

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT MUKONO
CIVIL SUIT NO. 375 OF 2018**

**1. NANTUME ANNET NYINIMUSINGO
2. KAYANJA SSEBARABIDDE ALIKISA
(ADMINISTRATORS OF THE ESTATE
OF LATE KIRIZESTOMU MULERA KAYANJA) :::::::::: PLAINTIFFS**

VERSUS

**1. IBRAHIM M. BACHU
2. THE REGISTRAR OF TITLES ::::::::::: DEFENDANTS**

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

1. The Plaintiffs filed this suit for cancellation of entries made on the suit land originally comprised in Kyaggwe Block 136, Plot 17 for fraud, permanent injunction against the 1st Defendant, general damages, interest on general damages and costs of the suit.

Background.

2. The Plaintiffs are the Administrators of the Estate of the Late Kirizestomu Mulera Kayanja, the first registered proprietor of land

known as Block 136 Plot 17 land at Kikandwa Kyaggwe. As per the Will of the deceased, the title deeds were returned and held by the Land Office Mukono as Trustees.

3. On the 1st December, 2017, the office of the 2nd Defendant released a certified search to the Plaintiffs upon their application to ascertain the current status of the land in issue. The search released to the Plaintiffs indicated that the current registered proprietor of the land in issue is the 1st Defendant. At the time when the 1st Defendant was entered in the register by the 2nd Defendant on the said property, the late Kirizestomu Mulera Kayanja was the legal owner and no one had obtained letters of administration to become the legal representative of the deceased.
4. On the 21st March, 2022, when the case came up for mention, court noticed that there was no affidavit of service on court record. It then directed the Plaintiffs' counsel to serve the Defendants by substituted service in the New Vision Newspaper and Monitor Newspaper which was effected and proof of the service is on court record. Both Defendants did not file their written statements of defence making the case to proceed ex-parte.
5. During the hearing of this suit the Plaintiffs were represented by Counsel Nabafu Eunice from M/s Nabwire & Co. Advocates. The Plaintiffs produced before court one witness and learned counsel filed the Plaintiffs' written submissions in this court on 11th October, 2022.



6. Section 133 of the Evidence Act, Cap. 6 provides that subject to the provision of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact. Accordingly, a party in a case is entitled to produce one witness or as many witnesses as he or she desires. The issues for determination by this court are as follows:

Issues

- 1. Whether the 1st Defendant's name was fraudulently entered on the certificate of title for land comprised in Kikandwa Kyaggwe Block 136, Plot 17 by the 2nd Defendant;**
 - 2. Whether there are remedies available to the parties.**
7. The general rule in civil matters is that he or she who asserts must prove his or her allegation to the satisfaction of the trial tribunal or court. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probability. Section 101 of the Evidence Act, Cap. 6 provides as follows:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Section 103 of the Evidence Act also provides that;

"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."

8. In the case of **Nsubuga v. Kavuma [1978] HCB 307**, it was held that;
"In civil cases the burden lies on the Plaintiff to prove his or her case on the balance of probabilities."

9. Further, in the case of **Miller v. Minister of Pensions [1947]2 All ER 372**, Lord Denning stated:

"The degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not."

10. The position of the law is also that the evidential burden does not shift to the Defendant unless there is cogent and credible evidence produced on the issue for determination.
11. However, allegations of fraud are so serious in nature which are required to be specifically pleaded and strictly proved before a court of law by the person alleging it. The standard of proof in allegations of fraud is slightly higher than that in ordinary civil suits but not beyond

reasonable doubt. In **Kampala Bottlers Ltd v. Damanico (U) Ltd, SCCA No.22 of 1992**, it was held that;

"fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters."

The Supreme Court added in the same case that;

"The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, 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."

Issue 1: Whether the 1st Defendant's name was fraudulently entered on the certificate of title for land comprised in Kikandwa Kyaggwe Block 136, Plot 17 by the 2nd Defendant.

12. It was argued for the Plaintiffs on this issue that the 1st Defendant is currently registered as the proprietor of the suit land as per the Land Office search statement. That P.W.1 brought evidence to show that Kirizestomu Mulera Kayanja was the 1st registered proprietor of land constituted in Kyaggwe Block 136 Plot 17 land at Kikandwa, Mukono District, who died and in his last Will indicated that the title deed for the land in issue was being held by the Land office Mukono for safe custody. Counsel added that evidence was led by P.W.1 that shows that the 1st Defendant became the registered proprietor without letters of administration or probate.



13. It was the Plaintiffs' submission that the 1st Defendant is guilty of a fraudulent act of transferring a deceased person's property into his names without letters of administration or probate and without being a *bonafide* purchaser for value. That the 1st Defendant never purchased the suit land otherwise the Will of the late Kirizestomu Mulera Kayanja would have excluded it from the list of property left behind and that the Will would have not indicated that the title deeds were with the Mukono Land office for safe custody. That if that was so then the 1st Defendant would have been in possession of the title deeds and not with Mukono Land office.
14. Counsel prayed that this court finds that the 1st Defendant was fraudulently entered on the suit property as the registered proprietor by the 2nd Defendant who was the custodian of the late Kirizestomu Mulera Kayanja's land title deeds. Learned counsel further prayed that this honourable court invokes section 77 of the Registration of Titles Act, Cap. 230 and finds that the title procured by the first Defendant is illegal.

Court's consideration

15. The Plaintiffs' pleadings and the attachments therein indicate that the 1st Defendant is currently registered as the proprietor of the suit land. The Defendants did not file their written statements of defence to explain the circumstances under which the 1st Defendant became registered on the certificate of title for the suit land.

16. In **F.K Zaabwe v. Orient Bank Ltd & Others SCCA No. 4 of 2006**, Katurebe CJ (as he then was) defined fraud as

“an intentional perversion of truth for purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by words or conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.”

17. Where a certificate of title is obtained by fraud, such title is void *ab initio*. Section 59 of the Registration of Titles Act, Cap 230 provides thus:

“Certificate to be conclusive evidence of title.

No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.”

Section 77 of the Registration of Titles Act also provides that:



“Certificate void for fraud.

Any certificate of title, entry, removal of encumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud.”

Section 176 (c) of the Act which is also pertinent to this case stipulates as follows:

“Registered proprietor protected against ejectment except in certain cases.

No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases—

(a);

(b);

(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.”

18. More specific to this case is section 54 of the Registration of Titles Act, which safeguard against any fraudulent transfer of an estate of a deceased person. It provides as follows:

“Instruments not effectual until registered.

No instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render the land liable to any



mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in the manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature; and, if two or more instruments signed by the same proprietor and purporting to affect the same estate or interest are at the same time presented to the registrar for registration, he or she shall register and endorse that instrument which is presented by the person producing the duplicate certificate of title."

19. The 1st Plaintiff who testified as P.W.1 stated during examination in-chief that she was appointed together with the 2nd Plaintiff as the legal representatives of the estate of the late Kirizestomu Mulera Kayanja by virtue of letters of administration attached to the plaint. That the late Kirizestomu Mulera Kayanja was the first registered proprietor of land constituted in Kyaggwe Block 136 Plot 17 land at Kikandwa, Mukono District.
20. P.W.1 further testified that the late Kirizestomu Mulera Kayanja died testate and in his last Will indicated that the title deed for the land in issue was being held by the Land Office Mukono for safe custody. It was also P.W.1's evidence that on the 1st December, 2017, a search on the register of land at Mukono Land Office revealed that the 1st Defendant had been entered on the said property as the registered proprietor.



21. P.W.1 claimed in her testimony that the 1st Defendant was fraudulently entered on the said property as the registered proprietor by the 2nd Defendant because he had no letters of administration or probate. That the Plaintiffs have been denied the right to develop, access and protect the said land which is currently being cultivated and used for sand extraction by the 1st Defendant and his agents.
22. It is the Plaintiffs' evidence that the 1st Defendant was registered on their father's certificate of title after his death in his own names and not as an Administrator to the deceased's estate. Also the statement of search dated 1st December, 2017 from the 2nd Defendant's office states that the current registered proprietor on the certificate of title for the suit land is Ibrahim M. Bachu that is the 1st Defendant who was registered on 9th December, 1996 under Instrument No. MKO57134.
23. I have also perused through the last Will of the late Kayanja. Page 2 of the Will clearly states that the certificate of title for his land measuring 74 acres was at the Land Office which was meant to be kept there in safe custody and in trust for Kayanja's beneficiaries.
24. I find that the circumstances under which the 1st Defendant got registered on the suit land without his possession of letters of administration were fraudulent. Secondly, the 2nd Defendant who was the appointed custodian of the said certificate of title failed in its duty as a trustee to maintain the title for safe custody for the beneficiaries to the estate of the late Kayanja. There is sufficient evidence proving that the 1st Defendant's name was fraudulently entered on the late Kayanja's certificate of title for land comprised in Kikandwa Kyaggwe

Block 136 Plot 17 by the 2nd Defendant. Therefore, the Plaintiffs have discharged the burden to prove this case. The 1st issue is answered in the affirmative.

Issue 2: Whether there are remedies available to the parties.

25. The Plaintiffs' counsel contended that the power to cancel certificates of title where fraud is alleged is vested in the High Court as per section 177 of the Registration of Titles Act. That the Plaintiffs are entitled to the remedy of cancellation of the name of the 1st Defendant from the register of titles as registered proprietor. Counsel prayed that upon cancellation, the Plaintiffs be entered in the register of titles.
26. For a certificate of title to be cancelled on the ground of fraud, one must follow due court process as the Plaintiffs did in the instant case. Having resolved the 1st issue in the Plaintiffs' favour, this court is empowered under section 177 of the Registration of Titles Act, Cap. 230, to direct the Registrar of Titles who is the 2nd Defendant in the instant case to cancel the 1st Defendant's names from Kayanja's certificate of title. Since the Plaintiffs are the legal representatives of the Late Kirizestomu Mulera Kayanja in possession of letters of administration, they are entitled to be entered to his certificate of title as administrators of his estate.
27. It is the Plaintiffs' case that the 1st Defendant's agents or workers are cultivating on and extracting sand from the suit land. This evidence was never controverted by the 1st Defendant. Since the 1st Defendant's name was entered onto the register of titles for the suit land



fraudulently and that the 1st Defendant and his agents trespassed onto the late Kirizestomu Mulera Kayanja's land, I rule that the Plaintiffs' are entitled to a permanent injunction against the 1st Defendant's agents or workers.

28. The law on permanent injunction is very clear and settled that it is a remedy for preventing wrongs and preserving rights so as to restrain and repair injury for the purpose of dispensing complete justice between the parties. In **Akena Christopher & 9 Others v. Opwonya Noah, HCCA No. 0035 of 2016**, Justice Stephen Mubiru held that:

"Permanent or final injunctions are granted as a remedy against an infringement or violation which has been proven at trial. Such an injunction will be granted to prevent ongoing or future infringement or violations."

29. The Plaintiffs' counsel averred that P.W.1 stated that they have been subjected through denial of the right to develop, access and protect the said land which is currently being cultivated and used for sand extraction by the 1st Defendant and his agents. She added that the Plaintiffs have proved that they have suffered injury as a result of the 1st Defendant's registration as a registered proprietor, occupation of the suit land and are thus entitled to general damages.

30. Damages are awarded to fairly compensate the aggrieved party for the inconveniences accrued as a result of the actions of the opposite party. It is the duty of the party alleging that he or she was

injured by the other party to plead and prove that there were damages, losses or injuries suffered by such actions

31. From the Plaintiffs' evidence considered above, I find that they have discharged their duties to prove damages and inconveniences caused as a result of the Defendant's actions hence they are entitled to an award of general damages. The Plaintiffs are accordingly awarded general damages of UGX. 40,000,000/= against the 1st Defendant.

32. In support of the Plaintiffs' prayer for costs, learned counsel cited section 27 of the Civil Procedure Act and the case of **Uganda Development Bank v. Muganga Construction Company Ltd (1981) HCB 35**. She prayed that costs of the suit be awarded to the Plaintiffs.

33. The general rule as to the award of costs in civil suits is that costs follow the event of the action; that is, the costs of the successful party are to be paid by the party who is unsuccessful. However, wide discretion is given to the court to grant or withhold or apportion costs as it thinks fit. This discretion is to be exercised judiciously. Section 27 (1) of the Civil Procedure Act, Cap.71 provides thus:

"27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what



property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."

34. This court finds no compelling reason to deny the Plaintiffs costs of this suit since they are the successful parties. The circumstances of this case warrant an award of costs to the Plaintiffs as against both Defendants by virtue of the fact that the 2nd Defendant being entrusted as a trustee or custodian to maintain safe custody of Kayanja's certificate of title is in breach of his trust leading the Plaintiffs to incur costs in prosecuting this suit to the end, which could have been avoided if not for such fraudulent and illegal actions.
35. Pursuant to the above analysis, judgment is hereby entered in favour of the Plaintiffs with orders that:
- (a) the Registrar of Titles is hereby ordered to cancel the 1st Defendant's names from the late Kirizestomu Mulera Kayanja's certificate of title and enter the Plaintiffs' names as Administrators of the estate;
 - (b) any transaction arising from the 1st Defendant's fraudulent entry on Kirizestomu Mulera Kayanja's certificate of title for the suit land by the 2nd Defendant is a nullity and is hereby declared void *ab initio*.
 - (c) general damages of UGX. 40,000,000/= are awarded to the Plaintiffs;

(d) vacant possession do issue against the 1st Defendant and his agents or workmen, which should be executed in accordance with the law and directives on eviction;

(e) a permanent injunction doth issue against the 1st Defendant restraining him, his agents, workmen, relatives, successors in title or those deriving survival from him, from interfering with the Plaintiffs' ownership and quiet possession of the suit land;

(f) costs of the suit are awarded to the Plaintiffs as against both Defendants.

I order accordingly.

This judgment is delivered this 2nd day of March, 2023 by



FLORENCE NAKACHWA
JUDGE.

In the presence of:

(1) Counsel Nabafu Eunice from M/s Nabwire & Co. Advocates for the Plaintiffs;

(2) Ms. Pauline Nakavuma, the Court Clerk.