

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 00 – CV – CS – 009 - 2023

KASHILINGI ZAINABU ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

RUYONDO EDWARD::::::::::::::::::::::::::::::::::::::::: DEFENDANT
(Admin of the Estate of theLate Kabakidi Gladdesi)

BEFORE: HON. JUSTICE VINCENT WAGONA

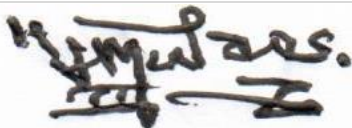
JUDGMENT

Introduction:

The plaintiff's cause of action is pegged on fraud and recovery of land situate at Lyengumba Village, Buheesi Town Council, Bunyangabo District measuring 6 acres (suit land) seeking a declaration that the suit land belongs to the plaintiff, a declaration that the suit land was wrongly included in the estate of the late Kabakidi Gladdesi, a permanent injunction restraining the defendant from trespassing on the suit land, punitive and general damages and costs of the suit.

The case of the Plaintiff:

Kabakidi Gladdesi (deceased) died intestate on 19th May 2021. The plaintiff and defendant are children of the deceased. The plaintiff is the legal and lawful owner of the suit land which she acquired by purchase from Ernest Kamara on 20th/2/1987. A purchase agreement was made to that effect. The neighbors of the said land at the time of purchase were Kabanyoro, Ndera, Stephen Zadoki Rujumba and Fideri.



After purchase, the plaintiff assumed possession and use of the land carrying out farming activities thereon and developed a permanent house which is still under construction. Whereas her mother Kabakidi Gladdesi died intestate, the suit land did not form part of her estate. The subsequent inclusion of the same in the grant for letters of administration over her estate by the defendant amounted to fraud.

The case of the Defendant:

The suit land belonged to her late mother Kabakidi Gladdesi who died intestate and thus forms part of her estate. The suit land was bought for the late Gladesi by his son in law, Ahmad Kashilingi in 1987. Ahamad Kashilingi requested the defendant to look for land around fort portal which could be bought for the parents. The defendant travelled to Kilembe in Kasese, met with his uncle who directed them to Mr. Ernest Kamara who was selling the suit land. The said Ahmad Kashilingi bought the suit land for the plaintiff's parents and since 1987, it is the defendant's parents who were in possession and use of the same and they were buried there.

Issues:

In the joint scheduling memorandum, three issues were framed for determination:

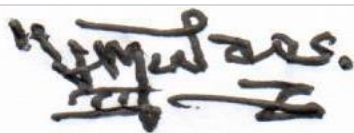
1. Who is the lawful owner of the suit land?

2. Whether the suit land forms part of the estate of the late Kabakidi Gladdesi.

3. What remedies are available to the parties?

Representation and hearing:

Mr. Masereka Chan Geoffrey appeared for the plaintiff while Ninsimma Jackie appeared for the defendant.

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The plaintiff led evidence of 4 witnesses and she testified as *PW1; Iggy Musaali (PW2); Nyakaisiki Lilian (PW3) and Aliganyira Augustine (PW4)*. The defendant
3 relied on evidence of five witnesses and testified as *DW1; Kaahwa Paul (DW2), Kamanzi Godfrey (DW3); Muganzi Charles (DW4) and Nyangoma Beatrice (DW5)*. The parties filed written submissions which I have considered.

6 **Burden of Proof and Standard of proof:**

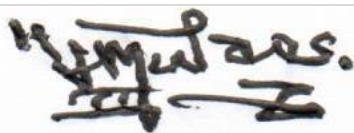
The plaintiff bears the burden to prove her claim on the balance of probabilities. Section 101 of the Evidence Act is to the effect that whoever desires any Court to
9 give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. (See also *Kamo Enterprises Ltd Vs. Krytalline Salt Limited, SCCA No. 8 of 2018*).

12 **Evidence of the Plaintiff:**

PW1 (Kashillingi Zainabu) stated that she was a biological daughter of the late Kabakindi Gladesi and a sister to the defendant. That the suit land is approximately
15 6 acres and neighbours with Mugisa James in the west, Masaali in the East and road to Kisimbi and Musinguzi Wilson in the south. She bought the suit land on 20th February 1987 at shs 16,000,000/- and the said money was paid to the daughter of
18 the seller called Asiimwe at UCB Bank and an agreement was made to that effect. Asiimwe was with the seller, Paul, the plaintiff's mother and the seller instructed her to hand over the money to her daughter. The agreement was signed by the seller and
21 those present (PE1) (a). That they moved to the ground on the same day to confirm the boundaries in the presence of other people indicated on PE2. After purchase, the seller was given three months within which to demolish the house he had on the land
24 to take the iron sheets and leave the land. After the seller vacating, the land remained

unused and people nearby used to graze cattle thereon. In 1997, she constructed a small house thereon after selling part of the said land to Masaali Ignatius (PW2). She also authorized other people to keep growing seasonal crops on the land and one of those was Aliganyira Augustine (PW4) who used the said land for over 30 years. In 1997 after the ADF insurgency, she allowed her mother to stay on the land together with her children and those of her sister (PW3). The mother later called her late brother to stay with her as he looks after the cattle who upon his death with the permission of the plaintiff was buried on the suit land. Her mother stayed on the suit land till her death in 2021. Later, the children of the plaintiff started constructing a permanent house for her on the suit land and the defendant started on the process of securing letters of administration contending that the land formed part of the estate of the late mother. During the meeting at the Attorney General's chambers at Kampala, the plaintiff appeared with Nyakaisiki Lilian (PW3), Kamanzi Godfrey (DW3), Ruyondo Edward, Hussein Kashillingi, Nabaasa Kashillingi, Busingye and others and the plaintiff categorically made it clear in the said meeting that the suit land was not part of the estate of her late mother. That as such the defendant wrongly and fraudulently included it in the grant he subsequently secured and as such the same should be revoked. In cross examination the plaintiff stated that she sold part of the suit land at shs 700,000/= to raise money for construction of a small house on the land. She used the money to buy construction materials and relatives helped. The father remained in Kilembe In re-examination she said that the mother came to live in the house on the suit land due to ADF insurgency in Kasese.

PW2 (IsgyMasaali) stated that the plaintiff was his neighbor in the East. In 1997, the plaintiff being the lawful owner of the suit land sold part of her land measuring one acre to him at a consideration of shs 700,000/=. On a number of occasions, the

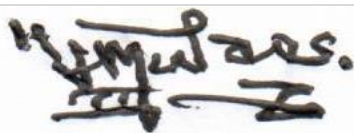


late Gladesi told him that the suit land belonged to the plaintiff. One time his cows strayed in her garden and she told him that compensation was to be paid to the plaintiff who was the owner of the suit land. In re-examination the witness stated that the late Kabadaki was a neighbor and found him in the area. By the time he bought the land from the plaintiff, the late Kabadaki was still living.

PW3 (Nyakaisiki Lilian) corroborated the testimony of PW1 her sister that the land in issue was for the plaintiff who bought the same in 1987 and by then she was staying with her at her home in Rukungiri. The plaintiff later brought her mother from Kilembe to live on the suit land. Her mother later invited a brother whom she lived with and after his death he was buried on the suit land. Their father who died in 2010 was also buried on the suit land. That the land in issue is for the plaintiff and was wrongly included in the grant to the defendant. In cross examination the witness testified that that the plaintiff got to know that the land was on sale through Byabagambi Paul, the uncle. In further clarification by court she stated that her mother originally came from Kibale but did not have land there.

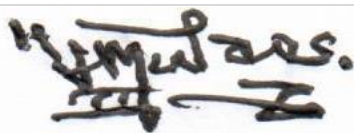
PW4 (Aliganyira Augustine) stated that the land belonged to the plaintiff and was conversant with the same. It was bought by the plaintiff from Kamara Erinest. The plaintiff gave him permission to use the land for farming and he had used it for over 30 years. The plaintiff built a muddy house and later brought her mother. In cross examination he stated that he came to know the plaintiff after purchase of the suit and they became friends. When the plaintiff brought her mother she was about 60 years. He was present when the plaintiff built the house.

Evidence of the Defendant:

A handwritten signature in dark ink, appearing to be 'Nyakaisiki Lilian', with a horizontal line underneath it.

DW1 (Ruyondo Edward) stated that the plaintiff was a biological sister and a beneficiary under the estate of the late Kabakindi Gladesi. The suit land was bought on 20/2/1987 by the former husband of the plaintiff Ahmed Kashillingi for their parents. This was after one of their brothers died in 1987 called Kagaba Christopher and they had nowhere to bury him. After purchase, the parents took possession till 19/3/2010 when their father died and in 2021 their mother also died. He was directed by Ahmad Kashillingi to look for land to buy for the parents and he got in contact with his uncle Byabagambi who located the suit land which was bought by Ahmad Kashillingi. Kashillingi thus bought the suit land for their parents and settled them in Kabarole. Upon the death of his father, he was buried on the suit land as well as his mother. The witness called for a family meeting regarding securing letters of administration and the plaintiff did not attend. In cross examination he stated that he was not present at the time of purchase and never witnessed the sale. He was not present during inspection of the boundaries. He had no document or agreement confirming that the land was owned by the mother. After purchase it was the mother who took possession because the father stayed in Kilembe because he had separated with the mother. The land was purchased for the parents as such it was family property and it belonged to both parents regardless of the separation. In further inquiry by court, he stated that when land was being bought, his father remained in Kilembe since he had separated with their mother and they were living separately.

DW2 (Kaahwa Paul) testified that the land formerly belonged to the late Erimest Kamara who sold it to Gladdesi before shifting to Kyenjojo. Erimest told him that the son in law bought it for Gladdesi, mother in law and she was introduced as the new owner of the suit land. Erimest told him that he had sold it. The witness was not present and he did not see the sales agreement. The seller told him that the agreement

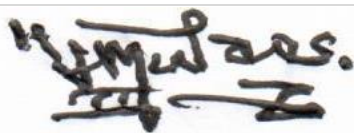


was made from the Bank. He was aware that the plaintiff sold part of the land to Masaali, the neighbor. The plaintiff constructed a house on the land for her mother.

3 The seller told him that it was Kashilling who paid him the money.

DW3 (Kamanzi Godfrey) stated that he is a son of the late Gladesi and a sibling to the parties herein. In 1987 was living with the plaintiff at her matrimonial home in Rukungiri. The brother in law Kashillingi informed him that he wanted to buy land for the parents and shift them from Kilembe. Later after a week, he called and informed him that he had found land in Kiyombya in Kabarole now Bunyangabu. In 1988, he left Rukungiri and started staying in Kilembe with the father and later went to stay with the mother on the suit land. The suit land was for the mother thus part of her estate. In cross examination he stated that he stayed with the plaintiff in Rukungiri for a long time till 1985 after the husband returned from the war. The plaintiff constructed the house on the suit land in 1987 and moved her mother in 1990 and for him he started staying with her in 1996. The land was purchased by the brother in law Kashillingi but the witness was not present. Masaali was a neighbour and he bought land from the plaintiff in 1989. His father never lived on the suit land. He lived in Kilembe. In re-examination he stated that Kashillingi bought the land while aware that the parents had separated.

DW4 (Muganzi Charles), stated that the suit land was for Gladesi and he had known her for over 25 years. He used to graze on the suit land. The seller told him that he was selling the suit land and had found an old woman who was interested in buying it and it was the son in law who was going to pay for the same. The seller later returned to bid farewell and intimated to them that the buyer had fully paid the money and it was paid by the in-law. He knew the land was for Kabakidi since she

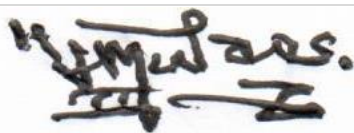


used to tell them on several occasions that it was her son in law who bought the same for her called Kashillingi and she constructed a house thereon.

3 **DW5 (Nyangoma Beatrice)** testified that the plaintiff and the defendant were children of the late Gladesi Kabakidi formerly of Birembo. DW5 was grazing cattle and gathering firewood for a long time from the suit land with permission from the late Kabakidi.

Submissions for the Plaintiff:

It was submitted for the plaintiff that in **Mash Investment Ltd v Kachwa Investment Co. Ltd & others, HCCS No. 8 of 2012, Musota J** (as he then was) while citing the **Osborn's Law Dictionary** explained that a person has an interest in land where he has rights, title, advantage, liabilities connected with land whether it be it present, future, ascertained or potential provided they are not remote. An interest in land must be capable of surviving the parties and must be recognizable to the world. PW1 gave testimony of how he acquired the suit land and presented a sales agreement executed with the seller in the presence of those indicated in the agreement. The seller remained in possession for some time and later handed over possession to her. She later constructed a house on the suit land and shifted the mother from Kilembe to the land owing to ADF insurgency. That after the death of her mother, she remained in possession of the suit land and when the children started to construct for her a permanent house thereon, the defendant started on the process of securing the letters of administration claiming the land belonged to their mother whereas not. Her testimony was in tandem with those of PW3, and PW4. She sold part of the land to PW2 who has never been disturbed. There was sufficient evidence to prove that the land was hers.



The land did not form part of the estate of the late mother. As such the plaintiff wrongly included the same in the grant of letters of administration over the estate of their late mother. The defendant acted fraudulently in including the suit land as forming part of the estate of the late Gladesi since the plaintiff had already protested his actions (*Fredrick Zaabwe v Orient Bank & Others SCCA No. 4 of 2006*). As such the letters of administration granted to him must be revoked.

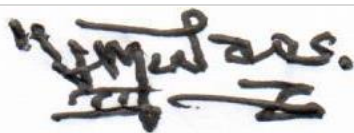
Submissions for the Defendant:

The defendant led cogent evidence to prove that the suit land belonged to the late Gladesi Kabakidi and as such forms part of her estate. The suit land was bought by Col. Ahmad Kashillingi for defendant's parents. Both their late mother and father were buried on the suit land and as such the land is family land and belonged to their late mother and thus forms part of the estate. The plaintiff was summoned for the meeting regarding the grant of letters of administration and she never turned up. He followed the correct due process in securing the letters of administration.

CONSIDERATION BY COURT:

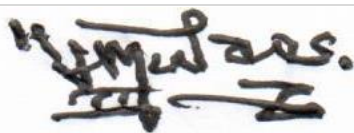
I will resolve issue one and two together. Ownership as a concept connotes the state, relation, or fact of being an owner. (*Merriam Webster Online Dictionary available on <https://www.merriam-webster.com/dictionary/ownership> accessed on January 17, 2024*). In the legal sense, ownership to property or a right in property can inter alia be acquired through purchase, inheritance, a gift or by possession under the doctrine of bona-fide and lawful occupancy and adverse possession.

The plaintiff asserted that she acquired the suit land by purchase from Erimest Kamara on 20/2/1987 by way of purchase. The agreement of purchase is PE1. After purchase, the plaintiff and the seller went to inspect the boundaries of the land and



those who were present signed or wrote their names in PE2. Since 1987, she had been in possession of the suit land. In 1997, she sold part of the land to Musaali (PW2) at shs 700,000/= and constructed a house on the suit land using the said money and support from relatives. After the ADF insurgency in Kasese, she moved her mother from Kilembe to the suit land. She continued being in possession of the land where she allowed PW4 and other people to continue cultivating the suit land with her permission. PW1's testimony was supported by that of PW2 who confirmed that he bought land from the plaintiff at shs 700,000/= which is approximately an acre and that the suit land was for the plaintiff and that sometime back his cows strayed into the suit land and the late Gladesi told him that the proper person to deal with was the plaintiff who was the owner of the suit. This testimony was supported by PW3, the sister to the parties who also confirmed that the suit land was for the plaintiff. PW4 also supported the evidence of PW1 and other witnesses that the suit land was for the plaintiff who had allowed him to continue cultivating the same. That he had used the same for over thirty years without any interruption. DW1 in cross examination confirmed that the agreement to the suit land was in the names of the plaintiff. DW2 also testified in cross examination that there was no agreement in the names of the late mother. DW2 and DW3 testified that it was the plaintiff who constructed a house on the suit land. DW2 was aware that the plaintiff sold part of the land to Masaali, the neighbor. DW1 and DW2 both admitted that at the time of purchase, the parents had separated and not living together. This renders the evidence incredible that Kashilingi would buy land for the parents with a view that they would live on it together when the two had already separated.

I find that the evidence of the plaintiff regarding how she acquired the suit land was consistent and not successfully challenged during cross examination. It was also

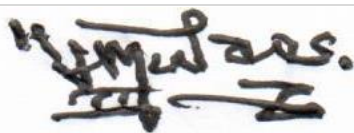


supported by the evidence of the defendant's witnesses in some material particulars including the construction of the house and selling part of the land. Therefore, on the balance of probabilities, I find that the plaintiff's case is more probable and believable than that of the defendant.

In relation to the second issue, it is trite law that only property of the deceased at the time of her death formed part of her estate. In this case, the defendant included the suit land well aware that it did not belong to the deceased. The suit property does not form part of the estate of the late Kabakidi Gladdesi.

The mere fact that property was wrongly included in the grant as part of the estate of the deceased does not make the grant null and void. Such property can be severed by court and the grant validated. However, where the only estate that an administrator is meant to administer is property that is to be severed from the grant, then the grant becomes inoperative since there is no estate to manage. In the case before me, it is indicated in DE2 at page 9, that the deceased in addition to the suit land left cows. The evidence on record is silent as to whether the same still exist or not. I will thus not pronounce myself on it.

It is also relevant to note, that where it is established that the property in issue was included by fraud and misrepresentation, then section 234 of the Succession Act as amended allows court to annul the grant if such fraud is proved. It matters not whether the misrepresentation was intentional or not. What is important is for one to prove that it was indeed a misrepresentation, or the act or omission was done fraudulently. (See: *Stella Maris Amabilis & Anor v Esther Nabusakala, HCT-00-FD-CS-0072-2007*). It is apparent from the evidence that the defendant was aware of the interests of the plaintiff in the suit land. PW1 stated that while in the meeting



at the office of the administrator general, she clearly indicated that the suit land was hers and not part of the estate of the late mother. Her testimony was corroborated by PW3. DW1 also stated that the plaintiff objected to the process on account that the land was hers and not for the estate. In DE2 from pages 12 to 18 (minutes of the family meeting), the defendant made a representation that the deceased left land with a semi-permanent house, a permanent house, a banana plantation and eucalyptus gardens. The defendant was well aware that the permanent house was constructed by PW1 and that the land was hers. It is my view that this constituted a misrepresentation which is material which constitutes a ground for revocation of the grant under section 234 of the Succession Act. I have arrived at the conclusion that the grant of over the estate of the late Kabakidi Gladessi to the defendant dated 24th October 2022 in HCT – 01 – FD – AC – 0072 – 2022 shall be and is hereby revoked. I therefore resolve the first and second issue in favour of the plaintiff.

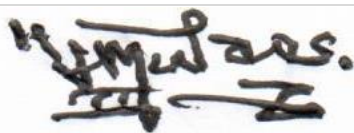
Issue 3: What remedies are available to the parties?

Learned counsel asked court to issue an order confirming the plaintiff as the owner of the suit land and a declaration that the said land was wrongly included in the estate of the late Kabakidi and Gladessi and issue a permanent injunction.

The plaintiff's counsel also sought to recover punitive and general damages and costs of the suit. Learned counsel for the defendant contended on the other hand that that the plaintiff is not entitled to the same since no evidence was led to that effect.

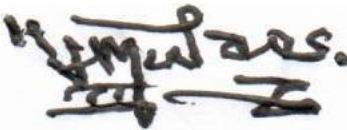
In my view since the plaintiff and the defendant are siblings, in order to promote harmony and togetherness in the family, I decline to award punitive and general damages and costs.

Consequently, the plaintiff's suit succeeds with the following orders:



1. A declaration that the plaintiff is the legal and lawful owner of land situate at Birembo Village, Kyombya Parish, Kiyomba Sub County, Bunyangabu District formerly known as Lyenguma Village, Buheesi Sub County, Kabarole District and all the developments thereon.
2. A declaration that the suit land does not form part of the estate of the late Kabakidi Gladdesi and was wrongly included by the defendant in the grant of letters of administration over the said estate.
3. An order is hereby issues revoking the grant of letters of administration to the estate of the late Kabakidi Gladdesi granted to the defendant on 24th October 2022 in HCT – 01 – FD – AC – 0072 – 2022 and he is accordingly directed to surrender the original copy of the grant to this court within five (5) days from the date of delivery of this judgment.
4. A permanent injunction is hereby issued against the defendant, his agents or assignees and any person who claims that the suit land forms part of the estate of the late Kabakidi Gladdesi from interfering with the plaintiff's use of the same or her developments thereon.
5. I make no award as to General and Punitive damages and costs of the suit.

I so order.



Vincent Wagona
High Court Judge, FORTPORTAL
DATE: 05/04/2024

