

**THE REPUBLIC OF UGANDA  
IN THE HIGH OF UGANDA HOLDEN AT KAMPALA  
(FAMILY DIVISION)  
CIVIL SUIT NO. 168 OF 2014**

1. **KASIRYE REBECCA JOANITA**  
2. **MUTAGU MUSOKE ESEZA**  
3. **PAUL SSEMANDA..... PLAINTIFFS**

**VERSUS**

1. **SIMAYA BIRUNGI SSUBI**  
2. **OBADIYA MUKUMBI**  
3. **REV. KEZIRONI KIWANUKA**  
4. **LYDIA KIWANUKA**  
5. **UGANDA LAND COMMISSION..... DEFENDANTS**

Before: Justice Ketrach Kitariisibwa Katunguka

**Judgment**

**Introduction:**

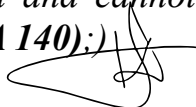
1. Kasiryre Rebecca Joanita, Mutagu Musoke Eseza and Paul Ssemanda (herein called **‘the plaintiffs’**) sued Simaya Birungi Ssubi and Obadiya Mukumbi (herein called **‘the defendants’**) for the cancellation and or revocation of letters of probate to the estate of the late Martin Luther Kasiryre, appointment of administrators denovo, cancellation of the title and lease granted by the 5<sup>th</sup> defendant, permanent injunction, general damages, mesne profits and interests thereon, costs of the suit; any other relief that court can deem fit.
2. The 1<sup>st</sup> – 4<sup>th</sup> defendants filed a joint written statement of defence contending that the plaintiffs lack locus standi to institute any actions for the estate of the late Martin Luther Kasiryre and for the Buganda Land Board.

**The case.**

3. The late Martin Luther Kasiryre (herein called **‘the deceased’**) was a sole proprietor of land comprised in LRV 2592 Folio 11, Kibuga Block 22 Plots 402 and 463 (formerly plot 413) plus other properties; he died on 29/5/2012 and was not survived by any children; the deceased’s wife died intestate before him; the plaintiffs are niece and nephew respectively of the late Martin Luther Kasiryre; and were brought up under his care and *loco parentis*;
4. The defendants jointly forged a purported Will of the late Martin Luther Kasiryre and obtained letters of probate; before issuance of letters of probate, the family members of the deceased had convened meetings on different occasions where the plaintiffs were appointed as suitable persons to administer the estate of the deceased; and consequently the plaintiffs were granted a certificate of no objection; the plaintiffs

believe that the defendants forged a Will and obtained letters of probate to defeat the grant of letters of administration to the plaintiffs; the defendants have never filed an account and inventory to the estate of the late Martin Luther Kasirye;

5. The 3<sup>rd</sup> and 4<sup>th</sup> defendants conspired with the 1<sup>st</sup> and 2<sup>nd</sup> defendants and with the aid of the 5<sup>th</sup> defendant to vary or obtain a lease extension from the 5<sup>th</sup> defendant; well aware that the mailo interest belonged to the Kabaka of Buganda; yet the property entity to grant the said lease ought to have been Buganda Land Board and not the 5<sup>th</sup> defendant;
6. In the course of hearing of the case, counsel for the plaintiffs informed court that the 2<sup>nd</sup> plaintiff had passed on; therefore, the 2<sup>nd</sup> plaintiff's case ceased with his death.
7. In opposition to the plaintiffs' case, the defendants assert that the plaintiffs lack locus standi to institute any action on behalf of the late Martin Luther Kasirye and the Buganda Land Board; the action for the cancellation of the title comprised in Kibuga Block 22 plot 462 and 463 to the estate of the deceased in 1999 is time barred; the suit land was a lease created on 1/4/1961 for 49 years by the Government of Uganda which expired and was renewed in the favour of the 3<sup>rd</sup> and 4<sup>th</sup> defendants on the application for verification of terms from 49 years to 99 years by the 5<sup>th</sup> defendant;
8. Before the demise of the Late Martin Luther Kasirye, he had given the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> defendants as a gift inter vivos; and the land was registered in their joint names in July 2006; six years before the deceased's death in June 2012; since the deceased was not survived by a spouse, child or parent, he was at liberty to bequeath his property to non-blood relatives;
9. The deceased died intestate on 30/5/2012 and his Will was proved before court vide High Court Administration Cause No.75 of 2013; the plaintiffs were always aware of the deceased's Will because it was read in various family meetings in 2012; therefore it was improper for the plaintiffs to apply for a Certificate of No Objection; the estate of the deceased was distributed in accordance with the Will from which even the plaintiffs benefitted; the defendants could not file an account because the plaintiffs filed this suit;
10. The 5<sup>th</sup> defendant did not file its written statement of defence; the position of the law is one who when served with summons to file a defence does not do so is treated as if he/she has; the effect was stated in *Devji versus Damor Jinabhai & Co. (1934) 1 E. A.C.A. 87* that; " such a defendant puts himself out of Court and no longer has any locus standi and cannot be heard". (see also *Sengendo versus Attorney General (1972) 1 EA 140*);



### **Representation:**

11. Counsel Deogratious Odokel of M/s Odokel Opolot & Co. Advocates represented the plaintiffs; while the 1 to the 4<sup>th</sup> defendants are represented by counsel Kenneth Engoru of M/s LEX Uganda Advocates & Solicitors. Both counsel filed written submissions which I have considered.

### **Issues for court's consideration:**

According to the Joint Scheduling Memorandum, the issues for court's determination are: -

1. *Whether the late Martin Luther Kasirye left a valid will?*
2. *Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants were rightly appointed as administrators to the estate of the late Martin Luther Kasirye?*
3. *Whether the Uganda Land Commission rightly and lawfully renewed the lease in favour of the 3<sup>rd</sup> and 4<sup>th</sup> defendant?*
4. *Whether the 3<sup>rd</sup> the 4<sup>th</sup> defendants rightly acquired the suit property Kibuga Block 22 plots 462 and 463 to LVR 2592 Folio 11 from the late Martin Luther Kasirye?*

### **Determination:**

Issue No.1; **Whether the late Martin Luther Kasirye left a valid will?**

12. The 3<sup>rd</sup> plaintiff (Paul Ssemanda) testifying as PW1 told court that after the funeral of the late Martin Luther Kasirye the 1<sup>st</sup> defendant presented a forged Will claiming to have been named an executor alongside the 2<sup>nd</sup> defendant; the members of the family disputed the information contained in the Will to the effect that the deceased's house and land comprised on LRV 2592 Folio 11, Kibuga Block 22 plots 462 and 463 (formerly plot 413) was allocated to the 3<sup>rd</sup> and 4<sup>th</sup> defendant; during cross examination he stated that the Will was not written in the deceased's hand writing but rather type written.
13. PW2 (the 1<sup>st</sup> plaintiff) testified that will presented by the 1<sup>st</sup> and 2<sup>nd</sup> defendants was a forgery; PW3 (Ssendege Kasirye) told court that the signature of the deceased as reflected on the Will is not of the deceased; however both PW3 (Ssendege Kasirye) and PW4 (Nanono Sarah) informed court that the deceased's personal property was distributed according to the will.
14. The 1<sup>st</sup> defendant testified as DW2 that he was brought up and trained in pottery by the deceased since 1960; that sometime in January 2011, when he had visited the late Martin Luther Kasirye, the later requested him to read and sign on the will and thereafter he DW2 kept a copy of the will; on 2/6/2012, he read the contents in the will before family members of the deceased, and property was shared as per the will; the plaintiffs were present and never objected to the Will.



***Submissions:***

15. Counsel for the plaintiffs submits that the will relied on by the 1<sup>st</sup> and 2<sup>nd</sup> defendants is not valid for reasons that; whereas the deceased in his will claimed to be in good health, DW3 stated that the deceased was getting weak; therefore at the time of making the purported will, the deceased was not in good health; the reasons mentioned by DW3 for the deceased giving the suit land to the 3<sup>rd</sup> and 4<sup>th</sup> defendants is not the same reason which is stated in the will; that the said will purported to distribute the family house of the deceased which is contrary to the law; the said will conferred property that had already been unlawfully transferred into the names of the 3<sup>rd</sup> and 4<sup>th</sup> defendants six years earlier before the death of the late Martin Luther Kasirye;
16. For the 1<sup>st</sup> - 4<sup>th</sup> defendants counsel cited section 36 of the Succession Act that according to the testimony of PW1, PW2 and PW4 during cross examination, the deceased was sane during the period when he executed the will; and capable of making a will; that the will is valid because it complied with sections 50(a) and sections 61 of the Succession Act; for it expresses the intention of the deceased.

***Court's decision on issue 1:***

17. **Section 101 (1) of the Evidence Act Cap 6** provides '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 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side; (see Nsubuga vs. Kavuma [1978] HCB 307 where it was held that in civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities); the plaintiffs claim that the will is forged so they must adduce evidence to show that the signature on the will could not be that of the deceased.
18. At the time this suit was filed the attestation of a will was governed under then section 50(1) of the Succession Act to wit;

*"Except as provided by this Act or other law for the time being in force, every testator not being a member of the armed forces employed in an expedition or engaged in actual warfare, or a mariner at sea, must execute his or her will according to the following provisions; (a) the testator shall sign or affix his or her mark to the will, or it shall be signed by some other person in his or her presence and by his or her direction; (b) the signature or mark of the testator or the signature of the person signing for him or her shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will; (c) the will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his or her mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his or her signature or mark, or of the signature of that other*



*person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

19. *Section 31 of the Succession (Amendment) Act 2022 has since amended section 50(c) to read 'the will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his or her mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his or her signature or mark, or of the signature of that other person; and each of the witnesses must in the presence of the testator, sign and write his or her name and address on every page of the will except that it shall not be necessary that more than one witness be present at the same time'*

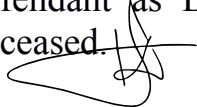
*Subsection 2 provides 'Where a person attesting a will does not write his or her name or address on a page of a will as required in subsection (1) (c), the will shall be valid except that the page of the will which does not bear the name or address of the testator shall, unless otherwise directed by court, be void.'*

The said amendment provisions however do not apply retrospectively; (see ***Wambewo v Mazelele (HCT-04-CV-MA 128 of 2013) [2015] UGHCCD 30 (12 February 2015)***); so they do not apply to this case which was filed in 2014.

20. A valid will therefore must be in writing, dated and signed by the testator, it must be witnessed by two or more attesting witnesses who must see the testator write, sign or affix his mark'. (see ***Malinga v Obukunyang (HCT-04-CV-CS-0013-2013) [2015] UGHCFD 39 (13 November 2015)***); and the Kenyan case of *Estate of James Ngengi Muigai (deceased), Nairobi High Court Succession Cause No. 523/1996*,

21. The Supreme Court of Queensland in the ***Estate of Grant Patrick Carrigan [2018] QSC 206***; stated the conditions necessary for a document to form part of a will are as: the existence of the document; the document purports to embody the testamentary intentions of the deceased; and that the deceased by some words demonstrated that it was his intention that the document operate as the last will;

22. The will in the pleadings and its English translated copy shows that the late Martin Luther Kasirye wrote it on 1/1/2011; the deceased states that the document is his will which cancelled all his previous wills; the will is signed by the deceased and it is witnessed by two witnesses who are the 1<sup>st</sup> and 2<sup>nd</sup> defendants in this case; the 1<sup>st</sup> defendant as DW2 testified that he attested to the Will in the presence of the deceased.





23. During cross examination, PW2 and PW4 testified that the deceased never lost sanity in his lifetime and knew how to write; both PW1 and PW2 dispute that the signature affixed on the Will belongs to the deceased; PW2 said she has some documents signed by the deceased she never presented them; none of plaintiffs' witnesses presented any documentary evidence showing a signature of the deceased in comparison to that purported to be of the deceased on the Will; no handwriting expert was called by the plaintiffs to prove the allegation that the signature on the Will is not that of the deceased.
24. Section 36(1) of the Succession Act provides that every person of sound mind and not a minor may by will dispose of his or her property; according to counsel for the plaintiffs the deceased was not mentally healthy at the time of making the will; he refers to the 4<sup>th</sup> defendant's witness statement under paragraph 6 wherein she states that the deceased wanted the 3<sup>rd</sup> and 4<sup>th</sup> defendants to extend the lease and transfer the remains of his dead relatives as the deceased was getting weaker; I have not found any proof that weakness attributed to the testator referred to his mental faculty which would if it had been proved probably incapacitate the testator to the extent that he could not make a valid will.
25. No evidence was led to show that the testate was not sane at the time he made the will therefore I find that he had testamentary capacity at the time he executed the will;
26. Unless it can be proved that the witness could not have witnessed the will for reasons that the signature is not his or hers or that he could not have been present at the time the will was made, a witness to the will is the best person to confirm that a will belongs to a specific person because other than the testator who would not be present, no other person can attest that the deceased made the will considering the secrecy concerning making a will; Court in **Mukoda and 2 Others v Kyemba [2020] UGHC 210**; agreed with the decision of Justice Byamugisha in **AG Vrs Bukirwa & Anor (1992-93) HCB 192**; that the best evidence regarding the execution of a will is by the attesting witness. PW4 Namono Sarah testified that Mr. Andrew Kasirye helped the deceased draft the will. This was not confirmed.
27. DW2 testified that he read and witnessed the will in the presence of the deceased; this evidence was not rebutted by the defence; and in absence of any contrary evidence to the effect that signature on the will is not that of the deceased, I hold that the will of the late Martin Luther Kasirye was dully signed by the deceased and witnessed by two witnesses;
28. That the deceased before his death gave portions of the land in issue to the 3<sup>rd</sup> plaintiff, Pw4 (Nanono Sarah) and a one Robert Bossa, (as gifts inter vivos) is not

disputed; that the 3<sup>rd</sup> and 4<sup>th</sup> defendants had also built on the land is not disputed; during cross examination, PW4 testified that the deceased's personal property was distributed in accordance with the Will and all those gifted are in occupation of their respective land; the will states that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were given part of the land as compensation for their expenses incurred in the extension of the lease on the suit land; the Will disposed of the personal property of the deceased and the said disposal was effected after burial of the deceased.

29. **Section 74 of the Succession Act Cap.162** provides that the intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.; Section 61 provides that it is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known from the wording.

30. I have found no evidence that the deceased could not have made the will; the witnesses to the will have not been discredited; some parties to this case including the 3<sup>rd</sup> plaintiff benefited from the will; in the result I find that the written will of the late Martin Luther Kasirye dated 1st January 2011 is his last will and testament. Issue one is answered in affirmative.

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants were rightly appointed as administrators to the estate of the late Martin Luther Kasirye?**

31. The plaintiffs contend that the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the basis of forged will, fraudulently obtained letters of probate; it is the 1<sup>st</sup>-4<sup>th</sup> defendants' case that the deceased died testate; the 1<sup>st</sup> and 2<sup>nd</sup> defendants were appointed as executors in the will. Attached to the reply to amended plaint by the 1<sup>st</sup> – 4<sup>th</sup> defendants is a copy of the probate granted to the 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 5/3/2014 vide High Court Administration Cause No.75 of 2013; in regards to the estate of the late Martin Luther Kasirye.

32. **Section 182. of the Succession Act** provides that; Probate can be granted only to an executor appointed by the will. **Section 183** provides that the appointment of an executor may be express or by necessary implication. Having found that the late Martin Luther Kasirye left a valid will; and in the said will the 1<sup>st</sup> and 2<sup>nd</sup> defendants were appointed as executors; the 1<sup>st</sup> and 2<sup>nd</sup> defendants were rightly granted probate for the estate of the late Martin Luther Kasirye.

**Whether the Uganda Land Commission rightly and lawfully renewed the lease in favour of the 3<sup>rd</sup> and 4<sup>th</sup> defendant?**

33. The plaintiffs claim that the 3<sup>rd</sup> and 4<sup>th</sup> defendants conspired with the 1<sup>st</sup> and 2<sup>nd</sup> defendant and with the aid of the 5<sup>th</sup> defendant (the Uganda Land Commission) purportedly varied and obtained a lease extension from the 5<sup>th</sup> defendant on Kibuga Block 22 plot 413; subdivided the plot number 413 into 402 and 463 belonging to the



estate of the late Martin Luther Kasirye; thereby usurping the powers of Buganda King by purporting to transfer land belonging to the Kabaka of Buganda; the plaintiffs seek for the cancellation of the title and lease granted by the 5<sup>th</sup> defendant.

34. The 1<sup>st</sup>-4<sup>th</sup> defendant in their defence plead that the action for cancellation of the title comprised in the suit land is time barred; they state that the suit property situate at Kibuga Block 22, plots 462 and 463 LRV 2592 folio 11 was a lease created on 1/4/1961 for 49 years by the Government of the Protectorate of Uganda which expired and was subsequently renewed in favour of the 3<sup>rd</sup> and 4<sup>th</sup> defendants on an application for variation of the term from 49 years to 99 years, by the 5<sup>th</sup> defendant; that at no time has such land which predates the Buganda Land Board been property of the Board;

35. PW5 (Bukirwa Joyce Samantha) a legal officer with the Buganda Land Board; told court that according to the Traditional Rulers Restitution of Property Act of 1993; the Kabaka of Buganda was registered as the proprietor of the main title in Kibuga Block 22 plot 4; and the certificate of title is in the names of the Kabaka; the controlling authority is the Buganda Land Board; that the variation of the lease by the 5<sup>th</sup> defendant and the subdivision was irregular without the consent of the Buganda Land Board; that if anyone is to deal with the Kabaka's land, the Board has to consent; that the Kabaka of Buganda as of 1993 was the registered proprietor of the mailo certificate of title comprised in Block 22 plot 4; therefore that the 5<sup>th</sup> defendant's dealing with the land in 2007 was unlawful;

***Court's analysis and decision issue no.3:***

36. The variation of the lease agreement dated 2007 between the 3<sup>rd</sup>, and 4<sup>th</sup> defendants of one part and the 5<sup>th</sup> defendant of the other; refers to land situate at Kibuga Block 22 plot 402 and 463 LRV 2592 Folio 11 measuring 0.428 Hectares; but the certificate of title presented by the defendants refers to Block 22 plot 462 and 463 LRV 2592 Folio 11 land at Kibuga measuring 0.428 hectares; a statement of search from the ministry of lands dated 3/9/2014; refers to Block 22 Plot 462 and 463 LRV 2592 Folio 11; notwithstanding the discrepancies, all parties to this suit referred to the same land, which for purposes of this suit I shall adopt the readings of the certificate of title and the search statement.

37. In their pleadings, the plaintiffs accuse the 5<sup>th</sup> defendant for fraudulently aiding the 3<sup>rd</sup> and 4<sup>th</sup> defendants to vary and obtain a lease extension on the suit land. The evidence before court shows that in 1961, the late Martin Luther Kasirye, obtained a leasehold interest of 49 years from the Government of Uganda Protectorate in respect of Kibuga Block 22 Plot 413; the leasehold certificate of title of the suit land comprised in Kibuga Block 22 plot 413 (now plots 462 and plot 463) was registered in the names of the late Martin Luther Kasirye before being transferred into the names of the 3<sup>rd</sup> and 4<sup>th</sup> defendants; this was as a result of the deed of variation of lease between the Uganda Land Commission (5<sup>th</sup> defendant) as a lessor and the 3<sup>rd</sup> & 4<sup>th</sup>





defendants as the lessee; the deed of variation presented in evidence by the defendants shows that the 5<sup>th</sup> defendant varied the lease from 49 years to 99 years in favour of the 3<sup>rd</sup> and 4<sup>th</sup> defendants with effect from 15<sup>th</sup> August 2007;

38. PW5 testified that the leasehold interest of the suit land derives its origin from the mailo certificate of title of land comprised in Kibuga Block 22 plot 4 at Mengo; she tendered in a certificate of title admitted and marked as 'PExb.13', where the history of ownership shows that the kabaka of Buganda was the first registered proprietor, then the land was vested into the Uganda Land Commission before it was transferred back to the Kabaka of Buganda by virtue of Statute No.8 of 1993 which is the Traditional Rulers (Restitution of Assets and Properties) Act.
39. I have found it pertinent to review the history of land ownership in Uganda; the 1900 Buganda agreement designated crown lands separate from the mailo land granted to the Kabaka of Buganda and other notable individuals; the Uganda Order in Council of 1902, defined crown land as "*all public lands which are subject to control of His Majesty by virtue of any treaty convention or agreement of His Majesty's Protectorate and all lands which have been acquired by His Majesty for public service or otherwise whatsoever.*"; the Crown Land Ordinance of 1903 provided for the manner in which crown land could be allocated by the Governor; upon the enactment of the Public Lands Act, 1962, crown land was after independence named public land which was vested in the Land Commission (see: Article 118 of the 1962 Constitution); the Land Commission (now the Uganda Land Commission) was mandated to manage all government and public lands in Uganda; (see: ***Laws of Uganda Protectorate, Vol.11, 1923, Cap.100,P.800***).
40. Upon abolition of all traditional or kingship institutions by the Uganda Constitution of 1967; article 108 (5) (b), vested land previously held by the Buganda Land Board into the Land Commission of Uganda; the Land Reform Decree of 1975 declared all land in Uganda to be public land being administered by the Land Commission to be held in trust for the people of Uganda; as a consequence, all freeholds including mailo ownership of land rights were converted into 99 year government leases; on which individuals could acquire leases of 49 years or 99 years; (see **A Journal of African Law 44:Page 65-77 by Simon Coldham**);
41. **The Traditional Rulers (Restitution of Assets and Properties) Act. Cap.247;** under section 2 subsections 1- 3 provides: "*Subject to the other provisions of this section, any asset or property previously confiscated by the state from or in respect of or in relation to any traditional ruler under the Constitution of 1967 is, with effect from the commencement of this Act, transferred to that traditional ruler without any further assurance than this Act. (2) A traditional ruler to whom any asset or property is transferred under this section shall, in the case of land, have the same estate or interest as was previously held by the Uganda Land Commission in respect of that*

*land. (3) Notwithstanding anything in this Act, all regalia where they exist shall vest in the traditional ruler in accordance with subsection (1), without the need for negotiation*

42. **Section 2(8)** provides that the Registrar of Titles shall take all necessary steps to give effect to the transfer of any asset or property effected whether by the alteration or cancellation of any relevant certificate of title, the issue of a fresh certificate of title or otherwise.
43. It is claimed by the plaintiffs through their PW5 that the Kabaka of Buganda took over administration of the suit land from the Uganda Land Commission of land comprised in Kibuga Block 22 plot 4, land at Mengo; However, no evidence was led to prove the connection or link between Mailo Land Certificate of Title comprised in Kibuga Block 22 Plot 4 land at Mengo and the leasehold land in issue which is LRV 2592 Folio 11 plot 462 and 463 land at Mengo.
44. It is not refuted that by 1961 when the late Martin Luther Kasirye obtained the leasehold interest of 49 years in the suit land from the Governor of the Uganda Protectorate, the lease preceded the 1967 Constitution which abolished all kingdoms vested all land into the Land Commission; no evidence was adduced to show that the lease of 1961 was by the Kabaka of Buganda; the additional information promised by the official from Buganda Land Board to clarify the relationship between the deceased's lease and the Kabaka was never submitted; in the premises, I would find that Kibuga Block 22 plots 462 and 463 LRV 2592 Folio 11 has always formed part of public land vested in the Uganda Land Commission;
45. In **F.K Zaabwe V. Orient Bank Ltd & Others SCCA No. 4 of 2006**; court defined fraud as: *“an intentional perversion of truth for 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 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 matters to do with fraud the burden of proof is heavier than the balance of probability; (see; the case of **Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992**);
46. The plaintiffs have not proved fraud against the 5<sup>th</sup> defendant during the variation of leasehold interest in Kibuga land Block 22 plots 462 and 463 LRV 2592 Folio 11; in the premises, I hold that the Uganda Land Commission could rightly and lawfully renew and extend the lease and they did;

Issue three is answered in affirmative.



**Whether the 3<sup>rd</sup> and the 4<sup>th</sup> defendants rightly acquired the suit property Kibuga Block 22 plots 462 and 463 to LVR 2592 Folio 11 from the late Martin Luther Kasirye?**

47. The plaintiff witnesses (PW2 and PW4) concede that the deceased before his death had given the 3<sup>rd</sup> and 4<sup>th</sup> defendants a portion of the suit land onto which the 3<sup>rd</sup> and 4<sup>th</sup> defendants were to build their home because they had helped him (the deceased) to fund the relocation of the graves of the deceased's relatives;
48. DW1 (Namanda Veronica Kiwanuka) testified that while her parents (the 3<sup>rd</sup> and 4<sup>th</sup> defendants) were out of the country, money was sent to her which she gave the deceased for the transfer of the remains of the deceased's relatives; that her parents signed transfer forms when in the United States of America between 2005 and 2007; she posted the forms, received them back, the forms had a stamp of an advocate; she DW1 did not open the envelope so she does not know; her parents never travelled to Uganda in 2005; she has never seen the transfer forms; she does not know if her parents could appear in Uganda before an advocate; her father sent her money for renewal/extension of the lease and the said father was not in the country during the extension of the lease; that the deceased permitted the 3<sup>rd</sup> and 4<sup>th</sup> defendants to construct a house on the suit land; the deceased transferred the suit land into the names of the 3<sup>rd</sup> and 4<sup>th</sup> defendants in 2006; the transfer forms were sent to the 3<sup>rd</sup> and 4<sup>th</sup> defendants to sign;
49. The 4<sup>th</sup> defendant testified as DW3 that by the death of Martin Luther Kasirye she was already occupying part of his land and she is still occupying it; that their daughter Namanda Veronica Kiwanuka (DW1), was on the ground she did everything and after that she posted papers to them to sign; she does not remember whether the documents were blank or not; did not know how the lease was renewed because she was not around; does not know the lease period or whether it was renewed into the names of Luther Kasirye or not; that the deceased had transferred the suit land to her and the 4<sup>th</sup> defendant on which conditions they fulfilled;

**Analysis.**

50. Evidence shows the transfers were processed by Namanda Veronica Kiwanuka the 3<sup>rd</sup> and 4<sup>th</sup> defendants' daughter because they were abroad and by the time they returned the transfers and the lease variation were done; a lease being a contract ought to be properly and legally executed by the parties with all trimmings of witnesses for the signatures of the parties; the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not show how a witness in Uganda (there is a stamp of a lawyer on the lease variation document purporting to confirm the signature of the 3<sup>rd</sup> and 4<sup>th</sup> defendants) yet at the time they were not in Uganda; evidence of DW1 concerning how the transfer and extension of the lease into the 3<sup>rd</sup> and 4<sup>th</sup> defendants' names when they were abroad between 2005 and 2008 is contradictory; she did not open the envelopes containing the



transfer forms and never saw them; then later she saw that the transfer forms bore a stamp of an advocate yet the mother DW3 testified that she DW1 did everything to facilitate the transfer! I would find that the process for the variation of the lease and the transfer to the 3rd and 4th defendants was bangled up by the DW1;

51. That the deceased before his death gifted the 3<sup>rd</sup> plaintiff, PW4, and a one Bossa portions on the suit land; and the 3<sup>rd</sup> and 4<sup>th</sup> defendants were also given a portion on the suit land by the deceased before his demise in exchange for money that was needed to extend the lease on the suit land is corroborated by the statements of the deceased in his Will dated 1/1/2011; at paragraph 3 of the english translation; that:

*“This plot of land on which I have my house is approximately 0.428 Hectares and is a Leasehold land, which, when I realised that the lease was due to expire in 2008 and would need extension, I asked Rev. Canon Kezlon Kiwanuka Semanda and his wife Lydia Damalie Buyinza who were looking for a plot of land to buy, to raise the money that was needed for the extension of the lease, which they willingly did. After paying all the extension fees to the Uganda Land Commission, I willingly gave them the plot, and signed the necessary transfer agreement for them with the Uganda Land Commission. Consequently, I also gave them ownership of my house which they bought on this plot of land...”*

52. At paragraph 4 it is stated that the deceased gave away some portions of land to his other children Paulo Semanda and Sarah Nanono while he was alive; and requested that Paul Semanda (3<sup>rd</sup> plaintiff(2nd Plaintiff) negotiates with the 3<sup>rd</sup> and 4<sup>th</sup> defendants to demarcate off his share; Currently it is the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are registered on the certificate of title of the suit land; their interest was registered on 7/7/2006 under instrument number 368447; this was 6 years before the demise of the late Martin Luther Kasirye;

53. According to the amended plaint, the plaintiffs allege fraud against the 3<sup>rd</sup> and 4<sup>th</sup> defendants for purporting to obtain a lease from the 5<sup>th</sup> defendant who is not the owner of the land; purporting to obtain a lease without the consent of the Kabaka of Buganda; purporting to obtain a variation of lease from the 5<sup>th</sup> defendant or having reason to believe it to be illegal or forged; purporting to have bought the suit property whereas not; I have stated above that the 5<sup>th</sup> defendant could and validly made a variation of the lease; if the Kabaka had issues with the variation he may bring it up on his own for there is no proof that the plaintiffs were acting on his behalf; having found that the will is valid and it acknowledged the entitlement of the 3rd and 4th defendants the process though bangled up by DW1 albeit irregular can not be attributed to the former as fraudulent;(see **Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992**);

54. **Section 59** of the Registration of Titles Act; provides that *the certificate of title shall be conclusive evidence of all particulars and endorsement therefore of and the*

*person named in the certificate as the proprietor is possessed of the estate or interest described with except for fraud; so once someone is registered as a proprietor of land his title is indefeasible save for fraud(see **John Katarikawe versus William Katwiremu (1977) HCB 187;***

In the result the 3<sup>rd</sup> and 4<sup>th</sup> defendants were therefore rightly registered on Kibuga Block 22 plots 462 and 463 to LVR 2592 Folio 11.

Issue 4 is answered in affirmative.

#### **Available Remedies.**

55. The plaintiffs prayed for revocation of letters of probate issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the ground of failure to file an account and inventory of the estate of the late Martin Luther Kasirye.
56. **Section 278 of the Succession Act Cap. 162** states that '*An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner within one year from the grant, or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner in which they have been applied or disposed of.*'
57. Section 234(1)(e) of the Succession Act provides that the grant of probate may be revoked or annulled on the ground that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with Part XXXIV of this Act, or has exhibited under that Part an inventory or account which is untrue in a material respect.
58. Evidence shows that the 1<sup>st</sup> and 2<sup>nd</sup> defendants obtained a grant of probate to the estate of the late Martin Luther Kasirye vide High Court Administration Cause No.75 of 2013 on the 5/3/2013; to date they have not filed an inventory nor rendered an account of the administration in the estate of the deceased;
59. I have considered the wording of the will and found that it was stating what the deceased had done with his property; the plaintiffs admitted that the personal effects were distributed; both parties concede that the 3<sup>rd</sup> and 4<sup>th</sup> defendants have not chased away those persons who were given portions of land when the late Kasirye was alive; DW3 testified that anyone who wanted to carve off their portion of land was welcome;
60. Considering the time this matter has been in court and the time it may take for other administrators to be chosen simply for purposes of filing an inventory of how the personal effects of the late Kasirye were distributed, would in my considered opinion





be a waste of time and resources; I therefore in the interest of justice pursuant to section 98 of the Civil Procedure Act and under section 96 of the Civil Procedure Act extend the time within which to file inventory because it is my considered view that revocation of the letters is not the best option;

**Costs;**

61. Considering that the suit majorly fails the plaintiffs shall pay 60% of the defendants' costs;

In the result, this suit majorly fails; it is hereby ordered and declared that;

1. The late Martin Luther Kasirye left a valid will.
2. Simaya Birungi Ssubi and Obadiya Mukumbi were rightly granted probate for the estate of the late Martin Luther Kasirye.
3. The Uganda Land Commission rightly and lawfully renewed the lease in favour of Rev. Kezironi Kiwanuka and Lydia Kiwanuka.
4. Rev. Kezironi Kiwanuka and Lydia Kiwanuka rightly acquired the suit property Kibuga Block 22 plots 462 and 463 to LVR 2592 Folio 11 from the late Martin Luther Kasirye.
5. Simaya Birungi Ssubi and Obadiya Mukumbi are hereby directed to ensure surveying the suit land for purposes of each of the persons who received plots inter vivos at their cost curve off their land from the title within 6 months;
6. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are directed to file inventory for the estate of the late Martin Luther Kasirye within a period of 8 months from this judgment;
7. The Plaintiffs shall pay 60% of the defendants' costs.



Ketrach Kitariisibwa Katunguka

Judge

13/03/2023

Delivered by email to: odokel24@yahoo.co.uk, okenguru41989@gmail.com

The dissatisfied party may appeal to the Court of Appeal of Uganda within 14 days of this judgment.

