

THE REPUBLIC OF UGANDA
IN THE HIGHCOURT OF UGANDA AT MASAKA

CIVIL SUIT NO. 33 OF 2019

NAKYAJJA FORTINANTA ::: PLAINTIFF
(Widow and Administrator of the estate of the Late Antonio Nsubuga)

VERSUS

- 1. KIZITO HENRY**
- 2. NANZIRI VENA**
- 3. SSERUGUNJU PETERO**
- 4. NANKYA NOELINE**
- 5. SENKUMBA RICHARD**
- 6. THE COMMISSIONER LAND REGISTRATION ::::::::::::::::::::::::::::::: DEFENDANTS**
(Administrator of the estate of the Late Dominiko Sajjabi)

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT.

BACKGROUND

The Plaintiff instituted this suit against the defendants for recovery of a Kibanja situate at Misaali village- Kako, Masaka district belonging to her and the estate of the Late Antonio Nsubuga which also constitutes her matrimonial home.

The Plaintiff’s case is that she married Antonio Nsubuga (deceased) on the 27th of August 1966 and that the two established their matrimonial home on the suit land. The Plaintiff contends that the Late Antonio Nsubuga and her, lived on the suit land, cultivated and enjoyed quiet possession of the same for over 34 years and that the latter left her on 5 acres of the land forming her matrimonial property when he died in 2000.

It is the Plaintiff’s case that in 2019, the 1st Defendant descended on to the suit land with his agents, cut down all crops and trees on the land. The Plaintiff also contends that prior to the above event of destruction of crops and property, the 1st defendant illegally processed and obtained registration

of the certificate of title over the suit Kibanja in 2012 which was comprised in Buddu Block 325 Plot 1809 without her consent.

In addition to the above, the Plaintiff contends that upon learning about the 1st Defendant's unlawful registration on her Kibanja, she called a family meeting which resolved to pay the latter **UGX. 15,000,000/= (Uganda Shillings Fifteen Million Only)**. This is a sum of monies that the 1st Defendant claimed as a refund for putting the kibanja/ land under registration; creating a title over the suit Kibanja.

The Plaintiff also maintains that the 1st Defendant was paid **UGX. 15,000,000/=** to transfer the suit land into the names of the family members but that he instead unlawfully subdivided it to create **plots 2266, 2267, 2268, 2269, 2270 & 2271**. The 1st Defendant then registered these plots in the names of Nankya Noelina, Ssenkumba Richard, Sserugunju Petero, Nanziri Vena and Kizito Henry respectively.

In their written statements of defences, the defendants denied the Plaintiff's claims. They maintain that the suit property did not form part of the Plaintiff's matrimonial property. They contend that the Plaintiff was given another piece of land at Kako by the Late Antonio Nsubuga, where she currently stays.

The Defendants also stated that the suit land was given to the Late Antonio Nsubuga's children during his life time. The 1st Defendant stated that the Late Antonio Nsubuga's issues, who are his joint defendants, (2nd to 4th and his heir, the 5th) defendants instructed him to get registered on the suit Kibanja.

The 1st Defendant further claims that the said issues of the Late Antonio Nsubuga paid him in land (Plot 2271) for his services. The Defendants denied destroying the Plaintiff's crops on the suit land. The (2nd, 3rd and 4th) defendants stated that the crops which were on the suit land belonged to them and not the Plaintiff.

Against the above background, each of the parties prayed to this honourable court to resolve the issues for trial in their favor.

Representation:

The Plaintiff was represented by **M/s ASPA Advocates**

The Defendant was represented by **M/s Nyanzi & Nyanzi Advocates.**

ISSUES FOR TRIAL.

At scheduling the parties agreed to the 5 issues, highlighted below;

- 1. Whether the suit Kibanja/land belongs to the Plaintiff as a widow and administrator of the estate of the Late Antonio Nsubuga?*
- 2. Whether the 1st Defendant fraudulently procured registration of the suit land/Kibanja into his names?*
- 3. Whether the 1st, 2nd, 3rd, 4th and 5th Defendants illegally subdivided and shared the suit Kibanja/land among themselves?*
- 4. Whether the defendants jointly and severally destroyed the crops, gardens and property of the Plaintiff?*
- 5. What remedies are available to the parties?*

When the parties closed their respective cases, they were directed to file written submissions. Only the Plaintiff complied with the directive. Her submissions will be referred to from time to time as and when deemed necessary.

DETERMINATION BY THE COURT.

Issue 1: Whether the suit Kibanja/land belongs to the Plaintiff as a widow and administrator of the estate of the Late Antonio Nsubuga?

It was submitted for the Plaintiff that, as per her pleadings and testimony, since she worked as a domestic assistant at Masaka Hospital and she contributed 50% towards construction of the matrimonial house, this Court should find that the suit Kibanja now passed to her as widow and Administrator of the Late Antonio Nsubuga.

Both Plaintiffs and defendants' witnesses testified that the Plaintiff is the widow of the Late Antonio Nsubuga. The defendants' witnesses also testified (during examination though contrary

to what is in their witness statements), that the Plaintiff and the deceased had lived on the suit land which measured 5 acres for a long time and that their matrimonial home is on the suit land.

Both Plaintiffs' and Defendants' witnesses also testified that the suit land also bears the family's burial grounds and that even the Late Antonio Nsubuga was buried on the same land.

Whereas the suit property was originally owned by the Late Antonio Nsubuga, having inherited it from his father, once he made a decision to convert it into his matrimonial home and he allowed the Plaintiff to make a contribution towards its development, the latter acquired an interest in it.

The Late Antonio Nsubuga election to be buried on the suit land is an important fact. This conduct implies that he desired for his estate to hold an interest in the suit land, after his death. The other factor to consider is the fact that he allowed his wife to contribute to the construction of a matrimonial home on the property. In her testimony, she worked as a domestic assistant at Masaka hospital and because she had more stable and consistent income, contributed over 50% to the construction of the new house which replaced the mud house they found in the kibanja. Since the Plaintiff and the Late Antonio Nsubuga decided to construct their matrimonial property together on the suit land, they intended to own the same as tenants in common. I say tenants in common because the land is also used as the family's burial ground. This negates, a joint tenancy in which the entire estate passes on to the surviving owner at the death of the other.

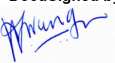
Unlike joint tenancies where each co-owner is equally and "wholly entitled on the whole" to the estate (*See Burton vs. Camden LBC [2000]2 AC 399*), in tenancies in common the co-ownership arrangements are such that each of the co-owners holds a distinct share, or proportion of the property. *See the Hon. Mr. Justice Mubiru Stephen in Auma Lillian vs. David Livingstone Lakony High Court Civil Appeal No. 0012 of 2019 (unreported)*

Furthermore, unlike joint tenants, with tenancies in common ownership interests do not have to arise at the same time. One person may own the property to begin with and then transfer or sell or permit another person to acquire an interest in the same property at a later date. This is what happened when the Late Antonio Nsubuga, having inherited the suit land, later on accepted the Plaintiff's contribution to the construction of their matrimonial house. This conduct of the Late Antonio, directly enabled the Plaintiff to acquire a tenancy in common interest in the suit property.

In conclusion, it is this court's finding that the suit land is owned by both the Plaintiff and the estate of the Late Antonio Nsubuga as tenants in common. In the event that the Plaintiff, so desires, she may sever these two interests. She may create her personal estate out of this property by registering half of the estate property into her names and the residue which must include land with burial grounds be registered in her capacity as Administrator of the Late Antonio Nsubuga in trust for all the beneficiaries in the estate.

This issue succeeds in part to the end that the suit property is owned by both the Plaintiff and the estate of the Late Antonio Nsubuga as tenants in common with equal shares.

Issue 2; Whether the 1st Defendant fraudulently procured registration of the suit land/Kibanja into his names?

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The testimony of Pw, the Plaintiff is that after her husband's death, the family members held a meeting in which it was decided that the land tenure would be elevated from a kibanja holding to registered land and Kizito Henry, the 1st Defendant would manage it. A plot of land would be sold to raise funds for the transaction and Sr.Nankya would spearhead the sale. According to Pw1 and Pw2, instead, the 1st Defendant got himself registered on the suit property.

It was submitted for the Plaintiff that the witness statement of Rev. Sr. John Chrisestom Batenga in paragraphs 5,6,7,8, 16 and 17 discloses that when the family discovered that the 1st Defendant had fraudulently transferred the suit land into his names, they called and rebuked him for the same. That it was further agreed at that meeting that the 1st Defendant signs transfer forms in the names of family trustees at a consideration of Ugx 15,000,000/-. Part of the land was sold to raise the 15,000,000/- but the 1st Defendant reneged on his undertaking and instead got himself registered on the title.

The Plaintiff further argued that by registering the suit estate land into his names, the 1st Defendant assumed the duties of the Administrator of the estate of the Late Antonio Nsubuga which conduct is fraudulent.

Fraud has been defined by the Black's law dictionary, 6th Edition page 660 as "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing or belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by 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...”

In his testimony on the court record, the 1st Defendant admitted that he purchased the *mailo* interest in the suit land because his cousins were not able to do so and that he agreed with them that he would process the titles and later on transfer to each one of them their respective parcel. He would be compensated with a small portion from each one’s kibanja and this is what he did. He got registered as proprietor of the suit land and transferred parts of it to some of the beneficiaries of the estate and other parts to himself. This was in total and complete disregard of the administrator of the estate of the Late Antonio Nsubuga.

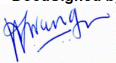
When asked as to whether he had a memorandum of understanding with the family to do the things he did, he said there was a memorandum of understanding but that he did not have a written deed to that effect. He also admitted that he did not get the permission of the Plaintiff to transfer the suit land into his names.

The Plaintiff testified that she only discovered that the 1st Defendant had transferred the suit land into his names when a bank official approached her and informed her that the latter (as registered) proprietor had applied for a loan against the suit land as security.

I find that the 1st Defendant’s conduct of transferring the suit property into his names was intended to create an advantage against the Plaintiff with the resultant effect of disenfranchising her of her registrable interest and removing her decision making power over the land. This conduct of concealment of the titles and transfer of the land into the 1st Defendant’s names and the coercive effect that it had on the Plaintiff connotes fraudulent conduct on the part of the 1st Defendant. I also agree with the Plaintiff’s submission that in registering the suit estate property into his names, the 1st Defendant assumed the duties of Administrator for the estate which conduct amounts to fraudulent misrepresentation.

In conclusion, since the registration of the 1st Defendant was procured through coercion and without the consent of the Plaintiff (a tenant in common to the suit property), the former’s registration was procured fraudulently.

This issue is therefore, answered in the affirmative.

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Issue 3: Whether the 1st, 2nd, 3rd, 4th and 5th Defendants illegally subdivided and shared the suit Kibanja/land among themselves?

The Plaintiff submitted that the subdivision and sharing of the suit plots, 2266,2267,2268, 2269 & 2271 was done without her consent nor approval yet she contributed significantly towards the development of the matrimonial property.

The Plaintiff prayed that the Court finds the subdivision unlawful.

S.191 of the Succession Act Cap. 162 provides that except as hereinafter provided but subject to Section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any Court of Justice, unless Letters of Administration have first been granted by a court of competent jurisdiction.

Both the Plaintiffs and Defendants' witnesses testified that the suit land belonged to the Late Antonio Nsubuga who lived on the same with the Plaintiff.

At the time the suit land was subdivided and transferred into the names of the Defendants in issue, the Late Antonio Nsubuga had long died and this Honourable Court had even been pleased to appoint an Administrator to his estate. None of the above defendants is an Administrator to the estate of the deceased.


Since the law as cited above, has prohibited persons not being Administrators of the estates of deceased persons from dealing in their properties, it automatically follows that whatever dealings, transfers, subdivisions and sharing amongst the said Defendants, was unlawful.

In their pleadings and witness statements, the defendants who are the lineal descendants of the Late Antonio Nsubuga, argued that during his lifetime, the deceased gave them shares out of the suit land. This argument was not supported by any documentary proof of gift deeds *intervivos* but even if the same had been adduced, they would be of no legal effect because, a spouse cannot give out a part of matrimonial property without the other spouse's consent. ***See Section 39(1)(b) of the Land Act prohibits a spouse from entering into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land, except with the prior written consent of the other spouse. See also The Hon. Mr. Justice Godfrey Namundi in HCCS No. 150 of 2016 Herbert Kolya vs. Ekiriya Mawemuko Kolya (Family Division, unreported) in which he held that it was***

unlawful for the deceased to bequeath the family matrimonial home without his spouse's consent.

The above provision of the Land Act and case law prohibits any dealings in family land/property by way of transfer to any person without the consent of the other spouse. ***Emphasis mine.*** In any event, even where the lineal descendants of Antonio Nsubuga claimed proprietary interest in the suit land, it had to be obtained legally.

This issue is accordingly answered in the affirmative.

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Issue 4: Whether the defendants jointly and severally destroyed the crops, gardens and property of the Plaintiff?

The Plaintiff testified that her crops were cut down by the Defendants.

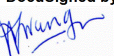
Counsel for the Plaintiff submitted that as per the Plaintiff's pleadings and witness statement, the Defendants through their agents and workers destroyed the former's crops worth UGX. 80,000,000/=

It was further argued for the Plaintiff that the said destruction of crops amounts to deprivation of the Plaintiff of her right to own property, which is protected under Article 26 of the Constitution of Uganda 1995 as amended.

In their witness statements, the Defendants' witnesses denied having destroyed the crops, gardens and property of the Plaintiff.

The Defence witness, however, acknowledged during cross examination that the Late Antonio Nsubuga left the Plaintiff on the suit land which measured approximately 5 acres. Key among the said defence witness are Nanziri Venna (Dw2) and Petero Sserugunju who both testified during cross examination that indeed upon his demise, the Late Antonio Nsubuga left his widow (the Plaintiff), on the suit land, which is her matrimonial land that measures about 5 acres.

The Defence witnesses admitted that the Late Antonio Nsubuga left the Plaintiff on the suit land. The same Defence witnesses made earlier, untruthful statements. In their witness statements they stated that the matrimonial home of the Plaintiff is not on the suit land but elsewhere in Kako. During cross examination, the said defence witnesses contradicted the earlier statements and

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testified that indeed the Plaintiff and the deceased lived in their matrimonial land at Misaali. Owing to the contradictions and untruthfulness in the defence witnesses' testimonies, I am more inclined to believe the Plaintiff that indeed when her husband died and left her on the suit land, she planted crops and that these crops were destroyed by the Defendants.

In conclusion, this issue is likewise answered in the affirmative.

Issue 6: What remedies are available to the parties?

The Plaintiff prayed for general damages and argued that she had been subjected to stress and strain at her old age through loss of land from which she derived sustenance. She buttressed her submission with the authority of *Lord Macnaghten in the case of Strooms vs. Hutchinson (1905) AC at page 525 in which general damages were defined to be the direct natural or probable consequences of the act complained of.*

The Plaintiff in her witness statement prayed for general damages of **UGX. 150,000,000/=** I have applied my mind to the weight of inconvenience that the Plaintiff was subjected to when she was evicted from her matrimonial property from which she derived sustenance. I have found the inconvenience to be grave enough to warrant a compensation in damages but I also find the amount claimed of UGX. 150,000,000/= excessive. I hereby make an award of **UGX. 70,000,000/= (Uganda Shillings Seventy Million only) in general damages.**

The Plaintiff also prayed for special damages of UGX. 80,000,000/= in respect to destroyed beans, Cassava, Maize, Coffee trees, Banana and piggery.

The rule on awarding special damages is that they must be specifically pleaded and satisfactorily proved. See *Uganda Breweries Ltd vs. Uganda Railways Corporation Supreme Court Civil Appeal No.6 of 2001; Kyambadde vs. Mpigi District Administration [1983] HCB 44; and Attorney General vs. Lutaaya Supreme Court Civil Appeal No. 16 of 2007.*

In the instant case, the Plaintiff simply quoted figures and quantities of money lost and items destroyed without availing court with a scientific valuation of what was really lost to establish actual loss.

In fact, when the Plaintiff was asked if she ever evoked services of an agricultural officer to assess and arrive at the correct quantum of what she allegedly lost, she honestly answered that she did

not. This Honourable Court was left wondering, how exactly she arrived at the figures that she finally put before it in her claim for special damages, recoverable.

I therefore find that the claim for special damages has not been sufficiently proved.

The Plaintiff prayed for Costs of prosecuting the suit. *Under S.27 of the Civil Procedure Act*, this Court is empowered to use its discretion to award or deny with a justification, costs. In the circumstances of this case, I find it appropriate that the Plaintiff who has successfully prosecuted the instant suit be reimbursed her expense on the same. The Plaintiff is therefore awarded costs of the suit.

According to the pleadings and submissions of the Plaintiff, her Advocates had prayed that the titles be wholly cancelled and she retains the original kibanja (unregistered land) interest as was the case before the impugned fraudulent registrations. I find this relief sought and approach unsustainable for the reason below;

- i) The above prayer, if implemented, would affect the former registered proprietor (The Administrators of the estate of the Late Joseph Kasibante) without affording them hearing because they are not a party to the suit.
- ii) The plaintiff earlier on consented to selling part of the now registered land to some individuals. These individuals who are not party to this suit would clearly be affected by the decision of Court, cancelling their titles and which is also contrary to the Plaintiff's intentions, without affording them a hearing.
- iii) The Plaintiff agreed and contributed to the elevation of the *kibanja* to *mailo*. Her contention only regards the 1st Defendant's registration on the title as proprietor and the subsequent subdivisions and distributions.

The Plaintiff also sought several other orders and declarations some of which are repetition. I hereby grant the declarations below;

Orders:

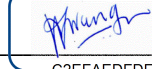
- 1) ***The Plaintiff is granted an Order for recovery of the Kibanja now comprised in the suit plots of land at Misaali village – Kako district which forms part of the estate of the Late Antonio Nsubuga and her matrimonial property.***

- 2) *A declaration issues that the defendants illegally intermeddled with the estate of the Late Antonio Nsubuga.*
- 3) *An order issues for cancellation of the Defendants' names from Buddu Block 325 now 1809 and now subdivided into Plots 2266, 2267, 2268, 2269, 2270 & 2271.*
- 4) *An order issues directing the 6th Defendant to register Buddu Block 325 Plots 2266, 2267, 2268, 2269, 2270 & 2271 into the Plaintiff's names in her capacity as Administrator of the estate of the Late Antonio Nsubuga.*
- 5) *A permanent injunction issues restraining the defendants from further trespassing and intermeddling in the estate of the Late Antonio Nsubuga.*
- 6) *An eviction order issues against the Defendants and their servants, agents, persons claiming under them or deriving title under them from the suit land.*
- 7) *The Plaintiff is awarded UGX. 70,000,000/= (Uganda Shillings Seventy Million Only) in general damages.*
- 8) *The Plaintiff is awarded Costs of the suit.*

I so order.

Dated and delivered electronically at Masaka this 2nd day of April, 2024.

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Victoria Nakintu Nkwanga Katamba, Judge.