

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL SUIT NO. 48 OF 2017

- 1. KAZIBWE RONALD**
2. KIZZA RICHARD PLAINTIFFS

VERSUS

- 1. ESSIGA LYA KIBONGO LTD**
2. SALONGO KIBUKA SSEKITAYIRA
3. GYAGENDA KABIRI JIM JEM
4. MUTANDA RICHARD
5. SSEKALEGE ALISON DEFENDANTS

JUDGMENT

Hon. Lady Justice Victoria N. N. Katamba

BACKGROUND

The plaintiffs instituted this suit against the defendants for an order of cancellation of the first defendant's certificate of title to land comprised in *Ssesse Block 109 Plot 3* situated at *Tale*, a declaration that land comprised in the title known as *Ssesse Block 109 Plot 3* is part of the Estate of the Late Magunda Richard, an award of general damages, interest, permanent injunction and costs of the suit.

The suit land was formerly *MRV 668 Folio 4* and it was registered in the late Yonasani Lubuye Katanyoleka. The late Yonasani Lubuye died testate in the year 1956 and at the time of his death, the suit land measured about 643.5 acres

According to the Plaintiffs, in his will which was admitted on the court record severally through the parties, the late Yonasani Lubuye bequeathed 615 acres out of *MRV 668 Folio 4 (643.5 acres)* to different beneficiaries of his estate.

The Plaintiffs claim that in 2003 one of the grand daughters, to the Late Yonasani Lubuye Katanyoleka, a one Edisa Nakyeyune, (*now deceased*) applied for and was granted letters of Administration for the estate of the late Yonasani Lubuye The late Edisa Nakyeyune administered the Estate till 2012 when she renounced the grant.

The Plaintiffs further state that the Late Edisa Nakyeyune resurveyed the land and it became **Block 109 Plot 1**. She later sub-divided it into 2 plots and it became Ssesse Block 109 Plots 2 and 3. That she sold **Block 109 Plot 2** to the Uganda Land Commission (hereinafter “ULC”) which ULC subsequently leased to Bidico Co. Ltd. It is this **Ssesse Block 109 Plot 3** which is the suit land that the late Edisa Nakyeyune and the defendants transferred to the 1st defendant company.

The plaintiffs’ claim that their great grandfather, a one late Yonasani Lubuye, was the lineal head of the sub-clan of Nakinsinge clan called Kibongo. He bequeathed the suit land to his nephew and heir, the late Richard Magunda, the plaintiff’s father. They thus maintain that the same is personal property which naturally devolved to them as the beneficiaries of the Estate of the late Richard Magunda hence this suit.

The defendants on the other hand, in their Written Statement of Defence, contended that the plaintiffs fraudulently obtained letters of administration to the estate of both the late Yonasani Lubuye and the late Richard Magunda respectively. That their conduct of obtaining the said Letters of Administration was undertaken without the knowledge of all beneficiaries of the said 2 estates.

The defendants further stated that both the deceased persons, Yonasani Lubuye and Richard Magunda never owned the suit land in their personal capacities, but rather in trust for the Kibongo sub-clan of Nakinsige clan, as their ancestral land (**OBUTAKA**). That this fact was clearly stated in the will and testament as a directive of the late Yonasani Lubuye K as well as in the late Richard Magunda’s will, under which the plaintiffs derive their claims.

The defendants denied forging the will of the late Richard Magunda, and stated that the 1st defendant’s registration as proprietor of the suit land was lawful. They further state that after Edisa Nakyeyune Ssemugera, the then administratrix of the estate of the late Yonasani Lubuye realizing her mistake of unlawfully selling 150 acres of land to Uganda Land Commission, she willingly

agreed to transfer the residue to the 1st defendant, as its rightful and lawful owner thus becoming the registered proprietor from then to date.

Representation:

The plaintiffs were represented by *M/S MACB Advocates*

The defendants were represented by *M/S Balikuddembe & Co. Advocates*

The following were Issues agreed upon in the Joint Scheduling Memorandum.

1. *Whether the land comprised in Ssesse Block 109 Plot 3 Kalangala formed part of the personal estate of the late Yonasani Lubuye K?*
2. *Whether the land comprised in Ssesse Block 109 Kalangala formed part of the estate of the Late Richard Magunda?*
3. *Whether the late Yonasi Lubuye K and the late Richard Magunda held/ owned the suit land in trust for Kibongo sub-clan?*
4. *Whether the first defendant company was lawfully registered and incorporated for the benefit of the sub-clan of Kibongo and all its members?*
5. *Whether the first defendant was lawfully registered as the proprietor of the land comprised in Ssesse Block 109 Plot 3 Kalangala?*
6. *Whether the plaintiffs are entitled to the remedies sought?*

Plaintiff's Submissions:

On Issue 1;

The plaintiffs submitted that the will of the deceased bequeathed **615 acres** comprised in **Vol. 668 Folio 4** and **8 acres** comprised in **Vol. 194 Folio 13** to his heir. The deceased also bequeathed his entire estate save for 3.50 acres comprised in **Vol. 668 Folio 4** which was to be dealt with by the clan council.

The plaintiffs submitted that it is an agreed fact in the Joint Scheduling Memorandum filed by parties in his Honourable court, that the late Yonasani Lubuye was the registered proprietor of the

suit land. They cited *Section 59 of the Registration of Titles Act, Cap 230* which provides that a certificate of title is conclusive proof of ownership and can only be impeached on grounds of fraud. That the aforementioned position was confirmed in the case of *Kampala Bottlers Ltd v Damanico (U) Ltd SCCA No. 22 of 1992*.

The Plaintiffs further argued that no evidence was adduced by the defendants to show that this certificate of title has ever been impeached or attained fraudulently and that as such, the late Yonasani owned the suit land as his personal estate.

The plaintiffs also argued that the succession register does not avail any proof that the late Yonasani Lubuye bequeathed property to the Kibongo sub-clan and hence the argument by the defendants that he left the property for the sub clan is untenable.

In conclusion, the Plaintiffs maintained that the suit land formed part of the personal estate of the late Yonasani Lubuye.

On issue 2;

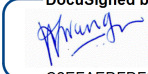
The plaintiffs maintained their earlier submissions in Issue 1, that the suit land belonged to the estate of the late Yonasani Lubuye, who in his will bequeathed it to his heir, the late Richard Magunda.

The plaintiffs submitted that the evidence by *PW 2 (Kazibwe Ronald)* and *PW3(Munawa Edward)* was never challenged and that indeed the Late Richard Magunda dealt with the suit property as though it was his personal property. *Sub section (b)* of his will, demonstrates that he dealt with the suit land as his personal property.

On issue 3;

The plaintiffs submitted that ancestral land does not specifically mean sub-clan land but can rather refer to land owned by a family, a community or even a cultural people and even if **DEx1** as well as **DEx2 (will attributable to Yonasani Lubuye Katanyoleka and its English translation respectively)** referred to ancestral land, it does not really belong to Kibongo sub-clan.

The plaintiffs relied on the **Black's Law Dictionary 8th Edition at page 1546** to define a trust; as the right enforceable solely in equity, to the beneficial enjoyment of property to which another

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person holds the legal title; a property interest held by one person (**the trustee**) at the request of another (**the settlor**) for the benefit of the third party (**the beneficiary**)

On the basis of the above definition, the plaintiffs submitted that a trust ought to be governed under the principles of trusts but not as someone pleases to emphasize their point that this land was not held in trust but rather as personal property.

On Issue 4;

The plaintiffs submitted that no evidence was adduced to show that the first Respondent Company was formed for the benefit of the Kibongo sub-clan. None of the descendants of the Late Yonasani Lubuye apart from the 4th defendant is a member of the Company. They further submitted that no general meeting has been held nor has the company ever declared annual returns to the members of the clan whom it purports to act for (**They referred this court to paragraph 27 of the Witness Statement of PW2**)

The plaintiffs also submitted that the 1st defendant company was fraudulently and unlawfully incorporated in the year 2007(**They referred this court to the certificate of incorporation admitted as PEX8**). They also submitted that **DW1**-Richard Mutanda, admitted that *“the members of the 1st defendant company/subscribers were neither natural persons nor legal persons at law”*.

The Plaintiffs referred this court to **Section 4(1) of the Companies Act, 2012 As Amended** which provides that any one or more persons may incorporate a company.

The plaintiffs equally made mention of **Section 8(1) & (2) of the Companies Act, 2012 As Amended** which requires that subscribers sign and write their full name and address on the memorandum of association.

The plaintiffs quoted **Section 21 of Companies Act, 2012 As Amended** which provides that when the memorandum and Articles are registered, they bind the company and the members of the company to the same extent.

The plaintiffs also made reference to **Section 47 (1) and (2) supra** which defines who a member is and other instances under which one can become a member respectively.

The plaintiffs referred to **Section 119 of the Companies Act, 2012 As Amended** which requires every company to keep a register of its members as well as the case of **Matthew Rukikaire v Incafex Limited, SCCA No. 3 of 2015** which extensively discusses how one can become a member of a company.

In conclusion, they prayed that this court finds that the 1st Respondent was not incorporated for the beneficiaries of the Kibongo clan members.

On issue 5;

The plaintiffs submitted that **DEx7, the transfer to the 1st Defendant** does not mention the name of the Block upon which the alleged transfer is attributable, the consideration and or the value of the transfer and that it was not signed by the transferee. That the alleged transfer was signed and executed by the transferor on the 27th day of August 2005 in favour of the alleged transferee **Ssigalya Kibongo**.

The plaintiffs submitted that the first defendant Company was incorporated in 2007, 2 years after **DEx7** was signed, and therefore, the transferee could not have transferred the suit land to a non-existent person in law.

In conclusion, the Plaintiff prayed that this court finds that the 1st Defendant was not legally registered.

On issue 6;

- i) On cancellation of title of the suit-land owned by the 1st defendant company as a result of fraud, the plaintiffs relied on **Section 64 (1) of the Registration of Titles Act, Cap 230 (RTA hereinafter)** which makes fraud an exception to any type of interest in land.

They relied on **Section 77 of the RTA, Cap 230** which provides that 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.

The plaintiffs also cited **Section 176(c) of the RTA supra** which bars ejectment of any registered proprietor other than in cases of fraud.

They relied on **Section 177 supra** which allows the High court to direct the Registrar of titles to cancel any certificate of title or instrument.

- ii) On the prayer of a declaration that the certificate of title of the suit land is part of the personal estate of the late Magunda Richard and not the clan, the plaintiffs invited this Honourable Court to consider their submissions in Issue 2.
- iii) On the prayer for a permanent injunction, the plaintiffs relied on the decision of **Akena Christopher v Opwonya Noah, HCCA No. 35 of 2016**, in which it was held that such a remedy is granted to prevent a violation which has been proven at trial.
- iv) On an order for special damages, the plaintiffs relied on the authority of **Besimira Moses v Attorney General, Civil Suit No.143 of 2015**, in which it was held *that special damages must not only be specifically pleaded but must also be proved*” The plaintiffs argued that they pleaded under paragraph 9 of the Plaint an amount of shs.154, 407,830/= and attached receipts. They prayed to be awarded the amount of 166,000,000/= being special damages for fees, power line, compensation for the road passing through the suit land and monthly fees for fish landing sites.
- v) On an order for general damages, the plaintiffs submitted that general damages are given by discretion of court. They prayed for general damages of shs.100 million.
- vi) Concerning interest on prayers (iv)-(v) above, they prayed for an ward of interest at court rate from the date of cause of action until payment in full. They relied on **Section 26(2) of the Civil Procedure Act** which provides that court has powers to award interest if agreed upon” and cases hold that “where no interest is provided, the rate is fixed at the discretion of the trial judge”. The plaintiffs prayed that court rate be awarded to the plaintiffs on items (iv) above.
- vii) On costs, the plaintiffs argued that under **Section 27(2) of the Civil Procedure Act**, costs follow the event, unless court, for good reason, otherwise directs.

Defendants Submissions;

The defendants jointly tackled issue **1, 2 and 3.**

It is the defendant's submission that according to the will of the Late Richard Magunda, at *page 2*, he bequeathed the land in question to the Kibongo sub-clan (*Essiga lya Kibondo.*) They argue that by bequeathing the said land to the Kibongo sub clan, the Late Richard Magunda was fulfilling the instructions of the late Yonasani Lubuye (his father), from whom he inherited the said land as a trustee for the said subclan.

They further submitted that **PW1** who is the substantive head of the sub-clan of Kibongo testified during his re-examination that his late father, Richard Magunda, died testate leaving behind a will that was prepared by the late counsel Balikuddembe Joseph.

The defendants submitted that **PW2** denied the genuineness of the will (**DExh.3**) of the late Magunda which was prepared by Counsel Balikuddembe. He further testified that there was another genuine will whose original or copy he never presented in court, since he neither had or possessed that original will nor its copy. He also denied knowledge of the meaning of the word Kibongo.

The defendants made reference to Sections **101,102, 103, 106 and 111** of the **Evidence Act Cap 6** on who bears the burden of proof. That he who alleges must prove. That the allegations of fraud are very serious so far as they can touch to the integrity of the person and the same must not only be pleaded but should be strictly proved. They submitted that the Plaintiffs had failed to prove that the 1st Defendant was registered on the suit land fraudulently.

The defendants submitted that whereas the Plaintiffs denied the genuineness of the Will of the Late Richard Magunda whose original was tendered in court as an exhibit and in which the suit land was bequeathed to the sub clan, they omitted to present to court the one they referred to as the deceased's genuine will.

In conclusion, the defendants prayed that this court resolves issues 1 and 2 in the negative and issue 3 in the affirmative.

On issue 4;

The defendants submitted that the company was set up to avoid the mischief brought about by registering clan land in personal names to protect it from alienation. It was formed to vest all the property of the Kibongo sub-clan into the company for effective management and administration. The defendants submitted that the plaintiffs failed to prove their alleged flaws in the registration process.

On issue 5;

The defendants submitted that the fraud alleged by the plaintiffs ought not only to have been specifically pleaded but also strictly proved. That the aforesaid legal requirement was not discharged by the Plaintiffs.

The defendants further submitted that the 1st defendant's title cannot be impeached except for fraud which has not been proved. They relied on ***Section 59 of the RTA*** which makes a certificate of title conclusive proof of ownership and ***Section 64 of the RTA Cap 230*** which makes the estate of the registered proprietor paramount save in cases of fraud and ***Section 176(c)*** which protects a registered proprietor of land except in cases of fraud. ***They also referred this court to the authority of Olinda De Souza v Kasamali Manji [1962] EA 756***

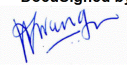
On issue 6;

The defendants submitted that the plaintiffs failed to prove their case against them and that as such the suit should be dismissed with costs.

Plaintiffs' submissions in rejoinder;

Rejoinder to Issue ***1, 2 and 3;***

The Plaintiffs disputed the defendants' claim that the late Yonasani Lubuye Katanyoleka was registered on the certificate of title of the suit land as a trustee for the Kibongo sub-clan. They argued that the above claim is legally unsound because ***Section 59*** of the ***Registration of Titles Act Cap 230*** clear vests ownership of land in the person registered as proprietor. They referred this court to Plaintiff exhibit 6 which is the certificate of title to the suit land.

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The plaintiffs also submitted that had the Late Yonasani Lubuye Katanyoleka been a trustee to the suit land, he should have been registered as one and that the defendants had not produced before court any trust deed under which the deceased was appointed.

Issue 4;

The plaintiffs submitted that the defendants failed to produce the Company register of the first defendant company to show that the plaintiffs in this matter or any other descendant of the late Yonasani Lubuye K save for the 4th defendant, is a member of the first defendant company which is a requirement under *Sections 119 and 119A* of the *Companies Act, 2012 As Amended*.

That the 1st defendant was not incorporated for the benefit of Kibongo sub-clan as the defendants would like the Court to believe.

Issue 5;

The plaintiffs submitted that they had sufficiently discharged their evidential burden on the balance of probabilities. That the transfer of the suit land to the 1st defendant was fraudulent and that the said fraud was committed by 2nd to 5th defendants as promoters of the 1st defendant who later became its members upon registration.

In conclusion, the plaintiffs prayed that this Honourable Court finds that the 1st defendant was not lawfully registered as proprietor of the land comprised in *Ssesse Block 109 Plot 3 Kalangala*.

Issue 6;

The plaintiffs submitted that they have ably proved their case against the defendants in this matter and that this court should find that they are entitled to all remedies sought under the plaint.

Determination by Court;

I have carefully perused the pleadings, the evidence on the record and the submissions of both counsel for the plaintiffs and defendants.

I will resolve the issues 1, 2 and 3 jointly because they are closely related.

- 1. Whether the land comprised in Ssesse Block 109 Plot 3 Kalangala formed part of the personal estate of the late Yonasani Lubuye K?***

2. *Whether the land comprised in Ssesse Block 109 Kalangala formed part of the estate of the Late Richard Magunda?*
3. *Whether the late Yonasi Lubuye K and the late Richard Magunda held/ owned the suit land in trust for Kibongo sub-clan?*

The contention is as to whether the late Yonasani Lubuye Katanyoleka and the late Richard Magunda held the suit land as their personal estate or whether the land was in fact, held by each of them in trust for the Ssiga Iya Kibongo.

The plaintiffs submitted that the land was passed on to the heir of the late Yonasani Lubuye in the will and that a certain portion was left for the administration of the clan council.

The Plaintiffs' claim that according to the evidence that they adduced through their witnesses, the late Richard Magunda treated this land as his personal property.

On the other hand, the defendants claim that the late Yonasani Lubuye bequeathed this land to the Late Richard Magunda with stern instructions to hold it for the sub-clan of Kibongo. They further assert, that these instructions were heeded by the late Richard Magunda in his will when he likewise instructed his heir not to sell that land but keep it for the Kibongo sub-clan.

According to the *Joint Scheduling Memorandum*, it is an agreed fact that the late Yonasani Lubuye K was the registered proprietor of the land comprised in *Ssesse Block 109 Plot 3 Kalangala*. The will of the Late Richard Magunda Katanyoleka is neither an agreed document nor has it been expressly denied by the Plaintiffs.

What stands out is the Plaintiff's annexure D1-2 attached to his plaint filed in this court on 21st August 2014 under paragraph 5(ii). This annexure comprises a Luganda version and the English translation of the testament of the Late Yonasani Lubuye Katanyoleka. According to this testament that was executed way back in 1960, it is clearly stated that the deceased left one square mile of land at Ssesse Tale for the clan. The Plaintiffs appear to have tactically left out its details while preparing their trial bundle and the evidence that they finally admitted on the court record because they realized that it lends credence to the Defendants case. This document is, however, part and parcel to the record of this court.

In addition to the above, the will of the late Yonasani Lubuye Katanyoleka, Luganda and English translation admitted as (**DExI and DEx2 respectively**), particularly at page 2 of DEx2, the late Yonasani Lubuye in the last paragraph on page 2 makes it clear that he bequeathed a Mailo at Tale, Ssesse to his heir to keep and not sell it because it's ancestral land.

This is very instructive in resolving issues **1, 2 and 3**. The foregoing documents and evidence confirms that the Late Yonasani Lubuye Katanyoleka did not treat the square mile at Tale as his personal estate.

In the premises, I hereby resolve issues 1 and 2 in the negative, and issue 3 in the affirmative. It is immaterial how the late Magunda Richard handled or treated the suit land. He inherited the same with specific instructions on how he had to handle it and that is, as ancestral land.

On issue 4; Whether the first defendant company was lawfully registered and incorporated for the benefit of the sub-clan of Kibongo and all its members?

It is submitted by the defendants that the 1st defendant company was established for the objective of managing property belonging to the Kibongo sub-clan. The defendants submitted that a matter like the one before court, where a lineal descendant of the sub-clan head of the Kibongo, comes and claims ancestral land, as part of the personal estate, of his father or grandfather is what prompted them to start the 1st defendant company. That the company was formed to avoid such similar occurrences in the future with regards to clan property.

I agree with this kind of reasoning. I also find it immaterial whether or not all the lineal descendants of the late Yonasani Lubuye appear on the company register as members. It is good enough that one of them, the 4th defendant appears as a member. This, in my view, does not alter the sole objective of the company, simply because some direct descendants of the late Yonasani Lubuye do not appear on the company register. The late Yonasani Lubuye Katanyoleka was the sub-clan head of the Kibongo sub-clan, he left the land to the said sub clan. Accordingly, all sub-clan members are stakeholders in the suit land.

This issue is hereby answered in the affirmative. I hasten to add that it is desirable that the members should go further to convert the 1st Defendant into a trust and register it as such on the title to seal the entity's objectives.

On issue 5; Whether the first defendant was lawfully registered as the proprietor of the land comprised in Ssesse Block 109 Plot 3 Kalangala?

I agree with the submission of counsel for the defendants that if a party alleges the existence of fraud, it must be particularly pleaded and strictly proven. This has been emphasized in a number of decisions (See: **Fredrick Zaabwe v Orient Bank Ltd & 5 Others Civil Appeal No.4 of 2006**) [2007] UGSC 21 (10 July 2007).

The Plaintiffs' allegations that Edisa Nakyeyune (Administrator of the Late Yonasani Lubuye Katanyoleka (as she then was), was coerced into executing a transfer in favor of the 1st Defendant on the suit land have not been proved.

In the premises, I find that the 1st Defendant was legally registered on the suit land.

Lastly, I noticed that plaintiffs made reference to annexure **DEx7** which is nonexistent on the defendant's evidence. The conduct of relying on imaginary evidence is unprofessional, to say the least, and should be avoided.

This issue is accordingly answered in the affirmative.

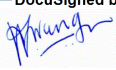
In conclusion, I find that the Plaintiffs are not entitled to the remedies sought. Judgment in this matter is hereby entered in favor of the Defendants and the Plaintiffs suit is dismissed with costs to the Plaintiffs.

I so order.

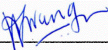
Orders;

1. HCCS No. 48 of 2017 is hereby dismissed.
2. The Defendants are awarded costs of the suit.

Dated and delivered electronically this 20th day of October 2023

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HON. LADY JUSTICE VICTORIA NAKINTU NKWANGA KATAMBA