THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 384 OF 2014

KATONGOLE YOKANA.....PLAINTIFF

VERSUS

1. **ZAKALIYA KAKEETO**
2. **MAURICE KAGIMU KIWANUKA**
3. **AMOS MWESIGYE.....DEFENDANTS**

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

Introduction:

The plaintiff brought this action against the defendants seeking declaratory orders, specific performance of the contract of sale of land comprised in ***block 24 plot 12 Gomba located at Kyahi LCII, Kyamukama, Gomba district,*** purportedly sold to him by Zakaliya Kakeeto, the 1st defendant and the transfer of the said land into his names.

Facts of the case:

At the scheduling, the following were highlighted as facts by the plaintiff:

By an agreement entered into between the 1st defendant and the plaintiff on 13th September, 2000 the 1st defendant sold three parcels of land, measuring 600

acres, including ***block 24 plot 12 Gomba located at Kyahi LCII, Kyamukama, Gomba district*** *(suit land).*

That the suit land was registered under the names of the 2nd defendant who at all material times was aware that the 1st defendant was contracting on his behalf as an agent.

It was the plaintiff's claim that soon after the sale, the 1st defendant agreed with the plaintiff to deliver to the plaintiff a certificate of title for eventual transfer of the land into his names.

The 2nd defendant denied ever transacting with the plaintiff; and that the two refused to hand over the title to him, despite the numerous requests and polite reminders.

On the 19th May 2009, the plaintiff filed ***Civil Suit No. 146 of 2009*** seeking specific performance of the contract. The suit was however dismissed for want of prosecution. Sometime during the pendency of that suit, the 2nd defendant disposed of the suit land.

On his part, the 3rd defendant who is the current registered proprietor failed in his duty to ascertain ownership of the suit land and is in constructive and partial possession of the suit land which he had entered forcefully.

The plaintiff therefore sought for declaratory orders as adverse possessor claiming to have lived on the land which he utilized for over 17 years, without interruption.

Facts as alleged by the 1st and 2nd defendants:

The 1st and 2nd defendants in their joint defence denied ever transacting with the plaintiff on the suit land comprised in ***Gomba block 24 plot 12 land at Kyayi LCII,*** Gomba district.

It was the 1st defendant's claim that the land sold to the plaintiff was comprised in ***Gomba Block 7, plot 7 and plot 4***, which was different from the suit land.

The 2nd defendant on his part also claimed that at the time of the purported sale the suit land was registered in his names; that he never dealt with the plaintiff and that the 1st defendant never had any authority to deal with the 2nd defendant's land or to receive any money on his behalf.

The 2nd defendant therefore contended that the agreement between the plaintiff and the 1st defendant was null and void; did not accord him any rights/interest in the suit land and that the plaintiff was therefore a trespasser on the suit land.

Their joint prayer for court to dismiss the suit, with costs.

Facts as alleged by the 3rd defendant:

The 3rd defendant/counterclaimant contended that he lawful purchased the suit land comprised in ***Gomba Block 24, plot 12 situate at Kisaka***o on 16th April, 2015 from Francis Ssebutama; obtained registration of the suit land on 17th February, 2016.

That he was however prevented by the plaintiff/counter defendant's illegal occupation, and acts of cultivation and grazing the land which have caused him unwarranted stress and mental anguish and lost opportunities.

That Ssebutama had previously lawfully acquired the land from the 2nd defendant who was at the time the registered proprietor. He denied being aware of the pendency of the suit which in itself according to him, could not have barred the sale or transfer.

In his counter claim he sought among others, a declaration that he is a *bona fide* purchaser of the suit land for valuable consideration without any notice of fraud; that the purported sale to the counter defendant by the 1st defendant was void *ab initio*; that court should therefore dismiss the suit and declare the counter defendant a trespasser who should vacate the land.

Agreed facts:

During scheduling, there were a number of agreed facts. These were:

1) The plaintiff and the 3rd defendant both have partial possession of the suit land.
2) The 3rd defendant is currently registered as proprietor of the suit land.
3) The 3rd defendant purchased the suit land during the pendency of the present suit in court.
4) The 2nd defendant was registered on the suit land as proprietor on 7th March 2003.

Representation:

The plaintiff was represented by ***M/s Mushanga & Associates Solicitors and Advocates.*** The 1st and 2nd defendants were represented by ***M/s Ayigihugu & Co. Advocates & Solicitors*** while ***M/s Magellan Kazibwe Advocates*** represented the 3rd defendant.

Issues:

The following issues were raised during the scheduling:

1) ***Whether the plaintiffs purchase of the suit land from the 1st defendant was null and void;***

2) ***Whether the plaintiff has any interest in the suit land;***

3) ***Whether the 3rd defendant fraudulently and illegally acquired the suit land;***

4) ***Whether the 3rd defendant purchased the suit land as a bonafide purchaser;***

5) ***Whether the plaintiff is a trespasser on the suit land;***

6) ***Whether the parties are entitled to reliefs sought.***

Issue No. 2: Whether the plaintiff has any interest in the land?

By virtue of ***section 101 (1) of Evidence Act, Cap. 6***, whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist. ***(George William Kakoma v Attorney General [2010] HCB 1 at page 78).***

The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. ***(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.***

This being a case of trespass, the principle as outlined in the case of ***Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4 of 1987*** by the East African Court of Appeal was applicable.

Court noted that in order to prove the alleged trespass, it was incumbent on the party to prove that the disputed land belonged to him; that the defendant had entered upon that land; and that the entry was unlawful in that it was made without his permission; or that the defendant had no claim or right or interest in the land. (***Ref also: H.C.C.S No. 118 of 2012, Tayebwa Geoffrey and Anor Vs Kagimu Ngudde Mustafa; Justine E.M.N. Lutaaya Vs Sterling Civil Engineering Co, SCCA No. 11 of 2002).***

Analysis of the evidence:

During trial, the plaintiff relied on evidence of four witnesses. ***Pw2*** Gisaaka Fred the LC1 chairman, Kyamukama; ***Pw3*** Martin Tumusiime; and ***Pw4,*** Yosam Nayebare.

The defendants on their part relied on the evidence of ***Dw1,*** the 1st defendant; ***Dw2*** the 2nd defendant; ***Dw3*** Francis Ssebutama and ***Dw4*** Amos Mwesigye, the 3rd defendant.

The plaintiff testified as ***Pw1*** and claimed to have continuously lived, cultivated and grazed animals on the land comprised in ***Gomba Block 24 plot 12,*** land at Kisaka, Maddu Gomba district since 2000.

In his evidence he relied on the sale agreements ***PExh 1A/B*** and ***PExh 2 A/B,*** between him and the 1st defendant dated respectively 13th September, 2000 and 20th March, 2005 by which agreements he claimed to have acquired the suit land.

The defendants however challenged the validity of the agreements, contending that the 1st defendant had no authority from the 2nd defendant, the registered proprietor at the time in his capacity as the administrator of the estate of the late Benedicto Kiwanuka, to deal with the estate property.

Secondly, that none of the said agreements referred to the land in dispute. In effect therefore that the contracts as alluded to did not meet the criteria of a valid sale agreement.

Thirdly, that the plaintiff did not carry out any due diligence before the purported purchase and acquisition of the disputed land.

The law:

By virtue of ***section 64(2) of the Registration of Titles Act*** any land included in any certificate of title is subject to the subsisting rights of (among others) of any adverse possessor.

The above when read together with ***section 35 (8) of the Land Act, Cap.227*** implies that any change of ownership of title effected by the owner by sale, grant and succession or otherwise should not in any way affect the existing lawful

interests of or *bonafide* occupant. A new owner is under obligation therefore to respect the existing interest.

In his submission counsel argued that interests in land include registered and unregistered interests. He referred to the case of ***John Katarikawe vs William Katwiremu [1977] HCB 210, at 214.***

In this case, the plaintiff had acquired the suit land through adverse possession and over a period of time the defendants' interest in the land had been extinguished.

The plaintiff's further claim was that he purchased the land from the 1st defendant as a proxy agent of the 2nd defendant, who knew the plaintiff's existence and occupation of the suit land for a period exceeding 12 years.

That the uninterrupted and uncontested possession of land for a specific period of time hostile to the rights and interests of the true owner is considered to be one of the legally recognized modes of acquisition of ownership of land by prescription, as discussed in ***Ibaga Taratizo vs Tarakpe Faustina Civil Appeal No. 0004 of 2017.***

It was submitted further that statutory bar on recovery of land claims in Uganda is governed by the ***Limitation Act, Cap. 80,*** under ***section 5,*** applicable to all suits for possession of land based on title or ownership, ie proprietary title as distinct from possessory rights.

Counsel referred to the authority ***Ogaba vs Kilama, Civil Appeal No. 0051 of 2015*** which defines prescription as the process of acquiring rights in land as a result of the passage of time.

His point was that the process of acquisition of title by adverse possession springs into action essentially by default or in action of the owner. Counsel further cited the case of ***Nebbi and Anor vs Alex Manano Ajoba Civil Appeal No. 3 of 2005*** and such acquisition would result in rectification of the register by allowing the registration of claims, based on long outstanding possession.

That in the eyes of the law, an owner of land is deemed to be in possession of the land so long as there is no intrusion. Thus where the person has possessed land openly, peaceably and without judicial interruption that person may be allowed to acquire title after a specified period of time or extinctive prescription.

In response to those submissions however, both counsel for the 3rd defendant and that of the 1st and 2nd defendants refuted the claim that the plaintiff had acquired valid interest in the suit land.

According to counsel for the 3rd defendant, an adverse possessor cannot bring a claim under ***section 5 of the Limitation Act.*** Furthermore, that it would be misleading for the plaintiff to claim adverse possession since that right can only be enjoyed by one who has been in physical possession of one's land for a period of 12 years or more, without any interference.

He cited the case of ***Tayebwa Geoffrey & Anor vs Kagimu Ngudde Mustafa HCCS No. 118 of 2012*** where court declared that for one to claim an interest in land, he or she must show that he or she acquired an interest or title from someone who previously had an interest or title thereon.

That from the incontrovertible evidence on record, the plaintiff had no interest whatsoever having bought from the 1st defendant who did not have a title to the suit land or powers of attorney.

Consideration of the issue:

The general applicable to all suits in which the claim is for possession of land, based on the title of ownership, ie proprietary title, as distinct from possessory rights is that no person shall bring any action to recover after the expiration of twelve years from the date on which the right of action accrued to him or her, or if it first accrued to some person through whom he or she claims, to that person. ***Section 5(1) of the Limitation Act.***

Section 5 of Limitation Act (supra) which governs the limitation period for recovery of land provides as follows;

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."

Section 6 of the Limitation Act (supra) of the same Act provides;

"The right of action shall be deemed to have accrued on the date of the dispossession."

The direct import of ***section 5 and 6*** is, first, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued; which is the date of dispossession.

In the case of ***F. X Miramago v. Attorney General [1979] HCB 24***, it was held that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed. Once a cause of action has accrued, for as long as there is capacity to sue, time begins to run as against the plaintiff.

Essentially a cause of action is said to be disclosed if three key elements are pleaded: existence of the plaintiff's right; violation of that right, and the defendant's liability for that violation. *(Refer also to:* ***Auto Garage vs Motokov (No. 3) [1971] E. A. 514,*** at 519 D.)

As emphasized in ***Cottar v Attorney General for Kenya 193 AC P. 18,*** if any of those essentials is missing no cause of action has been shown and no amendment is permissible.

Statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is interest *republicae ut sit finis litum,* meaning that litigation shall be automatically stifled after a fixed length of time, irrespective of the merits of the particular case.

A cause of action accrues when the act of adverse possession occurs.

As noted by this court, it is only the 3rd defendant who filed a counterclaim, claiming to have purchased the land in 2016. His interest accrued in 2016, during which time the plaintiff claimed to have already been in possession and even filed the suit thus allegedly acquiring adverse possession.

On the issue of adverse possession however, the Supreme court decision of ***Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu: SCCA 15 of 2019***) sets out the preconditions which must be met before court can consider one to be an adverse possessor in Uganda.

These are:

1) ***Factual possession of the land. There must be physical control of the land in issue. The person in occupation must be dealing with the land as owner might be expected to, and no one must be doing the same;***

2) ***The possession must be a continuous period of at least 12 years uninterrupted.(emphasis added).***

3) ***Animus possidendi; an intention to possess the land to the exclusion of all others, including the legal owner.***

4) ***The possession must be adverse, ie without legal entitlement or without the owner's consent;***

5) ***The possession must be peaceful, exclusive, open and notorious so as to put the owner of the land on notice of the possessor's intention;***

6) ***The possession must start with a wrongful disposition of the rightful owner.***

The title of adverse possessor rests on the infirmity/failure of the right of others to eject him. The owner is therefore under duty to protect his interest in the land;

not just look on when his rights are either infringed or threatened by third parties such as squatters and trespassers occupying his or her land.

Failure to do so would mean that the owner of the land has abandoned the property to the adverse possessor or has acquiesced to the hostile acts and claims of the person in possession.

Section 78 of the RTA recognizes adverse possession in the terms below:

> ***A person who claims that he/she has acquired title by possession to land registered under this Act may apply to the registrar for an order vesting the land in him /her for an estate in fee simple or other estate claimed.***

The court added another aspect that the law does not make it a necessity for the claim of adverse possession to be by one person for the whole period; as long as the period of possession is continuous, the period of possession of successive squatters may be aggregated.

In this particular instance, a chronology of events which took place between 2000 and 2014 when this suit was filed rules out any possibility that the plaintiff was an adverse possessor, as claimed.

The evidence as alluded to by the plaintiff himself was such that during that period was engaged in various running battles in his futile attempts to secure titles and transfer instruments over the suit land, which as he found out later, was already registered in the 2nd defendant's names.

It is not in dispute that the land originally belonged to the late Benedicto Kiwanuka.

The 2nd defendant who testified as ***Dw2*** informed court that he became registered on the certificate of title on 7th March 2002, in his capacity as the administrator of the estate of his late father.

For his proof, he presented a copy of the title for the land comprised in ***Block 24, plot No. 12,*** measuring 72.845 hectares (approximately 180 acres), tendered in court as ***DExh 7.***

It is also not in dispute that in the year 2000 the plaintiff acquired from the 1st defendant several other portions of land, neighboring the suit land. It was the plaintiff's claim supported by that of ***Pw2, Pw3 and Pw4*** that he had lived on the land since 2000; and that is where the family put on their homes. This was confirmed by the survey report which indicated that the plaintiff occupied part of the suit land.

The plaintiff further claimed that after buying the land he had it fenced off and put up a permanent residence where he lived with his wife and children. ***Pw3*** one of his children confirmed that position. He added that his father showed him a portion of that land where he had built his own house, where he currently resides with his family.

The contested agreement between the plaintiff and the 1st defendant and which according to the 1st defendant ***(Dw1***) he had been forced to sign in the presence of security, was made in 2005.

Two years later in 2007, the plaintiff had lodged a caveat and was forced in 2009 to institute ***HCCS No. 146 of 2009 at Mpigi*** against the 1st and 2nd defendants wherein he alleged that he had legally purchased the land; and therefore entitled to certificate of title and transfer forms.

From his own facts evidence however, the said suit was left unconcluded before he filed the present suit. The main difference between this suit and the one he apparently abandoned was the addition of the 3rd defendant.

It was also ***Pw3***'s evidence that he had been arrested in 2016 for malicious damage to property belonging to James Rwomushana who claimed to have bought the land from Amos Mwesigye, the 3rd defendant.

It was also his evidence that the 3rd defendant had lied to Rwomushana that the land had no occupants and some had been compensated for their land. Rwomushana was not however made party to this suit nor were his names entered onto the title which was availed to court.

The witness also relied on a ruling of a no case to case by Chief Magistrates' Court at Mpigi, ***Criminal Case No. 285 of 2016 (Ref. PExh 8(c)),*** which exonerated him from wrong doing.

On *page 2* of that ruling, court had this to say:

I have evaluated the same and I find that it points to the fact that there is a land dispute on the said land which is unresolved and the said dispute can only be determined in a civil court. That notwithstanding the evidence led does not point to the commission of the offence by the accused.

The significance of the above ruling was that the Chief Magistrates' court took cognizance of the fact that there was a running dispute, which disproved the claim that the plaintiff had resided on the suit land without interference.

The record further indicates that a meeting was held on 2nd July, 2014. It was convened after the registered owner ***Dw2,*** filed a complaint to the Police Land Protection Unit.

The plaintiff never responded to the allegation made by the defence that at that meeting, when he was asked to present the documents to prove his interest/ownership of the land he had failed to present them. What he presented instead were documents relating to different pieces of land bordering the suit land.

It was also noted by court that the 1st defendant had been arrested but that after his release, the 1st defendant promised to deliver the title within 4 months, which he however failed to do, and which therefore forced the plaintiff to lodge a caveat on the land and file a suit in 2009 that he later abandoned.

The plaintiff claimed to have lodged the caveat in 2007, yet as confirmed through his testimony, the 2nd defendant as the registered owner had made it clear to him earlier that the 1st defendant who purportedly sold the suit land to him (the plaintiff) was neither known to the 2nd defendant nor had he obtained prior authority from him to do so, or receive money on his behalf.

The plaintiff admitted that he had gone to the 2nd defendant's office after the purported sale, the 2nd defendant asked for more money, which offer the plaintiff however did not take up.

The 2nd defendant in *paragraph 8* of his statement stated that before selling the land to Ssebutama in 2007 he visited the land and confirmed that it was bare land and had no occupants.

Decision of court:

From the above facts and developments there is nothing to prove that the plaintiff enjoyed continuous uninterrupted, peaceable possession, as his counsel wanted court to believe.

The plaintiff's possession was constantly interfered thus his possession failed to meet the criteria as spelt out in ***Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu*** (supra), which requires possession to be a continuous period of at least 12 years uninterrupted, so as to qualify him to claim the status of an adverse possessor.

I could not agree more with the authority as cited by the counsel for the 3rd defendant in ***Tayebwa Geoffrey & Anor vs Kagimu Ngudde Mustafa (supra)*** that the claimant must show that he or she acquired an interest or title from someone who previously had an interest or title thereon.

The 1st defendant ***(Dw1)*** by his own admission had no interest equitable or otherwise in the suit land which originally belonged to the 2nd defendant's late

father. It is also evident from the facts above that the plaintiff did not in fact know the actual legal owner of the land which he claimed as his.

Indeed if, as claimed by the plaintiff that he came onto the land in 2000 then the cause of action first arose against the 2nd defendant in 2002 when he (2nd defendant) registered his names onto the title as administrator of the estate of his late father.

But secondly going by his own arguments, since the plaintiff had already purportedly acquired interest and started residing on that land in 2000, this very suit should not have been filed against the 1st defendant in 2014, two years after the 12 year period had elapsed.

In that regard he cannot himself run away from the application against him of the provisions of ***section 5 of the Limitation Act,*** barring him from filing this suit.

Issue No. 1: Whether the plaintiffs purchase of the suit land from the 1st defendant was null and void:

Section 10(1) of the Contract Act, 2010 defines a contract as an agreement made with the free consent of parties with capacity to contract for a lawful consideration and with a lawful object, with the intention to be legally bound.

Therefore, for a contract to be valid and legally enforceable, there must be capacity to contract, intention to contract, *consensus ad idem;* valuable consideration; legality of purpose; and sufficient certainty of terms.

If in a given transaction any of these is missing it could as well be called something else. (***Ebbzworld Ltd & Anor vs Rutakirwa Civil Suit No. 398 of 2013).***

a) Consensus ad idem:

When parties have deliberately put their agreement into writing it is conclusively presumed between themselves and the privies that they intend to form a full and

final settlement of intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory ***(refer also to Phipson on Evidence (14th Edition) pg 1019).***

Those intentions must be clear and unambiguous, leaving no room for doubt about the intentions of the contracting parties. In that regard, the duty of court would be only to give effect to the meaning of the words as intended by the parties.

In this instance, the defendants presented a number of sale agreements: ***DExh1*** dated 18th September, 2000 between the 1st defendant as buyer and Yulita Nagadya as the vendor. This was in respect of land comprised in ***Gomba, Block 7, plot 1,*** measuring 180 acres which had been sold to the 1st defendant at ***Ugx 3,600,000/=***.

DExh 2A/B was an earlier agreement dated 5th June, 1999 for 200 acres bought by the 1st defendant from the same vendor, Nagadya, at a consideration of ***Ugx 4,600,000/=***.

DExh 3A/B was for the land comprised in ***Gomba block 7, plot 7,*** measuring 200 acres purchased from Kahonda at ***Ugx 4,500,000/=.*** It was between Ezekiel Kahonda and the 1st defendant.

DExh 4A/B is another agreement between the plaintiff and the 1st defendant, made on 17th October, 2000. It referred to another earlier agreement ***PExh 1 A/B*** dated 13th September, 2000 between the plaintiff and the 1st defendant.

The land measuring 350 acres referred to in that agreement ***(PExh 1A/B)*** is land comprised in ***plot 8, plot No.1, Gomba*** which was in the names of Erisa Kyamanyi.

By that same agreement, land measuring 250 acres was purchased from Nagadya Zuruta located on ***Block 7 plots 7 and 4*** in Kirimanyaga. The total consideration was ***Ugx 20,000,000/=***.

Another document: ***DExh 6A/B*** dated 7th December, 2000 indicates that as 10th August, 2002 the unpaid balance for the land only described as *land situated at Kirinyagga measuring 600 acres* was ***Ugx 860,000/=.*** There is nothing to prove that the plaintiff ever completed the payment or that the said consideration was in respect of the suit land.

As also noted earlier, the 2nd defendant as administrator of the estate was registered onto the title around 2002, around the time when the said deals between the plaintiff and 1st defendant were taking place.

Most relevant however for the purposes of this suit is ***PExh 2A/B,*** yet another agreement, dated 20th March, 2005, in respect of the land in dispute measuring 200 acres.

It was endorsed by the parties in the presence of the LC III Chairman, Maddu Sub county and LCII, subcounty chief; Kyaayi OC Police among others. Francis Ssebutama (***Dw3***), who later on purchased the suit land from the 2nd defendant was one of the witnesses.

As per that agreement, the 1st defendant claimed to have sold land comprised in ***Block 24, plot 12,*** measuring 200 acres. In the scheduling it was clearly stated that he was claiming 600 acres including ***block 24 plot 12 Gomba, land at Kyahi LCII***, Kyamukama.

Parties are in any case bound by their pleadings. *Paragraph 6(a)* of the amended plaint reads:

> *By an agreement entered into between the 1st defendant and the plaintiff on the 13th September, 2000, the 1st defendant sold three parcels of land measuring 600 acres including* ***block 24 plot 12 Gomba, land at Kyahi LCII****, Kyamukama (A copy of the agreement to the suit land is hereto marked Annexture A* ***(PExh 1A/B)****).*

The second agreement, ***PExh 2A/B***, dated 20th March, 2005 in respect of the land in dispute (and which the plaintiff mainly relied on), was annexed onto the

plaint but was not referred to in the main text of the plaint, the question was, why?

In *paragraph 6 (b)* of the amended plaint, the plaintiff claimed that the 1st defendant assured him that he had bought all the three pieces of land from their respective registered owners. The contents of the agreement tendered in as ***PExh 1A/B*** which was referred to in the plaint however did not include the suit land.

Secondly, it was plaintiff's claim that the 1st defendant had showed him a copy of the agreement of sale between the 1st and 2nd defendants, copies of cash receipts issued by the 2nd defendant but none of these documents was presented in court by the plaintiff.

Thirdly, from the reading of both agreements ***PExh 1A/B and PExh 2A/B*** the false impression created was that the second agreement was an extension of, or rather intended as an execution of the first, whereas not, since the 1st agreement was in respect of different portions of land, located on a different block.

PExh 2A/B, (as per English version) was titled: *Agreement with Mr. katongole Yokana concerning the land which I sold to him being block 24 plot 12 measuring 200 acres* , is dated 20th March, 2005.

It reads:

> *For the above reason, I have agreed with the above named gentleman among the local people while we are in the office of LC II to hand over to him his things namely the transfer and title deed registered in his names.*
>
> *We have agreed on a period of months. If they lapse before I hand over his transfer and title, I come back to this office and we decide on the next course of action or if I fail he proceeds with his case which he has reported to Police.*

It was made in the presence of 12 people.

A careful examination of both documents, as a matter of fact indicates that although ***PExh 2A/B*** was signed by the two, it could not be interpreted as constituting the actual sale agreement for the suit land.

Finally, whereas the plaintiff's claim was for only 600 acres, the agreements he relied on were for a total of 800 acres. 200 acres were unaccounted for. In any case, the certificate of title for the land in dispute ***DExh 7,*** indicated an area of 180 acres, but not 200 acres as claimed by him in the second agreement, ***PExh 2A/B***; and as per his witness statement *para 3 e* (i) thereof.

It becomes absolutely clear to court that the documents referred to above relied on by the plaintiff as agreements and acknowledgments of receipt of payments were in respect of the previous transactions between the plaintiff and the 1st defendant; and in respect of different portions of land owned by others and purchased by him from the 1st defendant.

Grave inconsistencies or contradictions unless explained, go to the root of the case and would result in the rejection of such evidence.

The above contradictions were also proof that the plaintiff did not establish the actual acreage of the land he intended to buy and never took the trouble to carry out boundary opening of the land.

On the other hand however, the 180 acres appearing on the certificate of title which was issued in the 3rd defendant's names on 17th February, 2016 tallied with that which appeared on the agreement between the 3rd defendant ***(DExh 10***); and the Francis Ssebutamu who had sold the land to him, upon acquiring it from the 2nd defendant.

Pw2 Gisaaka Fred the LC chairman was clear in his evidence that the plaintiff told him that he had bought the land from the 1st defendant but that he never came to consult him before doing so.

Neither the plaintiff's son ***Pw3,*** nor ***Pw4*** Nayebare Yosam the LC II Chairman for Kyahi Parish, who according to the plaintiff was well versed with the matters

having been the chairman of the area for 16 years since 2001 gave court any useful information about their knowledge of the legal owner of the land in dispute.

Pw4 even went ahead to draft the agreement by which agreement the 1st defendant undertook to provide the titles to the plaintiffs within four months, which he undertaking he never fulfilled.

This agreement was sanctioned by the LC, the land whose original ownership they all knew nothing about. ***Pw4*** participated in a meeting committing the 1st defendant into an arrangement without prior verification of the details of location of the land, its size, registered ownership and the authority of the 1st defendant as the purported vendor.

As rightly noted by counsel for the 3rd defendant, ***(ref. Haji Nasser Katende vs Vithaalidas Haridas and Co. Ltd CACA No. 84 of 2003)*** lands are not vegetables that are bought from unknown sellers. Land is a valuable property and buyers are expected to make thorough investigations not only of the land but also the sellers before purchase.

Due diligence in land transactions is however not a preserve of, or only exercisable by the intending buyers of land, intending sellers must be also investigated by the buyers and area LCs as witnesses, for proper/correct guidance.

From the evidence on record the conclusion is therefore inevitable that the plaintiff and the 1st defendant entered into transactions which had no bearing with the suit land and whose ownership they each knew nothing about.

It would appear therefore that the plaintiff purchased land which did not belong to the 2nd defendant but decided to settle on land which belonged to the 2nd defendant, but which he never purchased. There could not have been a meeting of minds under those circumstances.

This was an illegal and unenforceable transaction.

In ***Parking Eye Ltd vs Somerfield Stores Ltd [2012] EWCA Civ. 1338*** when considering the question whether an illegality would render the contract unenforceable, the court considered the object and intent of the party attempting to enforce the contract; the gravity of the illegality in the context of the claim; and the nature of the illegality.

The objective on the one hand by the 1st defendant to enter into the 2005 agreement with the plaintiff, in the presence of the police and LC was merely to save his skin, having failed to present the titles and transfer instruments to the plaintiff as promised. This was an illegal object and could not be used as a basis of a valid contract.

The act on the other hand by the plaintiff of relying on agreements relating to other portions of land to secure protectable interest in land belonging to another land owner who was not party to the contract, was demonstration that he was not entirely honest in his dealings concerning this land.

As noted earlier, the land on which he settled was in the names of the 2nd defendant at the material time, a person whom he had never met before or transacted with and with whom he had no actual written agreement.

Even when he met him subsequently in his office and he made him the offer to sale to him the suit land, he never took it up. Since therefore there was no subject matter for sale; no certainty of the terms of agreement; there was no consensus *ad idem* between him and the 2nd defendant so as to constitute a valid contract.

b) Capacity to contract:

Under ***section 11(1)*** a person has capacity to contract where that person is of eighteen years or above; of sound mind; and not disqualified from contracting by any law to which he or she is subject.

Capacity to contract goes to the root of both of the validity and enforceability of an agreement. A person without authority to contract cannot be said to have due

capacity to enter into a binding contractual relationship. Authority and consent (another key element of a valid contract), go hand in hand. Such consent must however be free.

Section 13 of the Contract Act provides *inter alia,* that consent of parties to a contract is taken to be free where it is not caused by coercion; undue influence; fraud; or misrepresentation. The consent in this instance had to be secured from the registered proprietor himself.

The plaintiff testifying as ***Pw1*** claimed that the 1st defendant as a proxy agent had sold to him a total of 600 acres. He however admitted in cross examination that the suit land was at the time registered in the names of Kagimu Maurice Kiwanuka, the 2nd defendant; and that the 1st defendant had presented a copy of the title to him.

He also went ahead to admit in court that the 1st defendant who sold the suit land to him never presented any written authority from the 2nd defendant as the registered proprietor before selling the land to him; and admitted that he never contacted the 2nd defendant to confirm if indeed he had sent the 1st defendant as his proxy agent to sell the land to him and receive the money on his behalf.

The plaintiff further admitted that when he went to the office of the 2nd defendant he was never shown any agreement between the two defendants concerning the suit land; and that he never showed him any powers of attorney or other form of instrument of agency to prove the claim that indeed the 1st defendant had authority to sell the suit land.

The plaintiff was under those circumstances fully aware that the 1st defendant was only a land broker, not even a care taker of the land which he purportedly sold to him.

The 1st defendant by his testimony also confirmed the 2nd defendant's assertion that there had been no such authority to sell the suit land or receive the

purchase money on his behalf and no evidence of acknowledgment of receipt of money was supplied in this court by the plaintiff.

The document availed to court in form of an agreement ***PExh 2A/B***, signed between the 1st defendant and the plaintiff in respect of the suit land was neither endorsed by the 1st defendant in his capacity as an agent of the 2nd defendant and nor did it bear the signature of the 2nd defendant as proof that he was aware of the transaction.

Pw2 told court that before the purchase his father the plaintiff had consulted the neighbors; that together with his father they went meet the LC, who assured them that the land belonged to 1st defendant.

That evidence was however watered down by that of ***Pw3*** who informed court that the prospective buyers never consulted the Lcs of the area before entering into the sale transaction.

Under those circumstances, it mattered least therefore that the plaintiff and the 1st defendant had had previous smooth dealings between them; that the relationship between them on that account was based on trust; or the fact that there had been prior inspection of the land and boundaries opened before the alleged purchase (which claims the plaintiff did not in any case prove).

As duly submitted by the defence, the plaintiff in that regard therefore failed to carry out any due diligence on the authority and capacity of the 1st defendant as vendor of the suit land.

The Court of Appeal in its decision of ***Joyce Nakayima & 3 others vs Nalumansi Kalule and 2 others CACA No. 111 of 2019*** held that a sale conducted without proper authority cannot be executed against any of the parties, let alone be enforced against a third party who was not privy to the contract.

c). Payment of consideration:

The 1st defendant denied having executed any formal sale agreement with the plaintiff in respect of the suit land; and having made any promises to give him plaintiff a copy of the certificate of title; or transfer forms.

He also denied the claim that he ever acted on behalf of the 2nd defendant and claimed therefore that the agreement dated 13th September 2000 was a forgery, though he did not present any document to prove the allegation.

In *paragraph 7* of the 1st defendant's witness statement he stated thus:

> *Out of the agreed* ***Ugx 20,000,000/=*** *the plaintiff only paid* ***Ugx 12,180,000/=,*** *leaving a balance of* ***Ugx 7,820,000/=.*** *Upon failure to pay the balance we agreed that he forfeits the 200 acres and takes possession of 400 acres only which 400 acres he was in possession of.*
>
> *That in 2001 the 1st defendant duly handed over the duplicate certificates of title in 3 sets, all totaling to 400 acres in respect of block 7 plot 7 measuring 200 acres which he purchased from Ezekiel Kahonda who had purchased the same from Yulita Nagadya on 5th June `1999; block 7 plot 9 formerly block 7 plot 1 measuring approximately 80 acres which he had purchased from Yulita Nagadya; block 24 plot 8 measuring 120 acres.* ***(refer to DExh 1, DExh 2A/B; DExh 3A/B.)***

It was ***Dw1's*** evidence that the three pieces of land measuring 600 acres of land at Kyayi, Kyamukama village belonged to three different people that is, Yulita Nagadya, Ezekel Kahonda and Yosiya Simbwa and these were available for sale at ***Ugx 20,000,000/=.***

The above was also demonstration that the two had other dealings that actually had no bearing with the suit land. It would have been a strange coincidence that the amount of purchase price payable by the plaintiff for the various land transactions in 2000 was exactly the same as that he had paid for the suit land in that same year.

In his evidence the plaintiff claimed that when in 2003 he went to the office of the 2nd defendant to get the title as promised by the 1st defendant the 2nd defendant declined to give it to him and requested instead for ***Ugx 16,000,000/=*** for him to release the transfer forms and title to him, which amount however the plaintiff failed to pay.

During cross examination when put to task the plaintiff not only failed to present evidence of payment of the full purchase price, he also failed to prove that the 2nd defendant had authorized the 1st defendant to receive, and did actually receive the purchase money on his behalf.

Going by the 2nd defendant's witness statement the actual amount as requested for by the 2nd defendant as the purchase price was ***Ugx 55,000,000/=,*** much more than what was purportedly paid by the plaintiff to the 1st defendant in respect of the same suit land.

Subsequently, as ***DExh 6B,*** dated 7th December, 2000 indicates, the plaintiff had paid ***Ugx 1,000,000/=*** as balance for the land at Kirinyagga, measuring 600 acres. The balance as at 10/8/2002 which remained unpaid by the plaintiff was a sum of ***Ugx 860,000/=***. This however had nothing to do with the property in issue.

From the above no evidence was availed to suggest that there was any agreed figure for the purchase of 180 acres comprising the actual area of suit land. There was no agreed consideration between the plaintiff and the 2nd defendant or between the 1st and 2nd defendant. All in all, the plaintiff could not provide credible evidence that he had actually paid any agreed purchase price for the suit land.

In conclusion, the above findings are clear indication that the agreement between the plaintiff and the 1st defendant (if at all it existed) failed to meet the test of a valid contract and was therefore null and void.

In response therefore to ***issues No. 1,2, and 5:***

1) *the agreements between the plaintiff and the 1st defendant in respect of the suit land were null and void;*

2) *the plaintiff had no basis therefore to claim as an adverse possessor of the suit land; and was therefore a trespasser on the suit land;*

3) *the action against the 1st and 2nd defendant was statute barred; and*

4) *the plaintiff did not accordingly come to this court with clean hands.*

Counterclaim by the 3rd defendant:

The questions of whether fraud was committed and whether or not the 3rd defendant was a *bona fide* purchaser for value (presented as ***issues 3 and 4 in the main suit)*** came up and are addressed in the counter claim.

The prayers sought in the 3rd defendant's counterclaim were:

A declaration of that the counterclaimant is the lawful owner and registered proprietor of all the suit land comprised in ***Gomba Block 24 plot 12,*** *situate at Kisaka, Gomba district; is a bonafide purchaser of all the suit land for valuable consideration, without any notice of the fraud; that the purported sale of the suit land to the counter defendant by the 1st defendant was void ab initio; a declaration that the counterclaimant is a trespasser on the land; an order that the counter defendant vacates the suit land; an eviction order; a demolition order; a permanent injunction to restrain the counter defendant and his his agents from reentering and trespassing on the suit land; general damages; interest of 30% per annum; and costs of the counterclaim.*

The counterclaimant tendered in evidence ***DExh 10,*** a memorandum of sale, dated 16th April, 2015 between him as the buyer and Francis Ssebutama***(Dw3)*** as the vendor.

The total sum of ***Ugx 150,000,000/=*** was payable in two instalments and the vendor guaranteed a good title to the land free from encumberances; third party

interests or clogs. As noted by court was however not stamped and endorsed by the Lcs.

The assurance was made by the vendor that the land would be encumbrance-free before the receipt of the last and final instalment of the purchase price. The vendor was to introduce the purchaser to the Lcs, immediately on payment of the balance of the consideration; and the purchaser was to take possession immediately after the execution thereof.

The plaintiff during cross examination informed court that the 3rd defendant committed trespass on the suit land which he came to occupy with his cows around 2015, and did so with the help of the security. He reported the matter to police but presented no evidence to that effect.

It was the 3rd defendant's claim that at the time he got registered onto the land on 17th February, 2016 the caveat forbidding the registration of a transfer which had been lodged in 2007 had been vacated. That he was not aware of the pending suit and had no intentions in any case, of defeating the plaintiff/counter defendant's purported interest.

Furthermore, that no court order was issued to restrain the 2nd defendant from selling the suit land and have the suit land registered in his names; that he was a *bonafide* purchaser for value without notice of any pending action or fraud and that the plaintiff had no protectable interest in the suit land.

That it was Francis Ssebutama ***(Dw3***) who sold him the land who was in actual possession at the time and who moved the Commissioner, Land Registration to vacate the caveat, having undertaken to settle all claims on the suit land. In any case, the 3rd defendant had not been party to the suit.

In his defence to the counterclaim, the counter defendant however claimed that the entire counterclaim was prolix, frivolous bad in law and disclosed no cause of action against him and ought to be struck out having been brought 15 years

after the counter defendant entered into the land on which he had resided for 16 years.

That the counterclaimant had duty to ascertain ownership which duty he never fulfilled, demonstrating that he failed to carry out due diligence; that Francis Ssebutama was never in occupation and had no right to sell the land that did not belong to him; and that his rights were under adjudication awaiting pronouncement in the earlier suit, (never mind the fact that during scheduling it was categorically stated that the earlier suit was dismissed for want of prosecution.)

Consideration of the issue:

The principles governing limitation by statute have been highlighted earlier and I will not repeat them here.

Suffice to state however that it has already been determined by this court that the plaintiff/counter defendant had no cause of action against the 2nd defendant (from whom the counter claimant had with approval/consent derived his interest) after disposing it to Ssebutama.

On the issue of his claim as a *bona fide* purchaser, the term is defined in ***Black's Law Dictionary 8th Edition at page 1271*** as:

> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."***

In ***Nafula vs Kayanja & Anor Civil Suit No. 136 of 2011 [2017]*** the court cited the authority in ***Kampala Bottlers Ltd vs Damaniaco (U) Ltd SCCA No. 22 of 1992.***

The principle as enshrined therein is that the party is required to prove that fraud was attributed to the transferee, either directly or by necessary implication. 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.

Section 181 of the RTA protects a *bona fide* purchaser for valuable consideration as long as the fraud is not attributed to him.

In ***David Ssejjaka Nalima vs Rebecca Musoke SCCA (1992) KALR*** court held that a *bonafide* purchaser for value cannot have his transfer defeated by fraud per se. That even if fraud was proved it must be attributed directly or by necessary implication to the transferee.

Fraud" as defined in ***FJ K Zaabwe vs. Orient Bank & 5 O'rs SCCA No. 4 of 2006 (at page 28)*** is an intentional perversion of truth for purposes of inducing another to part with some valuable thing belonging to him/her, or to surrender a legal right.

It is also defined as 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 he shall act upon it to his legal injury.

It is anything calculated to deceive, whether by a single act of combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture amounts to fraud.

Fraud unravels everything and vitiates all transactions. (***Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994] KARL 307).*** It must therefore be specifically pleaded and proved.

The burden of proof lies with the plaintiff who holds the duty to furnish evidence, whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities.

(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.

In any allegation of fraud, the standard is heavier than on a mere balance of probabilities as generally applied in civil matters. ***(Kampala Bottlers Ltd. Vs Damaniaco (U) Ltd (supra)).***

It is also trite law that a certificate of title is conclusive evidence of ownership, save where there is fraud. (Ref: ***sections 59 and 176 of the RTA). PExh 5*** is the certificate of title for the same land which was registered in the names of the 2nd defendant on 16th March, 2016.

The counterclaimant in this case purchased the land from Francis Ssebutama ***(Dw3)*** who had purchased the suit land from the 2nd defendant. It is an admitted fact that this was during the time when the issue of ownership of the suit land was pending determination by this court.

The counterclaimant may not have known about the previous dealings between the plaintiff and the 1st defendant touching on the suit land but that is only because he never carried out prior inquiries and consultations to establish what was on the ground, before purchasing it.

In the case of ***Jennifer Nsubuga versus Micheal Mukundane, Civil Appeal No. 208 of 2018,*** the holding on due diligence was:

> ***"…. a due diligence investigation would seek to cross check or confirm the vendor's claim by inquiring, seeking to cross-check or confirming the vendor's claim to title by inquiring of independent persons knowledgeable about the land or that which could otherwise shed light on the bonafides of the intended land purchase.***
>
> ***It ought to be directed at persons that are independent of the beneficiaries of the land transaction in question, with a view to ascertaining the authenticity of the title sought to be conveyed. Of***

necessity that would exempt routine, contractual inquiries made of the seller to establish his/her title to property".

In the case of ***Uganda Posts & Telecommunication vs Abraham Katumba (1997) IV KALR 103,*** it was held that as the law now stands a person who purchases an estate which he knows to be in use of another (legally or otherwise), other than the vendors without carrying out the due inquiries from the person in occupation and use, commits fraud.

The plaintiff evidence was clear that the LCs were never consulted by the counter claimant. The counterclaimant could not prove that he or his predecessors in title carried out prior inspection or consultations with the neighbours or the LCs.

Had he himself done so, he would have found the counter defendant/plaintiff's presence on that land. In the unlikely event that he did, it was an act of sheer negligence on his part and fatal for him therefore to have ignored the red flag.

Court in ***Jenifer Nsubuga vs Michael Mukundane and Anor CACA NO. 208 OF 2018*** made it clear that Lcs cannot be disregarded in land transactions. Though not in statute law, consultations with the leadership of the area where the land is located is very key in establishing that due diligence was carried out.

The above accordingly disposes of ***issues No. 3 and 4.***

Decision of court:

The maxim of law which is applicable to both parties to the counterclaim is that no man shall take advantage of his own wrong. ***(See: Nabro Properties Ltd vs. Sky Structures Ltd & 2 others [2002] 2 KLR at page 299).***

Equity comes in, true to form to prevent a person from insisting on his/her strict rights, whether arising out under a contract or on his title deeds or by statute, when it would be inequitable to do so having regard to the dealings which have taken place between the parties. (***Ibaga vs Tarakpe Civil Appeal No. 0004 of 2017).***

The counter claimant in this case though a registered proprietor knew or ought to have known about the pending suit filed by the plaintiff in 2014 before he bought the land. Francis Ssebutama, the person who sold him the encumbered land was not made party to the suit.

During the *locus* visit, this court noted that there were several structures which had been up on that land including the permanent and modern structure which was put up by the counter defendant/plaintiff.

The counter defendant/plaintiff's evidence had been that he had settled on the land, where he had put up the permanent houses and paddocks for his cattle, which evidence was not disputed by the counterclaimant.

Indeed, from court's observation at locus, it was not unlikely that the main house had been put up before the counterclaimant purchased the land, indicating that neither consultations/inspection nor prior boundary opening exercise had been conducted by the interested buyer.

The counterclaimant is therefore presumed to have been fully aware of the fact that the land was encumbered by the plaintiff's presence, but still went on to pay the purchase money despite his being fully aware of the sais encumberances on that land. In my view, it matters least that the counter defendant was occupying that land illegally.

In the case of ***Kayabura Enock & 2 others Vs Joash Kahangirwe, Court of Appeal in C.A No. 88/2015*** where similar to the present case the suit was still pending before the Chief Magistrate's court in Mbarara, the respondent processed and obtained a certificate of title over a big chunk of land inclusive of the suit land.

Their Lordships at *page 17* of the judgment held that the matter was already sub-judice and therefore agreed with the appellant's counsel that obtaining a certificate of ownership over disputed property which dispute was pending in court is a fraudulent act. The decision is binding on this court.

Section 33 of the Judicature Act, Cap. 13 vests this court with powers to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly bought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined, and all multiplicities of legal proceedings concerning any of those matters avoided.

It is in exercise of those powers and also in light of the given the circumstances as highlighted that the following orders are made:

1. ***The plaintiff's action against the 1st and 2nd defendant is dismissed on the ground that there was no valid contract between the plaintiff and the 2nd defendant as the registered proprietor of the land comprised in Gomba Block 24 plot 12, situate at Kisaka, Gomba district.***

2. ***The suit against the 1st and 2nd defendant is statute barred and accordingly dismissed, with costs to the 1st and 2nd defendants.***

3. ***The 3rd defendant did not carry out due diligence prior to the purchase of the suit land; he purchased the suit land during the pendency of the suit which amounted to fraud;***

4. ***The 3rd defendant shall accordingly pay compensatory damages to the plaintiff in respect of all the developments made on the area which the plaintiff is currently occupying, and shall do so within a period of 6 months.***

5. ***Upon payment of the compensation, the plaintiff shall give the 3rd defendant immediate vacant possession; and the 3rd defendant shall take full possession of the entire land.***

6. ***In case of failure to compensate the plaintiff within the period as stipulated (which period shall be inclusive of the 30 days under order 9 below for the opening up boundaries), the certificate of title comprised in Gomba Block 24 plot 12, situate at Kisaka, Gomba district currently in the names of the 3rd defendant shall be cancelled and the 3rd defendant shall remain registered owner/proprietor for only the area which he is currently occupying.***

7. ***In the event that the 3rd defendant deems it necessary to dispose of the land that he is occupying, the plaintiff shall be given the first option to purchase the land, on the basis of willing seller- willing buyer.***

8. ***For due compliance with the orders of this court, the District Staff Surveyor shall open up the boundaries to ascertain the actual area/acreage occupied by each party on the land, taking into account the respective existing structures/developments on the land.***

9. ***The exercise shall be conducted within a period of thirty days, in the presence of the Lcs, neighbours and Police.***

10. ***Each party to the counterclaim shall meet the costs of surveying their respective areas as well as the costs of the suit and counterclaim.***

Alexandra Nkonge Rugadya

Judge

11th March, 2024

Delivered by email

11/3/2024