

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT FORT PORTAL  
CIVIL SUIT No. 23 OF 2009**

**MRS.HALIMA NAKIVUMBI WAKAABU }} :::::::::::::::::::::::::::::::::::::::  
PLAINTIFF**

**VERSUS**

**THE REGISTERED TRUSTEES OF }}  
FORT PORTAL CATHOLIC DIOCESE }} :::::::::::::::::::::::::::::::::::::::  
DEFENDANT**

**BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO**

**JUDGMENT**

The Plaintiff (a female adult) has brought this suit against the Defendant Board of Trustees (a body corporate); seeking a declaration that she is the lawful owner of a plot of land situate at West Division, Fort Portal Municipality, now comprised in freehold certificate Register Volume 659 Folio 7 (LWFP 6347 (hereinafter the suit property) and registered in the name of the Defendant, cancellation of that title, eviction order, general and exemplary damages for trespass, permanent injunction, and costs of the suit. She alleges that the Defendant fraudulently acquired the suit property since it did so with knowledge of her proprietary interest in it.

In its written defence, the Defendant denied all the adverse claims the Plaintiff made against it in the plaint; contending instead that it was lawfully allocated the suit property (comprised in Freehold Register Volume 659 Folio 7, otherwise known as Plot 2 Lugard Close at Kagote) by the Kabarole District Land Board when it was available for such allocation, with the Plaintiff having no legal or equitable claim thereto. It specifically denied the allegations of fraud made against it in the plaint; and pleaded with Court to dismiss the suit with costs.

At the scheduling conference, the parties agreed that: –

- (i) The Defendant is holder of a freehold title to the suit land effective from 24<sup>th</sup> July 2009.
- (ii) Prior to the registration, the suit land was claimed by the Plaintiff and one Asaba Selvano.

The issues agreed upon by the parties hereto, and proposed to Court to frame for determination are: –

1. Whether the Defendant procured registration with notice of the Plaintiff's interest; and with fraud.
2. What remedies are available to the parties?

Either party adduced evidence, with relevant documents some of which were admitted by consent, in support of their respective contention. The Court visited the locus in quo to acquaint itself with the suit property, and thereby have the opportunity to better appreciate the evidence adduced with regard to the property, as well as the surrounding area. A sketch of the area is herein contained. Upon the close of the hearing of the suit, the counsels for the parties filed written submissions as directed by Court to do so; and attached useful authorities for ease of Court's work. They maintained the parties' respective contention in their pleadings as supported by the evidence adduced in Court.

**Issue No. 1: – Whether the Defendant procured registration of the suit property with notice of the Plaintiff's interest in it; and with fraud.**

The parties agree that at the time the Defendant was registered as freehold owner of the suit land, both the Plaintiff and Asaba Selvano claimed proprietary interest in it. It is therefore necessary first, to establish whether the Plaintiff had the proprietary interest she claimed she had in the suit property, and the nature of that interest; and second whether, at the time of acquiring the

registered interest in the suit property, the Defendant had notice of the Plaintiff's interest in it. Then finally, whether there was fraud in the Defendant's acquisition of the registered interest.

**(a) Whether or not the Plaintiff had proprietary interest in the suit land.**

Through his letter dated the 22<sup>nd</sup> August 1995 (exhibit **PE2** and consent exhibit **CE1**), the Town Clerk Fort Portal Municipal Council informed the Plaintiff that the Council had, on the 12<sup>th</sup> July 1995, allocated to her '*unsurveyed plot on Kaija Road between Campsite and Asaba's area for a Nursery School.*' This letter was copied to the Senior Staff Surveyor, Lands & Surveys Department. Then, vide exhibit **PE1**, the Town Clerk sought planning advice from Chief Physical Planner (Mid Western) for that land indicated on a site print attached. By letter dated the 24<sup>th</sup> August 1995, the Commissioner of Land Administration as agent of Fort Portal Municipal Council served the Plaintiff with a Lease Offer Form (consent exhibit **CE2**).

As is shown by exhibit **PE4**, the site location plan of the plot was approved by Fort Portal Municipal Council on the 25<sup>th</sup> May 1999. Alinda Peter (DW1), Secretary Kabarole District Land Board, explained that a site location plan is prepared by the Physical Planning Department. Court witness Alfred Itorot Ochen (CW1) who was the Senior Staff Surveyor Kabarole at the time of the allocation, testified that the land allocated to the Plaintiff was surveyed in February 1996, plotted in Lands Office Fort Portal, then forwarded to the Commissioner Surveys & Mapping. The letters (consent exhibits **CE4** and **CE7**) he wrote to that Commissioner, shows the land was surveyed under I/S No. A7062, the survey approved, and deed plan issued showing the plot as No. 6 Kaija Road, Fort Portal Municipality.

He explained that premium for land allocated, is determined after the land has been surveyed, with cadastral boundaries known. The receipt (exhibit **PE3(b)**) issued by Fort Portal Municipal Council shows that on the 27<sup>th</sup> September 1999, the Plaintiff completed payment of the premium and ground rent levied on the land allocated to her; and Mr. Alinda Peter, (DW1), admitted in cross examination that this payment was for the entire land allocated to the Plaintiff (which included the suit property). The Plaintiff testified that after the survey of the land, Selvano Asaba was discovered to have encroached onto it. She then sold to Asaba, the portion (the suit property) he had encroached upon.

However, in 2006, she considered Asaba's default in satisfying the terms of the sale agreement they had entered into ten years before, a repudiation of that sale. She therefore repossessed the suit property; for which Asaba took her to Court. However, the Court only awarded her damages for breach of contract, on top of the contractual sum owing to her from Asaba; but not the recovery of the suit property she had effected. She appealed to the High Court; and while the appeal was still pending, the Defendant applied for, was allocated the suit property, and obtained a registered title to it; and then attempted to take possession of it from her, but was unsuccessful.

It is against this backdrop that I have to determine the contentious issues herein. The uncontested evidence, adduced by the Plaintiff (PW1), Alinda Peter (DW1), and Court witness Alfred Itorot Ochen (CW1), is that the land allocated to the Plaintiff in 1995, included the suit property. It is also not in dispute that the Plaintiff did not acquire a registered title for the whole of the land allocated, as the suit property had to be excised out of the original land allocated to her. What is in contention is whether at the time the Defendant applied for the suit land on 10<sup>th</sup> April 2008, and were offered the same on 28<sup>th</sup> August 2008, resulting in their acquisition of the registered title on 24<sup>th</sup> July 2009, the Plaintiff still had any interest in it.

The evidence by Alfred Itorot Ochen (CW1) is that it was on his advice that the Plaintiff accepted to have the suit land excised out of the original allocation to her, to enable her acquire a title for the part over which there was no dispute; while awaiting the resolution of that dispute. It was this, which prompted him to write the letters (consent exhibits CE4 and CE7) to the Commissioner Surveys & Mapping, requesting for adjustment of the earlier survey. Alinda Peter (DW1) testified that Staff surveyors are agents of the controlling authority; and they offer technical advice and services to the authority with regard to land held by it. At the locus in quo, Alfred Itorot Ochen (CW1) explained that: –

*“When a piece of land applied for is left out of the title, the applicant has to apply for it again. When premium has been paid for land and part of it is excised off, the part excised off has to be applied for again.”*

Fr. George Ahairwe (DW2) however stated in his testimony in Court that the Defendant is the owner of the suit property from the moment it paid the premium for it, because the District Land

Board assured them that upon paying the premium, the land would become theirs as the Plaintiff had not paid premium for the land.

In the case of *Ismail Jaffer Allibhai & 2 Ors vs. Nandlal Harjivan Karia & Anor; S.C. Civ Appeal No. 53 of 1995*. [1996] IV KALR 1, at p. 13, Oder J.S.C. reproduced a principle of law from *THE LAW OF REAL PROPERTY*, by R.E. Megarry and H.W.R. Wade, 3<sup>rd</sup> Edn., at p. 582, which can neatly be summed that in a sale of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable proprietary interest in it enforceable against third parties; while on the other hand, the legal title remains with the vendor who becomes a trustee holding the property in trust for the purchaser, until the final payment when the legal title passes to the purchaser.

It is therefore clear that upon payment of the premium and ground rent levied by the controlling authority, the Plaintiff duly acquired proprietary interest in the land she was allocated; and all that remained was the processing of the registered title for it. However, since for some technical reason, part of the land had to be excised out after she had already paid the premium and ground rent for, she still had equitable interest in the portion excised out of the land originally allocated to her; and was entitled to acquire a separate title for the portion excised out.

From the evidence of Alfred Itorot Ochen (CW3), the adjustment of the survey of the land allocated to the Plaintiff was done with her knowledge and blessing; upon his technical advice. It is noteworthy that the two letters (consent exhibits CE4 and CE7), which CW3 wrote to the Commissioner Surveys and Mapping for adjustment of the survey, were copied to the Plaintiff; but not to the controlling authority. This could only have been due to the Surveyor's recognition of the Plaintiff's equitable interest in the whole of the land allocated to her, after she had paid the premium and ground rent; and that the excising of the suit portion out of it did not extinguish her proprietary right over the portion excised out.

Alfred Itorot Ochen CW3 was of the view that it was upon the resolution of the dispute between Asaba and the Plaintiff that the controlling authority should then allocate the suit plot. I do not share the view that the Plaintiff would have to apply afresh for an allocation of that portion excised out of the original allocation after she had paid premium and ground rent, hence had acquired equitable interest therein, and only awaiting registration. She was entitled to apply for a

separate title (not allocation again) of the suit land, as the allocation to her would still be valid. There is no evidence that when the suit land was excised out of the original allocation to the Plaintiff, it reverted back to the controlling authority either under the terms of the offer, or by law.

When Asaba paid a deposit to the Plaintiff for the suit land (exhibits ***PE5(a)*** and ***PE5(b)***), he acquired only an equitable interest in it while the Plaintiff retained legal interest therein. He could only process a title thereto in his name upon clearance by the Plaintiff who was known to the controlling authority as the allocatee with an equitable interest therein. The transaction between Asaba and the Plaintiff was exclusively a matter between the two. Indeed, in the suit between the two in ***Fort Portal Magistrate Court's Civil Suit No. 11 of 2006***, which was on the effect of repudiation of contract, which I decided on appeal in ***Fort Portal High Court Civil Appeal No. 64 of 2008***, there was no interest of the controlling authority in issue at all.

Alinda Peter (DW1) testified in the instant suit before me that from his record, the suit land was not allocated to Asaba; hence he sold to the Defendant land which was not his and therefore, when the suit plot was allocated to the Defendant, it was available for allocation. Alfred Itorot (CW3) also testified that he surveyed the suit plot when it was not allocated to Asaba. Unfortunately, the evidence by the two witnesses in this regard cannot stand in the face of the clear evidence of application by Asaba for the plot (consent exhibit ***CE5***), and the written request dated the 22<sup>nd</sup> October 2002 (consent exhibit ***CE6(a)***) made by Mr Itorot (CW3) himself to the Commissioner Physical Planning to plan a road access to the suit land and another plot applied for by Asaba as shown in the print (consent exhibit ***CE6(a)***).

Fr. George Ahairwe (DW2) also revealed that when they were allocated the suit land, the instruction to survey was in the name of Asaba; something he was not comfortable with. He denied that Asaba had sold the suit land to them, although Alinda Peter (DW1) testified that Asaba sold the suit land to the Defendant; a transaction which he considered illegal. I will revert to this later in my judgment. It is however quite apparent from the evidence that Asaba had commenced the process of registering the suit land; and had already secured instructions for its survey.

It does appear it was due to the, as yet, unresolved dispute with the Plaintiff that Asaba's attempt at acquiring the registered title to the suit land floundered. Therefore, given that there was no provision in the terms of offer of the land to the Plaintiff (which included the suit portion) for revocation by the controlling authority of the offer where the Plaintiff transferred the land or any part of it to a third party, and in fact no such revocation was effected, and in 2006 well before the suit land was allocated to the Defendant she took it back from Asaba, I find that her equitable proprietary interest in the suit property was fully extant at the time the property was allocated to the Defendant.

**(b) Whether the Defendant had notice of the Plaintiff's interest in the suit land.**

On this, the evidence adduced by the Plaintiff was that she had accepted the repudiation of the contract by Asaba Selvano and taken physical possession of the suit land in 2006 by causing it to be fenced off, and converted into her school-girls' playground; for which Asaba Selvano sued her in Court. Her Deputy Francis Byaruhanga (PW2) corroborated this and explained that in 2006, acting on the directive of the Plaintiff, he personally converted the suit land into a netball playground, and constructed goal posts thereon; and the school-girls used it up to 2009, when some people intruded onto it and forcefully constructed barbed wire round it and also destroyed the goal posts.

Second, the Plaintiff's uncontroverted evidence is that her neighbour to the suit land Sister Goretti Kabakaali from Fort Portal Diocese used to attend the Court proceedings between Selvano Asaba and herself over this land, between 2006 and 2009; and, as shown by exhibit ***PE9(a)***, the Rev. Sister signed as witness to the cash deposit Asaba made into Court in satisfaction of the decree, and as well of the withdrawal of that money from Court (exhibit ***PE9(b)***). Third, the Plaintiff testified that in April 2008, she vehemently objected to any inspection of the suit land by the West Division Fort Portal Municipality Land Committee headed by its Chairman David Mwesige; and was assured that the on-going inspection exercise did not include the suit land, but the ones adjacent to it instead.

This was corroborated by the said Chairperson David Baguma Mwesige himself, who in his testimony as Court witness (CW2) stated that on the 9<sup>th</sup> April 2008, he inspected two lands applied for respectively by the Defendant and Virika Pharmaceuticals; and on approaching the

Plaintiff to sign, she was quite agitated and expressed her objection to any inspection of the school-girls' playground over which she was in Court with Asaba. He assured her that the two lands for inspection were the ones neighbouring the school playground, and the Committee merely wished her to sign as a neighbour to the two lands. She was satisfied by this explanation but still declined to sign.

Court witnesses, Geoffrey Billy Bwangi (CW3) and Peter Sande Rusoke (CW4), both members of the said Land Committee, corroborated the evidence that the Plaintiff had forcefully expressed her objection to their inspecting the school-girls' playground on which there were goal posts. Fourth, Fr. George Ahairwe (DW2), a member of the Defendant Board of Trustees and, by his admission, was involved in the acquisition of the suit land, testified that the Diocese was aware that Asaba had sold the suit land to Virika Pharmaceuticals which the Diocese has shares in; and was also aware that a dispute had however arisen over the land sold, and the Plaintiff was in Court with Asaba over it. He admitted having seen documents showing payments to Court by Asaba, witnessed by Sr. Kabakaali.

Fifth, the Plaintiff's written instructions to her lawyer, dated 24<sup>th</sup> November 2008 (exhibit ***PE7***), to appeal against the trial Court decision, was copied to the Resident District Commissioner, Secretary District Land Board, and Chairman Land Committee West Division. It is manifest from the various stamps on the Plaintiff's copy of the letter that the officials received the letter. Indeed Alinda Peter (DW1) admitted having received his copy. Sixth, the uncontroverted evidence by the Plaintiff is that in August 2009, the Resident District Commissioner (RDC) Kabarole, summoned her to his office where she found him with Sisters Goretti Kabakaali and Turyasayo.

She stated that the RDC showed her a freehold title for her school-girls' playground and informed her that this land she had been claiming in Court, the Sisters had acquired a title to as Registered Trustees; and two days after this, Sister Goretti Kabakaali, with the police and others, came to fence off the playground, but she objected to it. Seventh, in ***Fort Portal Chief Magistrate's Court Civil Suit No. 011 of 2006***, instituted by Asaba Selvano against the Plaintiff herein, for recovery of the suit land, Asaba Selvano adduced evidence that he had conditionally sold the suit land to the Sisters of Virika Pharmaceuticals, pending the issues he had to resolve with the Plaintiff herein.



In my judgment in the appeal from that case by the Plaintiff herein in **Fort Portal High Court Civil Appeal No. 0064 of 2008**, I said the following, with regard to that conditional sale by Asaba the Plaintiff/Respondent then: –

*“From the evidence adduced by the Plaintiff, the suit land is still available as the sale to the Sisters of Virika Pharmacy was conditional; it having been done with a caveat by the Plaintiff himself (as seller), that the land sought to be demised to them was encumbered; hence whatever interest they could have acquired therein was subject to that notice.”*

In the instant case before me, the sale by Asaba to Virika Pharmaceuticals has also featured, although Fr. George Ahairwe (DW2) contends that the sale was not to the Defendant. He however admitted having been aware of the Court suit between the Plaintiff and Asaba over the suit property when the Defendant applied for it. Further, the Plaintiff’s objection to the Division Land Committee, which Peter Sande Rusoke (CW4) a member of the Committee testified was led in its inspections of the two plots in the area by the Sisters – whose involvement in the payment of the deposit in Court by Asaba in the suit between him and the Plaintiff, Fr. George Ahairwe (DW2) admitted having been aware of – was notice to the Defendant, through its agents the Sisters, that the suit property was contested.

Equally, in causing the RDC to summon the Plaintiff to notify her that the suit property now belonged to them, and in taking the police to have the suit land fenced off, the Sisters betrayed the fact that they were either the agents of the Defendant or were themselves the beneficial owners of the suit property; and also that as the Plaintiff’s neighbours, they were aware of her interest in it as well as her being in possession, when the Defendant acquired it. It therefore follows that the application for, the offer, and the letter (consent exhibit **CE15**) dated 20<sup>th</sup> April 2009 by Alinda Peter the District Lands Officer to the Commissioner Land Registration to prepare a freehold title for the Defendant, were all done with the knowledge on the part of the Land Board and the Defendant that the suit land was fettered by the Plaintiff’s adverse claim of proprietary interest.

From the totality of the instances pointed out above, I have no difficulty in finding that the Defendant had ample notice, both before the allocation of the suit land to it by the controlling authority and before its being registered as freehold proprietors thereof, that the suit land was fettered by the Plaintiff’s adverse claim.

(c) **Whether there was fraud in the Defendant’s acquisition of the registered interest in the suit property.**

The basis of the Plaintiff’s claim that the Defendant acquired the suit land fraudulently is that it did so with the full knowledge that the land had been allocated to her, of her having physical possession, and her being in Court with Asaba Selvano over it. The Defendant denied all the allegations of fraud made against it by the Plaintiff; contending that it acquired the suit land from the District Land Board when it was available for allocation; with the Plaintiff having no lawful claim whatever whether legal or equitable over it. An action for recovery of land, founded on fraud, is provided for in section 176 of the Registration of Titles Act (RTA) (Cap. 230); the relevant part which protects a registered proprietor against ejectment states as follows:

*‘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 deriving otherwise than as a transferee bona fide;*

(d) *the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of the other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide for value;*

(e) ... ..’

From the above provisions of the Act, only a person deprived of land through fraud, which includes misdescription of the land in the registered title, can bring an action against the person registered as proprietor of that land under the Act. Court has to be satisfied that the registration was fraudulently done; and as was stated by Wambuzi C.J. in ***Kampala Bottlers Ltd. vs.***

**Damanico (U) Ltd.; S.C. Civ. Appeal No. 22 of 1992**, for a plea of fraud to succeed, the fraud proved:

*“... must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean 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. ... Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.”*

I have already found several instances of the Defendant having had knowledge of the Plaintiff's interest in the suit land at the time it acquired it from the District Land Board. However, it is not enough to rely on this knowledge per se to seek to impeach the Defendant's registered title. The Plaintiff must prove to Court on a balance of probabilities, and at a standard much higher than in ordinary suits, though below the requirement of proof beyond reasonable doubt demanded in criminal cases, that the Defendant was guilty of fraud in the procurement of the registration of the contested title.

There are, here, salient instances of notice the Defendant had of the Plaintiff's interest in the suit property which I have to consider in determining whether there was fraud on the part of the Defendant in its acquisition of the registered title to the suit property. These are, first, the knowledge Fr. George Ahairwe (DW2) who, by his own revelation, was personally involved in the acquisition of the suit land for the Defendant, admitted he had knowledge of the Plaintiff and Asaba being in Court over the suit land. This was a serious caveat which should have stopped him in his track at the very outset from dealing in the suit property; as it should have been obvious to him that it would certainly be contested.

His explanation that the Defendant acquired the suit property upon the assurance by the District Land Board that it was available for allocation as the Plaintiff had neither applied for, nor paid premium for is not borne out by the other evidence in that regard. Alinda Peter (DW1) and Alfred Itorot Ochen (CW1) are clear that the Plaintiff went through all the process up to the payment of premium for land which included the suit property. It would therefore be strange for the Land Board to mislead the Defendant over this incontestable fact. Be it as it may, the fact that the Defendant sought to know from the Land Board the nature of the interest the Plaintiff had in the suit property, is clear evidence that it was aware of the Plaintiff's interest in the property.

Second, was Fr. George Ahairwe's knowledge that the Sisters' purchase of the suit property from Asaba had been frustrated, and the Sisters were actively involved in the payment into Court by Asaba in the suit between Asaba and the Plaintiff. For reasons which I have stated in my judgment herein as to the link between the Defendant and the Sisters, Fr. George Ahairwe ought to have kept clear off the suit premises; and no amount of assurance by the Land Board should have prompted him into making the Defendant have any dealing in the suit land. That he chose to do the contrary was certainly an act of defiance of the clear warning of the dangers attendant thereto.

Third, is the Sisters' involvement with the RDC to notify the Plaintiff that they had the title to the suit property and their subsequent involvement with the police in seeking to fence off the suit land; which irresistibly point to the Sisters as being either the agents of the Defendant at the time of acquiring the title to the suit property or as the ultimate beneficial owners. Either way, any act by the Defendant in acquiring the suit property with this knowledge would seriously raise any person's eyebrows. Fourth, is the Sisters' knowledge, as neighbours of the Plaintiff, of her having physical possession of the suit property and her being in Court with a third party over it; which should have restrained their hands in any adverse dealing with it.

Fr. George Ahairwe (DW2) denied ever meeting Asaba, and confessed having been uneasy with the instructions for survey of the land being in the name of Asaba. That may well be so; but this could be because the sale transaction by Asaba was between him and the Sisters whom, as I have pointed out above, I am persuaded were either the agents of the Defendant or the ultimate beneficiaries of the suit property. The denial by Fr. George Ahairwe (DW2), of any goal posts having been on the suit land; contending that in March 2008, there was only well maintained grass on it, was however negated by the overwhelming evidence adduced by the Plaintiff to the contrary.

The members of the Division Land Committee who gave evidence in Court all confirm having found the suit property being used as a playground. Being in physical possession of land, as was clearly pointed out by Ssekandi J. (as he then was) in the case of ***John Katarikawe vs William Katwiremu & Anor.***; [1977] H.C.B. 187, is decisive, and will often operate as notice to anyone dealing with the same land; hence if a purchaser, despite knowledge of the occupation of the land under a contract of sale, proceeds with a transfer of the title in his name in order to defraud the occupier, this would be evidence of fraud.

The learned judge pointed out that fraud, though not defined under the Registration of Titles Act, covers dishonest dealings in land; such as depriving a purchaser for value in occupation of the land of his unregistered interest. I find that this authoritative proposition of the law convincingly answers the issue in contention before me, as here it is clear that the Defendant through Fr. George Ahairwe (DW2) and the Sisters had the full knowledge that the Plaintiff was in effective physical possession of the suit property at the material time.

The Defendant was fully aware that the Freehold Offer of the suit property to it was conditional as it was subject to the express caveat in paragraph 8 of that offer, dated the 28<sup>th</sup> August 2008 (consent exhibit **CE13**), which provided that: *‘The offer is subject to land being available and free from disputes at the time of survey.’* In the light of the adverse claim by the Plaintiff to the knowledge of the Defendant, the caveat provision in paragraph 8 of the Freehold Offer of the suit land to the Defendant (consent exhibit **CE13**) had not been reckoned with when the title was processed in the Defendant’s name; hence it acquired the suit property through a process that could only have been intended to defeat the Plaintiff’s interest in the suit property.

In the case of ***Ismail Jaffer Allibhai & 2 Ors vs. Nandlal Harjivan Karia & Anor; S.C. Civ. Appeal No. 53 of 1995. [1996] IV KALR 1***, Oder J.S.C. cited the celebrated case of ***David Sejakka Nalima vs Rebecca Musoke; C.A Civ. Appeal No. 12 of 1985*** (unreported); and the other cases cited with approval in that case, such as ***Assets Company Ltd. vs Mere Roihi & Others [1905] A.C. 176***, where at p. 210 the Privy Council, while considering statutory provisions similar to those in our Registration of Titles Act, defined fraud as “*dishonesty of some sort*,”; and that to establish fraud as a cause of action, it has to be attributable either to the registered purchaser or its agents. The Privy Council explained further on when the purchaser’s actions would amount or point to fraud, as follows: –

*“The mere fact that he might have found out if he had been more vigilant, and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.”* (emphasis mine).

I have already discounted the testimony of Fr. George Ahairwe (DW2) that they acquired the suit property upon the assurance by the Land Board that the Plaintiff had not paid premium for the

suit property; and further, his denial of the Plaintiff's being in possession when the Defendant processed the contested title. He was the representative of the Defendant in the acquisition of the suit property, and yet he never accompanied the Division Land Committee to identify for it the land the Defendant had applied for, and was due for inspection. He instead preferred to be represented by the Sisters at this very important stage of the acquisition of the suit property.

I cannot resist the persuasion that he did not wish to confront the truth he knew would stare him in the face if he were to seek any clarification over the Plaintiff's evident adverse interest in the suit property, or if he accompanied the Division Land Committee to inspect the land which he knew the Plaintiff was in physical occupation of. This did not only cast serious doubt over the Defendant's honesty in its acquisition of the suit land, but it also exacerbated the confusion over the location of the land the Defendant had applied for, and which the Division Land Committee actually inspected. David Baguma Mwesige (CW2) and Geoffrey Billy Bwangi (CW3), both members of the Committee were categorically clear that the land they inspected for the Defendant was not the suit land.

These members of the Committee testified that the Plaintiff had furiously expressed her objection to the suit land being inspected; and the Chairman of the Committee had to assure her that the two lands they had gone to inspect excluded the suit land. The land the two witnesses testified to have inspected for the Defendant is clearly marked in the sketch of the area I made following the visit to the locus. I am aware that (CW4), also a member of the Committee, testified that the Chairman (CW2) showed them the suit property as one of the lands they had gone to inspect. He however does not clarify whether they then proceeded to inspect the suit property in the light of the fierce objection by the Plaintiff which he does not deny.

It is quite important to note that Fr. George Ahairwe (DW2) admitted that the land the Defendant was allocated was surveyed in the name of Asaba Selvano. However, the request for planning advice made to the Commissioner Physical Planning by Alfred Itorot Ochen (CW1) on 22<sup>nd</sup> October 2002 (consent exhibit **CE6(a)**) with its attached site print (consent exhibit **CE6(b)**) upon Asaba's application for development, only adds more confusion as to which of the two plots conspicuously indicated by arrows, and each marked 'X', was the plot whose survey instruction was sought in the name of Asaba; and was later offered to the Defendant by the District Land Board.

At the locus, the two members of the Division Land Committee showed Court a small plot at the same level with and north of the walled property above the suit property, as the property inspected for the Defendant. Their explanation was that the other plot, which is for the Virika Pharmaceuticals is the one to the south of the same walled building, and at the same level with it. The school playground (the suit property) which the Plaintiff was keen to ensure they did not inspect, is to the west of the walled building, and below it. Their inspection report (consent exhibit **CE10**) interestingly, states clearly that the Sisters and the Plaintiff were talked to and they confirmed the boundary of the land applied for by the Defendant.

In the light of the evidence by the Plaintiff, corroborated by that of the two members of the Division Land Committee, that she seriously objected to any inspection of the suit land, it can only logically mean that of the two plots marked as having been applied for by Asaba for survey and development, it was the one to the north of the walled premises directly above the suit property that was inspected. Therefore, the plot of land which the Defendant was eventually issued a freehold title for was not the one the Division Land Committee inspected and recommended; and accordingly, the title to the suit land was granted to the Defendant in utter disregard to the clear objection by the Plaintiff to its being inspected.

This then means the land for which a title was granted to the Defendant was the consequence of a misdescription which offended the provision of section 176 (d) of the Registration of Titles Act (Cap. 230). Failure to inspect the suit land, and thereby give the Plaintiff the opportunity to state her case to the Committee over it, amounted to a denial to her of the right to be heard; which is an affront at the time honoured right of all persons to the enjoyment of natural justice. In the case of **Matovu & 2 Others vs Sseviri & Anor.**; [1979] H.C.B. 174, the Court of appeal, citing **Katarikawe vs Katwiremu** (supra) with approval, held that a person who procures registration to defeat any unregistered interest which he had knowledge of, is guilty of fraud.

The Court stated further that a decision made in breach of the '*audi alteram partem*' rule, such as granting a lease without hearing the occupant of the land, was void and of no consequence in the same way a decision made without jurisdiction is a nullity; and the Court should never hesitate to correct a decision of an administrative body arrived at in breach of the principles of natural justice. The Court clarified that although section 56 of the RTA provides that a certificate of title

is conclusive evidence of title, and shall not be impeached for reason of informality and irregularity, instances of breach of natural justice would not be treated as ‘informality or irregularity’.

It then concluded by recommending that where the person who has been defrauded or denied natural justice has already accepted the lease offer and paid the necessary fees, the Registrar should issue the title to such person. Section 64 of the Land Act 1998, as amended by section 27 of The Land (Amendment) Act, 2004, provides that a District Council may, in its discretion, establish a Land Committee at any Sub County with advisory powers including with regard to the ascertainment of rights in land. Regulation 23 of The Land Regulations 2004, provides that the Committee has to give adequate notice to all that may be affected by the acquisition of the land in issue; and to record all objections against the acquisition of any such land.

In *Venansio Bamweyaka & 5 Others vs. Kampala District Land Board & Another – Civ. Appeal No. 20 of 2002 (C.A)* Okello J.A. made it clear that where the alienation of land by a controlling authority has been done without consulting the occupants of the land, the grant would not stand. The Court was interpreting the provisions of regulation 22 of the Land Regulations 2001 (Statutory Instrument No. 16 of 2001) whose text was the same as regulation 23 of the Land Regulations 2004 which it replaced. The Court made it clear that despite the provision on consultation being in the regulations being in language which imputes discretion on the part of the Land Boards, it is in fact incumbent on them accord it mandatory force.

This is because the alternative has the danger of the Land Boards denying those who may wish to object, the opportunity to do so; which is in direct contravention of the cardinal rule of natural justice conferring on all the right to be heard before a decision is made which affects the interest of any person. In the case now before me, the non inspection of the suit land, and yet a title was processed and issued to the Defendant was both fraudulent and offended the right of the Plaintiff to be heard. This is the more so in the light of the fact that she had physical possession, had asserted her interest in the land by objecting to its inspection.

The issuance of the contested title was, in fact, the consequence of a misdescription of the land which the Division Land Committee had inspected and recommended for such title. In the result, I find that the Plaintiff has proved to my satisfaction to the requisite standard that the Defendant acquired the suit property with full knowledge of her vested interest in it; and this amounted to a



fraudulent acquisition. The evidence on record is however that the Defendant only succeeded in destroying the goal posts but never took possession of the suit property.

Alinda Peter (DW1) indeed advised in his testimony that owing to the background of the case, the parties should have sat down and resolved the matter amicably. As the parties are evidently neighbours, and one may not easily choose who one's neighbour should be, I prefer to pick a leaf from the counsel of Alinda Peter over the need for amicable resolution of the dispute; and accordingly choose to promote reconciliation by not awarding any damages against the Defendant. In the result, I allow the suit; and consequently make the following declarations and orders: –

- (i) A declaration that the Plaintiff is the lawful equitable owner of the suit property.
- (ii) An order directing the Registrar of Titles to cancel the certificate of title for the suit land, comprised in Freehold Register Volume 659 Folio 7 (LWFP 6347 otherwise known as Plot No. 2 Lugard Close at Kagote), registered in the name of the Defendant.
- (iii) An order of permanent injunction hereby issues, restraining the Defendant and its agents from in any way interfering with the Plaintiff's possession and quiet enjoyment of the suit property.
- (iv) The Plaintiff is awarded costs of the suit which shall attract interest at Court rate from the date of judgment.



**Alfonse Chigamoy Owiny – Dollo**

**JUDGE**

**30 – 04 – 2012**