

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]**

CIVIL SUIT NO. 0129 OF 2010

SHEIK HUSSEIN MAYANJA:.....:PLAINTIFF

VERSUS

MUBIRU CHRISTOPHER KISINGIRI:.....:DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff sued the Defendant for a declaration that the land comprised in Bulemezi Block 1026 Plot 65 at Namaliga – Bombo/Luwero belongs to him as its registered owner. The Plaintiff also contends that the forceful entry of the Defendant and his agents without the Plaintiff’s consent or authority constitutes trespass. The Plaintiff also prayed for a permanent injunction, general damages for trespass, interest and costs of the suit.

The Defendant on the other hand filed written statement of defence denying the matter above and raised a counterclaim in which he states that there is no cause of action; and that the Plaintiff registered himself by fraud and his titles should be cancelled.

Three issues were agreed upon at scheduling as herebelow:

1. Whether the Plaintiff obtained registration on the suit land fraudulently.
2. Whether the Defendant trespassed on the suit property.
3. What are the remedies available to the parties.

To prove their respective cases and counterclaim, the following evidence was assembled:

The Plaintiff led evidence through PW1 - Sheik Hussein Mayanja who told Court that he had sued the Defendant because he stopped him from opening the boundaries of his land; block 1026 plot 65. He said that he got the land in 1986; upon purchase of the said land from Stanley Kitaka Kisingiri. He said that they made an agreement upon which he made a transfer document for him. He paid shs. 5,000,000/- only (*five million*), in instalments of first, shs. 2,500,000/-, (two million, five hundred thousand), then he was taken by the agent called Ndawula to Bukalasa where he signed on the transfer forms and Kisingiri Kitaka also signed. This was in the presence of a one Kajubi and Ndawula (agent). Kajubi signed as the witness. He tendered PE1; a certified copy of the transfer forms. He then got registered in 1996. He tendered PE2; Powers of Attorney, authorising Ndawula to be responsible for Kisingiri's estate. He later put his father Abubaker Tidi on the land; but sold it in 1998 to Moses Ali.

When he tried to open boundaries, the Defendant Mubiru Kisingiri mobilised people who stopped the process. As a result, Moses Ali demanded for a refund of his money, and took him to police. He was later charged in Luwero Court, but the case was later dismissed as per PE3. He also tendered PE4; a certificate of title. He also averred that he had dealt with Kisingiri on other lands like block 29 plot 14 which he bought from him at shs. 1,000,000/- only (*one million*) through Ndawula his agent. He also tendered PE5; a Consent Judgment before the land tribunal.

During cross examination, he said that the said Kisingiri gave him transfer forms signed in 1988. He stated that he did not immediately give him the certificate of title, but left Ndawula to follow up and he called him to collect it in 1996. He also said that he knew nothing about the Special Certificate of title and said in further cross examination that he could not occupy the land because the occupants were incited and wanted to kill him, led by Kassim Ramadhan. He further said that he was not given any receipt, but was only given a transfer and confirmed in re-examination that the whole process of transfer was handled by Ndawula, the agent of Kisingiri.

The Defendant led evidence through DW1; Mubiru Christopher Kisingiri and stated that the Plaintiff sued him for land in Bombo, but he has never disturbed him at all. He said that block 1026 plots 65 and 69 which is the suit land belongs to his late fathers' estate Stanley

Kisingiri who died on 21st February 1991. He said that in 1996, the executors touched on that land whereby while compiling an inventory of the estate, this land “*came up*”. He said that the Plaintiff went to him (Defendant) as heir, claiming that he was the rightful owner; but he had no powers over the land because the powers were with the executors namely Grace Nalima (deceased); Tefelo Kisosonkole (living) and Geoffrey Kaaya Kavuma (living).

He testified that he has a counterclaim whereby he wishes to claim for the land as a beneficiary of the estate. He told Court that the titles had been changed in names of the Plaintiff. He told Court that he holds Powers of Attorney from the executors giving him powers to sue. He then took steps which led to the matters now in Court.

During cross examination, the witness conceded that Mayanja is the registered owner of the land, but that he has proof that the transfers to Mayanja were not signed by the late S. Kisingiri and that Mayanja forged the same.

DW2; Apollo Mutashera Ntarirwa’s evidence was expunged from the record. In its place, the defence then called DW2 Kiwanuka Joseph who told Court that he is one of the Administrators of the estate of the late Kisingiri; since November 2016. He exhibited DE1; Letters of Administration. He told Court that the first Administrators failed in their duties to manage the estate and he and 3 other beneficiaries sued them. He exhibited DE3; the Original Death Certificate. He informed Court that he disputes the claims by the Plaintiff on this land because the land still belongs to the estate of the late Kitaka Kisingiri by virtue of DE3; (Title for block 1026 plot 65), showing that the names of Kitaka Kisingiri were registered there on 6th August 1987 for 20.2 hectares. The title is ok and everything on it still visible. He further informed Court that he got it from Godfrey Kaya Kavuma and Tefelo Kisosonkole, the old Administrators. He further testified that the said plot 65 has now been subdivided and yet this was done as the case was going on in Court. He prayed that Court declares that the land is part of the late Stanley Kitaka’s estate and cancels all the illegal subdivisions that were made on plot 65 and 69.

Given the above evidence, I will now examine the issues for determination; following the submissions as filed by both Counsel.

1. Whether the Plaintiff obtained registration on the suit land fraudulently.

Counsel for the Plaintiff relied on PW1's testimony and EXP1, EXP2, EXP3 and EXP5 to argue that the Plaintiff purchased the land from Kisingiri Stanley through his agent Ndawula. He argued that after purchase, both the transfer and title, were given to him by the late Stanley Kisingiri's agent. Counsel pointed out that though the defence was that the signatures on the transfer forms were forged, no handwriting expert was called to confirm so. Counsel further argued that the Defendant failed to prove the counterclaim; and that particulars of fraud were neither pleaded nor proved. He argued that the standard of proof required in fraud cases was not satisfied.

Counsel referred to Section 59 of the Registration of Titles Act to argue that possession of a Certificate of title by a registered person is conclusive evidence of ownership of land described therein. He also referred to Section 176 (c) of the Registration of Titles Act to argue that a registered proprietor of land is protected, save for fraud 'fraud'. He referred to cases of ***John Katwiremu & Anor (1977) HCB 187, and Mudiima Issa & 8 Others versus Elly Kayanja & 2 Others; Civil Suit No. 232/2009*** for emphasis of the holding that under Section 61 (now 59) of the Registration of Titles Act, once a person is registered as proprietor of land, his title is indefeasible except for fraud.

Counsel argued that no evidence implicating the Defendant in forgery of the documents was led in Court. He referred to case law including ***Mayanja J. B versus Lawrence Maggato Guta; HCT CS NO. 727/2006***, to argue that fraud must be proved by evidence, not by submissions based on pleadings. The Plaintiff's Counsel argued for the dismissal of the counterclaim on grounds above.

In reply, Counsel for the Defendant/Counter claimant referred to Section 101(1) of the Evidence Act to argue the law applicable on the standard of proof. He argued that it is provided therein that whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. He also referred to the authority of ***Frederick J. K. Zaabwe versus Orient Bank and 5 Others SCCA No. 4/2006*** for the definition of fraud. He then referred to the evidence of Kiwanuka Joseph (DW2, as evidence which proved that the suit land still belongs to the estate of the late Stanley Kitaka Kisingiri and the transfer of the same into the Plaintiff's names was done fraudulently and illegally.

Counsel then referred the defence exhibits contained in DE2; (Death Certificate) and DE3; (Certificate of title) to argue that they prove that the Plaintiff obtained his registration on the Certificate of Title fraudulently. He argued that Stanley Kitaka Kisingiri died on the 2nd day of March 1992, yet the Plaintiff got registered on 6th August 1996 with no intermediary Administrator of the estate of the deceased – taking part. This to Counsel, raises a question of legality and propriety of the Plaintiffs’ registration on the certificate of title for the Suitland.

He referred to Section 191 of the Succession Act for emphasis; and concluded that it was illegal for the Plaintiff to cause his registration on the certificate of title for the suit land directly and immediately after Stanley Kitaka Kisingiri’s death.

He further argued that much as illegality is not fraud, fraud can be imputed and attributed to the Plaintiff. He referred to the authority of *Edward Gatsinzi & Mukasanga Ritah versus Lwanga Steven; Civil Suit No. 690/2004*, which inferred fraud from an illegality.

Counsel similarly referred to the evidence of the duplicate certificate of title and pointed out that DE3 is proof that this land is still in the names of Stanley Kitaka Kisingiri. He also referred to PE4; the special title issued on 14th December 1995 under Instrument No. BUK52525 for reasons stated as the Duplicate Certificate of title which was originally issued got destroyed.

Counsel argued that this certificate was obtained fraudulently by the Plaintiff because;

- a) He had stated that the said Stanley Kitaka Kisingiri gave him the duplicate certificate of title as per paragraph 4(b) of the plaint in paragraph 4(b) of the defence to the counterclaim. This is contrary to the fact that this original certificate (DE3) was in possession and custody of the Administrators of the estate of the late Stanley Kitaka Kisingiri.
- b) He alleged that the original title issued got destroyed, yet the same was still very fine, clear and visible.

Counsel pointed at all those facts as evidence of fraud. He also faulted the Plaintiff’s evidence for the fact that there is no sale agreement for the suit land between Stanley Kitaka Kisingiri (deceased) and the Plaintiff.

Relying on the authority of **Edward Gatsinzi & Mukasanga Ritah versus Lwanga Steven**(*supra*) to re-echo the Hon. Judges' Ruling that;

“Where sale of land is involved, the purchase cannot be by mere presumption, there must be actual purchase with written memorandum or not duly signed by the parties, and the failure to prove the same would render the said claim baseless”.

Counsel argues that the implication of the facts above are that the Plaintiff acted illegally and fraudulently in obtaining registration as proprietor of the suit land. Counsel argued that the evidence of DW2 proves that the Plaintiff was deceitful, fraudulent and acted illegally in obtaining his registration. The certificate held by the Plaintiff ought to be impeached and cancelled.

Finally, on the illegalities above, Counsel referred to the authorities of **Konde Mathias Zimula versus Byarugaba Moses and Grace Nampijja HCCS NO. 66/2007**, that;

“Courts of Justice will not allow a person to keep an advantage which he obtained in bad faith.....”

Makula International Ltd. versus H. E. Cardinal Nsubuga & Anor (1982) HCB II that Court cannot sanction what is illegal and an illegality once brought to the attention of the Court overrides all questions of pleadings including admissions made thereon.

National Social Security Fund & Anor versus Alcon International Ltd. SCCS No.15/2009 when Odoki CJ (as he then was) held that;

“One of the principles of law is that as long as there is an illegality, it can be raised at any time as a Court of law cannot sanction that which is illegal”.

Counsel therefore submitted that the Defendant/counterclaimant proved his case to the required standard and prayed for resolution of this issue in the affirmative.

In rejoinder, Counsel for the Plaintiff stated that the evidence by the Plaintiff that he purchased the suit land in 1987 and given transfer forms EXHPI and EXH P2 explain the facts surrounding the delayed registration since everything was handled through the agent Ndawula, who caused the delay.

In response to the absence of a formal sale agreement, he argued that this is not necessary. He relied on the authority of *Kabenkwine Christopher and 2 Ors versus Christopher Mugenyi Civil Appeal No. 35/2011*.

He argued that this sale is evidence by the signed transfer forms by the late Stanley Kitaka Kisingiri.

Counsel argued further that Section 191 of the Succession Act is inapplicable as the Suitland was not available for Administration because the same had been transferred to the Plaintiff before the death of the late Stanley Kitaka Kisingiri, and does not constitute part of the deceased estate. Counsel reiterated that fraud cannot be proved by the Advocate's submissions, but a party relying on fraud, must set it out in the pleadings and specifically plead and particulars of alleged fraud must be set out and proved which was never the case with the Defendant. He prayed for orders as in the plaint.

Having the above as the pleadings, evidence and submissions, I resolve this issue as follows:

The issue is whether the Plaintiff obtained the registration of the suit land fraudulently. To determine this issue objectively, this Court will first determine the Plaintiff's case, as distinct from the counterclaim, which is a separate suit.

In all civil matters, the Plaintiff bears the burden to prove his/her case on a balance of probabilities. The Plaintiff in this case therefore by virtue of Section 101, 102 and 103 of the Evidence Act has the burden to prove the facts alleged by him in the plaint; as per Section 101 of the Evidence Act. The Act provides therein that;

“Whoever desires any Court to give Judgment as to any legal right or liability, dependant on the existence of facts which he or she asserts must prove that those facts exist”.

In this particular issue the Plaintiff has to prove that he obtained good title to this land. The burden to prove the alleged fraud however falls on he who alleged it (Per Section 103 of the Evidence Act).

In this issue therefore, the duty of the Plaintiff is to lay before Court sufficient evidence to prove that he obtained the registration on the suit land without any fraud or illegality and

hence he has a good title. On the other hand, the defence must prove under this issue that the title was obtained fraudulently.

Arising from the evidence and the submissions, the Plaintiff relied on PW1 and PE1, PE2, PE3 and PE4 to prove that he has good title to this land. The crux of the evidence is contained in PE1; (transfer forms); PE2; (the Powers of Attorney) and PE4 – (the Certificate of title). The Plaintiff then averred that he lawfully bought and got transferred forms and later had his name registered on the certificate of title.

However, to counter this evidence, the defence through DW1, DW2 and DEI; (Letters of Administration) and DE2; (original Certificate of Title), put the above evidence to question by laying claim to the suit land as the estate property for which the Plaintiff has fraudulently and illegally acquired title.

From the submissions by Counsel for the Plaintiff, it has been argued that the claims of fraud have not been proved. It is Counsel's contention that the Defendant filed the counterclaim without locus and failed to prove fraud. He relied heavily on Section 59 of the Registration of Titles Act and Section 176 (c) of the Registration of Titles Act, to argue that the Plaintiff's title remains conclusive evidence of ownership in the absence of proof of any fraud. Counsel further faulted the defence Counsel attempted to prove fraud by the submissions, adding that the said fraud was neither specifically pleaded, particularised, nor proved.

However, as noted, the defence brought before this Court evidence of DW1, DW2, DEX4 and DEX3 and raised serious questions regarding the registration certificate tendered by the Plaintiff as PEx4.

I will first deal with the question of the pleadings.

Did the Defendant/counter defendant plead fraud and give particulars of the fraud as per the legal requirement normally in such cases?

First of all, the record shows that on the 23rd day of June 2014, the Court granted parties an order to file fresh pleadings in the matter.

The order reads and *I quote*;

‘It is therefore ordered that the parties file fresh pleadings in this matter. The pleadings shall be deemed to have been filed at the time the matter was first instituted

in the Land Tribunal. Therefore a fresh hearing shall be conducted after the parties have filed a joint scheduling memorandum’.

Arising from that order, I note that the Defendant filed the Written Statement of Defence and Counter claim on the 8th day of September 2014 and refers to his claim as that of the Defendant/counterclaimant as beneficiary in the estate. I note from tis counter claim that the alleged fraud and its particulars are itemised and given under paragraphs 3, 4 and 5 of the counterclaim.

I am therefore satisfied as argued by the Counsel for the Defendant in reply to the Plaintiff’s Counsel that these particulars were pleaded and therefore there are no irregularities in the pleadings. That having been determined, it is trite law that fraud must be strictly proved. The standard of proof in fraud is higher than in ordinary Civil Suits but not beyond reasonable doubt.

I have reviewed all the cited authorities but will for emphasis rely on the Supreme Court decision of ***Frederick J. K. Zaabwe versus Orient Bank & 5 Others; SCCA NO. 4/2006***; for the definition of fraud thus;

“Fraud, according to Black’s Law Dictionary means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him/her or to surrender a legal right and fraudulent means acting wilfully and with specific intent to deceive or cheat, ordinarily for purposes of either causing some financial loss to another or bringing about some financial gain to oneself”.

This case further defined fraud to mean;

“Anything calculated to deceive, whether by a single act culmination, or by suppression of truth, or suggestion of what is false, whether it is by a single, direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture a generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling an any unfair way by which another is cheated.....”

The above definition is what this Court will accord to the question before me, was the Plaintiffs' title therefore as obtained clear from all the above incidences of fraud?

The Plaintiff claims that by virtue of PW1, PEX1, 2, 3 and 4, it is clean. The defence, though faults it on account of the evidence of DW1, DW2, DEX1, and DEX2 and DEX3. It (defence) raised the questions regarding the fact that DW2's evidence showed that at all times, this land has been the estate property with its title still intact as evidenced under DEX3. The same evidence of DW1 and DW2, is relied as to the question why and how did the Plaintiff obtain a special certificate registered in his names, yet the original was not lost or destroyed as declared by the registration by the Registrar on the special certificate relied on by the Plaintiff. The defence also raised a question why the Plaintiff states that while buying the land, he was given the duplicate title by Kisingiri, yet the said title is still with the Administrators and has never been altered, lost or destroyed.

The defence also questions how the Plaintiff could buy land of that extent without a formal sale agreement, and then its registration is done 4 years after Stanley Kitaka Kisingiri's death.

Counsel for the Plaintiff rubbished off all these concerns and argued that since the defence failed to bring direct evidence to impute fraud on the Plaintiff (like a hand writing expert), then the rest is speculative and the title is good. He also relied on the law of contract to argue that a sale is valid upon meeting of minds and exchange of consideration, even if no formality is followed.

I am inclined to rule that land is a very valuable asset, where it is the rarest of the rare of cases that purchases part with money without taking precautions to document the transactions. That be it as it may, the Plaintiff is in Court to prove his case. I notice that save the word of mouth of PW1 who is the only surviving party of this alleged transaction, there is no other scintilla of proof before Court to concretise his allegations. This creates a big doubt in the mind of this Court when such evidence is countered by other cogent evidence from the defence, challenging his statement.

The biggest challenges to this evidence of PW1 is the evidence of DW1, DW2 and DEX3; (the original title). How did the Plaintiff get a special certificate of title when the original

title is intact and shows nowhere that it has ever been dealt with in anyway by the owner thereof; Stanley Kitaka Kisingiri?

The burden to explain all questions posed by the defence is on the prosecuting Plaintiff, who claims he has a good clean title.

From the Plaintiffs' evidence, I am unable to find any plausible explanation. I am constrained to agree with the defence that the Plaintiff has not come to Court with clean hands. He has a duplicate title which he obtained 4 years after the death of Stanley Kitaka Kisingiri. He claimed that they had made no sale agreement. No evidence is on record to prove this. He relied on the signed transfer forms which he got in the year he got the title, but importantly, while in the pleadings per plaint, paragraph 4(b); he states that the was given a copy of a duplicate certificate by Stanley Kitaka Kisingiri. The defence still has that certificate (EXD2). The certificate PEX4 shows that the registrar declared that the special certificate was issued because the original 'got destroyed' yet it is shown that it exists as DEX2.

These averments, if not explained by the Plaintiff show that the special certificate was obtained by deceit or illegally contrary to sections 71 and 72 of the Registration of titles Act. Section 72 of the Registration of Titles Act provides that;

“if any original certificate of title is lost or destroyed or so obliterated as to become illegible, the Commissioner may cause a copy of it to be prepared and to be endorsed with all such entries as were upon the original so far as they can be ascertained from the records of the office and other available information and shall make and sign a memorandum, upon the copy stating that it is a substitute to be used in place of the original, and what has become of the original so far as may be bound in the Register book and used in place of the original for the purpose of dealings”.

This section is subsequent to Section 70 of the Registration of Titles Act which provides that;

“If the duplicate certificate of title is lost or destroyed or becomes so obliterated as to be useless, the persons having knowledge of the circumstances may make a statutory declaration stating the facts and the particulars of all incumbrancers affecting the land or the title to the land to the best of the deponents' knowledge, information and belief and the Commissioner if satisfied as to the truth of the statutory declaration and the bonafides of the transaction may issue to the proprietor, a special certificate of

title to the land, which special certificate shall contain an exact copy of the certificate of title in the Register Book and of every memorandum and endorsement on it and shall state why the special certificate is issued.....”.

From the provisions of the Registration of the titles Act, it is clear that a special certificate of title like (EXPE4) can only be issued if the original/duplicated is either lost or destroyed, or becomes so obliterated as to be useless; or illegible.

In the case of Section 70, this information must be supplied by the person having knowledge thereof, by a statutory declaration. Under Section 71, it is by order of Court. Under Section 72, it is by the action of the Commissioner ascertaining the information from the records in the office or other available information.

A look at (PEX4) and (DEX3) reveals that while PEX4 is a special certificate in respect of Bulemezi Block 1026 plot 65, in the names of Hussein Musa Mayanja, under instrument No. BUK 53020 registered in 1996 from Stanley Kitaka Kisingiri, issued as special on the 14th day of December 1995 at 11.37 am, “the Duplicate certificate of title which was originally issued having been destroyed”.

On the other hand, EXD3 is the original certificate of title for Bulemezi Block 1026 plot 65, registered on 5th August 1987 under instrument No. BUK 46948 in the names of Stanley Kitaka Kisingiri. The title is still intact, clean, unobliterated and very legible.

It bears no encumbrances and still holds the deed plans thereof for Bulemezi Block 29 plot 65 intact. How then did the duplicate certificate of title come up?

From DEX2; (death Certificate) it is shown that Stanley Kitaka Kisingiri died on 2nd March 1992. Therefore the special certificate was obtained after his death. Under Section 70 of the Registration of Titles Act, the information that EXD3 was destroyed could only have been given by the proprietor who is Stanley Kitaka Kisingiri, but was dead by 1995 or any other person who had that person must have been the Plaintiff – who alleges in paragraph 4 (b) of his plaint states that;

“After the said purchase, Stanley Kitaka Kisingiri handed over to the Plaintiff a duplicate certificate of title and signed transfer forms, to enable the Plaintiff transfer

the said land into his names or those of his nominees. Copies of the title and transfer forms are hereto attached and marked as 'A' and 'B' respectively”

Annexure 'A' is a copy of PEX4. It is the special certificate of title. This pleading raises eyebrows in view of the existence of DEX3. It tends to infer that when the Plaintiff went to the Registrar for effecting a transfer, he presented PEX4, but the certificate which was available as at that time of purchase is DEX3 and there is no way the said Stanley Kitaka Kisingiri could have handed to him PEX4 in 1987, which came into existence on 14th December 1995, long after his death!!

Also, since DEX3 has never been declared lost, what title did Stanley Kitaka Kisingiri hand to the Plaintiff as claimed in his pleadings under the plaint paragraph 4 (b) and reply to the Written Statement of Defence (paragraph 4 (b)?

In paragraph 4 (b) of the reply to the Written Statement of Defence, he state that;

The said Stanley Kitaka Kisingiri handed over duly signed transfer forms to the Plaintiff together with the Certificate of title and the Plaintiff has since 1996 been registered proprietor of the suit land.

The import of all the above discoveries in evidence which came out in defence to the Plaintiffs' case is that the Plaintiffs' title to this land is tainted with illegalities. There are unexplained questions raised by the defence evidence regarding the authenticity of the Plaintiff's title. There cannot be two valid title owners on the same land at the same time running concurrently. The duplicate is supposed to be a legal photocopy of the original which is declared lost, destroyed, and illegible or obliterated by the late Stanley Kitaka Kisingiri or his estate and it was exhibited and seen as such in Court as DEX3.

The special certificate upon which the Plaintiff bases his claim PEX4 has therefore been shown to be questionable and its creation is a violation of Sections 70, 71 and 72 of the Registration of Titles Act, under which special certificates of titles are created. I therefore, in answer to this issue do find that the legal implications of all evidence on record show that the Plaintiffs' title is not clean and was therefore obtained by fraud because Stanley Kitaka Kisingiri could not have been the author of PEX4; the special certificate which the Plaintiff alleges he gave to him at the time of handing over of the transfer documents; PEX4 having

been created in 1995, yet the alleged sale occurred in 1986. Furthermore, the original certificate to this land DEX3 still exists and therefore PEX4 is a suspected document.

Going by the definition of fraud as in *Zaabwe versus Orient Bank and Ors (Supra)*, the author of PEX4 must have calculated to deceive, by suppressing the truth that the original certificate is still available. By declaring that it is destroyed, the author thereof told a direct falsehood whose aim was to gain unfair advantage of the property comprised in this land. The Plaintiff in his pleadings under paragraph 4(b) of the plaint and reply to the written statement of defence and the evidence of PW1, insisted that when he purchased, he was given a title which he exhibited as EXP4. Unfortunately, the said title is not authentic for reasons already pointed out. He must be aware that by 1986; PEX4 was not in existence. He has failed in his evidence to explain all these loopholes. He cannot therefore plead innocence. Section 101 of the Evidence Act requires him to prove that his title is right and clean.

The question of proof is crucial here because fraud though raised by the defence, by way of a counterclaim, operates against the Plaintiffs' case both as a sword and a shield. This is so because though raised by the defence, in the course of trial, there has appeared adverse evidence which tends to bring the Plaintiffs' case to question, necessitating a defence thereof. The defence by virtue of DW1, DW2 and DEX3 has questioned the authenticity of the Plaintiffs' case.

However, from the submission of Plaintiff's Counsel, what I get from his theory is that '*you Defendant raised this question of fraud and inspite of what you say, you prove it*'.

It is trite that fraud must be specifically pleaded and proved, and the standard of proof is strict. However in this case there has been proof by implication and inference. This is because the defence has brought before Court evidence in form of DW1, DW2 and DEI, DE2 and DE3 which shows the Plaintiff's title PEX4 smells of fraud. This evidence stretches the case beyond the allegations of fraud into the realm of illegality.

However, inspite of this, the Plaintiff chose to remain silent and did not offer any explanation or evidence in rebuttal of these allegations. Counsel for the Plaintiff also did not address Court on the question of the Defendants' allegations especially concerning the authenticity of PEX4, and the Defendant DEX3. The law as per the case of ***Makula International Ltd. versus His Eminence Cardinal Nsubuga & Anor (1982) HCB 11***, is that Courts of Law

cannot sanction what is illegal and an illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon. This same position was re-emphasised by the Supreme Court in the case of **National Social Security Fund and Another versus Alcon International Ltd SCCA No. 15/2009**, when CJ Odoki (as he then was) observed *inter-alia* that;

“One of the principles of law is that as long as there is an illegality, it can be raised at any time as a Court of Law cannot sanction that which is illegal. Counsel for the Appellant maintains that the Arbitral award was procured by fraudulent means which is an illegality, which this Court must act upon!

Basing myself on the above authority, I find that the evidence raises issues which border on fraudulent acquisition of the title by the Plaintiff, using illegal or unexplained irregular methods and this Court must act upon this evidence and deal with the said illegality.

The import of all this is that the Plaintiffs’ case which was hinged upon this title (PEX4) is wholly unsustainable on account of this illegality.

The illegality here is that the Plaintiff has a special certificate of title issued on the belief by the commission that the original was destroyed whereas not. The procurement of this special certificate was contrary to the law since the original (DEX3) is still available and in the hands of its rightful owners; the estate of the late Stanley Kitaka Kisingiri

The second illegality is that the Plaintiff’s pleading show that he was given the original certificate at the time of purchase, but in proof, he annexed PEX4 – which is not the original but a special certificate issued in 1995 after the date of purchase in 1986. In 1986, this annexed certificate had not yet been created, so is the Plaintiff telling the truth?

The third illegality is that the annexed PEX4, which the Plaintiff relies on was created 4 years after the death of Stanley Kitaka Kisingiri, yet the purported purchase was alleged to have occurred in 1986, Stanley Kitaka Kisingiri died in 1992 and the Plaintiff registered in 1996.

In his own evidence in chief, the Plaintiff (PW1) stated that all this was brought about because he dealt with the agent a one Ndawula. He said that it was Ndawula who carried out all the transactions related with this transfer. However, save the word of mouth, there was no other supporting evidence to exonerate him from the allegations by DW1 and DW2 that he

personally hand in this fraud since the signatures on his transfer documents were even suspect. The Defendant did not prove this either, but the documents as presented and the circumstances alluded to above show that the Plaintiffs' certificate of title (EXP4) was obtained illegally.

Counsel for the Plaintiff in submissions emphasised the absence of any evidence to pin down the Plaintiff as having orchestrated any fraud or forgery, since no direct evidence was called by the defence like a handwriting expert to prove him vulnerable. Counsel was however moot on the defence exhibits and line of argument which showed the illegalities as discussed. He attacked the said arguments as evidence from the bar. I do not agree. The submissions made reference to evidence which was given in open Court by DW1 and DW2 and exhibits DE1, DE2 and DE3.

For Counsel for the Plaintiff to suggest that Court should gloss over this evidence and technically concentrate on the phraseology of "fraud must be specifically pleaded and proved" is to call upon Court to meet out injustice to the parties. To blink over this evidence would be awful. The intention of any trial is to give all evidence its due consideration by placing it on the scales of justice and test its weight in view of the facts and the law it is only after such due consideration that a just decision can be reached.

In this case, the evidence as adduced has revealed that there are illegalities, which implicate the evidence produced by the Plaintiff.

The said illegalities show that the Plaintiff did not come to Court with clean hands.

The evidence as adduced raises issues which put to question the reliability of the Plaintiff's evidence and hence by implication showed that the Plaintiff was or is not an innocent participant in the process of acquisition of the registration of his names unto the special certificate of title (EXP4).

The fact that he dealt with Ndawula, an agent of Stanley Kitaka Kisingiri, to get his registration done, but waited for Stanley Kitaka Kisingiri to die and only registered after 4 years following the death, using a special title, yet he claims he had been given the original title at purchase in 1986, (which he did not annex on the pleadings as pleaded, but instead annexed it much later) are all indicators that he is not innocent; but participated in the fraud by implication.

Therefore on the strength of the wide definition of fraud as in the case of Zaabweversus Orient Bank(*supra*) which includes intentional pervasion of truth for purpose of inducing another to rely on it to part with some valuable thing belonging to him or her or to surrender a legal right...

I am convinced that there is enough evidence of intentional pervasion of truth by the Plaintiff; aimed at inducing the whole world to believe that he obtained the said evidence by implication also shows that the Plaintiff acted wilfully and with specific intent to cheat when he got himself registered on the special certificate of title (PEX4), claiming the original was destroyed, whereas it was not and is still intact as seen in DEX3. He is to that extent proved to have obtained the said registration by fraud.

The Plaintiff therefore failed to lead any evidence to show that his title is a valid title. On the other hand, the Defendant has proved that the Plaintiff procured the title illegally and by necessary implication fraudulently. This issue terminates in the positive.

ISSUE NO. 2 Whether the Defendant trespassed on the land

From the evidence on record and as discussed and determined by this Court under issue No. 1 above, the Plaintiff having been found to have obtained registration illegally, the Defendants having the mother original title to the land, could not trespass on this land since he is the heir and a beneficiary. This issue therefore terminates in the negative.

ISSUE NO. 3 Remedies

The Plaintiff has failed to prove his case against the Defendant on the balance of probabilities. The suit is therefore dismissed with costs to the Defendant.

I so order.

Counterclaim

The Defendant set up a counter claim against the Plaintiff. In the course of determining the main suit, this Court has reviewed all the evidence and there is no need to repeat the same here.

To prove the counterclaim, the Defendant/counterclaimant relied on evidence of DW1, DW2 and Exh DE1, DE2 and DE3. The counterclaimant failed to adduce in Court any evidence through DW1, DW2, EXD1, EXD2 and EXD3 which showed that the Plaintiff, who relied on PW1, PEX1, PEX2, PEX3 and PEX4 in defence, obtained registration illegally and hence was fraudulent by implication. This Court has already analysed all this evidence and reached the conclusion that on the strength of the said evidence, it has been proved that PEX4; (special title) was procured illegally, since the original title EXD3 is still available and was never destroyed, so as to give rise to the issuance of a special title. This is contrary to the law as in Section 70, 71 and 72 of the Registration of Title Act. There were also overt actions that are alluded to the conduct of the Plaintiff by implication which in conclusion show that he was not an innocent party in the chain of causation.

These included;

- i) Declaring in pleadings to Court under the plaint and answer to counterclaim that he was given the duplicate certificate of title at the time of signing the transfer form in 1986. (See paragraph 4(b) of the reply to the written statement of defence).

However, he attached/annexed a copy of the PEX4 which instead is a special certificate issued in 1995.

- ii) The fact is by 1995, the vendor (alleged) Stanley Kitaka Kisingiri, had already passed on in 1992; but the Plaintiff registered himself in 1996, yet the purchase was in 1986 and the title was given in 1986, as per his own pleadings.
- iii) The absence of any sale agreement or any other independent evidence save the alleged transfer forms and title, though not fatal, raises eyebrows given the nature of this transaction.
- iv) In the evidence of DW1 and DW2, the signatures on the transfer forms were questioned.

- v) The Plaintiff did not rebut or answer any of those issues as raised any of those issues as raised impeaching his title, neither did he explain why the title DEX3 still exists, yet he has a special certificate.

His claim that all this was the concern of Ndawula was unsatisfactory. This Court on the strength by the above findings found and confirms the finding that the Counter claimant has proved that the plaintiff/counter defendant obtained the said title illegally.

As already held – an illegality once brought to the attention of Court cannot be allowed to stand; (*Makula International Ltd. versus His Eminence Cardinal Nsubuga & Anor* (*Supra*).

This Court therefore finds that the Counterclaim is proved. Judgment is therefore entered for the counterclaimant/defendant with orders as herebelow:

Remedies

- a. It is declared that the counter defendant/Plaintiff acted illegally and fraudulently in obtaining registration of his name as proprietor of the suit land and this land is the property of Stanley Kitaka Kisingiri.
- b. An order is hereby issued to the Registrar of Titles/Commissioner for Land Registration to cancel the special certificate of title issued to the Plaintiff on land registered as plot 65 block 1026 Bulemezi Namaliga as the original title thereof has never been destroyed and is still intact. The names Stanley Kitaka Kisingiri should therefore be retained and reverted back on the register, title and on all entries therein as the owner and registered proprietor thereof.
- c. Damages;

The Plaintiff/Defendant counterclaimant shall compensate the counterclaimant the amount of shs. 30,000,000/- only(*thirty million*) for pain and suffering, psychological torture given the time spent in Court, defending this claim, the aim being to compensate and atone for the time lost and attendant, suffering meted upon the Defendant on account of the Plaintiff/counter defendant's action.

I take it that since the Plaintiff had opted to sell this land at shs. 40,000,000/- only (*forty million*) as he testified, this is an indicator that if it was not for the Plaintiff's disturbances, the Defendant could have at least also sold and earned the same amount. However, given the fact that no proof of such was given in Court, I have considered that shs. 30,000,000/- only (*thirty million*) is reasonable.

d. COSTS

The Plaintiff/counter defendant shall pay the Defendant/counter claimant costs of the counterclaim.

Court grants the successful party interest on costs and damages at the Court rate. Judgement entered on terms as above.

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Henry I. Kawesa

JUDGE

2/5/2018

2/05/2018:

Muhimbura Paul for the Plaintiff.

Kiiza Kikomeko for the Defendant/counterclaimant.

Parties absent.

Court:

Judgment delivered in the presence of parties above in Court.

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Henry I. Kawesa

JUDGE

2/5/2018

Right of Appeal communicated.

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Henry I. Kawesa

JUDGE

2/5/2018