

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT – OO – CV – LD – CS NO. 013 OF 2017**

**BAKAKUNDA FAUSTA ::: PLAINTIFF**

5 **(APPLICANT FOR LETTERS OF ADMINISTRATION  
TO THE ESTATE OF THE LATE BAGAMBA YOWANA)**

**VERSUS**

**1. TIBAMANYA KIGAMBE WILLIAM**

**2. TIBAMANYA ABDU**

10 **3. TIBAMANYA JOHN**

**4. TIBAMANYA CHARLES**

**5. TIBAMANYA HILLARY**

**6. TIBAMANYA GEORGE**

**7. TIBAMANYA EMOLYNE**

15 **8. TIBAMANYA MONICA**

**9. TIBAMANYA MERCY**

**10. TIBAMANYA CAROLINE**

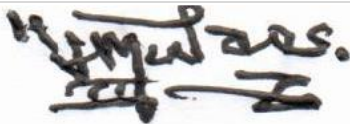
**11. TIBAMANYA GABRIEL ::: DEFENDANTS**

**BEFORE: HON. JUSTICE VINCENT WAGONA**

20 **JUDGMENT**

**Introduction:**

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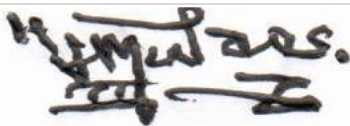
The plaintiff sued the defendants jointly and severally seeking among others the removal of a caveat lodged on her petition for a grant of letters of administration over the estate of the late Bagamba Yowana; a declaration that the defendants had included part of the land that formed part of the estate of the late Bagamba Yowana into their title; and an order for cancellation of the defendants' title.

**The case of the Plaintiff:**

The plaintiff is a granddaughter of the late Bagamba Yowana who died intestate in 1984. The case of the plaintiff was that the deceased at the time of his death owned the suit land located at Bwera I Village, Kyakabale, Kamwenge District measuring 35 acres. That in 2017, the plaintiff applied for letters of administration over the estate vide Administration Cause No. 006 of 2017 and the 1<sup>st</sup> defendant lodged a caveat against the grant. The plaintiff learnt that the defendants had fraudulently and illegally registered the land into their names.

**The case of the Defendants:**

The Defendants contended that the suit land belonged to the late Kigande George, father to the 1<sup>st</sup> defendant who by written agreement (**PEX 3**) had bought it from the late Bagamba Yowana in 1972. That Kigambe George took possession of the suit land and fenced it and started grazing cattle thereon but allowed the vendor to continue living on the land until he died in 1984 and was buried on the suit land as had been agreed with the buyer. That in 1981, the late Bagambe Yowana had called the 1<sup>st</sup> Defendant and in a written document (**DX 1**) among others stated therein that the suit land belonged to the 1<sup>st</sup> Defendant. It was contended that the suit land had since belonged to the 1<sup>st</sup> defendant and his children who secured a title over the same



and thus the 1<sup>st</sup> defendant had locus to lodge a caveat against the plaintiff's petition for letters of administration over the suit land.

**Issues:**

1. Whether the caveat lodged by the defendants on the application for letters of administration is maintainable.
2. Whether the defendants fraudulently obtained the suit land.
3. What remedies are available to the parties.

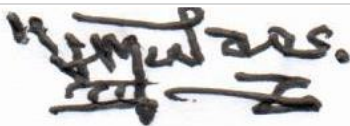
**Representation and hearing:**

*Mr. Kigenyi Emmanuel* appeared for the plaintiff while *Mr. Herbert Kwikiriza* appeared for the defendants. Both parties addressed me by way of written submissions which I have considered.

**Burden and Standard of Proof:**

The plaintiff bears the burden to prove her claim on the balance of probabilities. Section 101 of the Evidence Act Cap. 6 is to the effect 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. In this case, the legal burden rests on the plaintiff to prove that the land in issue forms part of the estate of the late Bagambe Yowana and that the caveat lodged by the defendants has no legal foundation.

**Issue No. 1: Whether the caveat lodged by the defendants on the application for letters of administration is maintainable.**



## Resolution:

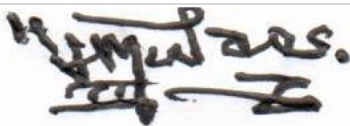
Learned counsel for the plaintiff did not submit on this issue. Mr. Kwikiriza for the defendants submitted that for one to lodge a caveat, he or she must have caveatable interest which could be legal or equitable (**Sentongo Produce V Coffee Farmers Ltd & Anor, HCMC No. 690 of 1999**). That the plaintiff had applied for letters of administration and included land that formed part of the titled land owned by the defendants. That by virtue of section 58 of the Registration of Titles Act, a certificate of title (**PEXII**) was conclusive proof of ownership. It was contended that this being the case, they had caveatable interest.

## 10 Consideration by Court:

Section 253 of the Succession Act permits lodgment of a caveat against the grant of letters of administration or probate. It is settled law that for one to lodge and maintain a caveat against the grant of probate or letters of letters of administration, he or she must have caveatable interests. In the persuasive decision of *Abhiram Dass vs Gobal Dass (1890) ILR 17 Cal 48*, the High Court of Calcutta guided that “*ordinarily.. caveatable interest would mean an interest in the estate of the deceased to which the caveator would be otherwise entitled to subject to having a special interest therein...*” In this case the defendants claim interest in the suit land on the basis of being the registered proprietors. As such the caveat lodged by the defendants is proper and maintainable. I therefore resolve this issue in the affirmative.

## Issue No. 2: Whether the defendants fraudulently obtained the suit land.

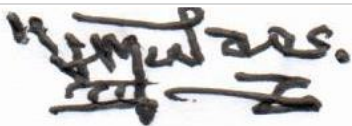
## Submissions for the Plaintiff:



It was contended for the plaintiff that the suit land formed part of the estate of the late Bagamba Yowana. That the purchase agreement (**PEX 3**) relied upon by the defendant contravened Section 3 of the Illiterates Protection Act as it was not read and explained to the deceased.

5 Further, that the agreement was not executed in the manner recognized in law. Learned counsel cited the case of *Hon. Justice Sign Choudry V. Mohinder Sign Channa, Civil Suit No. 335 of 2014* where *Sekaana J* cited the decision of *Greenboat Entertainment Ltd Vs. City Council of Kampala, H.C.C.S No. 0580 of 3003* where it was held that; “*In law, when we talk about an agreement, we mean*  
10 *an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be; capacity to contract, intention to contract, consensus ad litem, valuable consideration, legality of purpose and sufficient certainty of terms. If in a given transaction any of them is missing, it could be called something other than a contract.*” Learned counsel also cited the case of *Nyairo Bruhan V*  
15 *Kasule Immaculate, HCT – 04 – CV – CA 78 of 2015* where court while examining the authenticity of an agreement observed that; “*I have examined the agreement and it falls short of satisfactory evidential value to attach to such a sale of land transaction. It was not signed by the buyer or the seller.*” It was contended that the agreement of sale relied upon by the defendant fell short of all these requirements as  
20 it did not state the consideration, it was structured in past tense and it was not signed by the parties, rendering it void.

Mr. Kigenyi further asserted that the title to the suit land was fraudulently obtained by the defendants. He argued that the land purchase agreement relied upon by the defendants was forged and thus illegal. It was pointed out that the neighbors were



not consulted. Learned counsel thus argued that the procedure adopted by the defendants to convert the land into titled land was fraudulent. He thus asked court to resolve this issue in the affirmative.

**Submissions for the Defendants:**

5 In response Mr. Kwikiriza contended that section 64 of the Registration of Titles Act provides that a certificate of title issued under the act is indefeasible except in cases of fraud. Counsel cited the case of *Kampala Bottlers V.Dama Niko (U) Ltd SCCA No. 22 of 1992* where court held that a party alleging fraud must prove that the same is attributed to the transferee and must be strictly proved on a standard above mere  
10 balance of probabilities.

That the 1<sup>st</sup>defendant indicated in his evidence that he acquired the suit land from his father through a will (DXV). That he later created a title together with other land neighboring the suit land. That his father had acquired the suit land through purchase from Mr. Bagamba Yowana, the grandfather to the plaintiff and this evidence was  
15 corroborated by the testimony of DW2, a biological brother to the plaintiff. That the defendant had proved that the late Bagamba could not sign the agreement due to advanced age and this was confirmed by DW2, DW3 and DW6.

It was pointed out that the duty to prove fraud rested upon the plaintiff who it was contended had failed to discharge this burden. Counsel thus asked me to resolve this  
20 issue in the negative.

**Rejoinder for the Plaintiff:**

In rejoinder for the plaintiff, it was pointed out that under Section 92 of the Evidence Act, where an agreement was reduced into writing, no oral evidence could be

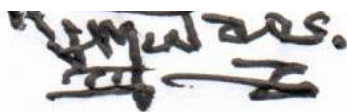
admitted to supplement the contents thereof. That the agreement of sale relied upon by the 1<sup>st</sup> defendant was not signed, there was no consideration and the title was obtained without following the due processes of the law thus rendering the title void on account of fraud.

5 **Consideration by Court:**

Section 59 of the Registration of Titles Act Cap. 230 provides thus: *No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and*  
10 *every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or*  
15 *possessed of that estate or interest or has that power.*

Section 59 of the Registration of Titles Act provides that a certificate of title issued is conclusive proof of ownership. Courts are therefore mandated by statute to consider title deeds presented in court as prima facie evidence of ownership to land described in the title and as conclusive evidence of proprietorship to land described  
20 therein save if it is proved that the same were obtained through fraud or procured illegally.

In *Fredrick J.K Zaabwe Vs. Orient Bank & 5 others, SCCA No. 4 of 2006, Katureebe*JSC adopted the definition of Fraud under the Black's Law Dictionary thus: *"An intentional perversion of truth for the purpose of inducing another in*

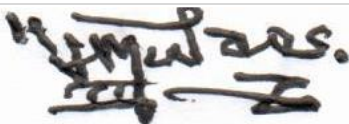


reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury...

In *Yakobo M.N Senkungu & 4 others Vs. Gresensio Mukasa, SCCA No. 17 of 2014, Nshimye JSC* (as he then was) noted further thus: *“In order to succeed on an action based on fraud, the Plaintiff must attribute the fraud to the transferee that is; by showing that Defendant is guilty of some dishonest act or must have known of such act by somebody else and taken advantage of such act. See: Supreme Court decision of Kampala Bottlers Ltd vs Domanico (U) Ltd SCCA No.22 of 1992”*

It was contended for the plaintiff that the agreement upon which the 1<sup>st</sup> defendant’s father purportedly acquired the land was a forgery; that the purchase agreement was not signed by the late Bagamba, it did not state the consideration and that the agreement contravenes the Illiterates Protection Act as it does not bear a certificate of translation as required under the Act; that the defendant forged a will of the late Bagamba Yowana and concealed the fact that the land formed part of the estate of the late Bagamba.

I have reviewed the said agreement (**PEX 3**) and observed that it was not signed by the seller Mr. Bagamba but it was signed by the purchaser, George Kigambe. In a persuasive dictum by the Hon. Justice Stephen Mubiru in *Olanya v Acullu (Civil Appeal No. 38 of 2016) [2018] UGHCLD 66 (6 December 2018)* which I am persuaded to adopt, he stated thus: *“..It is therefore a well-established principle that the signature of the parties to a written contract is not a precondition to the*





*existence of contractual relations, as a contract can be accepted equally well by conduct.”* In *Bristol Cardiff and Swansea Aerated Bread Co. Ltd Vs Maggs (11890) 44 Ch. Div 616* court held that: “*it is necessary to look into the whole of the correspondences between the parties to see if they have come to a binding agreement.*” Further in *Sebuliba v Basalidde (Civil Suit No. 17 of 2014) [2018] UGCommC 59 (28 June 2018)*, it was observed that Court in ascertaining whether there was a valid and binding agreement or not, it can look into the conduct of the parties before or after execution of the contract.

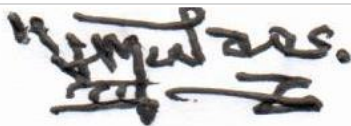
Further, although Section 91 and 92 of the Evidence Act bars admission of oral evidence to vary or add to the terms of a written agreement, a written agreement maybe contained in more than one document. Furthermore, oral evidence can be admitted to prove the existence of an agreement (see *Justice Anup Singh Choudry Vs. Mohinder Singh Channa & Anor, Civil Suit No. 335 of 2014*, by the Hon. Justice Ssekaana).

In this case, whereas **PX 3** was not signed by the late Bagamba, the subsequent document (**DX 1**) and conduct of the parties paints a clear picture of an understanding between the parties involving sale of the suit land. In the subsequent document (**DX 1**) the late acknowledged that the 1<sup>st</sup> defendant knew his land. It is also clear from the evidence that the late Kigambe fenced and used the land for grazing and also planted trees thereon after the said transaction while the vendor was still alive. This evidence taken together leads to the conclusion and finding that on the balance of probabilities, there was a sale involving the suit land by the late Bagamba to the late Kigambe.

Mr. Kigenyi also argued that the agreement did not state the consideration. It is settled law that consideration need not be adequate but it has to be sufficient. That it has to be something of value and tangible. (See **Tweddle Vs Atkinson (1861) 121 ER 762** and **Combe Vs Combe (1951) 2KB 215.**). Further, it is a settled rule of evidence that all evidence relating to a transaction in the different aspects must be evaluated as a whole as such with the aim of giving effect to the proper intention of the parties. (See *Olanya v Acullu (Civil Appeal No. 38 of 2016) [2018] UGHCLD 66 (6 December 2018)*).

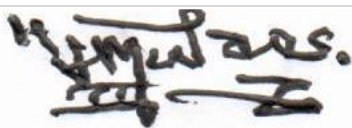
In this case whereas the agreement is silent about the consideration, there is unchallenged evidence on record that the late Bagamba was given a cow as the last payment. This was confirmed by DW2 and DW6 who stated that they witnessed the cow being given to the late Bagamba. In this case, PX3 does not state the consideration provided. I am satisfied on a balance of probabilities that indeed consideration was paid by the late Kigambe to the late Bagamba for the sale involving the suit land.

The other contestation by the Mr. Kigenyi was that the late Bagamba Yowana was an illiterate and PX3 did not comply with Section 3 of the illiterate Protection Act. That the person who wrote the agreement did not include a jurat confirming that he read the contents thereof to the late Bagamba and as such the same is a nullity. I observe that in this case, the plaintiff did not plead in the plaint or in the reply to the written statement of defense that the late Bagamba Yowana was illiterate. Order 6 rule 7 bars a party from departing from the pleadings and a party cannot be permitted to leave evidence outside his pleadings.

A handwritten signature in black ink, appearing to be 'Kigenyi' with some additional scribbles below it.

In *Interfreight Forwarders(U) Limited v EastAfrican Development Bank* ((Civil Appeal No.33 Of 1992)[1993] UGSC 16 (2 July 1993), Oder JSC while considering Order 6 rule 1 of the Civil Procedure Rules observed in relation to pleadings thus; “The system of pleadings is necessary in litigation. It operates to define and deliver  
5 it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have  
10 to determine at the trial. See Bullen &Leake and Jacob’s Precedents of pleading 12th Edition, page 3. Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be  
15 allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.”

In this case, the plaintiff did not plead illiteracy by the late Bagamba as such under order 6 rule 7, is barred from leading evidence to that effect. However, be that as it  
20 may, even if was to consider such allegation, the same would fail. Section 101 and 102 of the Evidence Act placed the legal burden to prove such allegation upon the plaintiff. None of the plaintiff’s witnesses gave evidence to the fact that the late was an illiterate. Even the plaintiff who testified as PW2 did not state in his evidence in chief that the late Bagamba was an illiterate and did not lead any evidence to confirm  
25 that indeed he did not know how to read and write. It therefore my finding that the

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agreement dated 14<sup>th</sup> January 1972 was made by the late Bagamba Yowana and it was for sale of land.

The next question is whether or not the defendants included land in the title beyond what is referred to in the agreement dated 14<sup>th</sup> January 1972 (**PEX 3**) and the document dated 16/10/81 (**DX 1**). This question can only be answered by examining the contents of the 2 document.

The agreement (**PEX 3**) reads thus:

**“14/1/1971**

**I Bagamba have sold my whole Kibanja/land to George Kigambe from home to the swamp and the papyrus reeds. I neighbor with Ndabagayire on one side, Katondo on the other side and Ndabagaire at home where I stay.**

**Those Present:**

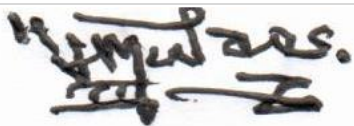
- 1. Ndabagayire**
- 2. SerasiKabyamera**
- 3. Andrew Karuhanga**

**I am George Kigambe who has bought”.**

The document dated 16/10/81 (**DX 1**) states thus:

**“16/10/81**

**WORDS SAID TO MY SON WILLIAM TIBAMANYA**



**I, Mr. Bagamba have handed over my house to you, know it, maintain it. I have given you my child Burandina, know her and her children. There is no person that is coming to disturb you. My grandchild Akileo has nothing here.**

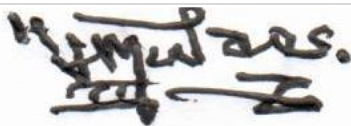
**My son, I have no many words. You know your land. Take care of my people.**

5 I have carefully reviewed **PEX 3** and **DX 1** together with the rest of the available evidence. My interpretation of the agreement (**PEX 3**) is that the late Bagamba sold land from home down to the swamp. He did not sell his home and land above his home.

10 The above interpretation is borne out by the evidence of the 1<sup>st</sup> defendant in cross examination when he told court that when Bagamba sold the land, he remained on the upper part on his plantation and his house. That the land was fenced off and Bagamba was also in a fence because he had put barbed wire to prevent the cows from destroying his banana plantation.

15 In relation to **DX 1**, the fact that the late Bagamba first sold his land to George Kigambe in 1971 and remained silent on his house and then separately handed over his house to William Tibamanya (DW1) in 1981 signifies that his home and plantation was separate and distinct from the land that he had sold to the late Kigambe in 1971 and resonates well with the contents of the agreement of 1971 (**PEX 3**) where he stated that he sold his land from his home to the swamp.

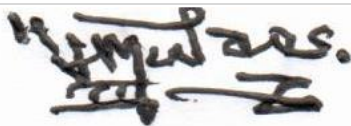
20 The above analysis is further supported by the defendants and their witnesses who stated that the late Bagamba lived on the said portion of land from 1972 to the time of his death in 1984 and was buried at his home on the suit land. The defendant's witnesses admitted that the late Bagamba lived on the said land and was buried



thereon plus his wives and a daughter. At locus in quo, DW2 stated that the late Bagamba lived on the upper side of the land which had his house while the lower part was fenced and used by the late Kigambe.

DW1 also admitted at locus that the late had a house which later got destroyed and that he and his wives were buried on the suit land. That after the house getting destroyed he fenced off the entire land. That where the house was, forms part of the titled land. At locus, it was vivid that there was a spot that had hosted a home and there were graves. Therefore, I am inclined to hold that the land that the late Bagamba sold to the late Kigambe was land situated from his home going down to the swamp. The land from his home going upwards was retained and belonged to the late Bagamba and was not sold to the late Kigambe.

In the light of the above evidence, I did not believe the evidence of the defendants that the late Bagamba had sold off all of the suit land to Kigambe way back in 1972 but was allowed by Kigambe to continue living on the land with his family members until his death in 1984 when he was buried on the same land where his 2 wives and a daughter were also buried. I find it more believable that Bagamba sold off the suit land but retained a portion for himself and his family, where he and his wives and daughter were later buried. I find that in **DX 1**, Bagamba did not hand over his piece of land; rather, Bagamba only handed over his house to the 1<sup>st</sup> Defendant with a request to the 1<sup>st</sup> Defendant to maintain it and take care of his people, namely his daughter Burandina and her children, while making it clear to the 1<sup>st</sup> defendant, that as for the land belonging to the 1<sup>st</sup> defendant, he (the 1<sup>st</sup> defendant) knew that land, referring to the rest of the land described in **PX 1**.

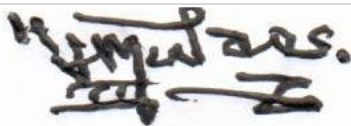


I therefore find that the defendants fraudulently or wrongly included land starting from where the late Bagamba's home was, upwards that had his home and banana plantation. This land did not form part of the land bought by the late Kigambe as per **PX 1**. I therefore resolve this issue in the affirmative to the extent of the land starting from the home of the late Bagamba going up, where his home and plantation were located.

**Remedies:**

The suit partially succeeds with the following declarations and orders:

1. A declaration that the defendants fraudulently or wrongly included part of the land that formed part of the estate of the late Bagamba Yowana into their title.
2. A declaration that the portion of the suit land located where the late Bagamba's home was, going upwards where his banana plantation was, forms part of the estate of the late Bagamba Yowana.
3. An order is hereby issued directing the commissioner land registration to sever off the portion of land referred to in No. 2 above from FRV 562, Folio 2, Plot 4, Block 107 at Bwera I, Kichehe, Kitagwenda currently registered in the names of the defendants.
4. That the costs of survey and mutating of the sad portion shall be borne by the defendants.
5. A permanent injunction is hereby issued restraining the defendants from trespassing on the portion declared to form part of the estate of the late Bagamba Yowana.



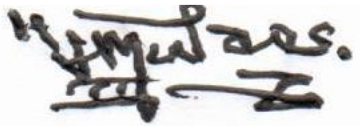
6. An order is hereby issued lifting and vacating the caveat lodged by the 1<sup>st</sup> defendant on the petition for grant of letters of administration over the estate of the late Bagamba Yowana lodged by the plaintiff.

5 7. That the petitioner shall amend the petition to reflect only the portion decreed to the estate of Bagamba Yowana herein.

8. That since the plaintiff suits only partially succeeded, I decline to award general damages.

9. The defendants shall pay the costs of the suit to the plaintiff.

I so order.

10 

Vincent Wagana  
High Court Judge  
FORT-PORTAL

15 DATE: 6<sup>th</sup>/10/2023

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