



**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
COMMERCIAL DIVISION**

Reportable
Civil Suit No. 0385 OF 2020

In the matter between

- 1. DR. JOSEPH KABUUBI**
- 2. SIMON BYEKWASO**

PLAINTIFFS

And

- 1. WILSON KASHAYA**
- 2. SEKINDI PAUL**
- 3. DIAMOND TRUST BANK**
- 4. REGISTRAR OF TITLES**

DEFENDANTS

Heard: 24 November, 2021
Delivered: 25 January, 2024

Land Transactions — Fraud — Prospective purchasers of registered land have two primary concerns; to establish whether the vendor has the right to sell the land in question and secondly, whether there are any third-party rights to the land.

Bonafide purchaser — Bona fides does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonable or fairly, and this includes taking ordinary precautions that ought to be taken.

Accord and satisfaction

Mortgages — The validity of a mortgage instrument goes to the root of the entire transaction, and if the instrument is invalid for whatever reason and it falls, all subsequent transactions fall with it.

JUDGMENT

STEPHEN MUBIRU, J.

The plaintiff's claim:

[1] The 1st plaintiff is the administrator of the estate of the late Paulo Lwanga Ssebugwawo while the 2nd plaintiff is one of the offspring and beneficiaries of the estate of the deceased. Before his death, the late Paulo Lwanga Ssebugwawo was the registered proprietor of land comprised in Kyadondo Block 244 Plot 501 situated at Kisugu, in Kampala. The 1st defendant is the current registered proprietor of the said land. It is the plaintiff's case that the 2nd defendant fraudulently obtained a grant of letters of administration to the estate of the late Paulo Lwanga Ssebugwawo on basis of which he caused a transmission of the title to that land into his name, and subsequently still fraudulently transferred it to the 1st defendant. Thereafter, the 1st defendant used the title deed as security for a loan which he obtained from the 3rd defendant. It is the plaintiff's case that the title deed was fraudulently mortgaged to the 3rd defendant. The 4th defendant is joined nominally to the suit being the office through which all the said transactions were perfected. It is sometime after July, 2004 during their attempt as administrators of the estate of the deceased to cause a transmission of the land into their names, that the plaintiffs discovered the alleged fraud. The plaintiffs now seek an order of cancellation of all the alleged fraudulent transactions in respect of that land, an order of restoration of the name of late Paulo Lwanga Ssebugwawo as the rightful registered proprietor of the land, a permanent injunction restraining the defendants from further dealings in the land, and the cost of the suit.

The 1st defendant's defence to the claim.

[2] By his written statement of defence, the 1st defendant denied liability for the claim made against him. He is a bona fide purchaser of the land for value without notice

of any fraud. It is in that capacity that he mortgaged the land. The plaintiffs have no rightful claim against him. He prayed that the suit is dismissed with costs. Neither the 2nd nor the 4th defendants filed a defence to the suit.

The 3rd defendant's defence to the claim.

[3] By its written statement of defence, the 3rd defendant too denied liability for the claim made against it. The 1st defendant is the registered proprietor of the land in dispute and at the same time the Managing Director of M/s Prime Contractors Limited.

The questions for determination;

[4] At the scheduling conference conducted in Court on 10th May, 2021 the parties agreed on the following issues for the Court's determination, namely;

1. Whether the 1st defendant acquired the land fraudulently.
2. Whether the 1st defendant fraudulently mortgaged the title deed to the 3rd defendant.
3. Whether the plaintiff is entitled to the remedies sought.

By consent, it was agreed between the plaintiffs and the 3rd defendant that the mortgage be vacated with cost to the plaintiff. A consent judgment to that effect was entered. The trial therefore proceeded as against the rest of the defendants.

The decision;

[5] In all civil litigation, the onus is on the plaintiff to prove to court on a balance of probabilities, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of her claim, or cause of action, in order to recover. In other words, the persuasive burden is cast upon the plaintiff to prove to the court why the defendant is liable for the relief claimed. The plaintiff has to prove in this

particular claim that; (i) the defendants owed her a duty of care; (ii) the defendants breached that duty of care; and (iii) as a result of which she suffered loss.

- [6] Fraud must be proved strictly. The burden of pleading and proving that fraud lies on the plaintiff alleging it, and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited* [1987] HCB 130 and *M. Kibalya v. Kibalya* [1994-95] HCB 80). Fraud is an amorphous concept which is impossible to define within strict parameters, but within the context of transactions in land, it has been defined to include dishonest dealings in land or sharp practice to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya* S.C. Civil Appeal No. 36 of 1995). It must be brought home to the person whose title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others*, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd.*, S.C. Civil Appeal No. 22 of 1992).

First issue; whether the 1st defendant acquired the land fraudulently.

- [7] It is the 1st defendant's case that he bought the land from the 2nd defendant by an agreement dated 11th June, 2007 (exhibit D. Ex.1). By that agreement, the 2nd defendant described himself as son and administrator of the estate of the late "Sebutemba Lwanga Paul...who was the registered owner of [Kyadondo] Block 244 Plot No. 501..." Whereas section 52 of *The Registration of Titles Act*, requires that whenever a memorial of any instrument has been entered in the Register Book, the Registrar must thereupon enter the like memorial on the duplicate

certificate of title unless the production of the duplicate is dispensed with, however the special certificate of title that was issued to the 1st or 2nd defendant on 24th January, 2008 bearing those specifications (exhibit D. Ex.3 also marked as exhibit P. Ex.4), and on basis of which the 1st defendant claims that transaction was concluded, does not reflect Sebutemba Lwanga Paul's name. Instead, it shows that the registered proprietor as at 29th June, 2007 was a one Paulo Lwanga and that it was transferred to the 2nd defendant on the same day, a minute apart. The implication is that the 2nd defendant was not the registered proprietor of this land as at 11th June, 2007 when he executed the agreement of sale. Having obtained the grant of administration on 4th June, 2007 (exhibit D. Ex.2), he attained that status of registered proprietor eight days following the sale, on 29th June, 2007.

[8] On the other hand, the plaintiff relies on a title deed bearing those specifications (exhibit P. Ex.3) with a long history of ownership while still under the Mailo Volume Register (MRV) series of title referencing, beginning 1st December, 1954 and the last registered proprietor being a one Paulo Lwanga, who was first registered thereon on 30th April, 1956 and later on 27th June, 1960 before its conversion into the current Mailo, Block and Plot series of title referencing on 29th June, 2007 (exhibit D. Ex.3 also marked as exhibit P. Ex.4). At closure, only the active instruments are carried forward to the new title i.e. the registered proprietor and encumbrances still affecting the land. The plaintiff relies on a grant of probate dated 6th July, 2004 (exhibit P. Ex.2) where the deceased is named Ssebugwawo Paul Lwanga of Kiweesa village, Bukulula Masaka District.

[9] A comparison of the two versions reveals that while to the plaintiffs the deceased who previously owned the land now in issue, was Ssebugwawo Paul Lwanga of Kiweesa village, Bukulula Masaka District in accordance with the grant of probate dated 6th July, 2004, exhibit P. Ex.2, to the 1st defendant it was Sebutemba Lwanga Paul of Nabaziza Zone L.C.1, Kyengera, Busiro, Nsangi sub-county Wakiso District in accordance with the grant of letters of administration dated 4th June, 2007, exhibit D. Ex.2. This then begs the question whether the two versions refer

to one and the same person, considering that both parties add an inconsistent third name to the two names appearing on the title deed, Paulo Lwanga, that are common to both grants. The other common factor between them is that the two parties are referring to the same parcel of land which under the Mailo Volume Register series of title referencing was described as MRV 1197 Folio 7 which upon conversion to the Mailo, Block and Plot series of title referencing came to be described as Kyadondo Block 244 Plot 501. Furthermore, the location, numbering and dimensions of the plot as illustrated in the deed plan in both title deed is identical. On basis of this, I find that both parties are referring to the same deceased person despite the variation in the added third name.

[10] That being the case, one of the two instruments, i.e. the grant of probate dated 6th July, 2004 issued by the High Court Circuit at Masaka or the grant of administration dated 4th June, 2007 issued by the High Court at Kampala, has to be invalid since there can only be one valid grant in respect of any estate, which has to be revoked first before another is issued. It is noteworthy that the grant relied on by the 1st defendant was issued nearly three years after that relied upon by the plaintiffs. P.W.1 Byekwaso Simon, aged 70 years old at the time he testified, stated that his late father died during the year 1985, yet the letter relied upon by the 1st defendant dated 20th February, 2007 from Nabaziza Zone L.C.1 states that he died on 22nd November, 2004. The defendant was unable to produce as his witness, either the 2nd defendant or any L.C.1 executive to corroborate the stated date of the late Paulo Lwanga's demise, yet P.W.1 was unshaken in cross-examination regarding his recollection of the event. According to him, they have since the year 2009 searched for Ssekindi Paul since but have never found him. They have for the same period demanded of the 1st defendant to produce him but he too has never done so. The suit had to proceed *ex-parte* because he could not be traced and service of court process upon him was by substituted means.

[11] I find the plaintiff's version to be more credible regarding the circumstances of the late Paulo Lwanga's affairs in respect of the land in issue, for the following reasons;

at his very advanced age, P.W.1 testified that he is the son of the deceased and this was not disproved by the 1st defendant nor discredited in cross-examination. He produced in Court the original MRV 1197 Folio 7 title deed that was issued in 1952 and to which the deceased became registered proprietor on 30th April, 1956. Considering that it is now a defunct title deed with no value, it could only have been kept as part of his personal effects by persons close to him. The plaintiffs obtained a grant of probate to his estate four years before the grant of administration was issued. In his testimony, the 1st defendant stated that he saw the seller again two months after the transaction but has never seen him again since. He called him on phone after he was sued. One time he called and told him to come to his office that there were things to sort out but he did not come. D.W.2 Ms. Kyinshabire Edith too did not know where the 2nd defendant lived at the time of the transaction, nor during the trial. It turns out that the 1st defendant was unable to trace the 2nd defendant or his relatives throughout the trial, and hence was unable to explain his whereabouts. The 1st defendant was unable to produce any witness who knew the late Paulo Lwanga. On a balance of probabilities, I find the grant of administration most unreliable as a basis for vesting title in the 2nd defendant who has since the impugned transaction, simply vanished without trace.

[12] Once the account by P.W.1 Byekwaso Simon is believed as true, which I do for the reasons explained above, the conclusion that the 2nd defendant obtained the grant of letters of administration to the estate of Paulo Lwanga, and subsequently the transfer of the title into his name on that basis, becomes inescapable. The late Paulo Lwanga died testate, hence the grant of probate, and therefore he could not have died intestate as the 2nd defendant must have declared as a basis for obtaining the grant of administration. In obtaining that grant, the 2nd defendant declared a date of death that is 22 years later than the actual date of the deceased's demise. The disparity is too wide to be explained away as a lapse of memory; it was a deliberate misstatement of a material fact. Since the original MRV 1197 Folio 7 title deed was available with the plaintiff, and not lost, issuance of a special certificate of title rather than a replacement title on conversion to the new

system of land registration was erroneous. The special certificate of title was clearly obtained on basis of a false declaration by the 2nd defendant that the original was lost or destroyed. Therefore, in the circumstances, the plaintiffs have proved to the required standard that the 2nd defendant fraudulently obtained title to the land comprised in Kyadondo Block 244 Plot 501. The only question that remains then is whether the 1st defendant or his agents, participated in or knew of this fraud and took advantage of it, so as to have the fraud attributable to him, either directly or by necessary implication.

[13] It is the defence of the 1st defendant that he is a bona fide purchaser of the land for value without notice of any fraud that may have been perpetrated by the 2nd defendant. He testified that the land now in issue is located in-between his two plots. Upon inquiring from one of his neighbours, a one Bamwine, he was told the owner of the land was Paul Sekindi, the 2nd defendant, whom he subsequently met in Wabigalo, Kisugu and then negotiated with him for the purchase of the land. The 2nd defendant gave him a photocopy of the title deed and a grant of administration as successor of Paulo Lwanga. He undertook a search at the Land Registry before buying the land and found it was registered to Paulo Lwanga, but the 2nd defendant showed him a grant of letters of administration where the deceased was named as Sebutemba Paulo Lwanga. It is on that basis that he signed the sale agreement dated 11th June, 2007 (exhibit D. Ex.1) and paid shs. 18,000,000/= as the agreed purchase price for the land. He was given the transfer forms and the special certificate of title on basis of which he secured his registration as proprietor on 5th November, 2008.

[14] Prospective purchasers of registered land have two primary concerns; to establish whether the vendor has the right to sell the land in question and secondly, whether there are any third-party rights to the land which may interfere with their intended use of the land be it for both registered and unregistered land. In order to avoid dealing with factious persons and impostors, it is also the duty of the purchaser to ascertain the existence and identity of the registered proprietor and the

genuineness of the instrument signed by him (see *Gibbs v. Messer*, [1891] A.C. 248). The Torrens system of land registration operates upon the fundamental principle that registration confers an “indefeasible title” to the registered proprietor. The object is to save persons dealing with Registered Proprietors from the trouble and expense of going behind the register (see *Gibbs v. Messer* [1891] AC 248 and *Williams and Glyn’s Bank Ltd v. Boland*, [1981] AC 487). Upon registration under the Torrens system, an interest holder cannot have his or her interest defeated by an unregistered interest, even where the interest holder registers with notice of the existence of the unregistered interest, it is indefeasible save for fraud or illegality. All registered interest holder will take subject to those encumbrances which have already been, or which may in the future be registered on the title.

- [15] Under the Torrens system of land registration it is irrefutable that, pursuant to the fraud exception, a fraudulent registered proprietor does not acquire an indefeasible title. There are two clear categories of cases in which the fraud exception may arise: (i) where a prior registered proprietor has been defrauded out of his or her interest; and (ii) where an unregistered interest holder has been defrauded out of his or her interest. In both cases the fraud exception will only apply if the fraud can be brought home to the current registered proprietor or his or her agent.
- [16] Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land is required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or can be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence is not of itself to be imputed as fraud (see section 136 of *The Registration of Titles Act*). The implication is that mere knowledge that a prior interest existed will be insufficient to constitute such fraud (see *Waimiha Sawmilling v. Waione Timber Co.* [1926])

A.C. 101). The transferee must have acted in a dishonest manner in respect of such interest for the transaction to be tainted by fraud and void the title, such as where registration is obtained in order to defeat a customary interest in land (see *Mayambala George Gilbert Kigozi v. Sentamu Joseph and another* [1987] HCB 68).

[17] On the other hand, in addition to the two undisputed categories, there is a third category of fraud case: (iii) where a fraud is committed against the Registrar, most commonly as a result of a false attestation. Again, the fraud exception will only apply in this third category if the fraud can be brought home to the current registered proprietor or his or her agent. The law is that any folio of the Register or amendment to the Register procured or made by fraud is void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit there from (see section 77 of *The Registration of Titles Act*). The provision targets both the fraudster and any person privy to fraud. Fraud in this sense arises when a person becomes registered pursuant to an instrument in respect of which the person has actual knowledge of, or is recklessly indifferent to, the fact that the instrument does not conform to the formalities of execution and attestation of the particular type of instrument, thereby presenting it as an instrument that is valid and can be acted or upon, when in truth the person presenting it knows that not to be the case, or when the instrument contains material misrepresentations of fact.

[18] Fraud in land transactions is usually committed by someone misrepresenting facts by making statements the maker knows to be false or is reckless as to whether they are true or false, or withholding material information or the truth where there is a duty to disclose the truth, and by so doing gaining a benefit for themselves or others. The fraud which must be proved in order to invalidate the title of a registered purchaser for value must be brought home to the person whose registered title is impeached or to his agents (see *Assets Company Ltd v. Mere Roihi* [1905] AC 176). A person is privy to as a perpetrator, by rendering dishonest

assistance or being a knowing beneficiary of the fraud. A consciously dishonest act or omission should be brought home to the registered proprietor of the interest sought to be vitiated. The burden lies on the plaintiff to disprove the bonafides or good faith of the defendant in the execution of the impugned transaction.

[19] Bona fides does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonable or fairly, and this includes taking ordinary precautions that ought to be taken. This creates a duty of due diligence which involves a search of title at the Land Registry and a physical inspection of the land (see Sir John *Bageire v. Ausi Matovu*, C.A. Civil Appeal No. 7 of 1996). An element of carelessness and negligence in either process negates bona fides. During that process, knowledge or notice obtained by the prospective buyer (actual, imputed or constructive), of a fraudulent or dishonest dealing with a previously existent, contradictory, and unregistered interest, might render the title acquired thereafter defeasible. It is not enough for a purchaser to merely show absence of fraud, forgery, deceit or dishonesty; knowledge of a dispute as to the ownership of the land and knowledge of a fraud allegation, for example, could vitiate good faith.

[20] It is the plaintiffs' case that the 1st defendant did not act in good faith on account of the fact that the occupants on the land, especially the family of a one Boda Mugongo, knew the plaintiffs to be the rightful owners of the land. For a considerable time after his purchase, dating as far back as the year 2009, the 1st defendant was embroiled with the family of Boda Mugongo, in an attempt to evict it from the land. Had he inspected the land and made the proper inquiries before purchase, he would have had notice that the land belonged to the plaintiffs and not to the 2nd defendant.

[21] In support of that assertion, P.W.2 Ali Rajab Goloba who has lived on the land since 1988 testified that he acquired rights of occupancy from the late Boda Mugongo and adduced in evidence a letter dated 30th June, 2009 (exhibit P. Ex7) by which he was summoned to a meeting scheduled for 3rd July, 2009 at the office

of the Deputy District Resident Commissioner, called at the instance of the 1st defendant regarding a dispute over his presence on the land. The witness first met the 1st defendant at the office of the RDC where he was shown to him as the complainant, and he has never met him again. P.W.3 Ahmed Sebbi, testified that he too has lived on the land since around 1960 and that it was his aunt Boda Mugongo Muhammad Rajab who told him that the owner of the land was Paulo Lwanga who lived in Masaka. It is during the year 2010 that the 1st defendant began the attempts to evict him from the land.

[22] The 1st defendant did not refute these assertions when testifying in his defence. He instead testified that at the time he purchased the land, it was occupied by squatters some of whom he later compensated and they vacated the land. He was in the process of compensating P.W.3 Ahmed Sebbi; he had so far paid him shs. 4,000,000/= in order to enable him acquire and relocate to land in Mukono, when the arrangement was interrupted by counsel for the plaintiff who went to his office claiming the land belonged to someone in Masaka. Sekindi had promised to remove all occupants from the land and hand over vacant possession but he did not. D.W.2 Ms. Kyinshabire Edith testified that when she settled on that land during the year 2004, she was told by the late Boda Mugongo that the owner of the land at that time was Sekindi Paul.

[23] I observed both P.W.2 Ali Rajab Goloba and P.W.3 Ahmed Sebbi as they testified in court. Both were of advanced age, being 69 years old and 79 years old respectively. Each of them was firm and consistent in his testimony. Each of them appeared to be a steady, truthful and reliable witness. Each of them withstood the rigorous cross-examination of defence counsel. Each of them answered all questions without hesitation or exaggeration. I could not detect or conceive of any motive of their own to falsely claim to have known at the time of the 1st defendant's transaction that the land belonged to Paulo Lwanga who lived in Masaka and not to the 2nd defendant. The 1st defendant's claim that he was in the process of compensating P.W.3 Ahmed Sebbi when he first learnt of Paulo Lwanga who lived

in Masaka, was never put to the witness in cross-examination while he was on the stand. It first emerged as an afterthought during the defence case. On the other hand, D.W.2's testimony that she was told by the late Boda Mugongo that the owner of the land at that time in 2004 was Sekindi Paul, contradicts the information on the special certificate of title (exhibit D. Ex.3 also marked as exhibit P. Ex.4) which shows that Sekindi Paul first became registered owner on 29th June, 2007 having declared that Paulo Lwanga had died on 22nd November, 2004.

[24] One can expect that a purchaser from a fraudulent Administrator will take care not to have notice of the fraud. The rule is, therefore, that a purchaser must be diligent and act in a reasonable manner, making all those investigations that a purchaser of land is normally expected to make. Then, he will be affected only by actual notice of the fraud. If he omits to make the usual investigations, then, he lays himself open to be affected by constructive notice. Notice has long been implied when a purchaser omits to investigate the vendor's title properly, or to make reasonable enquiries as to deeds or facts which come to his knowledge. He will be deemed to have notice of anything which he has failed to discover because he did not investigate the title properly or if he did not inquire for deeds or inspect them. The equitable doctrine of notice says that a purchaser is bound by any right which he would have discovered if he had made the ordinary investigations of deeds, births, deaths, marriages, and other facts which affect the ownership of land.

[25] In his testimony, the 1st defendant did not disclose whom he met and what information he obtained during the inspection of the land prior to the purchase, yet he was aware that there were occupants on the land whom Sekindi Paul undertook to compensate and cause to vacate upon conclusion of the transaction. Certainly the 1st defendant did not claim to have met either P.W.2 Ali Rajab Goloba or P.W.3 Ahmed Sebbi, yet both of them were ordinarily resident on the land and knew the land belonged to Paulo Lwanga who lived in Masaka and not to the 2nd defendant. The 1st defendant did not pick interest in meeting them in order to ascertain the basis of their occupancy and who their landlord was prior to the transaction, but

rather opted to cause their eviction two years after the purchase. He offered no explanation for this rather unusual behaviour.

[26] Constructive notice is the knowledge which the courts impute to a person upon presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him on further enquiry or from wilfully abstaining from inquiry to avoid notice. The doctrine applies if a purchaser knows facts which made “it imperative to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper” (see *Macmillan v. Bishopsgate Investment Trust (No. 3)* [1995] 1 WLR 978). It applies where the person acquired knowledge of circumstances which would put an honest and reasonable man on inquiry (see *Baden v. Societe Generale pour Favoriser le Developpement du Commerce et de l’Industrie en France SA*, [1993] 1 WLR 509), and yet he did not undertake the necessary inquiries.

[27] I therefore find that had the 1st defendant acted honestly, reasonably and fairly by taking the ordinary precautions that a person in his position, who already owned land in the neighbourhood, ought to have taken, he would have discovered that the land now in issue belonged to Paulo Lwanga who lived in Masaka and not to the 2nd defendant. When a person wilfully abstains from inquiry to avoid notice, such person cannot claim to have acted in good faith (see *The Zamora* [1921] AC; *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378 at 812 and *English and Scottish Mercantile Investment Co v. Brunton* 1982] 2 QB 700). The 1st defendant therefore did not meet the standard of due diligence that the circumstances of this transaction required and thus cannot claim to be a bona fide purchaser of this land. The plaintiffs have succeeded in bringing home to the 1st defendant, whose registered title is sought to be impeached. Accordingly, this issue is answered in the affirmative; the 1st defendant fraudulently acquired the land comprised in Kyadondo Block 244 Plot 501 situated at Kisugu, in Kampala.

Second issue; whether the 1st defendant fraudulently mortgaged the title deed to the 3rd defendant.

[28] By virtue of section 51 of *The Registration of Titles Act*, registration is the core event in the acquisition of legal title to an estate or interest in land (see *Khamis Bin Salim Bin Khamis El Sheksi v. Mohamed Ismail Khoja [1958] 1 EA 92*). Registration once effected must attract the consequences which the Act attaches to registration. Central among these, is the immunity from attack by adverse claim to the (registered proprietor's) title or interest in respect of which he is registered, commonly referred to as "indefeasibility of title." An owner of interest in land which was originally obtained from the rightful owner through fraud, still obtains an indefeasible interest in that title if they were unaware of the fraud (see *Frazer v. Walker [1967] 1 AC 569*). Registration of a mortgage therefore confers indefeasibility of title on a mortgagee (see *Olinda De Souza Figueiredo v. Kassamali Nanji [1962] 1 EA 756*).

[29] An indefeasible title or interest is one that cannot be set aside on the ground of any defect in the way that it was acquired, except for illegality and fraud. In the instant case by reason of the findings made in answer to the first issue, the 1st defendant acquired title fraudulently in deprivation of the rightful owners, the plaintiffs. Despite that, the 3rd defendant still secured an indefeasible interest in that land if it was unaware of the fraud, and if there is no factor nullifying the instrument. The validity of a mortgage instrument is a very serious matter which goes to the very root of the entire transaction, for if the instrument is invalid for whatever reason and it falls, all subsequent transactions fall with it (see *Eccon Construction and Engineering Ltd v. Giro Commercial Bank Ltd and another [2003] 2 EA 426 at 432*). By consent though, the 3rd defendant opted to vacate the mortgage.

[30] It is the plaintiffs' case that the 1st defendant did not act in good faith in mortgaging the land on account of the fact that the occupants on the land, especially the family

of a one Boda Mugongo, knew the plaintiffs to be the rightful owners of the land. Having purchased the land by the agreement dated 11th June, 2007 (exhibit D. Ex.1) and secured registration as proprietor on 5th November, 2008 (exhibit D. Ex.3 also marked as exhibit P. Ex.4), the 1st defendant mortgaged the land to the 3rd defendant on 15th April, 2009 wherefore it was registered as an encumbrance on 5th May, 2009 and later created a further charge thereon, on 12th December, 2014. The fact that during the proceedings the mortgagee opted to vacate the mortgage renders this a moot issue that no longer requires this Court's determination since it is of no consequence to the outcome of the suit.

Third issue; whether the plaintiff is entitled to the remedies sought.

i. Order of cancelation of title;

[31] According to section 177 of *The Registration of Titles Act*, upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order (see also *Grace Manjeri Nafula v. Brig. Gen. Elly Kayanja and another, H. C. Civil Suit No. 136 of 2011*; *Lwanga Andrea v. The Registrar of Title [1980] HCB 24* and *Nandyose Elizabeth v. R. Kyogaba [1971] HCB 13*). The plaintiffs having proved that the 1st defendant fraudulently acquired the land comprised in Kyadondo Block 244 Plot 501 situated at Kisugu, in Kampala, an order hereby issues directing the 4th defendant to cancel the 1st defendant's registration as proprietor of that land, and instead on basis of the grant of probate dated 6th July, 2004 to register the land in the name of the 1st plaintiff as executor of the estate of the late Paulo Lwanga. Having ordered so, I find that the circumstances of this case require a consequential order as an offshoot of this.

[32] A consequential order is an order which gives effect to a judgment or ruling (see *Mugerwa John Bosco and another v. Mss Xsabo Power Ltd, H. C. Misc. Application No.273 of 2018*). It gives meaning to the Judgment or ruling. It is traceable or flowing from the judgment or ruling prayed for and made consequent upon reliefs claimed by the plaintiff or applicant. It must be incidental and flow directly and naturally from the evidence and more so if the justice of the case demands, from reliefs claimed by the plaintiff or applicant. It is an offshoot of the main claim and it owes its existence to the main claim. Its purpose is to give effect to the decision of the Court but not by granting an entirely new, unclaimed and/or incongruous relief which was not contested by the parties at the trial, which does not fall in alignment with the original reliefs claimed in the suit or application, or where it was not in the contemplation of the parties that such relief would be the subject-matter of a formal executory judgment or order against either side to the dispute. In this case, it is not possible to have two grants at the same time over the same estate (see *Doreen Otto Aya and four others v. Okwera William, H.C. Civil Appeal No. 36 of 2013*).

[33] In light of the findings and order the Court has just made, it would be an absurdity if the grant of administration made to the 2nd defendant on 4th June, 2007 (exhibit D. Ex.2) were to remain operative. According to section 234 (2) (b) and (c) of *The Succession Act*, the grant of letters of administration may be revoked or annulled for just cause, which includes the fact that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case, or where that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently. The Court having found that the 2nd defendant obtained that grant by making untrue allegations of being the son of the deceased, the date of his demise and place of residence, all of which were material, and three years after probate had been granted over the same estate, which grant of probate

had not been revoked, there is a sound basis for the annulment of the grant of 4th June, 2007 and it is hereby accordingly annulled.

ii. An award of general damages;

[34] General damages are monetary compensation allowed for loss suffered by the aggrieved party due to the violation of his or her property rights. The object of the court in awarding general damages violation of property rights is that the aggrieved party may be put in the financial position which would have existed had there been no such violation. In civil litigation the law does not punish the party in violation by reason of his or her wrongful act, but if the other party has suffered any pecuniary (monetary) loss, the court will compel the party in violation to compensate the loss by paying damages to the other party. Compensatory damages are awarded for the harm caused by the defendant's violation of the plaintiff's legal rights. While special damages are awarded for past, pecuniary losses arising out of circumstances peculiar to the plaintiff's case and are recoverable only upon proof of actual loss, general damages, on the other hand, may be awarded for either pecuniary or non-pecuniary losses, and provide compensation for harm that any plaintiff can be expected to suffer as a result of the commission of the wrong in question.

[35] General damages for nonpecuniary losses may be proven or presumed. They are recoverable only upon proof of actual loss when the sole nonpecuniary harm sustained by the plaintiff is harm to the person, such as pain and suffering, mental and emotional distress, or humiliation. In contrast, when the substantive cause of action is for harm to other intangible interests, such as reputation, property ownership, and privacy, general damages are presumed, although the scope of the presumption varies. They are awarded for the usual or probable consequences of the wrongful act complained of. For example, in a suit for medical negligence in a personal injury claim, pain and suffering is presumed to exist, therefore if the suit is successful, general damages would be awarded as compensation even though

not specifically claimed or proved. The principal purpose of both special and general compensatory damages is to put the plaintiff in the same position as the plaintiff would have been but for the defendant's harmful actions.

[36] Where the plaintiff has not proved any actual or specific loss or injury as a result of the defendant's violation, then the Court will award only presumed nominal damages. Since they are awarded for the purposes of declaring and vindicating legal rights, nominal damages do not require proof of harm. Unlike compensatory damages which are intended to compensate for injury, nominal damages are awarded to commemorate the plaintiff's vindication in court. Such damages are awarded when a plaintiff proves that their legal rights have been violated but does not demonstrate they are actually entitled to receive monetary compensation.

[37] In the instant case, the plaintiffs have succeeded in a claim which has established their wrongful deprivation of title to the land since 29th June, 2009 which is a period of approximately 15 years. Since the plaintiffs have not proved any special damages, specific loss or injury resulting from that period of deprivation, the Court may only award general damages based on the usual or probable consequences of that wrongful act. Most courts award the plaintiff compensation for the period of lost use. These usually flow from the type of user and the historical perspectives of use of the particular land in issue. There is barely any evidence of user or historical use by the plaintiff. What is on record is that the land has had since the late 1960s been almost entirely occupied by squatters whose possessory rights thereof have not been clarified during this trial. There is no evidence to show that the plaintiff has ever derived benefit from their possession. Absence of a basis for reasonably ascertaining the monetary value of the lost use of land justifies the denial of recovery of substantial damages. Allowing recovery in circumstances such as these would open the Court to imagination and speculation in determining general damages.

[38] Of course, in a land economy where delay followed by future development may be the most appropriate economic use of land for the owner, the idea of attributing fault to landowners who fail to make effective economic use of their land, is not straightforward. In some circumstances a landowner who leaves property undeveloped may not necessarily have failed to make economic use of the land, as to retain the land for future development or use, for example, when market conditions are more favourable, may be viewed as the most economically efficient use of that particular land at that particular time.

[39] That notwithstanding, it has not been demonstrated to this Court that the plaintiff ever put the land to economic use or that the 1st defendant's deprivation interrupted or prevented such use. Although in a proper case substantial injury may be presumed to flow from certain wrongful acts when they invade interests that are not capable of precise physical or monetary measurement, this is not such a case. Substantial injury may justifiably be presumed to flow from certain tortious acts, even though the plaintiff has presented no proof of actual loss, when the torts invade interests that are intangible, but that should not necessarily extend to ones which are physical or economic. Beside presumed mental pain and suffering, most property rights, have economic value that can be ascertained. For that reason, an award of substantial general damages for their violation ought to be based on actual, provable damage.

[40] Alternatively, the doctrine of presumed damages directs the Court's focus not to the subjective reactions of the individual plaintiff or to the degree of malice exhibited by the defendant, but to the nature of the right violated. The Court should determine, in the light of its common experience, what amount would be sufficient to compensate a citizen for the loss of the right in question. In determining the appropriate amount to compensate for invasion of the right, the Court should consider whether the violation was of the sort that would cause a reasonable person to suffer such consequential injury as mental distress, embarrassment, and humiliation. However, the Court may not rely entirely and exclusively on its

common experience; there should be some evidence to guide that discretion, or else it becomes susceptible to arbitrariness.

[41] Although proof of intangible harm required as justification for an award of substantial general damages may amount to nothing more than an inference derived from the nature of the violation itself, there is no evidential basis in the instant case upon which this Court may reasonably estimate the usual or probable consequences of the 1st defendant's wrongful act in respect of this land, without delving in speculation, the best the Court can do is to award nominal damages in vindication of the plaintiffs' violated property rights. It is on that account that a sum of shs. 1,000,000/= is hereby awarded for each year of deprivation, hence a total sum of shs. 15,000,000/= as general damages.

iii. The costs of the suit.

[42] The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. The 4th defendant having only been added nominally, the judgment against it is only declaratory and non-executory, save for the orders of cancellation and registration.

Orders:

[43] Therefore in conclusion, judgment is entered in favour of the plaintiffs against the 1st and 2nd defendants, as follows;

- a) A declaration that the 1st defendant fraudulently acquired the land comprised in Kyadondo Block 244 Plot 501 situated at Kisugu, in Kampala.

- b) A declaration that the 1st defendant fraudulently mortgaged the title deed to the land comprised in Kyadondo Block 244 Plot 501 situated at Kisugu, in Kampala.
- c) An order directing the 4th defendant to cancel the 1st defendant's registration as proprietor of the land comprised in Kyadondo Block 244 Plot 501 situated at Kisugu, in Kampala.
- d) An order directing the 4th defendant instead, on basis of the grant of probate dated 6th July, 2004 to register the land in the name of the 1st plaintiff as executor of the estate of the late Paulo Lwanga.
- e) An order of annulment of the grant of letters of administration issued to the 2nd defendant on 4th June, 2007 in respect of the estate of the late Sebutemba Lwanga Paul.
- f) An award of general damages of shs. 15,000,000/=
- g) Interest on (e) above at the rate of 6% per annum, from the date of this judgment until payment in full.
- h) Judgment by consent of the plaintiffs and the 3rd defendant, by which the latter is to vacate the mortgage registered on the title deed to the land comprised in Kyadondo Block 244 Plot 501 situated at Kisugu, in Kampala, that was registered on 5th May, 2009 and the further charge of 12th December, 2014, and to hand over to the plaintiffs the special certificate of title to the land, free from all encumbrances, within thirty (30) days from the date of this judgment.
- i) The costs of the suit.

Delivered electronically this 25th day of January, 2024

...Stephen Mubiru.....

Stephen Mubiru
 Judge,
 25th January, 2024.

Appearances

For the plaintiff : M/s Sekabojja & Co Advocates.

For the defendant : M/s Ntambirweki Kandeebe and Company Advocates.