

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MASAKA  
CIVIL SUIT NO. 0053 OF 2007

JOLLY TUMUSHABE ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. MYANYA ALLAN MUGUME
2. MAKYATI BENSON (Administrators of the estate  
Of the Late Edward Katungi) ::::::::::::::::::::::::::::::::::::::: DEFENDANTS

AND

NYAGO NIMROD ::::::::::::::::::::::::::::::::::::::: THIRD PARTY

*Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba*

**JUDGMENT**

The Plaintiff brought this suit against the Defendants jointly and severally for recovery of possession of land, damages, eviction order, permanent injunction and costs of the suit. The Defendants are administrators of the estate of the late Edward Katungi, the former Defendant. The Plaintiff's claim is that she is the registered proprietor of the land comprised in Mawogola Block 44 Plot 28 measuring approximately 110 acres (the suit land). Sometime in 2006, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without the knowledge of the Plaintiff entered onto the suit land before the plaintiff had processed a certificate of title, occupied the suit land and started cutting trees and grazing thereon and continue to occupy the land. As a result, the Plaintiff has suffered loss and has been deprived of income by the Defendants.

In his Written Statement of the Defence, the Defendant denied the claim and contended that he bought the suit land free of encumbrances from a one Nimrod Nyago. That prior to the

purchase, the Defendant conducted a physical search to determine ownership and the land was vacant. He was informed by the vendor Nimrod that the Plaintiff from whom he derived his interest was still processing the title which would be handed over to the Defendant upon completion. He further stated that he had no knowledge of any fraud by Nyago Nimrod and that he is a bonafide purchaser without notice.

In his Written Statement of Defence, the third Party, Nimrod Nyago denied the contents of the plaint and averred that he purchased 260 acres of land from the Plaintiff vide agreement dated 14/02/2006 which he later sold to the Defendant who then took possession and is still in occupation of the land.

In rejoinder, the Plaintiff acknowledged that indeed the third party purchased 260 acres of land from her and (05) five others with the Plaintiff contributing 130 acres. The 3<sup>rd</sup> Party managed to pay for 150 acres and surrendered the balance of 110 acres to the vendors. The Plaintiff obtained title to the 110 acres for the suit land, and the 3<sup>rd</sup> Party obtained title to the 150 acres at Block 44 Plot 30.

**Plaintiff's case;**

The Plaintiff's case opened for hearing on the 7<sup>th</sup> of February 2019 with the evidence of the Plaintiff, Tumushabe Jolly, PW1 who stated that the Defendants are children of the late Edward Katungi and she sued them because she found them on her land. The 3<sup>rd</sup> Party is her neighbor whom she had sold a piece of land and the Defendants claim that he sold to them the disputed area. In her witness statement dated the 8<sup>th</sup> day of October, 2018, she stated that she obtained part of the suit land from her late husband Mukasa Clement who died in August 2000, and she purchased another portion from beneficiaries altogether making a total of 110 acres.

Before becoming registered proprietor, her and the other beneficiaries entered into an agreement with the 3<sup>rd</sup> Party and sold to him 260 acres at 39,000,000/=. The 3<sup>rd</sup> Party managed to pay 29,000,000/= and upon failure to clear the 10,000,000/= balance, transfer forms were effected to him for only 150 acres and the Plaintiff transferred the remaining

110 acres into her names. The Defendant (Late Edward Katungi) had encroached on her land before she obtained the certificate of title and he continues to occupy the land despite several warnings

In cross examination, she stated that the sale to the 3<sup>rd</sup> Party was in 2006 and they sold 260 acres 150 acres of which belonged to the girls and 110 acres were from her. They did not have any dispute with Defendant prior to 2007 and in 2016, she learnt of the sale to the Defendant. The 3<sup>rd</sup> Party failed to pay for the 110 acres and went ahead and sold them so the Defendant gave him money to remove the people from the land.

PW2 Jjumba John stated in his witness statement that he is the co-administrator and beneficiary of the estate of the late Clement Mukasa. Upon his father`s death, he obtained 80 acres together with one Mugerwa Yayiro out of Block 44 which they sold to the Plaintiff and in addition to her 40 acres, the Plaintiff received 110 acres altogether. After sometime, he saw the late Edward Katungi on the land and when he inquired if the Plaintiff had sold it to him, she informed him that the late Edward was a trespasser. The Defendants are trespassing on the land. The 3<sup>rd</sup> party bought 260 acres and a transfer of 150 acres was made to him.

That was the Plaintiff`s case.

**Defendants` evidence;**

The Defendant`s case opened with the evidence of DW4, Nyanya Allan Mugume, the 1<sup>st</sup> Defendant who stated that the Plaintiff sold the suit land to the 3<sup>rd</sup> Party who then sold to his father the late Edward Katungi vide agreement exhibited as DExh 4(a) & (b). In his witness statement, he stated that he is the co-administrator of the estate of the late Edward Katungi who bought the suit land together with one Saati Wilson from the 3<sup>rd</sup> Party. He stated that he was informed by Saati Wilson that the 3<sup>rd</sup> Party indicated that he had purchased 260 acres from the Plaintiff and had settled the plaintiff fully. He stated that the late Edward bought 110 acres from the 3<sup>rd</sup> Party but before he could take possession, the Plaintiff lodged a complaint with the area local leadership claiming that the 3<sup>rd</sup> Party,

Nimrod Nyago had not paid the full purchase price. A meeting was convened at which it was agreed that the 3<sup>rd</sup> Party pays to the Plaintiff Ugx. 14,000,000/= at an agreed date. That the area chairperson wrote to the Plaintiff at the agreed vide letter dated 11-12-2006 informing her to pick the money but she never went. Further, that the late Edward Katungi and Saati Wilson bought the land legally and are in lawful possession and if the Plaintiff has a claim, it is against the 3<sup>rd</sup> Party. He further stated that he was present when the land was purchased and that at the time, there was still money owing to the Plaintiff and the 3<sup>rd</sup> Party informed them that he would pay her.

DW2 Saati Wilson stated in his witness statement that the late Edward Katungi is his brother with whom they bought the suit land measuring 110 acres from the 3<sup>rd</sup> Party. The Plaintiff lodged complaints before they could take possession claiming that the 3<sup>rd</sup> Party had not paid the full purchase price and the buyers took it upon themselves to find the balance of 14,000,000/= and gave it to the 3<sup>rd</sup> Party who later presented it to the area LC1 to clear the Plaintiff. He also stated that the Plaintiff never came for the money when she was called and even when the LC1 wrote her a letter and the buyers started using the suit land. By the time the Plaintiff disturbed his occupancy, he had completed the purchase price

DW3 Kyombo Abart stated in his witness statement that he knows the 3<sup>rd</sup> Party as the seller of the suit land and that he and one Muhereza Coreb also bought 150 acres from the 3<sup>rd</sup> Party for which a certificate of title was issued and transfer from the plaintiff to them was effected. He was appointed Vice Chairperson of Kitooke Village and he introduced the late Kitungi Edward and his son Saati Wilson to the 3<sup>rd</sup> Party who had indicated that he was selling 110 acres. The 110 acres was then bought by the late Katungi and his son vide agreement dated 02/03/2006 but before the transaction could be concluded, the Plaintiff came up claiming that she still owned the land considering that the 3<sup>rd</sup> Party had not paid the full purchase price. A meeting was held at which it was agreed that the 3<sup>rd</sup> Party pays the balance of 10,000,000/= plus a penalty of 4,000,000/= but when the day for handing

over the money reached, the Plaintiff never showed. The members present the agreed that the purchasers take full possession of the land they had purchased.

DW4 Nabimanya John stated in his witness statement that he knows the 3<sup>rd</sup> Party as the seller of the suit land and he got to know him during that sale transaction. He stated further that the Plaintiff and the rest of her family members sold 260 acres of land to the 3<sup>rd</sup> Party and the late Edward Katungi bought 110 acres, part of the same land. That he was involved in the transaction as the secretary of the area LC1 Committee.

**3<sup>rd</sup> Party`s evidence;**

In his witness statement, Nyago Ndimulodi, the 3<sup>rd</sup> Party stated that on the 14<sup>th</sup> day of February 2006, he purchased 206 acres of land from the Plaintiff and 5 others at Ugx. 39,000,000/= of which he paid Ugx 29,000,000/= vide agreement dated 14/02/2006. On 15<sup>th</sup> March 2006, when he was supposed to pay the balance of Ugx. 10,000,000/=, the Plaintiff did not show up and again on 11<sup>th</sup> December, 2006 when it was agreed that he pays the money as per the undertaking dated 16/11/2006, the Plaintiff did not show up. He was then advised to hand over the money to the LC1 Committee which he did and a written document to that effect dated 11/12/2006. He stated further that the chairman returned the money to him after sometime when the Plaintiff failed to pick it up. He also stated that he sold the suit land to the late Edward Katungi and Wilson Saati and he is willing to pay the Plaintiff and her co-vendors. It is also his evidence in cross examination that he had not completed payment by the time he sold to Katungi and Saati and further that he never made an agreement selling the land back to the Plaintiff.

Parties filed written submissions and they are on the court record;

**Plaintiff`s submissions;**

Counsel for the Plaintiff raised the following issues for the determination of court;

1. Whether the Defendant is a trespasser on the suit land;
2. Whether the third party acquired any interest in the suit land;

3. Whether the third party is liable to indemnify the Defendant, and if so to what extent;
4. What are the remedies available to the Parties;

Counsel argued issues one and two concurrently and submitted that the Defendant is not a bona fide purchaser for value without notice since he bought the land well knowing that the vendor/third party did not have title and neither had he lodged a caveat on the Plaintiff's title. Counsel also submitted that the Defendants were aware of the adverse claims from the Plaintiff's title which was actual notice and hence the defendants do not qualify as bona fide purchasers for value without notice. Counsel relied on the definition of a bonafide purchaser for value without notice in the *Black's Law Dictionary 8<sup>th</sup> Edition at Page 3897, the case of Grace Manjeri Nafula Vs Brig. Gen. Elly Kayanja & Anor CS 136 of 2011 and the case of Sir John Bageire Vs Ausi Matovu CACA No. 17 of 1996 at page 26*, to support their submissions. As to whether the Defendant is a trespasser, Counsel relied on the Plaintiff's and Defendant's evidence in PEX3, DEX5, DEX6, DEX1A and DEX1B, and submitted that the Defendants were aware of the third party's indebtedness to the Plaintiff and that due to failure to clear the entire purchase price, the third Party relinquished his equitable interest back to the Plaintiff vide DEX2B, DEX1A and DEX1B. Counsel argued that the third party did not have any interest in the suit land and as such, the Defendant never acquired a genuine interest in the same.

As to whether the 3<sup>rd</sup> party is liable to indemnify the Defendant, Counsel argued that both the Defendant and 3<sup>rd</sup> Party were at fault in the transaction. Counsel submitted that the Defendant can claim and enforce the terms in DEX1A and DEX1B in which agreements the third party relinquished his equitable interest and agreed to give the Defendant another piece of land, or seek damages and compensation but he is not entitled to indemnity. Counsel prayed for court to grant the prayers and awards damages of 50,000,000/= with interest on the decretal sum at a rate of 20% p.a. from the date of judgment, plus costs of the suit.

**Defendant`s submissions;**

Counsel for the Defendant argued issues 1 & 2 concurrently and submitted the question for determination is whether the 3<sup>rd</sup> party had a right to sell and therefore capable of passing good title to the Defendants. Counsel`s argument is that the 3<sup>rd</sup> Party concluded his transaction for the purchase of the suit land from the Plaintiff although he did not complete the purchase price. Counsel relied on the 3<sup>rd</sup> Party`s evidence that all attempts were made to pay the balance to the Plaintiff but she frustrated the efforts and purported to rescind the agreement yet the other vendors have never come to claim the said balance. In that regard, counsel submitted that the transaction was concluded and the Plaintiff retains only a right to specific performance through the claim for the outstanding balance. To support these arguments, counsel relied on the cases of *Ismael Jaffer Allibhai & others Vs Nandalar Harvijan Karia & Anor SCCA No. 53 of 1995* and the case of *Semakula & Anor Vs Sentiba CA No. 5 of 2013*

It is further Counsel for the Plaintiff`s submission that the 3<sup>rd</sup> Part legitimately held good title to the suit land which he passed on to the purchasers and the elements of trespass do not arise. Further that the purchasers were bona fide purchasers for value for the reason that the Plaintiff had sold the suit land to the 3<sup>rd</sup> Party and as such is not illegally deprived of land but rather is entitled to payment of outstanding purchase price, if any.

On the issue of indemnification by the third party, Counsel cited and relied on the case of *M/s Panyahululu Co. Ltd V M/s New Ocean Transporters Co. Ltd & Others HCCS No. 523 of 2006*, and submitted that the Defendants/purchasers did all the necessary due diligence and were satisfied that the 3<sup>rd</sup> Party owned the land and had the right to sell. Further that, for any action or omission attributable to the 3<sup>rd</sup> Party which has a consequence of occasioning loss to the Defendant, the 3<sup>rd</sup> Party should be held liable to indemnify the Defendant for any such loss.

Counsel for the Defendant prayed for the suit to be dismissed with costs and an order for cancellation of the Plaintiff as registered proprietor and in her place the Defendants to be registered as proprietors to the suit land.

**3<sup>rd</sup> Party`s submissions;**

Counsel for the 3<sup>rd</sup> Party argued that the moment the Plaintiff and her colleagues entered into a contract for sale of the 260 acres to the 3<sup>rd</sup> Party, ownership passed to the 3<sup>rd</sup> Party and the Plaintiff remained with a claim to the unpaid balance. To buttress this argument, counsel relied on the cases of *Lysaght Vs Edward (1876) 2 Ch. D 499 and the case of Sharif Osman Vs Hajji Haruna Mulangwa SCCA No. 38 of 1995*. Counsel further submitted that the 3<sup>rd</sup> Party has at all times been willing to pay the unpaid balance and further that the Plaintiff's effort to demand the unpaid balance vide DEX6 dated 18/05/2007 supports the view that ownership had passed to the 3<sup>rd</sup> Party and the vendor's right was only for the unpaid balance.

It is also Counsel's submission that since the Defendant entered on the suit land with consent of the 3<sup>rd</sup> Party who had purchased the same from the Plaintiff, the Defendant is not a trespasser. Counsel further disputed the claim that the Defendant relinquished his interest by entering into DEX1A and DEX1B which agreements were denied by the Defendant in his evidence when he stated that he was illiterate and had no knowledge of the said agreements.

As to whether the 3<sup>rd</sup> Party is liable to indemnify the Defendant, Counsel submitted that since there was no express or implied obligation in the purchase agreements between the 3<sup>rd</sup> Party and the Defendant, the Defendant is not entitled to any indemnity. To support this argument, Counsel relied on the cases of *Edward Kironde Kaggwa Vs L. Costaperania & Anor (1963) 1 EA 213, the case of Lasto Bosco Mayanja Vs Lugya Ronald M.A No. 1236 of 2014*. Counsel prayed for the case to be dismissed with costs of the suit to be paid by the Defendant.



**Court's determination:**

I will resolve the issues raised in the same order as they were argued by Counsel for the Third Party. It only makes sense to determine ownership before determining anything else.

***Issues two: Whether the 3<sup>rd</sup> Party acquired any interest in the suit land***

The Defendants claim to derive ownership of the suit land from the 3<sup>rd</sup> Party. The question therefore is, did the third party own the land in dispute and did he have a right to sell?

It is not in dispute that the Plaintiff and five others sold 260 acres of land, part of which forms the suit land, to the 3<sup>rd</sup> Party. However, the Plaintiff claims that subject to the sale agreement and upon failure to pay the entire purchase price, the 110 acres that was unpaid for, reverted to her.

I have carefully perused the evidence adduced by the parties and in PExh1 dated the 14/02/2006 which is the sale agreement between the Plaintiff and the 3<sup>rd</sup> Party, the Parties clearly agreed to sell the entire 260 acres to the 3<sup>rd</sup> Party and made a transfer for 150 acres subject to the initial payment of Ugx 29,000,000/-with a future promise of transferring the remaining 110 acres on 15/03/2006 upon payment of the remaining balance of Ugx. 10,000,00/= . This was confirmed by the plaintiff in her testimony.

On the 02/03/2006, the 3<sup>rd</sup> Party sold part of the land he had bought from the Plaintiff (100 acres) to the late Edward Katungi and Saato Wilson in which agreement he stated that if something went wrong with the purchase, he would repay the purchase price or exchange a different piece of land equivalent to the 100 acres.

According to the 3<sup>rd</sup> party, on 15<sup>th</sup> March 2006, the day he was supposed to pay the balance of Ugx 10,000,000/- he went to Kitookye village Sembabule district to pay and none of the vendors turned up to receive it.

In November 2006, he received information that he was required to appear before the LC1 Committee of Kitokye village on matters concerning payment of the balance. He appeared

before the Committee and in an understanding dated 16/11/2006 promised to pay Shs14,000,000/- on 11/12/2006. Again the Plaintiff did not turn up to receive the agreed amount of Ugx14,000,000/- This evidence was never controverted by the plaintiff nor was it challenged in cross examination.

On 19/12/2006, the 3<sup>rd</sup> Party sold 110 acres of the said land to the same buyers and further stated in the agreement that in case the vendor failed to secure a certificate of title for the land, he shall give them an alternative piece of land of the same size and the same price.

The effect of such contract was discussed in **Lysaght vs Edward (1876)2 Ch. D 499** as cited in **Sharif Osman v Haji Haruna Mulangwa Civil appeal No.38 of 1995**.

*“It is that the moment you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of the purchase money and a right to retain possession of the estate until the purchase money is paid, in the absence of express act as to the time of delivering possession.”*

In *John Katarikawe versus William Katwiremu (1977) HCB 187*, the Court held inter-alia that a contract for sale of land is not perfect until an effective transfer of title has been made, **but failure to do so, does not affect the contract until the land is transferred to other persons**. It was further held that before transfer of the land, a buyer under contract acquires only equitable interest. On the land being transferred to him, he acquires an indefeasible registered estate unless the transfer was effected through fraud.

In the instant facts, the 3<sup>rd</sup> Party obtained an equitable interest subject to the contract of sale in PExh1 for the entire 260 acres. A transfer for 150 acres which was paid for was made in his favor and a future promise of transferring the remaining 110 acres was to be fulfilled upon payment of the remaining balance. By that sale agreement, the 3<sup>rd</sup> Party acquired the equitable interest in the entire 260 acres.

In the case of *H.M Kadingidi v. Essence Alphonse, H.C.C.S. No.289of 1986 (cited in the case of Semakula & Anor Vs Sentiba Civil Appeal No. 05 of 2013)*, Ntabgoba PJ. (as he then was) held that;

*“A purchaser who has concluded a sale agreement with the owner, immediately becomes the owner of the land and the vendor becomes his trustee in title. This is because the purchaser is potentially entitled to the equitable remedy of specific performance. He obtains an immediate equitable interest in the property, for he is, or soon will be, in a position to call for it specifically. It does not matter that the date for completion, when the purchaser may pay his money and take possession, has not yet arrived. Equity looks upon that as done which ought to be done, and from the date of contract the purchaser becomes owner in the eyes of equity.”*

Court in the case of *Semakula &another vs Sentiba , Civil Appeal No. 5 of 2013*, further cited and relied on the Supreme Court case of *Ismail Jaffer Allibhai & 2 O’rs v. Nandlal Harjivan Karia & A’nor, S.C.C.A. No. 53 of 1995* where it was stated that, in a sale of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable interest in the property and the vendor becomes a trustee who holds the property in trust for the purchaser. That the purchaser becomes the lawful purchaser when he paid the deposit and acquired equitable interest.

I associate my opinion with the decisions in the above cited cases which are applicable to the instant facts and duly find that the 3<sup>rd</sup> Party became the owner of the entire 260 acres upon execution of the sale agreement between himself and the vendors, on the 14/02/2006.

In the circumstances, the Plaintiff and other sellers were entitled to the entire purchase price just as the 3<sup>rd</sup> Party was entitled to a transfer for the remaining 110 acres upon payment of the remaining balance. At that point, the 3<sup>rd</sup> Party was an equitable owner with the rights to deal in the land including selling to third parties although the 3<sup>rd</sup> Parties would obtain the same equitable interest he had under the equitable doctrine of *nemo dat non habet* to the effect that the buyer does not get better title than what the seller has.

Counsel for the Plaintiff argued that the 3<sup>rd</sup> Party's equitable interest was relinquished when he failed to pay the remaining balance subject to the agreement dated the 16/11/2006.

As already noted, the 3<sup>rd</sup> Party upon paying the deposit, obtained an equitable interest and became the owner of the suit land with the rights to deal in the land although under obligation for specific performance of the sale agreement to wit paying the remaining balance of Ugx. 10,000,000/=

The suit land was sold to the late Edward Katungi and Saati Wilson on the 02/03/2006 and 13/12/2006 respectively as per DEX4/DEX4B, and DEX7. Counsel seeks to rely on evidence in DEX1a &b, and DEX2b to argue that the equitable interest was relinquished upon failure to pay the remaining balance.

The Plaintiff further seeks to rely on evidence in DEX2 a & b to assert her claim that the land reverted to her following non-payment. According to DEX2 dated the 16/11/2006, the Parties agreed that the 3<sup>rd</sup> Party pays Ugx 14,000,000/= to the Plaintiff on 11/12/2006 and if he did, the transfer would be made but if he did not pay, the land would revert to the Plaintiff.

From the evidence of all Parties, it is clear that DEX2 was entered into with the aim of having the 3<sup>rd</sup> Party pay the remaining balance on the purchase price. The 3<sup>rd</sup> Party's evidence is that on the agreed date of 11/12/2006, the Plaintiff did not show up to receive the payment and as such, he handed the money over to the LC1 Chairperson. This evidence is corroborated and supported by the evidence in DE8 dated the 11-12-2006 in which the LC Committee was informing the Plaintiff that the 3<sup>rd</sup> Party had brought the remaining balance for payment and informing her to collect the same from the Chairman. This was further corroborated by DW3 who identified the document and his signature thereon.

The Defendant testified that the money was later returned to him and that he has been willing to pay the same to the Plaintiff.

The Plaintiff in her evidence stated that she used all efforts to demand the payment including procuring services of bailiffs. Respectfully, I do not believe her. The evidence adduced by the 3<sup>rd</sup> party as well as the Defendants shows that the third party tried to pay the balance so stipulated at all times and was frustrated by the Plaintiff. I have to note that at this point, the 3<sup>rd</sup> Party had already sold part of the suit land to the Defendant who had taken possession. I believe, from the evidence adduced that upon the third party selling to the Defendants in March 2006 the Plaintiff realized that she could have obtained a better deal from the transaction than she did from the third party. I believe this is true because, she did not turn up to receive the balance on the purchase price on 15<sup>th</sup> March, 2006 nor 11/12/2006. She is the typical seller of a treasured possession who after selling a treasure regrets the sale.

Considering that the initial agreement and subsequent agreement both recognized that the 3<sup>rd</sup> Party had purchased the property and would receive transfer of the same upon payment of the purchase price, I find that the 3<sup>rd</sup> Party has adduced sufficient evidence to prove that he took reasonable steps to clear the payment and is therefore entitled to a transfer of the remaining 110 acres upon payment of that outstanding contract sum. I have already stated that he acquired equitable interest in the 110 acres and that the defendants acquired the same interest when he sold to them.

The Plaintiff stated in her witness statement and further in her evidence that the suit land reverted to her upon failure by the 3<sup>rd</sup> Party to pay the remaining balance. Evidence in DEX1a & b dated 10/10/2007 shows that the 3<sup>rd</sup> Party sold the suit land back to the Plaintiff for a price and not that it reverted back to her.

The Plaintiff stated in her evidence that subject to DEX1a & b, when the 3<sup>rd</sup> Party failed to pay, she gave him money for his people to leave the land. This evidence was contested by the 3<sup>rd</sup> Party who stated that he is an illiterate and could not have written the said agreement. This agreement purported agreement was subsequent to the initial agreement of 16/11/2006 which the Plaintiff sought to rely on to assert that the suit land reverted to her.

This leaves the court wondering why, if the land had already reverted to her upon failure to honor the agreement dated 16/11/2006, did she then have to execute another agreement in which she had to pay the 3<sup>rd</sup> Party to evict the people on the land? Why did she extend money to the 3<sup>rd</sup> Party instead of simply taking possession if the transaction had not been concluded? This is why I believe that the Plaintiff regretted a sale she made to the third party and misused her authority as registered proprietor to hold him at ransom by refusing to accept the balance on the purchase price and refusing to execute a transfer deed to him.

I am therefore inclined to believe that the Plaintiff was not only aware that the 3<sup>rd</sup> Party had received ownership to the suit land and duly transferred possession of the same, but also that the only right she had in regards to the suit land simply for the balance on the purchase price.

***Section 101 of the Evidence Act*** places an obligation on any party alleging the existence of a fact to prove its existence. I find that the 3<sup>rd</sup> Party has adduced sufficient evidence to prove that he indeed made attempts to pay the Plaintiff's balance on the purchase price and the Plaintiff was rather reluctant in receiving the same. In addition, the law cited herein as per the decided cases is clear that upon payment of the initial deposit, the 3<sup>rd</sup> Party had the right to deal in the land although he had an obligation for specific performance of the sale agreement.

To answer the question stated by this court, the effect of the initial agreement was that it passed on ownership of the suit land to the 3<sup>rd</sup> Party and he held an equitable interest with rights to deal in the same.

***Issue One :Whether the Defendant is a trespasser on the suit land?***

**Sale to the Defendants & Trespass;**

The law on trespass to land was clearly stated in the case of ***Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)***.

In that case, Mulenga JSC held:

***“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land.”***

In the instant case, the Plaintiff holds the certificate of title to the suit land and seeks to recover possession of the same from the Defendant who is currently utilizing it. The Plaintiff's claim is for recovery of possession of the suit land her case being that; together with five others, they sold 260 acres of land to the 3<sup>rd</sup> Party but the 3<sup>rd</sup> Party was only able to pay for 150 acres of the land and the remaining 110 acres reverted to the Plaintiff in accordance with the terms of the sale agreement.

The Plaintiff seeks to recover possession of the 110 acres which she holds certificate of title to, and the same is being utilized by the Defendant estate who claims to have purchased the same from the 3<sup>rd</sup> Party.

As to whether the Defendants are trespassers on the suit land, having found that the 3<sup>rd</sup> Party had an equitable interest with rights to deal in the same, the late Edward Kalungi and Saati Wilson purchased and acquired the same equitable interest that the 3<sup>rd</sup> Party had.

When they purchased the suit land, the vendor had good title and therefore their entry onto the land was not an interference on the Plaintiff's legal title which she was simply holding in trust subject to payment of the balance by the 3<sup>rd</sup> Party.

I therefore find and hold that the Defendant obtained good title from the 3<sup>rd</sup> Party and as such the Defendant estate is not trespassing on the Plaintiff's land.

Issue one and two are resolved in the affirmative.

***Issue three; whether the 3<sup>rd</sup> Party is liable to indemnify the Defendant, and if so to what extent;***

Counsel for the Plaintiff argued that the Defendant was also at fault and as such is not entitled to indemnification from the 3<sup>rd</sup> Party. Counsel for the Defendant submitted that for any act or omission attributable to the 3<sup>rd</sup> Party which action has a consequence of occasioning loss to the Defendant, the 3<sup>rd</sup> Party should be held liable to indemnify the Defendant for such loss.

Counsel for the 3<sup>rd</sup> Party argued that there was no initial obligation or express term in the purchase agreement between the Defendant and the 3<sup>rd</sup> Party and as such the Defendant is not entitled to indemnification.

Having found that the 3<sup>rd</sup> Party acquired and passed on good title/equitable interest to the Defendant, there is no need to address the issue of indemnity as no loss has been occasioned the Defendant.

This issue is therefore resolved in the negative.

***Issue four; what remedies are the Parties entitled to;***

From the forgoing resolution, it is my finding that the Plaintiff has not proved a case against the Defendant and as such is not entitled to the remedies sought.

The Defendant prayed for a consequential order for the cancellation of the Plaintiff's registration on the title to register the certificate of title to the suit land in the Defendant's estate.

Having found that the Defendant acquired good equitable interest, the Defendant's estate is therefore entitled to have legal title of the same. However, this shall be upon the 3<sup>rd</sup> Party fulfilling his obligations under the sale transaction and clearing the balance of the purchase price.



The 3<sup>rd</sup> Party acknowledged that he never completed the purchase price but is willing to clear the same. Counsel for the 3<sup>rd</sup> Party prayed for costs of the suit to be awarded to the 3<sup>rd</sup> Party at the expense of the Defendant.

I am inclined to deny this prayer having consideration to the fact that the 3<sup>rd</sup> Party at all-time has been aware that he did not complete the purchase price. It was therefore necessary that he be added to the suit to determine the substantial dispute among the Parties.

The 3<sup>rd</sup> Party is hereby ordered to pay the outstanding agreed amount of Ugx. 14,000,000/= (Uganda Shillings Fourteen Million) to the Plaintiff being the outstanding amount on the purchase of the suit land.

The suit is hereby dismissed upon the following orders;

1. The 3<sup>rd</sup> Party shall pay the outstanding amount of Ugx. 14,000,000/= to the Plaintiff,
2. The Plaintiff shall transfer the suit land to the Defendants as Administrators of the estate of the late Edward Katungi within 14 working days from the date of this order.
3. In the event that the order in 2) above is not complied with in the stipulated time, a consequential order for the transfer of the suit land comprised in Mawogola Block 44 Plot 28 measuring approx. 110 acres to the Defendants as Administrators of the estate of the late Edward Kitungi shall take effect;
4. Costs of the suit are awarded to the Defendants.

I so order.

Dated at Masaka this 30<sup>th</sup> day of September, 2021.

Signed;



**VICTORIA NAKINTU NKWANGA KATAMBA**

## **JUDGE**