

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
CIVIL SUIT NO. 301 OF 2018

1. YUDAYA NAMAZZI
2. MANSUR MUKUYE
3. SULAIMAN KIIZA..... PLAINTIFFS

VERSUS

1. JAMES NDIWALANA
2. MUSANYUSA RHONA.....DEFENDANTS

BEFORE: HON LADY JUSTICE JEANNE RWAKAKOOKO

JUDGMENT

Introduction

The Plaintiffs' claim is for;

1. An order cancelling the 2nd Defendant's name from the certificate of title in respect of land comprised in Block 277, Plot 19 at Kigoma
2. A return and re-transfer of the said land to the estate of the late JAMIRU KIZITO SSALONGO.
3. In the alternative but without prejudice to the foregoing Plaintiffs' claim from the Defendants, the current market value of the said land which Is the sum of UGX 600,000,000/= (Six Hundred Million Uganda Shillings)
4. An order for;
 - i) Payment of mesne profits
 - ii) General damages
 - iii) Interest on the alternative sum in (3) above and on the general damages at the rate of 24% per annum from the date of judgment till payment in full.
 - iv) Permanent Injunction against the Defendants, their agents/anyone claiming under or through them and or their representatives and or assignees.
 - v) Costs of the suit.
5. Any other remedies this Honorable court deems fit.

Background

The Plaintiffs are administrators of the estate of the late Jamiru Kizito Ssalongo who were appointed vide a decree in Civil Suit No. 143 of 2008 dated 7th July 2011. Resultantly, through execution of the decree, letters of administration were granted to the Plaintiffs on 7th May 2012.

On the 8th December 2011, the Defendants allegedly purported to transfer the land comprised in Busiro Block 277 Plot 19 land at Kigoma measuring approximately 5.0 (five) Acres (herein referred to as the suit land) to the 2nd Defendant.

The Plaintiffs pleaded these particulars of fraud by the 2nd Defendant;

- a) Transferring the suit land with knowledge from and through Shaban Mubiru and James Ndiwalana of CS No. 143 of 2008 and orders thereof between the Plaintiffs and the said Shaban Mubiru and James Ndiwalana from who she acquired the same illegally.
- b) Transferring the land in issue with full knowledge and disobedience of the Court Order Vide CS No. 143 of 2008 that decree the retransfer of the suit land into the name of the deceased.
- c) Transferring the suit land with full knowledge that the 1st Defendant had no title to pass.
- d) Transferring the suit land even after the 2nd Defendant was challenged through the office of the RDC Wakiso District in 2007 and the State House Land Protection Department in respect of other land she had earlier illegally acquired from Shaban Mubiru and James Ndiwalana developed with her home and forming part of the late Jamiru Kizito Salongo's estate.

That the registration of the said illegal transfer was effected on 8th September 2011 and was to the detriment of the Plaintiffs who could not distribute the same to the rightful beneficiaries of the estate. That the 2nd Defendant had full knowledge and was aware of the decree/orders in CS No. 143 of 2008 but nonetheless proceeded to transfer the land into her names.

In her defence, the 2nd Defendant averred that the suit did not disclose a cause of action against her. More-so, that she was a bonafide purchaser for valuable consideration without notice of any fraud having conducted all the relevant due diligence before she purchased the suit land. That she was never a party to CS No. 143 of 2008 and she was never put on notice of the outcome of any of those proceedings.

Further-more, that the suit land was transferred into her names long before the court order was delivered for registration therefore all allegations of fraud, illegality and disregard for court process were denied. The 2nd Defendant averred that the transaction of the suit land with the registered proprietors at the time was done in a transparent manner and the 2nd Defendant even went ahead to plan, develop the land and even constructed her home with the knowledge of the Plaintiffs who never raised any alarm or complaint. Furthermore, that the land



was registered in the name of the 2nd Defendant in 2003 and the Plaintiffs had been duly compensated for the same by the a one Shaban Mubiru (now deceased) and the 1st Defendant.

Allegedly that Plot 19 has since mutated and the property therein passed on and cannot be recovered by the Plaintiffs. The 2nd Defendant prayed that the suit be dismissed with costs and a permanent injunction doth issue against the Plaintiffs, their agents or anyone claiming through them or their representatives.

The 1st Defendant in his defence raised a preliminary objection as to the competence of the suit against him on grounds of res judicata as the matters under consideration in the present suit were previously determined in this honorable court vide Civil Suit No. 143 of 2008 by Hon Justice Moses Mukiibi. More-so that the remedies sought by the Plaintiffs against the 1st Defendant were already granted in the decree vide CS No. 143/2008 and thus that the Plaintiffs are not entitled to any of the reliefs in as far as the 1st Defendant is concerned. The 1st Defendant averred that the Plaintiffs have no cause of action against him and the suit should be dismissed with costs.

Representation

At the hearing on 7th December 2022, Umar Nyanzi and Senfuka Robert appeared for the Plaintiffs. The 1st and 2nd Plaintiffs were in court while the 3rd plaintiff was absent. Ofumbi Dan appeared for the 2nd Defendant who was in court. Kenneth Situma holding brief for Emiru Dominik appeared for the 1st Defendant who was present in court. Court gave timelines for filing of the submissions which all parties duly complied with.

Issues for Determination

The parties filed a joint scheduling memorandum and the issue therein are hereby adopted with slight modifications;

1. Whether the Plaintiffs have any interest in the suit land
2. Whether the 2nd Defendant is a bonafide purchaser for value without notice and whether the registration of the 2nd Defendant on the Certificate of Title was lawful
3. Whether the Plaintiffs are entitled to the remedies sought.

Resolution

Before delving into the resolution of the above issue I will address the Preliminary Objection raised by the 1st Defendant.

- a) That the instant suit is res judicata against the 1st Defendant.

In his written statement of defence, the 1st Defendant averred that the matters under consideration in the present suit had been determined in CS No. 143 of 2008.



Section 7 of the Civil Procedure Act provides that, no court should try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

To give effect to the plea of res judicata, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit. **[David Kabarebe V Major Prossy Nalweyiso CACA No. 34/2003]**

PEX8 is a consent judgement between the Plaintiffs and the 2nd Defendant (Ndiwalana James) vide CS No. 143/2008 where in it was agreed as follows;

1. The 2nd Defendant is to pay to the Plaintiffs the sum of UGX 10,000,000/= in full and final settlement of the Plaintiffs claim for land measuring 10 acres comprised in **Block 277 Busiro Plot 20**.
2. Letters of administration previously granted to the 2nd Defendant be revoked and instead a new grant be given to the Plaintiffs
3. The 2nd Defendant is to pay UGX 3,000,000/= upon signing this consent judgement.
4. The balance of UGX 7,000,000/= shall be paid to the Plaintiffs by the 2nd Defendant within 6(six) months from the date of signing the consent judgement.
5. Parties to pay their respective costs.
6. In the event that the 2nd Defendant fails to pay the balance of UGX 7,000,000/= as agreed, then execution shall issue against the 2nd Defendants for recovery of the same.

The above consent judgment is dated 16/12/2010. James Ndiwalana then made payments in two installments each of UGX 3,000,000/= on 16/12/2010 and 24/06/2011 marked PEX9 and PEX10 respectively.

According to PEX4 and PEX5, which are the proceedings and decree vide Civil Suit No. 143 of 2008, the orders therein where to the effect that;

- a) The grant of letters of administration made to the Defendants in High Court Administration Cause No. 225 of 2003 dated 30th April 2003 be and is hereby revoked and that the Defendants surrender the original grant to the court within one week from the date hereof or furnish evidence that the same no longer exists to the Registrar Family Division of the High Court.
- b) Letters of Administration to the estate of the late Jamiru Kizito Ssalongo be issued to the Plaintiffs without the necessity of any other application for the same.



- c) The Defendants shall jointly and severally render a true and correct account to the Plaintiffs of all their dealings/transactions relating to the estate and property of the late Jamiru Kizito Ssalongo
- d) Any land still registered in the Defendant's names as Administrators of the estate of the late Jamiru Kizito Ssalongo be re-transferred into the deceased's name. The commissioner land registration is hereby directed to give effect to this order
- e) Defendants shall jointly and/or severally pay the taxed costs of this suit to the Plaintiffs.

In the consent agreement PEX8, the subject of the suit was Block 277 Plot 20 and the present subject of this suit is Block 277 Plot 19. These are two different pieces of land. The Plaintiffs claim is for an account relating to the administration of the deceased's estate and restitution of property that was wrongly dealt with or alienated by the 1st Defendant.

As per PEX8, the 1st Plaintiff - PW1 during cross examination testified that the 1st Defendant breached the consent judgment since she only received UGX 6,000,000/= out of the UGX 10,000,000 that had been agreed upon. She also testified that the consent was in respect to plot 20. PW2, the 2nd Plaintiff gave testimony during cross examination that Plot 19 was not in dispute in CS No. 143 of 2008 because the certificate of title was still in the name the late Jamiru Ssalongo and there was a caveat on the same.

The 1st Defendant compensated the Plaintiffs in respect to Block 277 Plot 20 and not Block 277 Plot 19. In as far as the 1st Defendant had a role to play in alienating the present suit land, the principle of res judicata doesn't apply in the instant matter because the same wasn't in issue at the time Cs No. 143 of 2008 was filed.

Clearly the estate of the late Jamiru Ssalongo did not comprise of only Block 277 Plot 20. The 1st Defendant did not discharge his obligations towards the Plaintiffs in respect to Block 277 Plot 19, which I believe is the purpose of the present suit.

For the reasons given above, I find no merit in this preliminary objection. The plea of res judicata only applies where the matters substantially in issue have been heard and finally disposed of which isn't the case in the present circumstances.

Issue one: Whether the Plaintiffs have any interest in the suit land.

Section 2(ma) of the Succession (Amended) Act, 2022 defines a lineal descendant to mean a person who is descended in a direct line from the deceased and includes a child, a grandchild of the deceased and any person related to the deceased in a direct descending line up to six degrees downwards.



Section (va) defines a spouse to mean a husband or wife married in accordance with the laws of Uganda or in accordance with the laws of another country and recognized in Uganda as a valid marriage.

The Plaintiffs brought this suit as administrators of the estate of the late Jamiru Kizito Ssalongo. PEX8 hereto attached are the letters of administration duly signed on the 7th May 2012 in favour of the Plaintiffs. The Plaintiffs are also beneficiaries to the estate of the late Jamiru Kizito Ssalongo, with the 1st Plaintiff being a widow and the 2nd and 3rd Plaintiffs as sons to the late Jamiru.

PEX4 are the proceedings vide CS No. 143 of 2008 wherein a judgment on admission was entered in favor of the Plaintiffs against the 1st Defendant and Shaban Mubiru. The letters of administration dated 30/4/2003 where revoked having been obtained fraudulently with concealment that the deceased had left a widow and children (the Plaintiffs). Vide that judgment, the Defendants were ordered to surrender the grant of letters of administration, render a true and correct account of all the dealings/transactions relating to the estate of the late Jamiru Kizito Ssalongo and to re-transfer any land still registered in the names of the Defendants as administrators of the estate of the late Jamiru back into the deceased's names. The Commissioner Land registration was also ordered to effect the above order. A decree to the above orders was also signed on 7/7/2011 and is hereto attached and marked PEX5.

PEX2 is a photocopy of the certificate of title for Block 277 Plot 19 land at Kagoma which is herein referred to as the suit land. The late Jamiru Kizito Ssalongo was registered on the same on 26/6/1967 under instrument number KLA47762, thereafter Mubiru Shaban and James Ndiwalana were registered as administrators of the estate of the late Jamiru on 2/5/2011 under instrument number KLA497768. The 2nd Defendant was registered as proprietor on 8/9/2011 under instrument number KLA515792.

PW1 and PW2 in their testimonies during cross examination gave evidence that Block 277 Plot 19 was not in dispute when CS No. 143 of 2008 was filed because that land was still registered in the name of the deceased. This is confirmed by PEX2 which is the certificate of title. The 1st Defendant only got registered on the same on 2/5/2011 way after the CS No. 143 of 2008 had been concluded. However, DW1 averred that Plot 19 was the first one to be sold in 2003 and by the time of filing CS No. 143 of 2004 the plot had been sold.

Section 54 of the Registration of Titles Act provides that no instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render the land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in the manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature; and, if two or more instruments signed by the same proprietor and purporting to affect the same estate or interest are at the same time presented



to the registrar for registration, he or she shall register and endorse that instrument which is presented by the person producing the duplicate certificate of title.

I am persuaded by the assertions of PW1 that she was not aware that plot 19 had been sold by the 1st Defendant and Mubiru Shaban to the 2nd Defendant since the same was still registered in the names of the deceased. **Section 54(supra)** is clear that a certificate of title is conclusive proof of ownership.

Primarily, Block 277 Plot 19 formed part of the estate of the late Jamiru Kizito Ssalongo as evidenced in DEX1 until the same was transferred to the 2nd Defendant. As beneficiaries and administrators of the estate of the late Jamiru, the Plaintiffs have an interest in the suit land in as far the transfer to the 2nd Defendant was made when letters of administration to the 1st Defendant and Mubiru Shaban had been revoked.

In the premise, I resolve this issue in the affirmative, the Plaintiffs have an interest in the land at Kagoma comprised in Block 277 Plot 19 as administrators and beneficiaries of the estate of the late Jamiru Kizito Ssalongo.

Issue Two: Whether the 2nd Defendant is a bonafide purchaser for value without notice and whether the registration of the 2nd Defendant on the Certificate of Title was lawful

Black's Law Dictionary 7th Edition defines a bonafide purchaser for value as one who purchases legal title to real property, without actual or constructive notice of any infirmities, claims, or equities against the title.

In the case of **David Sejjaaka Nalima V Rebecca Musoke CACA No. 12 of 1985** it was stated that, *'While the burden of proving the case lies on the plaintiff, it is well settled that the onus of establishing the plea of a bona fide purchaser lies on the person who sets it up. It is a simple plea and is not sufficiently made out by proving purchase for value and leaving it to the plaintiff to prove notice if he can. In Pilcher V. Rawlins (1872) 7 Ch. App. 259, Sir, James L.J. said at P.268,*

'I propose to apply myself to the case of a purchaser for valuable consideration without notice obtaining upon the occasion of his purchase and by estate, some right, some legal advantage, and according to my view of the established law of this court. Such consideration without notice is an absolute unqualified, unanswerable to the jurisdiction of this court. Such a purchaser where he has once put in that plea may be interrogated and tested to any extent as to the valuable consideration which he has given in to show the bona fide or mala fides of his purchase, and also the presence or absence of notice; but once he has gone and has satisfied the terms of the plea of purchase for valuable consideration without notice, then



according to my judgment, this court has no jurisdiction whatever to anything more legal advantage which he has obtained whatever it may be. In such a case a purchaser is entitled to hold that which without breach of duty, he has had conveyed to him."

In the case of **Nekomia Obina & Ors V Okumu Vincent & Ors Civil Appeal No. 42/2018** Justice Stephen Mubiru stated that a person is considered a purchaser in good faith if he or she buys the property without notice that some other person has a right to or interest in such property and pays its fair price before he or she has notice of the adverse claims and interest of another person in the same property. It connotes an honest intention to abstain from taking undue advantage of another. Good faith consists in the buyer's belief that the person from whom the buyer purchased the land was the owner and could convey title. Good faith, while it is always to be presumed in the absence of proof to the contrary, requires a well-founded belief that the person from whom title was received was himself or herself the owner of the land, with the right to convey it. There is good faith where there is an honest intention to abstain from taking any unconscientious advantage of another. Otherwise stated, good faith is the opposite of fraud and it refers to the state of mind which is manifested by the acts of the individual concerned.

The 1st Defendant DW1 testified that he and Mubiru Shaban sold the suit land to the 2nd Defendant at UGX 8,500,000/= and they proceeded to sign the transfer forms in her favor. DW2 - the 2nd Defendant testified that she bought the land in May of 2003. That she did a search and infact confirmed that the 1st Defendant and Mubiru Shaban were administrators of the estate of the late Jamiru Kizito Ssalongo. DW2 further testified that the 1st Defendant and Shaban were not registered on the certificate of title but they had the authority.

DW2 also stated in cross examination that she was registered as a proprietor on 8th September 2011. That it was supposed to be transferred in 2008 but due to the gymnastics in Lands, she got the title in 2008. Contrary to DW1's testimony, DW2 stated that the transfer forms were signed in 2006 and not 2003 as alleged by DW1. DW2 further stated that at the time she bought the suit land, there were no squatters and the land was also vacant except for trees and monkeys. She asserted that she had done her due diligence.

Vide paragraph 4 of DW2's witness statement, she averred that she visited the land registry and confirmed that the land was registered in the names of the 1st Defendant and Shaban Mubiru as administrators of the estate of the late Jamiru Kizito.

DEX4 is a copy of the certificate of title of the suit land. The late Jamiru Kizito Ssalongo was registered on the same on 26/6/1967 under instrument number KLA47762, thereafter Mubiru Shaban and James Ndiwalana were registered as



administrators of the estate of the late Jamiru on 2/5/2011 under instrument number KLA497768. The 2nd Defendant was registered as proprietor on 8/9/2011 under instrument number KLA515792.

The 1st Defendant and Mubiru Shaban were evidently registered as administrators in 2011, almost 8 years after the sale agreement dated 12th May 2003 was executed. This contradicts DW2's averments that she visited the Land registry and found that the 1st Defendant and Mubiru were registered as administrators of the certificate of title prior to execution of the sale agreement.

PW2 in his witness statement vide paragraph 3 stated that he had lodged a caveat on the suit land on 25th May 2006 and this is evidenced by PEX3 which is a search report. The same search report indicates that DW2 also lodged a caveat on 21st October 2010. As earlier mentioned, the transfer forms were dated 23rd June 2006. These transfer forms were signed when PW2's caveat had already been lodged.

It is not disputed that DW2 bought and paid for the suit land at UGX 8,500,000/= in 2003. The duty of this court herein is to establish whether or not the 2nd Defendant had notice that the 1st Defendant and Mubiru Shaban did not have good title to pass to her.

According to Cheshire and Burns in their book Modern Law of Real Property, 16th Edition page 60; constructive notice is generally taken to include two different things: (a) the notice which is implied when a purchaser omits to investigate the vendor's title properly or to make reasonable inquiries as to the deeds or facts which come to his knowledge; (b) the notice which is imputed to a purchaser by reason of the fact that his solicitor or other legal agent has actual or implied notice of some fact. This is generally called imputed notice. In Hunt V. Luck (1901) 1 Ch 45 the court considered the nature of constructive notice. Farwell J said: "Constructive notice is the knowledge which the courts impute to a person upon presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him on further enquiry or from willfully abstaining from inquiry to avoid notice." **[Nekomia Obina V Okumu Vincent(supra)]**

Counsel for the 2nd Defendant cited the case of **Dr. David Kaggwa V Audrey Musimenta Civil Appeal No. 195 of 2017** for the position that for a purchaser to successfully rely on the bonafide doctrine he must prove that he holds a certificate of title, purchased the property in good faith, had no knowledge of the fraud, the vendors had apparent valid title, he purchased without notice of the any fraud and he was not a party to the fraud.

Evidently at the time when the transaction for the sale of the suit land took place, the 1st Defendant and Mubiru Shaban were in possession of the letters of administration (DEX2) and certificates of title but they were not registered on to



the certificate of title as the registered proprietors in their capacity as administrators of the estate of the Late Jamiru Kizito Ssentongo. DW2 even confirmed this during cross examination that the two had letters of administration but they were not registered on the certificate of title.

Section 54 of the RTA is quite clear that a certificate of title is conclusive proof of ownership. DW2 averred during cross examination that as an informed person she did a search. The 2nd Defendant as an informed person already had actual notice that the 1st Defendant and Mubiru were not the registered proprietors of the land in question. Mere possession of letters of administration was not enough in those circumstances. The onus fell on DW2 to ascertain that the 1st Defendant and Mubiru were the registered proprietors which she neglected to do. In fact, DW2's testimony and her witness statement are contradictory in that regard. Furthermore, from the case of **Kaggwa V Musimenta (supra)** cited by counsel for the 2nd Defendant, it is apparent that the 1st Defendant and Mubiru Shaban did not have a valid title to pass to the 2nd Defendant.

Justice Monica K. Mugenyi J.A in the case of **Jennifer Nsubuga V Micheal Mukundane & Anor CACA No. 2018/2018** noted that a due diligence investigation would seek to cross check or confirm the vendor's claim to the title by inquiring of independent persons knowledgeable about the land or that could otherwise shed light on the bona fides of the intended land purchase. It ought to be directed at persons that are independent of the beneficiaries of the land transaction in question with a view to ascertaining the authenticity of the title sought to be conveyed. It would be self-defeating to consider supposed consultations with the vendor of the property to amount to due diligence for purposes of cross checking the authenticity of her interest in the land in question. As was observed by this court in **Sir John Bagire V Ausi Matovu, Civil Appeal No. 7 of 1996**, buyers are expected to make thorough investigations not only on the land but also of the seller before purchase.

PW3 Mukasa Steven gave evidence as the former LC1 Chairperson of Kawoko LC1 between 2006 and 2011. Vide paragraphs 6,7,8, and 9, he averred that the 2nd Defendant was served with the complaint letters from the RDC and the state house pertaining to the disputes on the suit land. He averred that as the LC he tried to get in touch with the 2nd Defendant but she was uncooperative. PW3 further gave evidence that the Defendant even transacted in the local council of Bujuuko and not Kawuko. When asked if she knew PW3, DW2 stated that she was seeing him for the first time during the hearing.

Independent persons with broad knowledge of the locality and the customary interests of the land in question should have been consulted....in absence thereof, I do not find the respondents to have undertaken due diligence. [Jennifer Nsubuga V Mukundane]



DW1 during cross examination stated that at the time of the impugned transaction with the 2nd Defendant, PW3 was the chairperson of the local area where the suit land was situate at the time. The sale agreement (DEX3) between the parties was executed in Bujuuko Busiro and not Kawuko where the situate land is/was situated.

I am persuaded by the position in the **Jennifer Nsubuga case (supra)**, that DW2 had the duty of undertaking in depth due diligence before purchasing, especially in a situation such as the present one where the certificate of title was not yet registered in the names of the 1st Defendant and Mubiru Shaban. Furthermore, there was need for DW2 to consult an independent person with knowledge of the suit land such as the Local Council chairperson or representative which was also not done.

Counsel for the Plaintiffs cited the case of **Nabeta V Konde HCCS No. 391 of 2010** where it was stated that *land is never bought from unknown sellers like buying tomatoes or bread. Land is a valuable property and all buyers are expected to make exhaustive investigations about both the land and the sellers before buying.*

I agree with counsel for the Plaintiffs. Transactions concerning land should not be taken lightly. A potential buyer must be exhaustive in their due diligence before concluding a transaction.

Section 101(1) of the Evidence Act provides 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.

Section 101(2) provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The Plaintiffs to wit, PW1, PW2 and PW3 all contended that the 2nd Defendant was well aware of the ongoing proceedings in CS No. 143 of 2008 but DW2 denied these allegations stating that she was not a party in CS No. 143 of 2008 and therefore she wasn't aware of the proceedings nor the court order. However, as per PEX3, the 2nd Defendant went on to lodge a caveat on the suit land on 21/12/2010. This is indicative that DW2 had notice of the disputes that were on the land in question.

I do not find the assertions of DW2 truthful that because she was not a party to the proceedings and the order vide CS No. 143 of 2008 she was not aware of the same. Considering that she was allegedly on the land from 2003 to-date then it is unlikely that she wasn't aware of the same, otherwise why would she be compelled to lodge a caveat on the same in the pendency of the proceedings in CS No. 143 of 2008.



That said, it is the finding of this court that DW2 had actual notice that the 1st Defendant and Mubiru Shaban did not have good title but she failed to make the due diligence that was required before purchasing the same.

In the premise DW2 has failed to discharge the burden of proving that she was a bonafide purchaser for value without notice.

Allegations of fraud

In the case of **Fredrick Zaabwe V Orient Bank Ltd SCCA 4/2006 Katureebe JSC** (as he then was) stated, 'I find the definition of fraud in *BLACK'S LAW DICTIONARY 6TH Edition* page 660, very illustrative;

"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or 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, and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc."

[**Wambuzi CJ** (as he then was) in the case of **Kampala Bottlers Ltd V Damanico (U) Ltd SCCA No. 22/1993** stated that *the case of Robert Lusweswe vs Kasule & Anor HCCS No. 1010 of 1983, where Odoki J. as he then was said, "while the cardinal rule of registration of the titles under the Act is that the Register is everything, the court can go behind the fact of registration in cases of actual fraud on the part of the transferee."*

PW2 in his witness statement vide paragraph 3 that he had lodged a caveat on the suit land on 25th May 2006 and this is evidenced by PEX3 which is a search report. The same search report indicates that DW2 also lodged a caveat on 21st October 2010. As earlier mentioned, the transfer forms were dated 23rd June 2006. These transfer forms were signed when PW2's caveat had already been lodged. Signing of this transfer was fraudulent because the Plaintiffs had already intimated that they had an interest in the suit land. The signing of these transfer forms was clearly meant to defeat the plaintiff's interest. Furthermore, the consideration stated in these consent forms was UGX 1,000,000/= which is a gross under valuation of the suit land.



Counsel for the 2nd Defendant relied on the case of **Nanteza Mariam & 3 ors V Nasani Rwamunono & Anor** and submitted that the Plaintiffs had not pleaded the particulars of the errors in the transfer forms and that parties are bound by their pleadings. It is trite law that parties are bound by their pleadings. However, as was stated in the case of **Makula International V His Eminence Cardinal Nsubuga (1982) HCB 11** that an illegality once brought to the attention of the court overrides all questions of pleading and court cannot sanction an illegality. In the premise, I respectfully disagree with the submissions of counsel.

Fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean transferee must be guilty of some fraudulent act or must have known of such activity
[Kampala Bottlers Ltd (supra)]

The decree vide CS No. 143 of 2008 was signed on 7/7/2011 wherein the letters of administration granted to the 1st Defendant and Mubiru were revoked, and the Defendants ordered to surrender the same, the Defendants were ordered to render a true account of all the dealings and transactions concerning the estate of the late Jamiru Kizito Ssalongo and a re-transfer of all land still in the name of the Defendants.

By the time this order was signed, the 1st Defendant and Mubiru had been registered on the certificate of title prior on 2/5/2011 and the 2nd Defendant later registered on 8/9/2011. The registration of the 2nd Defendant was illegal because it was a violation of the decree vide CS No. 143 of 2008.

As earlier on decided, DW2 has failed to convince this honorable court that she was not aware of the disputes that were on the suit land. This court is convinced that the 2nd Defendant was aware that the 1st Defendant and Mubiru had been sued in CS No. 143 of 2008 and that was the purpose of her lodging a caveat in 2010. Furthermore, this court is convinced that DW2 had actual notice that the 1st Defendant did not have conclusive title to pass when she purchased the suit land.

For the reasons given above, this court finds that the registration of the 2nd Defendant was illegal and fraudulent. This issue is answered in the affirmative.

Issue Three: Whether the Plaintiffs are entitled to the remedies sought

Section 178 of the Registration of Titles Act, Cap 230 provides that, any person deprived of land or of any estate or interest in land in consequence of fraud or through the bringing of the land under the operation of this Act or by



the registration of any other person as proprietor of the land, estate or interest or in consequence of any error or misdescription in any registered certificate of title or in any entry or memorial in the Register Book may bring and prosecute an action for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the estate or interest through the fraud, error or misdescription; but—

(a) except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of the person to bring such land under the operation of this Act or to be registered as proprietor of the land, estate or interest or in any instrument signed by him or her, that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damage which but for the transfer might have been recovered from him or her under the provisions herein contained; and in the last-mentioned case, and also in case the person against whom the action for damages is directed to be brought as aforesaid is dead or has been adjudged bankrupt or cannot be found within the jurisdiction of the High Court, then and in any such case such damages with costs of action may be recovered from the Government; and

(b) in estimating the damages the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded.

Kampala District Land Board & Another v. Venansio Babweyana, Civil Appeal No.2 of 2007, *“General damages are the direct and probable consequence of the act complained of. This can be inconvenience, mental distress, loss of use of money retained or loss of profit.*

Justice Mubiru in the case of **Adrabo V Madira CS No. 24/2013** stated that the moment someone proves a better title against the person who was in prior possession, he or she is entitled to compensation against the unlawful possessor of property. Mesne profits are one such mode of compensation that can be claimed against a person in unlawful possession. It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property. One broad principle governing liability for mesne profits that emerges from available authority is that the court may be guided by profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but should not include profits due to improvements made by the person in wrongful possession. Determination of the quantum of mesne profits is left at the discretion of the court and being in the nature of damages, the Courts have not laid down any invariable rules governing award and assessment of mesne profits in every



case. There is no uniform criteria for the assessment of mesne profits. The quantum depends upon the facts and surrounding circumstances of each case. The Court may mold awards and assessment of mesne profits according to the justice of the case. It is settled principle of law that in case of mesne profits the burden of proof rests on the plaintiff. The onus of proving what profits the Defendant might have received with the ordinary diligence lies on the plaintiff.

Counsel for the Plaintiffs prayed for UGX 200,000,000/= as mesne profits considering that the 2nd Defendant has been using the suit land for agricultural produce for 20 years and deprived the Plaintiffs of income. The Plaintiffs averred that the Defendant's actions denied the Plaintiffs access to use the same and has greatly inconvenienced the Plaintiffs.

In awarding mesne profits, I will consider the time when the Plaintiffs realized the fraud on the suit land which was 2006 as evidenced from the witness statement of PW2 and PW1 and from the time PW2 lodged the caveat on the suit land which comes to 17 years at UGX 1,000,000/= per year.

In light of the resolution of issue one and two above, the 2nd Defendant testified that she has been on the suit land for over 19 years and has/had made developments thereon. DW2 also stated that she had subdivided the land for the benefit of her children. This court doesn't find it fair or just that the 2nd Defendant be removed/struck off from the certificate of title for Block 177 Plot 19 or removed from the suit land. Therefore, this court will turn to the Plaintiffs prayers in the alternative.

The Plaintiffs prayed for UGX 600,000,000/= as the current market value of the suit land. However, there was no valuation report attached to the pleadings to substantiate this amount. The 2nd Defendant bought the suit land at UGX 8,500,000/= in 2003 and this fact isn't disputed by DW1 or DW2. At the time that she bought the land, DW2 testified that there were no developments on the suit land and this is confirmed by PW1 who also stated during cross examination that the land was unoccupied at the time.

In evaluating the current market value of the suit land, the developments on the land are also taken into consideration. However, **Section 178(b) of the RTA (supra)** is clear that in estimating such damages the value of the buildings and other improvements are excluded. In the present case, all the developments on the land was done by the 2nd Defendant with no input from the Plaintiffs.

Without any evidence from the Plaintiffs as to what the value of the suit property was in 2003, this court is inclined to believe the assertion of the 2nd Defendant (DW2) that the amount she paid for was the value of the suit land which is supported by DEX3. In the premise, it is only just and fair that the 2nd Defendant pays the amount that the beneficiaries of the estate would have received had the money received by the 1st Defendant and Mubiru Shaban been received by the




Plaintiffs/beneficiaries.

Conclusion:

In conclusion, I hereby make the following orders:

1. The 2nd Defendant is hereby ordered to pay UGX 8,500,000/= (Eight Million Five Hundred Thousand Uganda Shillings) as the market value of Block 277 Plot 19 when she purchased the same in 2003.
2. General Damages of UGX 20,000,000/= (Twenty Million Uganda Shillings Only) is awarded to the Plaintiffs to be paid by the 1st Defendant.
3. The Plaintiffs are awarded mesne profits of UGX 17,000,000/= (Seventeen Million Uganda Shillings) to be paid by the 2nd Defendant.
4. Interest on (1) and (3) above at 6% per annum from date of delivery of this judgment till payment in full.
5. Costs of this suit will be borne by the Defendants.

I so order.



Jeanne Rwakakooko
JUDGE
26/04/2023

Judgment delivered on this 8th day of MAY, 2023