

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL SUIT NO. 0014 OF 2016

1. DAVID NYAKABWA

5 **2. DAMALIE KAIRUMBA ::: PLAINTIFFS**
(Suing as Administrators of the estate of the late Christopher Kasa Kairumba
and for the beneficiaries of the will of the late Joseph Kairumba Rusongoza)

VERSUS

1. KENNETH KALIMBI KAIRUMBA

10 **2. ROBINA BWITA**

3. COMMISSIONER FOR LAND

REGISTRATION::: DEFENDANTS

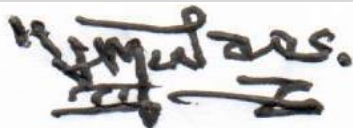
BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

15 **Introduction**

The plaintiff brought this suit against the defendants as administrators of the estate of the late Christopher Kasa Kairumba seeking the following:

- 20 (i) A declaration that the plaintiffs, the 1st defendant, and 12 other beneficiaries of the will under the estate of the late Dr. Joseph Kairumba Rusongoza are the rightful and lawful owners of 30 acres of land comprised in Bunyangabu Freehold Block 7, Plot 69, Land at Burungu (the suit land).

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(ii) A declaration that the 1st defendant fraudulently and illegally transferred the suit land into the names of the 2nd defendant to defeat the interests of the plaintiffs and 11 other beneficiaries of the estate of the late Dr. Joseph Kairumba Rusongoza.

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(iii) A declaration that the 2nd defendant's purchase of the suit land was fraudulent, illegal and void.

(iv) An order directing the 3rd defendant to cancel the special certificate of title to the suit land issued to the 1st defendant.

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(v) A declaration that the 2nd defendant is a trespasser on the suit land.

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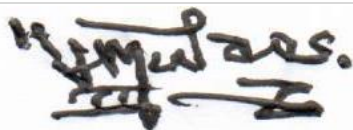
(vi) An eviction order against the 2nd defendant from the suit land and to hand over vacant possession to the plaintiffs and 12 other beneficiaries of the estate of the late Dr. Joseph Kairumba Rusongoza.

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(vii) An order to the 3rd defendant to reinstate and validate the original certificate of title to the suit land and register the same into the names of all the beneficiaries of the estate of the late Dr. Joseph Kairumba Rusongoza.

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(viii) A permanent injunction restraining the defendants, their agents and or servants from interfering with the suit land Block 7 Plot 69 in any manner whatsoever.



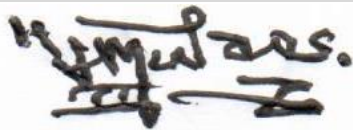
- (ix) An order against the 1st and 2nd defendants for lost mesne profits from the suit land, general damages, punitive damages, and costs of the suit.

The case of the Plaintiffs:

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It was the case of the plaintiffs that the suit land originally belonged to Dr. Joseph Kairumba Rusongoza (**deceased**) who was the grandfather of the plaintiffs and father of the 1st defendant. That deceased prior to his death transferred the suit land into the names of his son Cypirian Kagaba Kairumba and later directed that it be transferred into the names of the 1st defendant to hold it on behalf of the 1st defendant and Florence Tumwesigye Mauda Kairumba the 2nd wife of the deceased. That upon the death of Florence Tumwesigye Mauda Kairumba on 27/07/2004 the deceased directed that the title be transferred back into the names of Cypirian Kagaba Kairumba. That the 1st defendant executed the transfer documents and handed them over with the original land title. That the deceased later executed a will in 2005 bequeathing the suit land to all his children.

That Cypirian Kagaba Kairumba later learnt that the 1st defendant was making attempts to sale off the suit land and the deceased put announcements on radio in January 2006 warning the public not to buy the land. That Cypirian Kagaba Kairumba further lodged a caveat on the title on 28/02/2006 forbidding any dealings in the suit land. That on 13/03/2006, the 1st defendant through his lawyers M/s Kaaahwa, Kafuzi, Bwiruka & Co. Advocates wrote a letter to Cypirian Kagaba Kairumba demanding for the original certificate of title for the suit land and the said Cypirian Kagaba Kairumba informed the said lawyers that the 1st defendant had

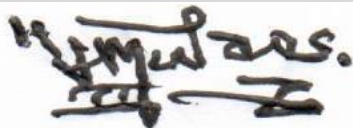


earlier signed transfer forms and he (Cypirian Kagaba Kairumba) was in the process of effecting the transfer.

That in February 2007, the late Christopher Kasa Kairumba discovered that the 1st defendant had obtained a special certificate of title to the suit land issued by the 3rd defendant on 21st August 2006 in currency of the caveat earlier lodged. That on 13/02/2007 another caveat was lodged forbidding any transaction on the suit land. That the plaintiffs and the rest of the beneficiaries discovered that the 1st defendant had fraudulently and unlawfully obtained a special certificate of title in currency of the original one. That subsequently, the 2nd defendant fraudulently purchased the suit land from the 1st defendant and trespassed thereon and registered it into her names despite the pending caveats, in disregard of notice of ownership and occupation by the deceased. It was averred that the defendants were jointly liable for the said illegalities, fraud and improper actions. The plaintiffs thus asked for judgment in their favour.

The case of the 1st Defendant:

The 1st defendant denied the claims of the plaintiffs and contended that the plaintiffs had no locus and cause of action to file the claim. That he was the registered proprietor of the suit land as such he had lawfully sold the same to the 2nd defendant and transferred the title and that the said 2nd defendant had been in possession of the suit land since 2007. The 1st defendant averred that he never signed transfer documents referred to in paragraph 7 (d) and (e) of the plaint. That the 2nd defendant's title could not be impeached by the plaintiff as there was no fraud



committed by the 1st and 2nd defendants. The 1st defendant thus asked court to dismiss the suit with costs.

The case of the 2nd Defendant:

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The 2nd defendant also contended that the plaintiffs had no cause of action against her and lacked locus to originate the claim. That she bought the suit land from the 2nd defendant who was the registered proprietor upon carrying out due diligence and the 1st defendant transferred the land into her names and she got registered as the proprietor. That she never participated in any fraud or illegalities. That she had been in possession of the suit land for over ten years and developed the same with trees and bananas when the plaintiffs and their father were looking on. That the deceased lodged a caveat on the 2nd defendant's title in 2008 but did not take any other step and in the premises, the caveat was redundant and should be removed by the plaintiffs. The 2nd defendant also filed a counter claim for removal of caveat, an award of general damages and costs of the suit.

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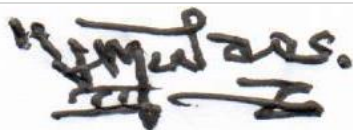
Issues:

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- 1. Whether the plaintiffs have any cause of action against the defendants.**
- 2. Whether the 3rd defendant fraudulently transferred the certificate of title to the 1st defendant.**
- 3. Whether the plaintiffs are entitled to the remedies prayed for in the plaint.**

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Representation and Hearing:



Mr. Ewalu Ronald appeared for the plaintiff, while **Mr. Wahinda Enock** represented the 1st and 2nd defendants. Both counsel addressed me by way of written submissions which I have considered.

5 **Burden and Standard of proof:**

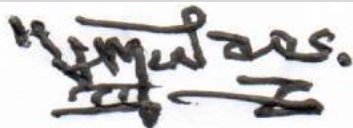
The burden of proof is in two broad categories that is the legal burden and the evidential burden. Sections 101 and 102 of the Evidence Act Cap 6 rests the burden of proof on whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which or she asserts to prove that those facts exist or who would fail if no evidence is adduced at all. Therefore, the plaintiffs bear the legal burden of proof to prove their case on the balance of probabilities.

Section 103 of the Evidence on the other hand places the evidential burden on any party who alleges the existence of a set facts to prove such facts. It provides thus: *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

20 **Issue No. 1: Whether the plaintiffs have a cause of action against the defendants**

Submissions for the Defendants:

Learned counsel for the defendants contended that the plaint disclosed no cause of action against the defendants. It was pointed out that the plaintiffs in paragraph 7(c)

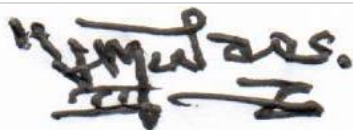
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stated that before the death of the late Dr. Kairumba Rusongoza, he had transferred the suit land to the 1st defendant. That they also claimed under paragraph 7 that the suit land was bequeathed to the children of the late Dr. Kairumba and further admitted that they are not among the children of the late Dr. Kairumba. That the plaintiffs filed the suit as administrators of the estate of the late Christopher Kasa Kairumba and did not state that they were beneficiaries under his estate. That the plaintiff did not demonstrate the right they enjoyed at the time the suit land was transferred to the 1st defendant.

Further that the plaintiffs sought to bring the action on behalf of all the 12 beneficiaries under the will of the late Joseph Kairumba Rusongoza but no representative order was secured as required under Order 1 rule 8 of the Civil Procedure Rules. That therefore in the absence of the order, the suit was improper before this court. Learned counsel thus asked court to strike out the suit for failure to disclose a cause of action.

Submissions for the Plaintiffs:

In response, counsel for the plaintiffs maintained that the plaint disclosed a cause of action against the defendants. That under paragraph 1 and 2 of the plaint, the plaintiff averred that they are co-administrators of the estate of the late Christopher Kasa Kairumba who was a beneficiary among the 13 persons entitled to the estate of the late Dr. Joseph Kairumba Rusongoza as such they enjoyed a right over the suit land which was bequeathed by the late Dr. Kairumba by a will and given to his children who included their late father Christopher Kasa Kairumba.

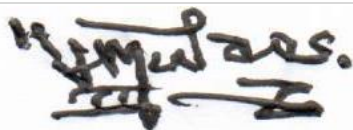
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CONSIDERATION BY COURT

It was contended for the defendants that the plaintiffs sought to bring the action on behalf of themselves and all the 12 beneficiaries of the will of the late Dr. Joseph Kairumba Rusongoza but that no representative order was secured as required under Order 1 rule 8 of the Civil Procedure Rules. That therefore in the absence of the order, the suit was improper before this court.

Points of law can be raised at any stage of the proceedings regardless of the fact that they were not raised in the pleadings. In **Mathias Lwanga Kaganda Vs Uganda Electricity Board, High Court Civil Suit No.124 of 2003**, the court cited with approval the decision in **Ndaula Ronald Vs Haji Nadduli Abdul, Election Petition No.20 of 2006**, where it was held as follows: *“On points of law, it is settled by the courts that illegality of an issue is a question of law which can be raised at any time or at any stage of the proceedings, with or without prior knowledge of the parties”*.

Order 1 rule 8 of the Civil Procedure Rule states as follows: *“Where there are persons having the same interest in one suit, one or more of such persons may, with permission of court sue or be sued or may defend such suit on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause, such notice is not reasonably practicable, by public advertisement, as the court in each case may direct.”*

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The above provision has been interpreted to be mandatory and if not complied with would render a suit incompetent and incapable of amendment.

5 In **Paul Kanyima vs Rugoora Per Pre Kicumbi Bavista Katwerana Society 1982 HCB 33** Manyindo J (as he then was) held inter alia that: *“This being a representative suit, it was mandatory under Order 1 rule 8 of the Civil Procedure Rules for the Plaintiff to obtain leave of court before filing it and a suit that is brought without leave of court is incompetent and cannot be stayed but should be*
10 *struck out.”* In that suit, the Plaintiff a member of an unregistered society had sued the Defendant on his own behalf and on behalf of his fellow members for trespass to land. Counsel for the Defendant raised a preliminary objection that since the suit was a representative action, the Plaintiff under Order 1 rule 8 of the Civil Procedure Rules had to obtain leave of court to sue. The trial Magistrate overruled the
15 objection arguing that the failure by the Plaintiff to obtain leave of court was a mere procedural irregularity which was not fatal to the suit. The learned trial Magistrate Grade I stayed proceedings to enable the Plaintiff to apply for leave of court to sue in a representative capacity. The Defendant appealed against the order hence the this holding.

20 In **Tarlogan Singh Vs Jaspal Phaguda & Ors 1997 – 2001 UCLR 408, 410** Ntabgoba P.J. (as he was (RIP) held in that: *“In my opinion, the taking of steps necessary to enable the Plaintiff institute a suit in a representative capacity is taking the procedure under Order 1 rule 8 of the Civil Procedure Rules and Order*
25 *7 rule 4 of the Civil Procedure Rules which is rendered in mandatory terms. With*

respect, therefore, the none compliance with Order 1 rule 8 of the Civil Procedure Rules and Order 7 rule 4 of the Civil Procedure Rules cannot be said to be a matter of mis joinder or non-joinder. It is a matter that must be complied with and failure to so comply renders the suit incurably defective.....”

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The mandatory nature of this requirement is fortified in Order 7 rule 4 of the Civil Procedure Rules which provides that: *“Where the Plaintiff sues in a representative character, the plaint shall show not only that he/she has an actual existing interest in the subject matter but that he or she has taken steps if any, necessary to enable*

10 *him or her to institute a suit concerning it.”*

There must be an application to court for a representative action, and when so granted, court directs on the mode of notice or service to all those involved. These are mandatory requirements of the law. The leave of the court is required only where

15 the plaintiff or defendant intends to file a suit for and on behalf of numerous persons who have the same interest in the suit. The Order does not compel persons who have the same interest to file a representative action, but where this path is chosen, the law must be followed. Otherwise each of the numerous persons are not prevented to

20 sue or be sued in the same suit individually. In a representative suit, the following conditions must be satisfied; (i) the parties must be numerous; (ii) they must have the same interest; (iii) Court must have granted permission or direction; and (iv) notice must have been issued to the parties whom it is proposed to represent (see

25 Order 1 rule 8 of *The Civil Procedure Rules*). The plaintiff in a representative suit must obtain the consent of the persons he or she seeks to represent, hence the requirement of publication of the notice.

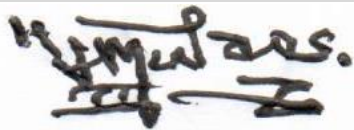
In this case, the heading of the plaint states that the plaintiffs were suing as administrators of the estate of the late Christopher Kasa Kairumba and for the beneficiaries of the will of the late Joseph Kairumba Rusongoza.

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Among the declarations and orders sought are:

1. A declaration that the plaintiffs, the 1st defendant, and 12 other beneficiaries of the will under the estate of the late Dr. Joseph Kairumba Rusongoza are the rightful and lawful owners of 30 acres of land comprised in Bunyangabu Freehold Block 7, Plot 69, Land at Burungu (the suit land).
2. A declaration that the 1st defendant fraudulently and illegally transferred the suit land into the names of the 2nd defendant to defeat the interests of the plaintiffs and 12 other beneficiaries of the estate of the late Dr. Joseph Kairumba Rusongoza.
3. An eviction order against the 2nd defendant from the suit land and hand over vacant possession to the plaintiffs and 12 other beneficiaries of the estate of the late Dr. Joseph Kairumba Rusongoza.
4. An order to the 3rd defendant to reinstate and validate the original certificate of title to the suit land and register the same into the names of all the beneficiaries of the estate of the late Dr. Joseph Kairumba Rusongoza.

The plaintiffs indicated under paragraph 6 of the plaint, that they commenced the suit on their behalf and on behalf of all the beneficiaries under the estate of the late



Dr. Joseph Kairumba Rusongoza. They stated under paragraph 6 (i) of the plaint that they sought a declaration that the plaintiffs, the 1st defendant and 12 other beneficiaries of estate of the deceased under his will were the rightful owners of 30 acres of land comprised in Bunyangabu Freehold Block 7, Plot 69, land at Burungu.

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Notably, however, the 12 beneficiaries were not named in the plaint or in evidence. At the same time, the plaintiffs in paragraph 7 (f) of the plaint stated that the deceased had bequeathed the suit land to all his children, and the will shows that the deceased had left 20 children, but the plaint limits itself to 12 beneficiaries.

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Further, the plaintiffs filed the suit as administrators of the estate of the late Christopher Kasa Kairumba but they did not disclose whether they were the only beneficiaries under his estate or name the other beneficiaries under the estate of the late Christopher Kasa Kairumba in whose behalf they would presumably also be suing.

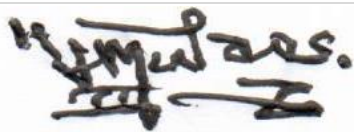
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Reading the plaint as a whole, the claim arises from the will of the late Dr. Joseph Kairumba Rusongoza and the plaintiffs aver that they are beneficiaries of the suit land by virtue of the said will together with 12 others on whose behalf they were suing. The claim of the plaintiffs is based on their being children of the late Chrisopher Kaisa Kairumba who was a son of the deceased and was a beneficiary under the will of the deceased together with other children of the deceased.

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I find that the suit herein bore all the features of a representative character as the plaintiffs sought to sue on behalf of themselves as well as on behalf of the

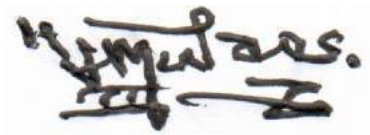
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beneficiaries under the will of the late Dr. Joseph Kairumba Rusongoza and sought orders in the interests of themselves and all those beneficiaries. I therefore agree with counsel for the defendants that the plaintiffs sought to bring the action on behalf of themselves and all the 12 beneficiaries under the will of the late Dr. Joseph
5 Kairumba Rusongoza but no representative order was secured as required under Order 1 rule 8 of the Civil Procedure Rules. In the absence of the said order, the suit was improper before this court. Therefore, the suit was incompetent for being brought in a representative capacity without a representative order. Consequently this suit is hereby struck out with costs awarded to the defendants.

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It is so ordered.



Vincent Wagona

High Court Judge

15 **FORTPORTAL**

DATE: 30/11/2023

