



**possession of and quarrying on all or any part of plot 995 without the express permission of the plaintiff.**

- (v) An order for mesne profits from the 8<sup>th</sup> October 2007 to the date of delivery up of possession of plot 995 to the plaintiff by the defendants;**
- (vi) Special and general damages**
- (vii) Costs**
- (viii) Interests on items (v) to (vii) above from the date of award until payment in full.**
- (ix) Any other order that this honourable Court may deem fit.**

**a.2** The 1<sup>st</sup> defendant through his lawyers Shonubi, Musoke & Co. Advocates filed a defence against the plaintiff's suit. The 2<sup>nd</sup> defendant through its lawyers Paul Byaruhanga Esq. Advocates, too, filed a defence contesting the plaintiff's suit.

**a.3 The plaintiff's facts of the case.**

The plaintiff's case is that the 1<sup>st</sup> defendant unlawfully caused the issuance of the certificate of land comprised in Mailo Register Kyadondo Block 82 plot 1252 ("plot 1252") (to the extent that the boundaries of the plot 1252 encroached on the plaintiff's land comprised in Mailo Register Block 82 plot 995 ("plot 955"). In addition to the aforementioned, the 1<sup>st</sup> defendant by creating a leasehold interest described as a leasehold register volume 3836 Folio 25 plot 1252 ("the lease") in favour of the 2<sup>nd</sup> defendant over the whole of plot 1252 unlawfully created a leasehold interest over plot 995. The 2<sup>nd</sup> defendant unlawfully took possession of plot 995 and has been and continues to excavate and extract stones from plot 995 therefore causing loss and damage to the plaintiff.

**a.4 The 1<sup>st</sup> defendant's facts of his defence case;**

It is the 1<sup>st</sup> defendant's case that the certificate of title for plot 995 was illegally and fraudulently issued and that the plaintiff participated and or perpetuated the fraudulent creation of the said certificate of title and the successive illegal transfers. The 1<sup>st</sup> defendant contends that the plaintiff has no interests whatsoever in the suit property or any other property originating from block 707 since the same belongs to the 1<sup>st</sup> defendant.

**a.5 The 2<sup>nd</sup> defendant's facts of its defence case;**

The 2<sup>nd</sup> defendant was under instrument no.KLA 366903 the registered owner of the lease in Kyadondo Block 82 LRV 3836 Folio 25 plot 1252 at Kungu.

- the instrument was registered on 15.2.08
- The 2<sup>nd</sup> defendant was in possession and occupation of the land operating a stone quarry long before the purported creation of the certificate of title in the name of the Administrator General and registration of the plaintiff as proprietor of his purported land on 28.8.08.
- the 2<sup>nd</sup> defendant is a bonafide purchaser/transferee for value of the suit land.
- the plaintiff's suit for ejectment and damages does not lie against the 2<sup>nd</sup> defendant.

**a.6 Agreed facts after scheduling conference**

- a) A certificate of title was issued on the 9<sup>th</sup> day of August 2007 in respect of land comprised in Mailo Register Block 82 plot 995 in the name of the Administrator General under instrument no. KLA 349308 dated 8<sup>th</sup> August 2007.

- b) A certificate of title was issued on the 8<sup>th</sup> October 2007 in respect of land comprised in Mailo Register Block 82 plot 1252 in the name of the 1<sup>st</sup> defendant under instrument No. KLA 35021 dated 4<sup>th</sup> October 2007.
- c) The certificate of title for land comprised in Mailo Register Block 82 plot 995 is currently registered in the name of the plaintiff, the plaintiff having been registered on the 28<sup>th</sup> day of July 2008 under instrument No. KLA 384494.
- d) The 1<sup>st</sup> defendant leased plot 1252 to the 2<sup>nd</sup> defendant and a lease was registered under Instrument No. KLA 366903 dated 15<sup>th</sup> February 2008 and a certificate of title described as leasehold Register Volume 3836 Folio plot 1252 was issued.
- e) The 2<sup>nd</sup> defendant is in possession and use of the said land comprised in Leasehold Register Volume 3836 Folio plot 1252.
- f) The 2<sup>nd</sup> defendant has been excavating and extracting stones from the said land comprised in Mailo Register Block 82 plot 1252 since May 2007.
- g) The land comprised in Mailo Register Block 82 plot 995 was transferred to the plaintiff after the issuance of the certificate of the title for land comprised in Mailo Register Block 82 plot 1252 and the lease to the 2<sup>nd</sup> defendant

## **2. Agreed issues by the parties**

1. Whether the certificate of title for land comprised in Mailo Register Block 82 plot 995 was lawfully issued.
2. If issue 1 is answered in the affirmative, whether the land comprised in Mailo register Block 82 plot 1252 encroaches on the land comprised in Mailo Register Block 82 plot 995.
3. If issue 2 is answered in the affirmative, what is the status of the 2<sup>nd</sup> defendant's leasehold interest in so far as it was granted over land comprised in Mailo Register Block 82 plot 995.

4. Whether the various transfers from the Administrator General and eventually to the plaintiff were valid.
5. Whether the plaintiff has a valid interest in land comprised in Mailo Register Block 82 plot 995.
6. What remedies are available to the parties?

With respect of issue no.6, this Court in Miscellaneous Application no. 79 of 2011, which was an application for discovery of all documents pertaining to or in respect of quantity of stone extracted, excavated and/or removed from the suit land for the period from the date of grant of the lease to the second defendant, ordered that the said application be adjourned pending the determination of issues nos. 1-5 in the suit and that evidence in respect of issue no.6 be adduced after this Honourable Court has made a decision in respect of issues nos 1-5.

The plaintiff's submissions herein therefore is only in respect of issues nos. 1-5 above in terms with the order of the Court referred to above that the evidence in respect of issue no.6 be given only after determination of issues nos. 1-5.

The order in which the plaintiff intends to deal with the issues as framed is as follows:

- (a) Issues 1 and 5 are dealt with jointly;
- (b) Issues 4, 2 and 3 are dealt with separately in the order listed herein

### **3. Witnesses for the parties**

#### **3.1: The plaintiff's witnesses**

The plaintiff called two witnesses, himself inclusive:-

1. Brigedier General Kasirye Gwanga, UPDF officer, attached to the General Headquarters, hereinafter referred to as PW1; gave evidence for himself. He narrated how he got the suit land. Counsel for the defendants seriously cross –examined him. His evidence in cross examination contradicts his evidence in examination-in-chief. His evidence was challenged by the defence Counsel in cross –examination.
2. Ddamulira Ahmed, the Registrar of Titles, hereinafter referred to as PW2. He gave evidence on how PW1 acquired the suit land. He was seriously cross –examined by Counsel for the defendants. His evidence was challenged in cross-examination by the defence Counsel. Both witnesses relied on a number of documents in support of the plaintiff’s case.

### **3.2: The 1<sup>st</sup> defendant’s witnesses.**

The 1<sup>st</sup> defendant called two (2) witnesses:-

1. Collin Simwogerere Bethal Njuki, hereinafter referred to as DW1 gave evidence saying that the suit land is his. He was seriously cross examined by Counsel for the plaintiff. From his evidence he remained unshaken during cross-examination.
2. Nsubuga Augustine, Records Officer in the Department of the Administrator General, hereinafter referred to as DW2, gave serious evidence against the plaintiff and the way the suit land was erroneously transferred to various persons/parties. He endeavoured to justify that the transfer at every level up to the plaintiff were tinted with fraud. In cross – examination he never contradicted himself at all. More or less his evidence remained unchallenged.

### **3.3 The 2<sup>nd</sup> defendant’s witness**

The 2<sup>nd</sup> defendant called one (1) witness:-

1. Milivoje Milisavljevic, the Managing Director of the 2<sup>nd</sup> defendant, hereinafter referred to as DW3, gave evidence for the defence. His evidence was not challenged by the plaintiff in cross-examination.

The defendant case, too, relied on my documentary evidence.

#### **4. Resolution of the issues by Court**

**4.1: issue no.1: Whether the certificate of title for land comprised in Mailo Register Block 82 plot 995 was lawfully issued, and, issue no.5 whether the plaintiff has a valid interest in land comprised in Mailo Register Block 82 plot 995.**

Counsel for the plaintiff, Ms Aissata Sylvia submitted that the certificate of title for plot 995 was lawfully issued and that the plaintiff has valid interest in the suit land plot 995. She argued that

- (i) The plaintiff is the registered proprietor of plot 995 and that he has been registered as such since 28<sup>th</sup> July, 2008.
- (ii) The certificate of title for plot 995 was issued on 9<sup>th</sup> August 2007 before the certificate of title for plot 1252 was issued on 8<sup>th</sup> October, 2007. From the submissions by Counsel for the plaintiff, she shifted the burden of proof to the defendants to prove that the plaintiff's certificate of title for plot 995 was illegally and fraudulently issued to the plaintiff. She further submitted that the defendants failed to discharge that burden of proof against the plaintiff.

Counsel for 1<sup>st</sup> defendant, Mr. Moses Byaruhanga; and that of the 2<sup>nd</sup> defendant Mr. Paul Byaruhanga in their respective written submissions do not agree with the evidence adduced by the plaintiff and the arguments by

the counsel for the plaintiff in her written submission. They, too, relied on a number of authorities to justify their clients' cases.

The creation of title of plot 995 was "allegedly authorized " by the Administrator General and later transferred to a one Patrick Kinene in or about August, 2007. There is however no documentation whatsoever that was produced in Court showing that the Administrator General authorized the creation of plot 995. No evidence was also produced in Court showing that the Administrator General who was apparently then the registered proprietor, authorized the transfer to Patrick Kinene. DW2 categorically denied ever authorizing the said entry or the purported transfer to Kinene. The purported root for the certificate of title for plot 995 therefore collapses as it was created without any authority whatsoever.

On the contrary, the 1<sup>st</sup> defendant's title was created through a clear and thorough process conducted by the Administrator General with the assistance of the Commissioner of Lands Registration, who instructed two surveyors, that's Hood Construction Services and Terrain Consult to survey all the land that had not been surveyed and transferred but belonged to the estate of the late Simeon Paine Njuki.

This evidence and documentation showing the creation of the 1<sup>st</sup> defendant's title were all availed to Court and is contained in the DW1's witness statement and this was not impeached at cross examination. The 1<sup>st</sup> defendant even in cross examination unequivocally stated that the suit land was clearly identified by his relatives, it was surveyed and this process was completed and the land was referred to as Block 82 plot 707. Therefore the 1<sup>st</sup> defendant's title, that plot 1252, Block 82 which the plaintiff seeks to impeach was created out of plot 707 block 82, after a though process by the

Commissioner Land Registration, working together with the Administrator General with a team of two surveyors.

It's also interesting that the plaintiff's title was created in August, 2007 but no documents authorizing its creation were availed to Court.

Further, the plaintiff per his own witness statement acknowledges that, he bought the suit land when it "allegedly" had disputes. He stated in his witness statement that Sam and Alfred told him that the 2<sup>nd</sup> defendant had possession. At the time of registration of the plaintiff, he was therefore aware of the existing unregistered interest of the 1<sup>st</sup> and 2<sup>nd</sup> defendants but was determined to defeat the said interests because per his own words "**I am an army man**". In fact in the last paragraph at page 2 of the plaintiff's witness statement, he states

**" that after the title was transferred into my names, I went to the land to introduce myself....., we found that there were Energoprojekt people on the land and stone was being extracted."** The plaintiff in otherwords admits that at the time of "purported purchase", the 2<sup>nd</sup> defendant was in possession."

In the case of **John William Kihuku & 2 others vs the Personal representatives of Rt. Rev.Eric Sabiit [1995] V KALR**, Court held;

**" where a person procures registration to defeat an unregistered interest on part of another person of which he is proved to have knowledge, then such a person is guilty of fraud".**

It is the 1<sup>st</sup> defendant's submission that the plaintiff participated in the fraud creating the title for plot 995. And that all the purported transfers finally to himself were desperate attempts to conceal his fraud. That the plaintiff is not

an innocent transferee but a major and active participant in the fraud. That this is further portrayed on the transfer instrument which stated that the consideration for the said land was Ug.shs 35,000,000/= while the consent to transfer states Ug. Shs 25,000,000/= and the same is further contradicted by the plaintiff during cross examination when he informed Court that he has never paid any monies for the said land and his intentions were to recover it and pass it on to the rightful owners. In paragraph 2, page 2 of the plaintiff's witness statement, he stated, **“that I told Alfred and Sam that I would purchase the land and find out the cause of the dispute as well as make an attempt to settle it.** One wonders why the plaintiff would buy land that firstly had disputes, but more importantly where someone else other than the person selling was in possession.

According to case of **Katalikawe vs Katwiremu (1977) HCB 187,**

**“Fraud shall on the part of the person obtaining registration include proven knowledge of the existence of the unregistered interest on the part of some other person whose interest he knowingly and wrongfully defeats by such registration.”**

The plaintiff's contention that his certificate of title for plot 995 was registered prior to the 1<sup>st</sup> defendant's certificate of title for plot 1252 also collapses because, the plaintiff was aware of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's unregistered interest in the land. The 2<sup>nd</sup> defendant was even in occupation. The plaintiff on realizing that the 1<sup>st</sup> defendant was in the process of creating the title for the suit land, fraudulently and illegally hurriedly created the title for plot 995 and now claims that the 1<sup>st</sup> defendant's title, that's plot 1252 encroaches in the boundaries of plot 995, yet the Administrator General unequivocally stated that plot 995 has

never been transferred to the alleged proprietors on the plaintiff's title but still belonged to the estate of the Simeon Katende Njuki.

It's therefore my considered view that the creation of the title for plot 995 at the time when the 1<sup>st</sup> defendant's land was being surveyed and in the process of obtaining title was a fraudulent act intended to defraud the 1<sup>st</sup> defendant who was in occupation of his unregistered beneficial interest.

Section 176 (3) allows the recovery of land against the person who was registered as the proprietor of the land through fraud. It is finding that, that the creation of the certificate of title for plot 995 was a fraudulent creation of the plaintiff, together with Alfred Serunjogi and Sam Kabali intended to take part of the 1<sup>st</sup> defendant's land and the same should therefore be cancelled. And it is ordered that Commissioner Land Registration cancels the creation of the Certificate of title for plot 995 and the registration of the plaintiff immediately after the delivery of this judgment.

The documents in the pleadings, testimony and exhibits indicate that no certificate of title was ever issued for plot 995, either in the name of Simeon Katende Njuki (grandfather of 1<sup>st</sup> defendant ), Henry Augustine K. Mukasa (father of 1<sup>st</sup> defendant) or the Administrator General (administrator of the estate of Simeon Katende Njuki) or at all. Simeon Katende Njuki bequeathed 145 acres of the suit land to Henry Augustine K.Mukasa. The 1<sup>st</sup> defendant is then son, administrator and beneficiary of the estate of Henry Augustine K.Mukasa. The Administrator General categorically denied the existence of any certificate of title for plot 995 nor transferring the same to Semey Patrick Kinene. There is no instrument of such transfer.

The unshaken and authoritative testimony of DW2 is that the plaintiff's exhibit P2 which is attached to the witness statement of DW2 as "B" is a mere letter and not a certificate of succession. It does not constitute an instrument for the creation of a certificate of title for plot 995 in the name of the Administrator General. The said Exhibit p2 for what it is worth is in respect of plot 501 and not plot 995. There is however a certificate of title for the said plot 501 which has no connection with plot 995. See annexure marked "A" to the witness statement of PW2.

The survey (not certificate of title since there had never been any) for plot 995 was cancelled by the District Staff Surveyor. In light of all the foregoing, it is my considered opinion that the certificate of title for land comprised in Mailo Register Block 82 Plot 995 was not lawfully issued and is therefore non-existent. The plaintiff who alleges the positive that is that the tile was lawfully issued and is therefore existent bears that burden of proof which he has failed to discharge.

As discussed above I do not see any interest accruing to the plaintiff in the suit land.

The 2<sup>nd</sup> defendant's was in possession and occupation of the land operating a stone quarry long before the purported registration of the plaintiff as proprietor of his purported land on 28/7/2008. Both the mailo and leasehold interests had long been registered. In the case of **Kampala District Land Board vs Babweyaka & 3 others [2008] HCB 22**, it was held that:-

**"knowledge of other person's rights or claims over land and deliberate acquisition of a registered title in face of such protests amounts to fraud. There was a deliberate effort by**

**the appellants to sideline the respondents as bonafie occupants or tenants at sufferance of the suit land.”**

The plaintiff having got registered in the face of both defendants’ registration, occupation, possession and use, such registration was through fraud. Assuming that the plaintiff purchased the land (which is very doubtful) the law is very clear, that is, a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the parties in such occupation may have in the land. in the case of **Uganda Posts and Telecommunications vs Abraham Kitumba Peter and Mulangira Lutaya, Civil Appeal no. 36 of 1995**, it was held:

“ The law is very clear that if a person purchases an estate which he knows to be in the occupation of another man than the vendor, he is bound by all the equities which the party in such occupation may have in the land.

The above proposition was stated in one old English case of Jesse v Smith (1841) 1 Here 43, at page 60. But earlier on in **Taylor v Stibbert (1803) -13 Aller 432 Loughborough L.C.** held that **if a vendor is not in possession of the land he is selling, the purchaser must make inquiries of the person in possession or otherwise the property purchased will be subject to that person’s right.**

Then in **Burburt v Greenshields (1853) 9 KCC PCC 18 Lord Bingadern** stated:

**“If there is a tenant in possession of land a purchaser is bound by all the equities which the tenant could enforce against the vendor”.**

Again in **National Provincial Bank Ltd vs Hastings Car Mart Ltd & Others [1964] 1 ALLER 683** Lord Denning held inter alia at page 698:

**“the charge of the bank upon the matrimonial house was a valid charge, but they took it subject to the deserted wife’s equity to remain in occupation”**

In **Hodgson vs Marks & another [1970] 3 ALLER 513**,

**“the occupation of the land constituted constructive notice to a purchaser of the rights of the occupier. The occupation of the suit land by the appellant put the would be purchaser upon notice of close adverse to the registered owner.”**

The plaintiff in his testimony denied ever paying any consideration for the transfer of the land to him. From the start of the case to the end he disclaimed interest in the suit land and that he would hand it to the owners at the end of the case. What could be gathered from the plaintiff’s evidence is that he even got registered in order to lend military muscle to others. However he did not present any power of attorney nor an order for the representative suit. PW1 just shifted the burden proof to the defendants to prove his case. The plaintiff in this case bears the burden of proof which he failed to discharge. On the persons talked about by the plaintiff and they were not called to testify in support of his claims adversely affected his case. In the case of **J.K Patel vs Spear Motors Ltd [1993] KALR 85** it was held that:

**“The parties’ evidence at the trial amply showed that the defendant’s general manager was a key witness in this case. But since the defendant refused to call him a witness, an adverse inference would be drawn against the defendant”.**

Therefore, for the reasons given hereinabove, issues nos.1 and 5 are answered in the negative.

**4.2: Issue no.2: If issue 1 is answered in the affirmative, whether the land comprised in Mailo register Block 82 plot 1252 encroaches on the land comprised in Mailo Register Block 82 plot 995.**

The plaintiff's counsel submitted that the encroachment on plot 995 by plot 1252 is evidenced by the fact that ;

- (a) According to the testimony of PW2, Mr. Ddamulira in exhibit EW2 (paragraph 4 page 4) to title for plot 707 which was already in existence and had not been lost and while it had already been subdivided to create plots 995 and 996. The plaintiff therefore submits that as a result of this error, a certificate of title was issued for plot 1252, while part of the land comprising plot 1252 was already subject to land as plot 995.
- (b) According to the 1<sup>st</sup> defendant, he carried out a survey to facilitate a certificate of title for plot 1252, which survey was evidenced by survey reports attached to the 1<sup>st</sup> defendant's written statements as annexure CN4 (a) and CN4(b), it was confirmed by the 1<sup>st</sup> defendant during cross examination, that although the survey reports were issued by 2 different surveyors, both on the 10<sup>th</sup> April 2007 (which was before 30<sup>th</sup> August, 2007 when the certificate of title for plot 1252 was issued) both reports expressly stated that plot 707 had already been subdivided into plot 995 and 996. Therefore in proceeding to cause the creation of plot 1252, out of plot 707 (as stated in paragraphs 6 to 10 of the 1<sup>st</sup> defendant's witness statement ) the 1<sup>st</sup> defendant created a certificate of title over land subdivided into plots 995 and 996 therefore encompassing plot 995 into plot 1252 and encroaching 995.

The plaintiff further submits that the fact that part of plot 1252 encroaches on plot 995 is proved by the fact that the certificate of title for plots 1252 was created from plot 707, which had already been subdivided into plots 995 and 996. That when the certificate of title for plot 1252 was issued it was issued over plots 995 and 996 which had already been created out of plot 707.

The defendants' lawyers do not agree with the submissions by Counsel for the plaintiff.

The plaintiff submits that the 1<sup>st</sup> defendant's certificate of title for plot 1252 encroached on plot 995. It is the 1<sup>st</sup> defendant's submissions that the question of encroachment does not even arise. This is because the 1<sup>st</sup> defendant has already shown that the creation of the title for plot 995 was all fraudulent. The Administrator General the purported authorizing entity, denied the creation of the said title. In her communication regarding plot 995 the Administrator General asserts that plot 995 is a residue by balance and still belongs to the estate of Simeon Katende Njuki. After the thorough process of survey and reconstruction of the late Simeon Katende Njuki's land, the process conducted by the Commissioner Lands Registration in conjunction with the Administrator General, plot 995 and 996 were reconstructed to create plot 707.

Hereinabove issue no.1 has been answered in the negative. It now becomes an academic exercise to discuss issue no.2. There is no land comprised in plot 995. Encroachment by plot 1252 does not therefore arise. There being no certificate of title for plot 995 the area was resurveyed on the application of the 1<sup>st</sup> defendant and it became plot 1252. The answer to issue no.2 is that

the land comprised in Maio registered block 82 plot 1252 does not encroach on land comprised in Mailo Register Block 82 plot 995.

In the result, issue no.2, also, is answered in the negative.

**4.3: issue no.3: If issue 2 is answered in the affirmative, what is the status of the 2<sup>nd</sup> defendant's leasehold interest in so far as it was granted over land comprised in Mailo Register Block 82 plot 995.**

From the on set, issue no2 was answered in the negative as analysed hereinabove in this judgment.

Counsel for the plaintiff submitted that since the 2<sup>nd</sup> defendant's lease was granted by the 1<sup>st</sup> defendant and not by the plaintiff, it is void as against plot 995. That this is because only the plaintiff can grant a lease over plot 995. As stated hereinabove, such arguments by the plaintiff cannot arise. This issue could be settled at this stage in favour of the defendants.

Counsel for the 1<sup>st</sup> defendant did not consider this issue no.3 in his submissions. Counsel for the 2<sup>nd</sup> defendant on the other hand in his submissions dismissed the plaintiff's claims. He disagreed with the submissions by Counsel for the plaintiff.

Considering the pleadings, the testimony, the exhibits and the discussion above, both issues Nos.1 and 2 have been be answered in the negative and consequently issue No.3 does not arise. Neither the 1<sup>st</sup> defendant's mailo interest in plot 1252 nor the 2<sup>nd</sup> defendant's leasehold interest in the same encroach on plot 995. It is not in dispute that the 2<sup>nd</sup> defendant was on 15.2.08 under instrument No.KLA 366903 registered as owner of the lease in

Kyadondo Block 82 LRV 3836 Folio 25 plot 2152 and is a bonafide purchaser/transferee for value. The answer to issue no. 3 is therefore that the 2<sup>nd</sup> defendant's leasehold interest was not granted over plot 995 (which does not exist) and its status is that it is good and valid. In the premises issue no. 3 is also answered in the negative.

**4.4: Issue no 4: Whether the various transfers from the Administrator General and eventually to the plaintiff were valid.**

It is the case for the plaintiff that on the 9<sup>th</sup> day of August, 2007, the date on which the certificate of title for plot 995 was created, then the certificate of title was registered in the names of the Administrator General. Upon registration in the names of the Administrator General, it was transferred simultaneously to Semey Patrick Kinene two days later, a transfer was registered from Semey Patrick Kinene to Isaac Serunjogi. Almost one year later a transfer was registered from Isaac Serunjogi to Mustak Enterprises Limited and simultaneously from Mustak Enterprises Limited to the plaintiff.

Counsel for the plaintiff relied on a number of authorities to justify her case against the defendants. Counsel for the defendants do not agree with the arguments submitted by Counsel for the plaintiff.

The plaintiff's title was created on the 8<sup>th</sup> August, 2007, at 11:24am. The first entry on the said title was the Administrator General. As already shown above, the Administrator General has unequivocally denied authorizing his entry on the said title and insists that the purported document that deposed of land to Semey Patrick Kinene is a mere letter but not an instrument of land for land which cannot bind the plaintiff. The 1<sup>st</sup> defendant produced the

records officer from the Administered General who stated in Court “that the Administrator General formally requested the Commissioner Land Registration to be registered on land she is administering. He also stated that when the Administrator General decides to transfer land to a beneficiary which has been the position since the year 1998 when the land office barred them from issuing Successions certificates but the Transfer Form that deposed of land to Semey Patrick Kinene was different and not issued by their office. There is no evidence whatsoever that the said procedure was followed in this case.

Obviously, it could not, since the Administrator General never asked to be registered on the said land. The plaintiff’s witness, PW2 Ahmed Ddamulira from the Commissioner of Lands and Registration could not explain how the Administrator General got registered on the title. The said official could not also produce the documents authorizing the registration of the Administrator General and the subsequent transfer to Semey Patrick Kinene. The entry of the Administrator General on the said land was therefore fraudulent, and the subsequent transfer to Semey Patrick Kinene was also illegal.

It is worth noting that PW2 also informed Court that succession certificates which evidence was discredited by DW2 when he advised Court that in the year 1998 the land office issued a policy which barred the Administrator General generated a standard transfer form, supported by an application to register the Administrator General first on any property that she administers, before the same could be transferred to the beneficiary. He further informed Court that all succession certificates that had been issued before the year 1998 and were in possession of beneficiaries had to be returned to the Administrator Generals’ office, verified, certified and sealed with the seal of the Administrator General and then taken to the land office to transfer land

failing which the land office cannot transfer land to any beneficiary without complying with that procedure.

The basis on which the plaintiff's title for plot 995 therefore collapses. What's quite interesting and further proof to the fraudulent actions of the plaintiff and his accomplices, the entry of the Administrator General and the transfer to Patrick Kinene was all done at the same time.

What's important is whether the plaintiff participated in this initial fraud of entering the administrator General on the title and the subsequent transfers. The plaintiff filed a witness statement in Court on the 30<sup>th</sup> of August 2010. In page 1 of the witness statement, paragraph 3, the plaintiff states that he bought the land through Sam Kabali and Alfred Serunjogi, from Mustak Enterprises at Ug shs 25,000,000/=.

In paragraph 2, page 2 of the plaintiff's witness statement, the plaintiff alleges that the suit land belonged to Isaac Serunjogi, and the said Isaac Serunjogi had given authority to Sam Kabali and Alfred Serunjogi to use the land. it's worth noting that the said permission granted to Alfred Serunjogi and Sam Kabali to use the said land was never produced in Court. That notwithstanding, the plaintiff was requested by the said Alfred Serunjogi and Sam Kabali to buy the land since they were "allegedly being intimidated by the 2<sup>nd</sup> defendant and they wanted the plaintiff to "buy the land since he was an army man".

What is surprising is that, the said Alfred Serunjogi and Sam Kabali had according to the plaintiff been given permission by the alleged owner of the land Isaac Serunjogi to use the land, but now, they decided to sell the land as if they were the owners. No evidence was produced to show that Isaac

Serunjogi, who to the plaintiff was the owner ever gave permission to Alfred Serunjogi and Sam Kabali to sell the land, neither was Isaac Sserunjogi, Alfred Sserunjogi nor Sam Kabali brought in Court to give evidence regarding their interests in the suit land.

The plaintiff in paragraph 2, page 2 of the witness statement goes further and stated “that I did not want to damage my reputation and I asked Alfred and Sam to prove to me that their claim to the land was genuine”. One wonders why the plaintiff would ask Alfred Serunjogi and Sam Kabali to prove that they were genuine owners of the land when they had already told him that they were on the land as mere licensees of Isaac Serunjogi. That notwithstanding, the plaintiff went a head and allegedly bought the suit land from them.

In the same paragraph 2 of page 2, of the plaintiff witness statement, Alfred Serunjogi & Sam Kabali gave him a copy of a will of the late Simeon Katende Njuki, which showed that Isaac Serunjogi had bought the land from Semey Patrick Kinene, who had inherited the same from Simeon Katende Njuki, his grandfather. That copy of the said will was never tendered in Court. The plaintiff states that he was given transfer forms to sign and proceed to register the land in his names.

Contradicting himself during cross examination, the plaintiff stated “that I did not buy the land, I simply gave Alfred Serunjogi and Sam Kabali Ug.shs 25,000,000/= (twenty five million shillings) to help them, but that he was only fighting to rescue the land and that after winning he would give the suit land back to Isaac Serunjogi. The plaintiff even stated in cross examination that he had been given authority by Isaac Serunjogi to fight and rescue the land. The plaintiff never produced any powers of attorney to prove his statements.

Considering the plaintiff's evidence in examination –in-chief viz-a-vis his evidence in cross –examination, certainly there are contradictions and inconsistencies in his case.

It is no coincidence that:-

- i. That suit land was created without the authority and authorization of the Administrator General who was administering the estate of the late Simeon Patrick Njuki.
- ii. The suit land was transferred to Patrick Kinene apparently from Administrator General without the appropriate documentation, nor the Standard transfer form but a mere letter.
- iii. The suit land was transferred from Patrick Kinene to Isaac Serunjogi, who apparently gave permission to Sam Kabali and Alfred Serunjogi to use the land. The licence to the said Sam Kabali and Alfred Serunjogi was not produced or exhibited in Court.
- iv. That it's Sam Kabali and Alfred Serunjogi who apparently approached the plaintiff to buy the suit land, yet these two were on the suit land as mere licenses of Isaac Serunjogi.
- v. That the plaintiff decided to buy the suit land because he wanted to settle the dispute between Sam Kabali, Alfred Serunjogi and the 2<sup>nd</sup> defendant.

Wherefore, a question arises from the above quoted evidence as to whether, the plaintiff got good title to the suit land?

Consequent to the above, a deeper analysis of the events as outlined in (i-v) above show how the whole creation of the title of plot 995 was perpetuated by the plaintiff together with Sam Kabali and Alfred Serunjogi based on the following;

- (a) If the plaintiff was an innocent purchaser, a simple search on the title in the Ministry of lands would have shown that entry of the Administrator General and Patrick Kinene was fraudulent.
- (b) If the plaintiff had carried out a physical visit on the suit land, he would have known that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in occupation although not yet with the certificate of title.
- (c) The plaintiff would not have bought the suit land that had disputes simply because he is an army man as per his evidence because even army men are subject to lawful authority.
- (d) The plaintiff would not have bought land from Sam Kabali and Alfred Serunjogi who were not registered as owners of the land and did not have authority to sell the suit land on behalf of the purported registered owner. The two never passed good title to the plaintiff.

Incredibly, after the suit land was transferred from Isaac Serunjogi, the land was transferred to Mustak Enterprises and in a matter of two minutes, a transfer was effected in favour of the plaintiff. That plaintiff's own witness, PW2, Mr. Damulira himself, an official in the Ministry of Lands could not himself explain how a transfer could be made from one person to another in a matter of two minutes. There is a likelihood that the transfer fees for the suit land were not paid to Government.

In paragraph 2, page 2 of the plaintiff's witness statement the plaintiff stated "that I told them (Isaac Serunjogi and Sam Kabali) I would purchase the land....., they gave me transfer form to sign....." one wonders why the suit land was not transferred from Isaac Serunjogi, whom according to the plaintiff were representing the then registered owner (Isaac Serunjogi) directly to the plaintiff. Instead, the land was first transferred to Mustak

Enterprises Ltd and in the space of two minutes in the absence of the company board of directors' resolution transferred to the plaintiff.

However, even if the transfer to Mustak Enterprises Ltd was proper, the transfer from the Mustak Enterprises Ltd to the plaintiff should also have been authorized by a company board of directors' resolution. This resolution was not produced in Court. Even all the transfer forms executed in favour of Mustak Enterprises Ltd from Isaac Serunjogi and from Mustak Enterprises Ltd to the plaintiff bears no company seal, were not in latin character and as such, the whole transaction contradicted the law. It is my considered view that all the several transfers were all a creation of the plaintiff to claim being a bonafide purchaser whereas not.

The plaintiff can't therefore, urge that he bought the land in good faith, that he was an innocent buyer for consideration. In fact, during cross examination, the plaintiff emphasized that the purported purchase price was a mere gift to Sam Kabali and Alfred Serunjogi, that he was not interested in the land because he is " a multibillionaire" as per his won words, but simply fighting for Isaac Serunjogi's land. One again wonders what relationship the plaintiff has with Isaac Serunjogi. That was not disclosed in the pleadings and evidence. And if indeed the plaintiff is holding the suit land in trust for Isaac Serunjogi, why did he have to transfer from Isaac Serunjogi in the first place? There was something fishy in the entire transaction in respect of the suit land.

It is well established in law that fraud means actual fraud or some act of dishonesty. In **Waimiha Saw Milling Co. Ltd vs Waione Timber Co. ltd. (1926) AC 101 at page 106**. Lord Bushmaster said "Now fraud implies some act of dishonesty". **Lord Lindley in Assets Co. vs Mere Roihi (1905)**

**Ac 176 states, “Fraud in these actions (i.e actions, seeking to effect (sic) a registered title) means actual fraud, dishonesty of some sort not what is called constructive fraud an unfortunate expression and one may opt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud”.**

**Robert Lusweswe vs Kasule & anor HCCS No. 1010 of 1983, where Odoki J, as he then was, said, “therefore while the cardinal rule of registration of 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”.**

Section 64 of the Registration of Titles Act allows impeachment of registered title on grounds of fraud and/or lack of valuable consideration. In this case, it’s apparent that the alleged title for plot 995 was created through fraud with the full participation and knowledge of the plaintiff.

It is Semey Patrick Kinene who could have defended the purported creation of the title and transfer of the same to him. The adverse inference should be drawn that his evidence would not have supported the plaintiff’s case. Even the alleged certificate of succession was not produced nor was the procedure of using it as an instrument of transfer followed. The testimony of PW2 therefore becomes incorrect in the face of the testimony of DW2 about a certificate of succession as an instrument of transfer of land.

Transfer of the said certificate of title therefore do not fall into the categorically of those that are transferred bonafide for value. The transfer from Semey Patrick Kinene to Isaac Serunjogi registered on 10.8.07 was not for any consideration. (See transfer deed annexed to the witness statement of

PW2 as “F”). It was therefore not for value. It was a time when the 2<sup>nd</sup> defendant was in occupation of the land operating a stone quarry.

The transfer from Isaac Serunjogi to Mustak Enterprises Ltd registered on 28.7.08 was not for any consideration. (See transfer deed dated 25.09.07 annexed to the witness statement of PW2 as “G”). It was therefore not for value. It was registered at a time when both the 1<sup>st</sup> and 2<sup>nd</sup> defendants were already registered for their respective interests (30/10/07) for the mailo and 15.2.08 for the leasehold) and the 2<sup>nd</sup> defendant was in occupation and use. It was therefore not bonafide.

The transfer from Mustak Enterprises ltd to the plaintiff registered on 28/7/08 was not for any consideration. The plaintiff categorically denies payment of Shs 35,000,000/= mentioned in the transfer deed annexed as “H” to the witness statement of PW2 nor the Shs 25,000,000/= mentioned in the application for transfer annexed as “I” to the witness statement of PW2. The consideration put forward by the plaintiff was that he was lending military muscle to the owners of the land. This would be illegal consideration. The purported transfer was therefore not for value. The existence of Mustak Enterprises Ltd has not been proved. That company from which the plaintiff purports to derive title was not called as a witness and an adverse inference can be deduced from this. I refer to the case of **J.K. Patel vs Spear Motors Ltd (supra)**. The transfer was at a time when both the 1<sup>st</sup> and 2<sup>nd</sup> defendants were registered proprietors of their respective interests.

I, therefore, hold that all the transfers are not valid in law. Accordingly, issue no.4 is answered in the negative.

#### **4.5: issue no. 6: Remedies available to the parties.**

As noted hereinabove in this judgment, Counsel for the plaintiff and 1<sup>st</sup> defendant did not address themselves on this issue. There is an order on Court record that the issue in respect to quantify the stone extracted, excavated and /or removed from the suit land by the 2<sup>nd</sup> defendant shall be determined after disposing of issues nos. 1-5. However, counsel for the 2<sup>nd</sup> defendant in one sentence in his written submissions addressed himself on this issue no.6.

Consequent to the above, after findings on issues nos 1-5 in favour of the defendants, I am of considered opinion that issue no.6 can be settled at this stage. From the evidence on record and the law cited hereinabove in this judgment, the plaintiff has no valid interest in the suit land. Therefore, there is no longer any need to allow that parties to adduce evidence on issue no.6.

Further, the plaintiff's suit against the defendants and in particular the 2<sup>nd</sup> defendants for ejectment and damages is barred by law; See Sections 176 (e) and 181 of the Registration of Titles Act, Cap. 230. In the same vein Miscellaneous Application no. 79 of 2011 which was an application for discovery of all documents pertaining to or in respect of the quantity of stone extracted or excavated and /or removed from the suit land has no merit. It is accordingly dismissed with no orders as to costs as the respondents/defendants had not filed in their respective affidavits in reply.

## **5. Conclusion**

In the result and for the reasons given hereinabove in this judgment, the plaintiff's suit is dismissed with costs.

Dated at Kampala this 22<sup>nd</sup> day of January, 2013.

**sgd**  
**Murangira Joseph**  
**Judge**