

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

CIVIL SUIT NO.33 OF 2005

JANET DIANA COPE &

4 OTHERS ::::::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

JANET NAMULI

ALLAN KATUSIIME ::::::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE THE HON. MR. JUSTICE ELDAD MWANGUSYA:

JUDGMENT

The late Allan Cope (hereinafter referred to as the deceased) lived at Kazo – Lugoba Kawempe Division till his death at Nsambya Hospital on the 16th day of June 2002. He was survived by eight children namely, Janet Diana Cope then aged 26 years, Rose Wendy Cope then aged 24 years, Tom Noora Cope then aged 23 years, Carolyn Sylvia Cope then aged 23 years, Charles Brian Cope then aged 22 years, Sandra Rachel Cope then aged 21 years and Derrick Edwin Cope then aged 2 years. There is a disputed as to whether or not he was survived by a widow because the status of Janet Namuli Cope (1st Defendant) who claims to be a widow of the deceased is disputed by the above children who contend that their father had never married her. It was this Janet Namuli, who, following the death of the deceased applied for and was granted Letters of Administration for the estate of the deceased on the 3rd February 2003. A perusal of the grant shows that the grant was made to her as a widow of the deceased. The application for the grant also indicates that the deceased died intestate and no will has been seen.

In his lifetime the deceased owned Land at Kazo Lugoba where he established a residential holding and Land at Kalagala Bulemezi. The Land at Kazo Lugoba measured 0.125 Hectares while that at Kalagala Bulemezi measured 30 acres. Following her grant of Letters of Administration the 1st Defendant registered her name on both properties as the Administratrix of the estate of the late Allan Cope.

The grant of Letters of Administration to the 1st Defendant and her registration as Administratrix of the deceased's estate were contested by the Plaintiffs, who, in a suit filed in this court on the 17th day of January 2005 alleged that the 1st Defendant had obtained the Letters of Administration fraudulently. They prayed for revocation of her grant and cancellation of her registration as proprietor for Plot 1425 Block 203 Kazo LRV 1528 Folio 14. The particulars of fraud were that she had obtained a grant by stating that she was a widow whereas not as their father never went through any form of marriage with her. They alleged that she was trying to cheat the estate by selling the house at Kawempe.

In her written statement of defence filed on 2nd February 2005 she contended that she went through a customary marriage with the deceased and was therefore entitled to administer the estate as a widow. She denied that she intended to sell the house or cheat the Plaintiffs of their inheritance. However, while the suit was pending she transferred both properties to Allan Katusiime (2nd Defendant) without the knowledge of the Plaintiffs and following the transfers the Plaintiffs amended their plaint to include Katusiime as a second Defendant.

The amended plaint was filed on 27.11.06 and the Plaintiffs claim against the Defendants as stated in paragraphs 5 and 6 is as follows:-

“5. The Plaintiffs claim against the Defendants is for:-

- (a) Revocation of the grant of Letters of Administration for the estate of Allan Cope to the 1st Defendant for reason of fraud and incompetence.

- (b) An order of court requiring the 1st Defendant to surrender to court the grant of Letters of Administration and to file a comprehensive true and correct statement of account of the estate of the late Allan Cope.
- (c) Annulment of the purported sale and transfer of the suit premises to the 2nd Defendant by the 1st Defendant.
- (d) A permanent injunction restraining the Defendants from undertaking any further dealings with the estate of the deceased.
- (e) An order for cancellation of the 2nd Defendant as Registered proprietor of the lands comprised in LRV 1528 Folio 14 Plot 1425 at Kazo and Block 19 Plot 176 at Bulemezi.
- (f) An order to pay reparation for the loss and damage negligently and willfully occasioned to the estate of the deceased by the Defendant.
- (g) Costs of the suit and interest thereon.

6. The facts constituting the cause of action arose as under:-

- (i) That the 1st Defendant following the Plaintiffs' father's death on 16th June 2002, deceitfully and fraudulently represented herself as a widow of the Plaintiffs' deceased father, by procuring a false affidavit sworn by her (1st Defendant) father about a customary marriage that actually never took place. She proceeded to apply for letters of Administration to the estate of the deceased.
- (ii) That the 1st Defendant then quietly and without knowledge of other family members, especially the Plaintiffs fraudulently obtained a certificate of no objection from the Administrator General; and was eventually granted letters of Administration even when she was part of the family meetings to agree on who should administer.

- (iii) That the 1st Defendant, as grantee of letters of Administration instead of carrying out her testamentary duties has since failed to execute her statutory duties, thereby causing tremendous loss to the estate of the deceased and the intended beneficiaries.
- (iv) That the 1st Defendant fraudulently purported to sell and transferred ownership of the estate of the deceased (the suit premises) to the 2nd Defendant.
- (v) That the 2nd Defendant fraudulently obtained registration of himself as registered proprietor of the suit premises in utter disregard of a long standing sign post indicating that the suit property was not for sale.”

The particulars of fraud against both Defendants are set out in paragraph 9 of the amended plaint. These will be set out and analysed in detail in the course of the judgment.

When the amended plaint was filed the first Defendant did not file any reply. All efforts to serve her including substituted service in the New Vision newspaper of 20th October 2006 were futile because she could not be traced. She also did not appear throughout the trial of this suit. Under Order 6 Rule 24 of the Civil Procedure Rules:-

“Where any party has amended his or her pleading under Rule 20 as 21 of this order, the opposite party shall plead to the amended pleading or amend his or her pleading within the time he or she has to plead, or within fifteen days of the service or delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the service or delivery of the amendment, and does not plead again or amend within the time above mentioned, he or she shall be deemed to rely on his or her original pleading in answer to that amendment.”

So in respect of the 1st Defendant this court shall rely on her written statement of defence filed on 2nd February 2005 already referred to in this Judgment.

As far as the second Defendant is concerned he filed a written statement of defence in which he denied all allegations of fraud against contending that he was a bonafide purchaser having purchased from the owner in possession who transferred the property to him for value. He also contended that the Plaintiffs are trespassers on the suit premises who occupied the premises after the sale was concluded.

This court held a scheduling conference on 22.06.07 and the following facts were admitted.

1. That following the death of the deceased the 1st Defendant obtained Letters of Administration from this court on 03.02.03.
2. That the Plaintiffs are beneficiaries on the estate of the deceased.
3. That the 1st Defendant transferred the suit property on 03.05.05 and 02.11.05.
4. That both the properties belonged to the estate of the deceased and they were sold subsequent to the filing of the suit and filing of the 1st Defendants defence.
5. That the 1st, 3rd 4th and 5th Plaintiffs are residents at the property described as LRV 1528 Folio 14 Plot 1445 land at Kazo.

Also admitted were copies of files of both properties, copy of transfer of the property at Kazo, an application for consent for the property at Kazo and a consent by the Buganda Land Board for the same property.

The issues framed were:-

- (1) Whether the 1st Defendant made a valid transfer of the property to the 2nd Defendant or whether the transfer is tainted with fraud.
- (2) What remedies are available to the Plaintiffs?

It should be noted that no issue was framed in relation to the Plaintiffs' prayer for revocation of the 1st Defendants grant of Letters of Administration but was raised by their Counsel during final submissions. So the issue as to whether or not any ground that warrants revocation of the grant

of Letter of Administration to the 1st Defendant is framed for resolution by this court. I will go ahead and dispose this issue.

S.234 of the succession Act (cap 162) provides as follows:-

- (1) The grant of probate or letters of Administration may be revoked or annulled for just cause.

- (2) In this Section “just cause” means:-
 - (a) that the proceedings to obtain the grant were defective in substance;
 - (b) that the grant was obtained fraudulently by making a false suggestion, or by conceding from court something material to the case;
 - (c) 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;
 - (d) that the grant has become useless and inoperative through circumstance; or
 - (e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with part xxxiv of this Act, or has exhibited under that part an inventory or account which is untrue in a material respect.

In the instant case evidence was adduced to the effect that the 1st Defendant was not married to the deceased. This testimony was not controverted. It was only in the 1st Defendant’s written statement of defence that she averred that she was married to the deceased but no evidence was adduced to support the averment. So the grant which was obtained fraudulently by making a suggestion that she was a widow which was false.

Secondly the 1st Defendant disappeared before she filed any inventory or account of the estate. An account of her disappearance the grant has become inoperative. In the circumstances of this case court finds that there is just cause for revocation of the grant made to the 1st Defendant on 3rd day of February 2003.

The second issue is whether the 1st Defendant made a valid transfer of the property to the second Defendant or whether the transfer is tainted with fraud.

The allegation of fraud were raised in paragraph 9 of the plaint and they relate to the circumstances under which the 1st Defendant obtained the grant of Letters of Administration and sold the property during pendency of this suit without the knowledge and consent of the Plaintiffs. In respect of the 2nd Defendant the following particulars were given.

- “(a) One 2nd Defendant purported to purchase the suit premises in letter disregard to of a clear notice which read “PLOT NOT FOR SALE. NOT FOR RENT.” See annexure ‘A’.
- (b) The 2nd Defendant proceeded to execute the transfer of ownership of the suit premises from the 1st Defendant without any form of consideration.
- (c) The 2nd Defendant bought the suit premises without the written consent of the family members and beneficiaries of the estate of the deceased.
- (d) The 2nd Defendant connived with the 1st Defendant and executed false transfer forms which clearly indicate that there were no developments on the suit premises yet there was a habitable house and other fixtures.”

As already indicated in this judgment the 2nd Defendant maintained that he was a bonafide purchaser for value without notice of effect of title and if indeed he is a bonafide purchaser for value his registration on the title is protected.

The most crucial element of this case in relation to the first issue is the rule established in the case **Samuel Kizito Mubiru versus G.w. Byansiba and another [1985] H.C.B. 106** where His Lordship Justice Karokora held that a buyer is not bonafide where he inserts a less figure on transfer from a consideration when actually paid more in order to defraud government of revenue. He stated thus:-

“The mode of acquisition of the title deed in question was tainted with fraud and illegality because bonafide includes without fraud or without participation in wrong doing. When the 2nd Plaintiff inserted Shs.500,000/= the consideration for the land and factory when he had paid Shs.2.4 million for it the design was to defraud the government of its revenue by way of paying less stamp duty. Furthermore by Public Policy, any transaction designed to defraud the government of its revenue is illegal. The effect of this illegality was to prevent the first Plaintiff from recovering under contract which he secured illegally. The title procured by the 1st Plaintiff was therefore void because of fraud.”

From recent decisions which have relied on the above rule to establish fraud in such circumstances the rule is still good law. In the case of **Tradimpex (U) Ltd vs Chris Serunkuma and Christine Okot HCCS No.1519 of 1999** the Hon Lady Justice Arach Amoko stated as under:-

“Mr. Bwanika also referred to a number of cases and submitted that the courts in Uganda have decided many cases that it is evidence of fraud to state different figures in the Sale Agreement from a transfer. The cases included: HCCS No.513 of 1982 Samuel Kizito Mubiru and Namelin Mixed Growers vs G.W. Byansiima and Namelin Farmers Ltd which was decided by Karokora J as (he then was) that mode of acquisition of the title deed in question was tainted with fraud and illegality, all rolled in one. The facts of that case were that the sale Agreement stated the consideration to be Shs.2.4 million yet the transfer stated Shs.500,000/=.

Recently, Ogoola J (as he then was) also made a similar decision in the case of **Tobacco Commodity Traders Ltd Corp. and Official Receivers vs Mastermind (U) Ltd and Anor**. In that case the consideration was Shs.100 million on the transfer yet the sale Agreement indicated Shs.120 million.

Similarly in the instant case, since the sale agreement stated US \$ 760,000. It would have been considered fraudulent to state a lower figure in the transfer, more so, when the land and assets were sold all together. **DW.2 was alive to this issue and she gave a satisfactory explanation**” (underline mine for emphasis).

I have cited the above passage because Mr. Byamugisha Kamugisha Counsel for the 2nd Defendant relied on the passage that I have underlined to submit that the 2nd Defendant had offered an explanation that would save an otherwise fraudulent and illegal ransaction according to the rule I have stated. He also submitted that a cure can be found in paying more money to top up the required government revenue as happens when less court fees are paid and all a litigant is required to do is pay more money and the suit is not dismissed.

I will apply the above rule to the circumstances of this case and also determine as to whether the explanation offered by the 2nd Defendant would cure the illegality.

According to a sale agreement tendered in the court and marked exhibit P.1 the purchase price for the land described as LRV 1528 Folio 14 on Kyadondo Block 03 situated at Kazo Bwaise Kampala District was Shs.30,000,000=. A copy of an Application for consent to Transfer of the same Land the consideration is stated as Shs.15,000,000= (see Admitted exh.4). The transfer which was tendered and admitted as Exh.3 leaves the space where the consideration should have been filed as blank. From the rule stated above the discrepancy between the purchase price and consideration stated in the consent to transfer makes the transaction illegal and fraudulent “all rolled in one” and can therefore not be sustained.

The second Defendant’s explanation if it can be called one, was that according to the agreement the transfer was the responsibility of the first Defendant and he disclaimed responsibility for the discrepancy. In my view there is no way a Transfer or Transferee can disown a document where both of them have signed and one of them cannot transfer without the other. This court rejects the so called explanation.

As to whether the discrepancy can be cured by paying the balance of the required revenue I am of the view that a transfer tainted with fraud and illegality cannot be cured. In this particular instance it happens that the seller of the property was a fraudster herself after obtaining a grant of Letters of Administration for the estate of the deceased as a widow in which she was not. So

after revocation of her grant of Letters of Administration there is no way her actions of fraudulently transferring the estate property can be validated.

It should be noted that while in respect of the sale agreement and transfer of the Land at Kawempe a sale agreement and other transfer documents were adduced in evidence none of such documents were adduced in respect of the purchase of the land at Kalagala Bulemezi. This leaves court wondering as to how the second Defendant got registered on this title.

The other element of the fraud was that the purchase of the property was without the consent and knowledge of the beneficiaries. The point here is that the 1st Defendant who was not even a beneficiary in the estate sold the estate property behind the back of the children of the deceased some of whom were not only beneficiaries in the estate but were also living with him in his house at Kawempe. The 2nd Defendant testified that he inspected the premises and was satisfied that they were unoccupied. But up to day he has not got access to the suit property at Kawempe because they are still occupied by the children of the deceased that used to live with him. So while there no legal requirement for a consent before an Administrator of an estate sells property of an estate a purchaser should ensure that the Administrator of the estate who to me is a trustee of the property on behalf of other beneficiaries is selling on their behalf unless what the Administrator is selling is his or her share of the estate.

My conclusion on the second issue is that there was no valid transfer of the estate property from the first to the second Defendant. The Plaintiffs have proved their case against Defendant and are therefore entitled to the remedies which they seek in the plaint. Accordingly, I enter judgment in their favour and make the following orders:-

- (i) An order under S.234 (2) (b), (d) and (e) of the Succession Act, revoking the grant of Letters of Administration issued by this court to the 1st Defendant.
- (ii) A declaration that the purported transfer of the estate land from the 1st to the 2nd Defendant is null and void.

- (iii) An order canceling of the 2nd Defendant as registered proprietor for Land comprised in LRV 1528 Folio 14 Plot 1425 a Kazo.
- (iv) An order canceling of the 2nd Defendant as the registered proprietor for the land comprised in Bulemezi Block 19 Plot 176 at Kalagala.
- (v) A permanent injunction restraining the Defendants from undertaking or any further dealings in the estate of the deceased.
- (vi) Costs of the suit.

The Plaintiffs had made a prayer for an order against the Defendants to pay reparation for loss and damages negligently and willfully occasioned to the estate of the deceased but no evidence was adduced as to how this arose and this court declines to make an order for the head of damage especially when the second Defendant has never possessed the property in question.

I order as above.

ELDAD MWANGUSYA

JUDGE

03.10.08

Date: 13.11.06

Enock Barata – for the Plaintiffs who are present in court.

Kamugisha – for the 2nd Defendant, who is absent.

Court Clerk – Irene

Counsel Barata

We are ready to receive Judgment.

Court: Judgment delivered in chambers by the
Ag. Asst. Registrar

Nambayo Ester

REGISTRAR

13.11.08