

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**  
**CIVIL SUIT NO.40 OF 2013**

**CHRISTINE NAZZIWA.....PLAINTIFF**

**VERSUS**

- 1. ISMAIL NYOMBI GAWERA (Administrator of the estate of the late Eriya Byemalo)**
- 2. ZZIWA ABBAS.....DEFENDANTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**JUDGMENT**

The plaintiff brought this suit against the defendants for a declaration that the plaintiff is the sole surviving biological child of the deceased entitled to administer the deceased's estate in priority to any other relatives; a declaration that the grant used by the 1<sup>st</sup> defendant is a forgery, illegal, null and void; an order that the plaintiff be granted letters of administration to the late Eriya Byemalo's estate; a declaration that the 1<sup>st</sup> defendant obtained registration of his names on to the late Eriya Byemalo's certificate of title to Buruli Block 98 Plot 1 land at Machumu Nakasongola through fraud; an order that the Registrar of Titles cancels the 1<sup>st</sup> defendant's names from the register in respect of land comprised in Bululi Block 98 Plot 1 land at Machumu Nakasongola and cancels all entries on the register made in favour of the 1<sup>st</sup> defendant and or his nominees and or his transferees; an order that the 1<sup>st</sup> defendant delivers the certificate of title to court for rectification of the register; an order that a permanent injunction do issue restraining the defendants by themselves their servants and or agents from claiming, interfering with and or trespassing on the suit land; eviction of the defendants from the land; general damages for fraud against the 1<sup>st</sup> defendant; general damages for trespass against both defendants; costs of the suit; and any other or alternative relief.

The plaintiffs' case is that at all material times the deceased Eriya Byemalo was the registered proprietor of land comprised in Bululi Block 98 Plot 1 measuring 44.00 hectares land at Machumu Nakasongola (suit land). The late Eriya Byemalo died intestate around the 1960s. He was survived by six children, all of whom have since died except the plaintiff. Eriya Byemalo distributed his entire estate of 44 hectares before his death. In particular he gave 14 hectares to the 1<sup>st</sup> defendant's father Gawera Bulasio and 6.00 hectares each to the rest of the other children including the plaintiff. The 1<sup>st</sup> defendant, a grandchild of the late Eriya Byemalo, forged or caused to be forged letters of administration to the estate of the late Eriya Byemalo vide HCT 00 CV AC 2007, forged a signature purporting to be that of Justice Margret Oguli Oumo whereas not. HCT 00 CV AC 2007 is in reality in respect of the estate of Jamal Abdual Nino executor, by Justice Eldad Mwanguhya issued on 10/09/2007.

It is also the plaintiff's case that after forging the grant, the 1<sup>st</sup> defendant fraudulently procured a certificate of title to the deceased's land at the mailo office in Bukalasa, which title he fraudulently transferred into his names as administrator of the estate of the late Eriya Byemalo. Since being fraudulently registered on the land, the defendant has threatened to evict the plaintiff from the land she has occupied for over thirty years. The plaintiff has so far resisted the threats and has lodged a caveat to protect her interests. The 1<sup>st</sup> defendant has since allocated portions of the estate to the 2<sup>nd</sup> defendant who is now using the land as his own and has also allocated the land to third parties. The defendants are now claiming to be the exclusive owners of the suit land and have denied the plaintiff and other family members their beneficial shares in the deceased's estate. The plaintiff further pleads that the defendants intend to alienate the suit land further unless restrained by court

The defendants never filed a defence though they were served with the summons to file a defence, together with the plaint. Each acknowledged service by affixing his names, signature and date on the court's copy of the summons. Eventually the plaintiff amended his plaint and withdrew his case against the 2<sup>nd</sup> defendant since he was no longer on the land. The amended plaint was served on the 1<sup>st</sup> defendant who again never filed a defence. The suit consequently proceeded *ex parte* on the application of the plaintiff's counsel. The plaintiff's counsel filed the plaintiff's sworn witness statements and written submissions within time schedules given by court.

The matter will be deliberated along the following issues:-

- i) *Whether the defendant used forged letters of administration to transfer the deceased's estate into his names?*
- ii) *Remedies available to the parties.*

***Issue 1: Whether the defendant used forged letters of administration to transfer the deceased's estate into his names?***

The plaintiff (PW1) stated in paragraphs 3, 8, 10, 13, 14, 15 16 and 17 of her sworn witness statement that the land comprised in Bululi Block 98 Plot 1 land at Machumu measuring 44.00 hectares (suit land) is now registered in the names of the defendant as administrator of the estate of the late Eriya Byemalo; that they never sat as a family to appoint the defendant as the person to take out letters of administration to her late father's estate; that it is not possible for two deceased persons to have one letters of administration; that the letters of administration obtained by the defendant are forged; that the defendant used the same letters to get the deceased's land registered in his names; that she became suspicious that the defendant had taken over the suit land when surveyors demarcated the land; and that she instructed her son Kamulegeya John to investigate and report back to her.

Kamulegeya John (PW2) stated in his sworn witness statement that he was the son of the plaintiff and also her most trusted companion; that he made a search and obtained a search certificate, exhibit **P1A** indicating that the suit land is registered in the defendant's names; and that the Registrar of Titles Bukalasa Land Office also gave them a copy of the grant in Family Division Administration Cause No. 1024/2007 used by the defendant to transfer the suit land in his names. PW2 also stated that he lodged a caveat on the suit land in the Bukalasa Land Office after which the plaintiff filed this suit against the defendant. PW2 further stated that during the pendency of the suit he made another search in the Family Division on Administration Cause No. 1014/2007 and established that the grant in the said Administration Cause, exhibit **P2C**, was in respect of the estate of Khalid Nino Abduho and not Eriya Byemalo. PW2 stated that the defendant has never got a genuine grant from a competent court and that his grant is a forgery, illegal, and null and void.

The sworn witness statement of Nansamba Rose (PW3) confirms the statements of PW1 and PW2. PW3 reiterates that their search revealed that the defendant forged the letters of administration which enabled him to transfer the deceased's land into his names.

The search certificate, Exhibit **P1A**, indicates that the suit property is registered in the names of Ismail Nyombi (the defendant) as administrator of the estate of the late Eriya Byemalo. A certified true copy of the certificate of title to property comprised in Buruli Block 98 Plot 1 land at Machumu (suit land) shows that the defendant's name was registered on the title land as administrator of the estate of the late Eriya Byemalo on 20/08/2007 vide Instrument No.BUK.80257 at 12.30 pm. The adduced evidence also reveals that the defendant used a grant purportedly issued to him on 5<sup>th</sup> June 2007 by Lady Justice Oguli Oumo vide **AC 1014/2007 Estate of the late Eriya Byemalo** (Exhibit **P3A**). However Exhibits **P2A**, **P2B** and **P2C** which are certified true copies of the petition, declaration, and grant reveal that the grant in **AC 1014/2007** was issued on 10<sup>th</sup> September 2007 to a one Jamal Abduo Nino (executor) by Justice Eridadi Mwanguhya in respect of the estate of Khalid Nino Abduo. This suggests that the grant used to register the suit land in the defendant's names (Exhibit **P3A**), was forged and therefore, was not in respect of the late Eriya Byemalo.

The evidence on record has not been challenged or rebutted by the defendant. It was held in **Massa V Achen [1978] HCB 279** that an averment on oath which is neither denied nor rebutted is admitted as the true fact. It is not in dispute therefore that the defendant used forged letters of administration which enabled to transfer the deceased's land (suit land) into his names.

Issue 1 is answered in the affirmative.

***Issue 2: Remedies available to the parties.***

The plaintiff sought various orders which were listed above, including the prayer to deregister the defendant from the suit land which the plaintiff's counsel treated as a separate issue but which I will address as a remedy, together with the other remedies sought by the plaintiff.

On the plaintiff's prayer to deregister the defendant from the suit land, the plaintiff has proved her case against the defendant that the defendant used forged letters of administration to transfer the deceased's land comprised in Buruli Block 98 Plot 1 land at Machumu into his names.

Section 77 of the Registration of Titles Act cap 230 provides that any certificate of title, entry, removal of incumbrance, or cancellation, in the register book, procured or made by fraud, shall be void as against all parties or privies to the fraud. In that respect, I agree with the plaintiff's counsel that for the defendant to be legally registered as successor to the deceased's estate, he must have a lawful grant and any illegality can lead to the impeachment of his registration. The defendant's registration to the suit land in this case was obtained fraudulently and therefore void. It cannot be upheld by this court. See **Makula International V His Eminence Cardinal Emmanuel Nsubuga & Another CA No. 40/1981.**

Thus, based on the adduced evidence that the defendant got registered on the suit land illegally and fraudulently, his names as successor to the late Eriya Byemalo's estate should be de registered from the certificate of title to the suit land comprised in Bululi Block 98 Plot 1 land at Machumu.

On the prayers for a declaration that the plaintiff is the sole surviving biological child of the deceased entitled to administer the deceased's estate in priority to any other relatives, the plaintiff adduced evidence that she is the only surviving child of the deceased, the other five having passed away after their late father's death. She also adduced evidence that the defendant is a grandson of the deceased. In the given circumstances, she, as the only surviving child of the deceased, is more entitled to administer her late father's estate than the defendant grandchild. This is in line with sections 27 and 202 of the Succession Act which are to the effect that administration is granted to a person entitled to the greatest portion of the estate.

The plaintiff's prayer for a declaration that the grant used by the 1<sup>st</sup> defendant is a forgery, illegal, null and void is supported by the plaintiff's adduced evidence showing that the said grant was forged. Thus, on that basis, I would declare the said letters of administration to be a forgery, illegal, null and void.

On the plaintiff's prayer to direct the defendant to deliver the certificate of title to court for rectification, the plaintiff's counsel submitted that this may not be possible as the defendant had not participated in the proceedings. Counsel instead based on the plaintiff's prayer for "*any other or alternative relief*" to invoke court's inherent powers to order the Registrar of Titles to issue a special certificate of title in respect of the suit land. It is my opinion however that the defendant's

not participating in the proceedings of this case does not bar this court from making orders against him, since the record clearly shows that he was at all material times summoned to file his defence and attend court but he chose not to, which was the reason the suit proceeded *ex parte*. The defendant has himself to blame for denying himself the opportunity to defend himself, as opposed to a person who is not sued or made a party to the suit.

In that respect, it is my opinion that an order against the defendant to surrender the faulted certificate of title for rectification would neither be out of order nor inappropriate. This court has already made a finding that the defendant used fraudulent means to have his names registered on the suit land. It follows therefore that his names as successor to the late Eriya Byemalo's estate should be de registered from the certificate of title to the suit land. It also follows that the plaintiff is entitled to an eviction order and a permanent injunction against the defendant, his servants or workmen and anybody claiming under him from trespassing and interfering with the suit land in any way.

On the plaintiffs' prayer for general damages, it is trite law that damages are the direct probable consequence of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. General damages must be pleaded and proved. See **Moses Kizige V Muzakawo Batolewo [1981] HCB 66**. In **Assist (U) Ltd V Italian Asphalt & Haulage & Another HCCS 1291/1999, unreported**, inconvenience was held to be a form of damage.

In this case, there is evidence that the defendant used the forged grant to transfer the suit land into his the names as administrator of the estate of the late Eriya Byemalo and to eventually sell part of the same to Wilson Mulwana, consequent upon which the plaintiff eventually lodged a caveat on the land on 28/06/2012 vide instrument no. BUK 101731. The plaintiff's un rebutted evidence is that the defendant cut down trees for timber and burnt her houses. I agree with the plaintiff's counsel's submissions that all this caused inconvenience to the plaintiff.

It is my opinion therefore, based on the findings and the applicable law, that the defendant's using the forged grant to sell off the property forming part of the estate of the late Eriya Byemalo prejudiced the plaintiff. This would entitle the plaintiff to general damages as a beneficiary to the estate. The suit land is registered which gives it a higher value than unregistered land. I would in

the circumstances, grant the plaintiff's request for award of general damages in the sum of ten million Uganda Shillings (10,000,000/=).

All in all, I find that the plaintiff is entitled to the orders sought against the defendant.

I therefore enter judgment for the plaintiff against the defendant for:-

- a) a declaration that the plaintiff is the sole surviving biological child of the deceased entitled to administer the deceased's estate in priority to any other relatives;
- b) a declaration that the grant used by the 1<sup>st</sup> defendant is a forgery, illegal, null and void;
- c) an order that the plaintiff be granted letters of administration to the late Eriya Byemalo's estate;
- d) a declaration that the 1<sup>st</sup> defendant obtained registration of his names on to the late Eriya Byemalo's certificate of title to Buruli Block 98 Plot 1 land at Machumu Nakasongola through fraud;
- e) an order that the Registrar of Titles cancels the 1<sup>st</sup> defendant's names from the register in respect of land comprised in Bululi Block 98 Plot 1 land at Machumu Nakasongola and cancels all entries on the register made in favour of the 1<sup>st</sup> defendant and or his nominees and or his transferees;
- f) an order that the 1<sup>st</sup> defendant delivers the certificate of title to court for rectification of the register;
- g) an order that a permanent injunction do issue restraining the 1<sup>st</sup> defendant by himself, his servants and or agents from claiming, interfering with and or trespassing on the suit land;
- h) eviction of the 1<sup>st</sup> defendant from the land;
- i) general damages to the tune of U.Shs.10,000,000/= (ten million) for fraud against the 1<sup>st</sup> defendant;
- j) Costs of the suit.

**I so order.**

**Dated at Kampala this 10<sup>th</sup> day of June 2016.**

Percy Night Tuhaise

**Judge.**