

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**CIVIL SUIT NO. 380 OF 2008**

**EFULAIMU KASIWUKIRA.....PLAINTIFF**

**VERSUS**

**SAMUEL SERUNJOJI.....DEFENDANT**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**JUDGMENT**

The Plaintiff instituted this suit for an order directing the Registrar to cancel the Defendant's registration in respect of certificate of title to Block 8 plot 234, for a vesting order vesting Block 8 plot 234 into the Plaintiff's names, and for costs of the suit.

The Plaintiff's case is that he is the beneficiary to the estate of the late Aligizanda Mudembuga who was the owner and proprietor of land comprised in Block 8 plot 234 land at Namirembe. In 2008, the Plaintiff discovered that sometime in 1987, a transfer was procured in the names of Samuel Serunjoji the Defendant by a one Aligizanda Katende M. Nduggwa the then Clan Leader of the Lugave clan who purported to be the registered proprietor of the land. The said Nduggwa had obtained a special certificate of title to the land without the knowledge of the beneficiaries. The Plaintiff contends that all the transactions involving transfer of the land into the Defendant's names were fraudulent and without the Plaintiff's consent, and that the Defendant was party to the fraud. The particulars to the fraud included the Defendant's conniving with the deceased Aligizanda Katende M. Nduggwa to transfer the land in full knowledge that the land did not belong to him; and causing the transfer of the land to himself without ascertaining and or consulting the owner or the beneficiaries.

The Defendant did not file any defence though he was served by substituted service as per court order vide MA 448/08. The affidavit of service of Fred Kyakwambala is on record. The Registrar of this court, on application by the Plaintiff, entered a default judgment and referred the matter to this court for formal proof.

When the matter was called for formal proof, Mr. Nsimbe Musa, learned Counsel for the Plaintiff was, on oral application, allowed to amend his plaint as follows:-

- a) The names "Aligizanda Katamba in paragraph 4(a) were changed to read "Aligizanda Mudembuga".
- b) The names "Aligizanda Katamba Mudde Nduggwa in paragraph 4(c) were changed to read "Aligizanda Katende M. Nduggwa."
- c) Paragraph 5 should end at the word "Plaintiff".
- d) The names "Aligizanda Katamba Mudde" in paragraph 7(a) should read "Aligizanda Katende M. Nduggwa".

The Plaintiff produced three witnesses who gave oral testimonies on oath before this court for formal proof of his case. This was in addition to the documents, namely a certified true copy of the certificate of title to land comprised in Block 8 plot 234 land at Namirembe (exhibit **P1**); a photocopy of a certified copy of the will and codicil of A. Nduggwa with their English translations (exhibits **P2** and **P3** respectively); a photocopy of a letter from the office of Omutaka Nduggwa dated 22/4/05 (exhibit **P4**); and a photocopy of a letter from the Katikiro w'ekika ky'olugave dated 17/10/2007 (exhibit **P5**) tendered in evidence as exhibits during the hearing. Counsel for the Plaintiff was allowed to file written submissions within time schedules set by this court.

The Plaintiff testified that he was given the suit land by his grandfather Aligizanda Mudde Nduggwa in his wills made in 1956 and 1958. He was given the land together with Absolom Mayanja and Alexander Mayanja, both of whom have since passed away. Alexander Katende Nduggwa was the heir who succeeded as Nduggwa but he died. It appears he transferred the land without the Plaintiff's knowledge. He was later replaced by Grace Semakula Nduggwa. The Plaintiff testified that he no longer receives rent from the houses on the land as the tenants say the land belongs to Serunjoji. His testimony was corroborated by that of PW1 Nalweyiso Mariam and that of PW3 Malijo James. In addition PW3 testified that the two wills allowed the three people to collect busuulu from the land. He also testified that Alexander Katende was heir to their father Mudde Nduggwa as head of their clan but had no entitlements to the land. The Lugave clan had no title to the land. He also stated that the office of the Lugave clan is positive that Kasiwukira the Plaintiff is the owner because the other two Mayanjas who passed on left no children. The originals of the two wills could not be produced in court. Ms M. Namutebi, Assistant Administrator General, by letter addressed to the Registrar of this court dated 12<sup>th</sup> December 2011, stated that the succession register in their office only contained a summary of the wills. She confirmed however that according to the summary, the suit land was given to Absolom Mayanja, Aligizanda Mayanja and Semakula Kasiwukira the Plaintiff to enjoy the rental proceedings but not to sell.

Learned Counsel for the Plaintiff Musa Nsimbe in his submissions reiterated the evidence as adduced by the Plaintiff. He contended that the Plaintiff's property was fraudulently transferred to the Defendant, and that the law makes such transfer void.

On the issue of not filing a defence, Order 9 rule 11(2) of the CPR. provides that where the time allowed for filing a defence has expired and the Defendant has failed to file his or her defence, the Plaintiff may set down the suit for hearing *ex parte*. There are court decisions to the effect that in such circumstances, the Defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37** court held that since the Appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 58**. However, whether a suit proceeds *ex parte* or not, the burden of the Plaintiff to prove his/her case on the balance of probabilities remains. Where fraud is pleaded as it was in this case, the fraud must be positively and strictly proved. See Karokora J, in **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**.

Order 9 rule 10 of the CPR also provides that where the Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence. Case decisions on this point are to the effect that a party who has not filed a defence is deemed to have admitted the allegations in the plaint. See Lugayizi J, in **Eridadi Ahimbisibwe V World Food Programme & Ors [1998] IV KALR 32**. In addition, the evidence as adduced under oath by the Plaintiff's witnesses has neither been denied nor rebutted. In this case fraud was also pleaded and as already stated, it must strictly be proved even where the hearing is *ex parte*. The Plaintiff has in the course of formally proving his case, adduced evidence as pleaded in his plaint that the suit land was fraudulently transferred in the Defendant's names through his connivance with the deceased Aligizanda Katende M. Nduggwa, and causing the transfer of the land to himself without ascertaining and or consulting the owner or the beneficiaries.

In **Kampala Bottlers Ltd V Damaniko(U) Ltd, Civil Appeal No. 22 of 1992**, unreported, the Supreme Court held that fraud must be attributable either directly or by necessary implication to the transferee, that is, 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. Also see **Hannington Njuki V George William Musisi [1999] KALR 783; J. W. Kazoora V Rukuba, Civil Appeal No. 13 of 1992**, unreported.

The unchallenged evidence as adduced by the Plaintiff imputes fraud on the Defendant regarding the transfer of the certificate of title for land comprised in Kibuga Block 8 plot 234 land at Namirembe. This makes the purported transfers or entries in the register book void under section 77 of the Registration of Titles Act, cap 230.

I must state however that though the Plaintiff prayed this court for a vesting order in respect of the suit property, he did not adduce any evidence to qualify him for the award of the said order. There is no adduced evidence to suggest that the circumstances contemplated by section 78 of the Registration of Titles Act on issuing of a vesting order exist. The adduced evidence on

record, which included the witnesses' oral testimonies and documentary evidence (exhibits **P2** and **P3**), indicates that he was not entitled to own the suit land or sell it. He was merely to enjoy the rental proceeds from the same. In fact, clause 3 of the codicil to the late Alexander Muddembuga Nduggwa (exhibit **P3**) the contents of which were confirmed by M. Namutebi Assistant Administrator General, states that the Plaintiff together with Abusolomu Mayanja and Alexander Mayanja " will be getting all the incomes from it but the owner of the plot is A. Mayanja." The person bequeathed the suit land was A. Mayanja who was stated by the Plaintiff's witnesses to have passed away without issues (children).

Thus, given the fact that the Plaintiff did not prove his claim to a vesting order in respect of this land, I would decline to grant it to him. This however does not remove his entitlements as the person to collect rent from the plot as the wills of 1956 and 1957 stated.

In the premises, I would enter judgment against the Defendant for orders that;-

- a) The Defendant's registration in respect of land comprised in Kibuga Block 8 plot 234 land at Namirembe under instrument no. KLA 123249 be cancelled and be substituted by the names of A. Mayanja or the administrators of the estate of his estate in that capacity.
- b) The costs of this suit are awarded to the Plaintiff.

**Dated at Kampala this 19<sup>th</sup> of January 2012.**

Percy Night Tuhaise

**JUDGE.**