

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL SUIT NO. 172 OF 1998**

**MOSES KASULE OSARE )**

**ISA OSARE ) :::::::::::::::::::::::::::::::::::::: PLAINTIFFS**

**VERSUS**

**1. ROBINAH NABIKOLO )**

**2. ROSE KAGGWA ) :::::::::::::::::::::::::::::::::::::: DEFENDANTS**

**3. ISA LUTWAMA )**

**BEFORE: HON. JUSTICE J.P.M. TABARO**

**JUDGMENT**

The claim in question concerns land situate at Mulago in Kampala. It is comprised in Block 5 Plots 399 and 400 Kibuga. Ownership of the land is rather contentious and a number of transactions touching the land must be addressed before the land can be said to be the property of any particular person or persons. From the evidence on record it is quite clear that a number of defence witnesses have entered into sale agreements with the plaintiffs, the plaintiff's mother Nuru Lutta, or the persons who claim interest in the property. With a careful analysis of the background to the dispute, and the history of the transactions in question, the salient issues of the suit can be sharply defined.

The plaintiffs Moses Kasule Osare and Isa Osare filed the claim through their mother, Lutta, in 1998. It is not in dispute that when they were registered on the property on

or about 15.10.1985 they were minors. Nuru Lutta alleged to have bought the land from a Ruth Kazibwe on 30.5.1985. No sale agreement appears to have been written or at all, between the parties but a transfer allegedly drawn and witnessed by Advocate J. Ssendege was annexed to the plaint (Annexure “F”) and later tendered in evidence. J. Ssendege Esq. did testify for the defendants. His testimony will be evaluated later on in this Judgment. Nuru Lutta appears on the registered title as Guardian to the Plaintiffs.

The defendants, Robinah Nabikolo, Rose Kagwa, and Isa Lutwama have since lodged a caveat against the title. It is the case for the defendants that their brother Clement Kantinti Mbazira registered the land in fictitious names for the purpose of fraudulently alienating the land in issue. They pray for dismissal of the suit and cancellation of the Plaintiffs’ names from the title. The Plaintiffs pray for declaration that the defendants have no interest on the land in question, removal of the caveat, and award for general damages.

The witness for the Plaintiffs were Samuel Sekitti, Nuru Lutta Kasule, Hajji Edirisa Sebugwawo, James Kibirige Muyira who at the material time was a Senior Assistant Registrar of Titles, and Ahamada Kyobe. Samuel Sekitti testified that he bought the plots in question on the 20.10.1992. The titles exhibited in Court show that the Plaintiffs were the last to be registered and hence ownership has never been transferred to him (Samuel Sekitti).

According to Nuru Lutta Kasule the Plaintiffs who are her children were born in 1983 in the case of Moses Osare, and 1985 in the case of Issa Osare. In her testimony she asserted that she bought the two pieces of land from a lady called Ruth Kazibwe in 1985 and the agreement of sale was written by Advocate Ssendege. She alleged that the sale agreement got lost in 1986 when she was in exile. She signed the transfers and titles on behalf of the Plaintiffs, and the titles were obtained from the Land Office. She signed the documents because at the time the plaintiffs were still babies. She testified that she did not know the defendant before the case or dispute arose. The import of Edirisa Sebugwawo’s evidence is that he bought the Plots in issue, that is, it will be related, 399 and 400, Block 5 Kibuga in 1977 from a person called Male. Male did not testify. James Muyira was the assistant registrar who signed the titles in

issue, that is, those which were in the possession of the Plaintiffs, and were exhibited in Court, as Exhibits P1A, and P1B, respectively. According to him the Plaintiffs were registered as “minors until 2006” but their guardian was also added on the register as is the practice in the Land Registry. He retired from Public Service in 1989. He stated that in 1985 it was impossible for either Issa Osare or Moses Osare to sign any of the transfers since they were aged 1 or 2 years in either case.

Among the Defendants it is only Robinah Nabikolo who testified for the defence. Other defence witnesses were as already named. According to Robinah Nabikolo the Plots in question were the property of her late father Clement Lule Katinti Mbazira. From the record of proceedings it is fairly clear that Clement Lule Katinti Mbazira died in 1985, on 5<sup>th</sup> day of November. She asserted that some time in 1984 she saw her late father’s titles encompassing the lands in dispute because she took them to the Bank for an intended loan security; the Bank’s offer was too small an amount and accordingly she declined it. According to her the actual or genuine titles had white pages and bore her late father’s signature. The titles exhibited in Court do not have her father’s title and the white pages are missing. Her father received his title from Kezironi Lubizi Kasenya. Titles in Exhibits P1A and P1B are false. She exhibited one of her father’s titled (Exhibit D14) to show what her father’s signature looked like. In June, 1991 James Kantinti her brother obtained Letters of Administration for the estate of their father but in 1999 she with her brothers successfully challenged the grant and the same was revoked. Subsequently a grant was made to them, duly signed by Mukanza J. (of good memory). The validity of the grant by Mukanza J. has never been challenged and it is on Court record. In 1996 James Kantinti her brother made an agreement of sale with one Umaru Kakooza and the same Plot is in the name of Osare. By 1996 the land had not been transferred into the names of James Kantinti Mbazira yet. She explained that she with other defendants were given Letters of Administration instead of Probate because the Executors never obtained Probate. The Will of the late Clement Kantinti is on record. Robinah Nabikolo was not cross-examined and so her depositions remain uncontradicted.

Frank Kawoya (DWII) alleged that in 1992 he was among LC Officials who inspected the land at Mulago in the presence of James Kantinti. James Kantinti allegedly claimed Plots 399, and 400 Block 5 as his property. The purpose of the inspection

was to identify one Henry Kato's property. Kawoya did state as well that a number of people had constructed buildings on some of the plots. Charles Sebishoma was the LC Chairman while his Vice was Samuel Ganafa Sekitti and the latter appended his signature to the report made after the inspection. Frank Kawoya's evidence was not challenged by the Plaintiffs. Samuel Ganafa Sekitti is the same person as Samuel Sekitti who testified for the Plaintiffs. The testimony of Umaru Kakooza (DW III) is to the effect that he has a commercial building on Plot 400 Block 5, that is one of the Plots in dispute between the plaintiffs and the Defendants. He asserted that he bought the land in 1993 from one Henry Kato who infact introduced him to James Kantinti who later stated to him that the required certificate of title had been stolen. He signed agreements with James Kantinti, that is, Exhibits D15. He has never met or known the Plaintiffs or their mother Nuru Lutta. One Moses Sempebwa has a building standing on Plot 400 Block 5, as well.

As already pointed out the advocate who is alleged by the Plaintiffs to have signed the transfers from allegedly Ruth Kazibwe to the Plaintiffs is Mr. Ssendege. He did testify for the Defendants and denied ever witnessing or writing any of the agreements or transfers. Mr. Ssendege knows Nuru Lutta well, as daughter of the late Hajji Musa Kasule who resided at Wandegeya in Kampala. He used to do legal work for Nuru Lutta, and the entire family of the late Kasule. In May, 1985 he was in Uganda but due to insecurity that prevailed in the Country at the time he did not go to his office regularly. The file, if any, relating to the properties in question has not been traced by his office so far. Since he did not witness the documents he could not tell whether or not in 1985 or 1986 Osare was a minor. Mr. Ssendege explained that for legal transactions an embossed stamp would be required but to show the office of origin witnessing the document, there is need for the advocate's signature. At the time of insecurity one James Kayanja used to work with him part-time, but left at the end of 1986. His Chambers handled Exhibit PVII but he personally did not witness it.

Initially the issues were framed as follows:-

1. Whether or not there was a valid sale o of land between 1<sup>st</sup> Plaintiff Nuru Lutta, and Ruth Kazibwe;
2. Whether there was a valid land sale between the Plaintiffs;

3. Whether the Plaintiffs have any valid interest in the suit land;
4. Remedies.

After amendment of the Plaint, dated 12.1.2001 Samuel Sekitti ceased to be a party to the suit; he was struck off as Plaintiff. The Plaintiffs remain Moses Kasule and Issa Osare, suing through Nuru Lutta as next friend. As matters stand the two Plaintiffs did not claim to have sold land to one another and hence the second issue as framed in terms above no longer arises. The person named as Ruth Kazibwe has not been identified by any witness or, indeed, established to be a person to be in existence anywhere. Nuru Lutta (PWII) claims that she bought the land in question from a Ruth Kazibwe in her testimony. The sale agreement if any, was not tendered in evidence. No person who could have witnessed the alleged sale was produced in court to testify to any such transaction. Considering that the onus is on the Plaintiffs to prove such a sale between Ruth Kazibwe and Nuru Lutta as alleged, it is fair to find that the second issue should be answered in the negative. No sale of land between Nuru Lutta, and a Ruth Kazibwe has been established.

I have already indicated that the Defendants were granted Letters of Administration to the estate of the late Clement Kantinti, their father on 26<sup>th</sup> May, 1999. The validity of the grant is not in issue in the present suit. It becomes crystal clear, after the grant, that the beneficiaries and administrators of the estate do have interest in the suit land. The Plots in issue, that is 400, and 399 Block 5 Kibuga are said to belong to the estate of the late Clement Lule Kantinti Mbazira. It remains to be resolved as to whether the two Plots were validly acquired by the two Plaintiffs, Issa Osare, and Moses Osare. In my view of the facts and the Law applicable in this case that is the fundamental issue by which the matter stands or falls.

According to Muyira (PWIV) the special certificate of title was issued on 27.6.1985 and the Plaintiffs were registered as owners on 15.10.1985. So do copies of the certificate of titles indicate, (Exhibit D1). Nuru Lutta herself certified, as already indicated that her sons, the Plaintiffs, were born in 1983 and 1985 respectively and the elder of the two was 2 years old by the time he is alleged to have signed a transfer of

title (Exhibit P.7) made in his favour by allegedly Ruth Kazibwe. Issa Osare was born in 1985. James Muyira (PWIV) rightly testified that it was physically impossible for Issa Osare to do so at the age of 1 year. It was also equally impossible for Moses Osare who was 2 years old to sign any instrument evidently someone did forge the instruments of transfer on behalf of the infants. In all probability Nuru Lutta was the forger or at any rate the forger did so with the knowledge of Nuru Lutta for her signature appears on the forged instruments. The price of Shs. 1,000,000/= in consideration is purported to have been paid. However infants aged 1 and 2 years respectively have no capacity to enter into any contract and therefore since Nuru Lutta was never appointed a guardian under the Law, she lacked legal capacity to enter into any contract on their behalf. There was no sale or transfer of ownership from any Ruth Kazibwe whom I have found to be fictitious. As is well known a bona fide purchaser for valuable consideration without which goes a good title. *Figueiredo Vs Nanji* [1962] E.A 756.

However, the situation before Court is totally different. As Osare Issa, and Osare Moses were incapable of contracting in law there was no bona fide purchaser to speak of. And since Nuru Lutta had knowledge of the fraud through her signing of the forged transfers, she cannot lawfully claim to be bona fide purchaser for value without notice. I reject Mr. Kisiima's Submissions that Plaintiffs got good title in spite of the fraud that was committed. It has been shown that in law Nuru Lutta never attained the status of a guardian. I agree with Counsel for the Defendants Mr. Othieno that the authority of the case of *Sekabanja Vs Sajjabi* [1983] H.C.B. 55 applies, that is, since there was no valid purchase, there could not be any valid transfer of interest. The Plaintiffs could only have succeeded if they had bought the land from the Ruth Kazibwe in the belief that she had a good title to pass to them. But it was not so. They never bought any land from a Ruth Kazibwe and Nuru Lutta was a party to the fraud. I therefore find that no valid title passed to the Plaintiffs. The Registrar of Titles shall be directed to cancel the certificate of title as the suit must be dismissed with costs.

The evidence on record shows that James Mbazira apparently, brother to the Defendants, has been selling lands belonging to their father's estate to more than one person, clearly under fraudulent circumstances. The defence evidence shows that the

very plots in question have since been occupied by some other people such as Umaru Kakooza (DWIII). Hopefully their willingness to testify on behalf of the Defendants is indicative of their readiness to accept the Defendants radical title to the property in issue. The Defendants as administrators of the estate of the late Clement Lule Kantinti Mbazira shall be registered in place of Issa Osare and Moses Osare whose registration I have found to be null and void and of no consequence in law. Even if they had been bona fide which is not the case, there was no witnessing of the transfer of property and this would have made it ineffective. All in all there is no merit in the Plaintiffs suit; as already ordered the claim stands dismissed with costs.

**J.P.M TABARO**

**JUDGE**

22.12.2006

22.12.2006

1<sup>ST</sup> Plaintiff present

2<sup>nd</sup> Plaintiff absent

1<sup>st</sup> Defendant present

2<sup>nd</sup> and 3<sup>rd</sup> Defendants absent

Mr. Kusiima for the Plaintiffs

Mr. R. Adubango for Defendants,

Holding brief for Mr. B. Othieno.

Judgment delivered.

**J.P.M TABARO**

**JUDGE**

22.12.2006