he never signed the memorandum. The whole document purported to have been drawn by the directors was a one man scheme which this court cannot permit to cheat bonafide purchasers for value such as the plaintiffs.

The 2nd defendant's testimony that the 1st plaintiff was a shareholder in the 1st defendant can only be false. There is no resolution registered in accordance with section 143 of the Companies Act (Cap. 110) supporting the defence case that the company had been mandated to take over the transactions which the plaintiffs had participated in as purchasers.

Companies transact business of this nature through shareholders resolutions filed with the registrar of companies because they are legal persons. The testimony of DW2, Mugisha Enock, just made the defence case worse because he did not know much about

the 1st defendant. He claimed to be a shareholder but did not have a share certificate nor did he know the number of shares he owned. He also said the 1st defendant was incorporated in 1995 as a limited company yet it was incorporated in 2001 just to eject the plaintiffs from the suit property.

He also claimed to have paid 40,000= just like the other members to buy the suit property yet the purchase price was over 40 million which the 20 members could not raise with their 40,000= each. This would only amount to 800,000= which falls far below the purchase price.

In a nutshell, the conduct of the 2nd defendant from the time the first certificate of purchase was issued on 1st December 2000 was dishonest and his testimony in court was full of falsehoods. He testified that Triple Mpungu Traders was registered in 1977 and by 1986, it had 18 members. This is false because the documents on record reveal Triple Mpungu was registered in 1997 as a business name which had commenced business in 1995. He claimed to be the Managing Director but was technically ignorant of how money for the purchase of the suit property was being paid to the Board. He is just a dishonest old man who may have been used by some unscrupulous persons to cheat the plaintiffs.

Courts frown over acts of fraud, and when proven as is the case here, they use all legal force to crush its ugly head to protect the victims from loss.

It is my finding on the available evidence that the 2nd defendant was registered as proprietor by fraud. I resolve the second issue in the affirmative.

What remedies are available to the parties?

Learned counsel for the plaintiffs asked me to award damages of 200 million to the plaintiffs for being inconvenienced by the defendants. It was PW2's evidence that he had a modern plan to rebuild the property but for the 2nd defendant's fraudulent schemes, he failed to do so.

The law on damages is that they have to be pleaded and proved. It is not clear from evidence, how the figure of 200 million was computed. Clearly, there was no attempt to lead evidence to prove damages by way of quantum. The building plan and its cost were not produced to help court quantify the damage. Damages serve to place the victim back to his/her original state as far as money can atone but there should be evidence to aid the calculation to avoid guess work.

Moreover, the plaintiffs are still in possession and continue to collect rent from tenants in the suit property. This mitigates any damages they would have otherwise got if there had been proof.

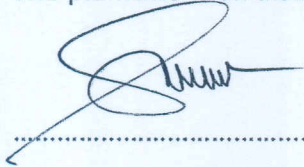
Taking into account that the suit property requires refurbishment on account of its age, it being a former Asian property, I would be inclined to award nominal damages. The reason being, that the plaintiffs could not renovate or indeed rebuild the property because of the actions of the defendants which deprived them of ownership. There is no doubt that the plaintiffs who had paid a total of 29,601,500= as their contribution to the purchase price were all of a sudden deprived of their proprietary interests by the fraudulent scheming of the 2nd defendant. This must have put their plans and expectations into jeopardy and loss. I would consider an award of 30 million to be appropriate and I impose an interest at court rate from the date of judgment till payment in full.

Having found that the 2nd defendant committed acts of fraud when he incorporated the 1st defendant with the sole purpose of depriving the plaintiffs of their property, I make a declaration that the property formally styled plot 74 High Street, Mbarara belongs the three original bidders and subsequent purchasers, namely **Elly Amani Gamukama, Elizabeth Kyosiimire and Edward Kanoti.**

I declare that the purported sale of the property to the 1st defendant was null and void since the title to the property had already passed to the three persons.

To give effect to these declarations, I make an order under section 177 of the RTA (Cap 230) that the certificate of title issued to the 1st defendant and registered on 30th May 2002 be and is hereby cancelled and the registrar is directed to substitute the same by making entries in the register indicating the proprietors as **ELLY AMANI GAMUKAMA, ELIZABETH KYASIIMIRE AND EDWARD KANOTI.**

The plaintiffs shall also have the taxed costs of this suit.



Lawrence Gidudu


JUDGE

10TH May 2012

Order:

This file has had a checked history which should not be repeated. The Judgment was reserved for 13th August 2010. Both counsel were to file written submissions before that date. Both counsel complied but the clerks kept the file and eventually archived it. After complaints from counsel the file was retrieved from the archives and delivered to me two weeks ago to write the judgment. I have written the judgment promptly.

The Asst. Reg Mbarara is directed to read this judgment before the parties on or before 16th May 2012 to minimize the waiting which has been regrettably long.



Lawrence Gidudu

JUDGE

10th May 2012