

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

CIVIL SUIT NO. 615 OF 2012

MADHIVANI GROUP LIMITED ::::::::::: PLAINTIFF

VERSUS

1. ALEXANDER DAVID SIMBWA 2. MOSES WALUGEMBE 3. HAJJI ABDU KARIM NSANJA SAAVA 4. WALUGEMBE GODFREY & 73 O'RS	}	::::::::: DEFENDANTS
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BY COUNTERCLAIM

1. ALEXANDER DAVID SIMBWA 2. MOSES WALUGEMBE 3. HAJJI ABDU KARIM NSANJA SAAVA 4. WALUSIMBI GODFREY & 73 O'RS 5.	}	::::::::: COUNTERCLAIMANTS
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VERSUS

1. MADHIVANI GROUP LIMITED 2. THE COMMISSIONER FOR LAND REGISTRATION	}	::: COUNTERCLAIM DEFENDANTS
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BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

J U D G M E N T:

MADHIVANI GROUP LIMITED (hereinafter referred to as the “**plaintiff**”) brought this suit against **ALEXANDER DAVID SIMBWA, MOSES WALUGEMBE, HAJJI ABDU KARIM NSANJA SAAVA, WALUSIMBI GODFREY and 73 Others** (hereinafter referred to as the “**defendants**”) jointly

and or severally for trespass upon its land comprised in ***FRV 45 Folio 2 Land at Nakigalala and Kansiri Estates***, (hereinafter referred to as the “suit land”). The plaintiff sought the following reliefs;

- 1. That the defendants jointly and or severally be declared trespassers on the suit land.***
- 2. An order of eviction against the defendants jointly and or severally together with their servants, agents employees, assignees and/or any other person deriving any purported title or interest on the suit land from them.***
- 3. An order of a permanent injunction against the defendants jointly and/or severally together with their servants, or agents from further trespassing on the suit land.***
- 4. That the defendants jointly and/or severally pay general damages to the plaintiff***
- 5. Costs of the suit.***

The 4th defendant, Walusimbi Godfrey and the 73 others also claimed interest in the suit land through several purchases from the 1st, and 3rd defendants. They applied in ***High Court Miscellaneous Application No. 831 of 2013*** and were joined as defendants to the suit. The 73 others defendants gave authority to 4th defendant to represent them in the suit.

In the joint Scheduling Memorandum, it is an agreed fact that the plaintiff is the registered proprietor of the suit land, and holds a certificate of title for land known as ***FRV 45 Folio 2 Land at Nakigalala and Kansiri Estates***. It is also an agreed fact that the 3rd defendant claims to derive interest in the suit land from 1st defendant, and the 4th and 73 other defendants claim interest in the suit land through purchase from the 1st and 3rd defendants. The parties agreed on the following issues for determination;

1. *Whether the plaintiff owns the land?*
2. *Whether or not the plaintiff fraudulently acquired the title to the suit land?*
3. *Whether the defendants jointly and or severally are trespassers on the suit land?*
4. *Whether the defendants jointly and or severally have the locus standi to bring the counterclaim against the plaintiff?*
5. *Whether the counterclaim discloses a cause of action?*
6. *Whether the counterclaim is barred by statute?*
7. *Whether the parties are entitled to the remedies sought?*

The plaintiff was represented by Mr. Paul Kuteesa of *M/s. Kampala Associated Advocates*, while the 1st and 2nd defendants were represented by Mr. Mugerwa R. of *M/s Mugerwa Partners, Advocates & Solicitors*. The 4th and the 73 other defendants were represented by Mr. Edward Bamwite of *M/s Bamwite & Co. Advocates*. All the Counsel, except for the 4th and 73 others, filed written submissions to argue the case for their respective clients. The submissions are on court record and I need not to reproduce them in this judgment. I will, however, make specific reference to them as and when need arises. I should also point out that the 3rd, 4th and 73 other defendants opted not to give evidence when the case was due for their defence. The case proceeded only on the basis of evidence adduced by the plaintiff and the 1st defendant represented by the 2nd defendant.

Background:

The plaintiff is the registered proprietor of the suit land comprised in ***Freehold Register Volume 45 Folio 2 Land at Nakigalala and Kansiri Estates*** measuring 948.15 acres. The suit land was acquired on the 08/06/1960 by M/s Madhvani Sugar Co. Works Ltd, and has since been owned at various times by companies related to and predecessors in title to the plaintiff company. The said companies

have been in possession of the suit land carrying on the business of tea estate, planting, processing, and other associated activities.

In 1972 during the advent of the expulsion of persons of Asian descent, of which the plaintiff's predecessors in title were, the suit land was expropriated and taken over by the Government of Uganda. The suit land was, however, repossessed in 1993 by the plaintiff's successor in title and it was subsequently transferred to the current plaintiff, which got registered on the title as proprietor on 02/02/2012.

The plaintiff brings this action in trespass against the defendants jointly and severally in that that around the 26/11/2012, they entered on to the suit land, cleared vegetation, cut down trees, and started to demarcate it into various plots. They constructed roads thereon, parceled it into small plots and carried out various activities, including depositing building and construction materials such as sand and bricks on various parts of the suit land in addition to constructing buildings thereon.

Further, that on the 16/09/ 2012 the 1st defendant by deed gifted part of the suit land measuring 200 acres to the 3rd defendant and others who have since also trespassed upon the suit land and started carrying on activities in utter disregard of the plaintiff's ownership of the suit land. Furthermore, that on the 13/08/2012 and the 25/08/ 2012 the 3rd defendant sold part of the suit land measuring 15 acres to a one Apollo Lumama, and that in the course of doing that the 3rd defendant trespassed upon and surveyed and made boundary marks on parts of the suit land, and that around 02/12/2012 the defendants commenced the construction of a building on the suit land.

The defendants, for their part, denied the allegations of trespass and also set up a counterclaim in which they laid claim to ownership of the suit land. The cause of action in the counterclaim is based on fraud committed by the 1st counterclaim defendant in conjunction with the Commissioner for Land Registration who was

sued as the 2nd counterclaim defendant. The counterclaimants contend that both counterclaim defendants connived in registering the suit land and superimposing **FRV 45, Folio 2** on the mailo interest comprised in **Block 372 – 373, Plot 2** and thus annexing more land to create 2948.15 acres well knowing that the **Block 372 – 373, Plot 2, Land at Nakigalala** did not form or constitute part of the suit land. Further, that the two illegally amalgamated land comprised in **FRV 45, Folio 2** with land comprised in **Block 372 – 373, Plot 2** measuring 669.52 acres.

The 1st defendant/counterclaimant in particular laid claim as *bona fide* owner of an unascertained huge chunk of land comprised in **Busiro Block 372 – 373, Plot 2 Land at Wasozi** measuring 669.52 acres comprised in a *Blue Page*, but which is not yet registered in his names on the *White Page*. The 1st defendant/counterclaimant claimed that that the suit land was bequeathed to him as a share in his father's Estate, the late Sir Daudi Chwa, whose names were entered on the *Blue Page* on 07/09/1955.

He further stated in 2013 when he attempted to commence the survey and subdivision of the suit land in order to bring it under the operation of the **Registration of Titles Act (Cap.230)**, he discovered that the plaintiff/1st counterclaim defendant also claimed ownership of the same land and was in possession a certificate of title known as **FRV 45 Folio2**. The counterclaimants aver that the registration of the plaintiff/ 1st counterclaim defendant was procured through fraud in connivance with the 2nd counterclaim defendant. The particulars of fraud against both counterclaim defendants are as follows;

- a) ***The 2nd defendant conniving with the 1st defendant and registering the suit land and superimposing FRV 45, Folio 2 on the mailo interest comprised in block 372 – 373, Plot 2 and thus annexing more land to create 2948.15 acres well knowing that the Block 372 – 373, Plot 2, land at Nakigalala does not and did not form or constitute part of the suit land.***

- b) By the 2nd defendant conniving with the 1st Defendant and illegally amalgamated land comprised in FRV 45, Folio 2 with land comprised in Block 372 – 373, Plot 2 measuring 669.52 acres.*
- c) By the 1st defendant illegally using repossession certificate in the names of Muljibhai Madhivani & Co. Ltd on the 6th day of March, 1991 (a different company) to repossess land that belonged to Madhvani Sugar Works Ltd.*
- d) By the 2nd defendant registering Madhivani Sugar Works Ltd. as owner of the suit land under instrument No. 147051 with two different dates of registration ; one for the 8th day of June, 1960 and 4th day of March, 1960.*
- e) By the 2nd defendant conniving with the 1st defendant and registered the suit land on the 7th day of October, 1993 in the names of Muljibhai Madhivani & Co. Ltd under Instrument No. 259684 a non existing company; what existed is Madhivani Company Ltd.*
- f) By the 1st defendant intentionally omitting to present to court the deed plan of its title which would have shown the exact acreage and location of the land?*

The counterclaimants prayed for the following reliefs;

- a) A declaration that the counterclaimants are not occupying the plaintiff's/ 1st counterclaim defendant's land.*
- b) A further declaration that the land occupied by the counterclaimants is Block 372 – 373, Plot 2 and not the plaintiff's/1st counterclaim defendant's land.*
- c) A declaration that the plaintiff/ 1st counterclaim defendant's land comprised in FRV 45, Folio 2 does not measure 948.15 acres.*
- d) A declaration that the said title was fraudulently issued and obtained by the plaintiff/ 1st counterclaim defendant.*

- e) *An order directing the 2nd counterclaim defendant to issue a certificate of title in respect of Block 372 – 373, Plot 2 to the 1st counterclaimant.*
- f) *General damages.*
- g) *Costs of the counterclaim be paid by the counterclaim defendants.*

Resolution of Issues:

Issue No. 1 whether the plaintiff owns the suit land.

Section 59 of the Registration of Titles Act (supra) which governs the legal ownership of land is to the effect that;

“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 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 possessed of that estate or interest or has that power.”

A number of decided cases have considered and applied the above provisions. In the case of *John Katarikawe v. William Katwiremu & A’ nor* [1977] HCB 187, it was held, *inter alia*, that provisions of **Section 61 (now S.59) RTA** are clear that once a person is registered as proprietor of land, his title is indefeasible except for fraud. Similar position was taken in *Olinda De Souza v. Kasamali Manji* [1962] EA 756 *that in absence of fraud possession a certificate of title by a registered proprietor is conclusive evidence of ownership of the land* and the registered proprietor has indefeasible title against the whole world.

Section 176 (c) (supra) protects a registered proprietor of land against ejectment except on ground of fraud. The relevant part provides as follows;

“No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases—

(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;...”

In the present case, PW1 K.P Eswar, the Director of Corporate Affairs in the plaintiff company adduced in evidence copy of a certificate of title for the suit land, which was admitted as *Exhibit P3* held by the plaintiff. According to particulars on *Exhibit P3*, the plaintiff got registered on the suit land on 02/12/2012 under *Instrument No.462012* having acquired the same from the immediate predecessor in title M/s Kakira Sugar Works (1985) Ltd. Evidence of possession of the certificate of title by the plaintiff was not rebutted nor was it proved that the title is not authentic or genuine. It is also an agreed fact in the joint Scheduling Memorandum that the plaintiff is the registered proprietor of the suit land. Since the position of the law is that possession of the certificate of title by a registered proprietor is conclusive evidence of ownership of the land described therein, subject to fraud being proved, it would follow that the plaintiff company, M/s. Madhivani Group Ltd, is the owner of the suit land. *Issue No.1* is answered in the affirmative.

Issue No. 2: Whether the plaintiff fraudulently acquired the title to the suit land.

In the case of ***Fredrick J. K Zaabwe v. Orient Bank & 5 O' rs, S.C.C.A.No. 4 of 2006*** (at page 28 of the lead judgment) Justice Katureebe JSC, relied on the

definition of fraud in *Black's Law Dictionary*, (6th Ed) page 660 which states as follows;

“An intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture... A generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestion or by suppression of truth and includes all surprise, trick, cunning dissembling and any unfair way by which another is cheated. “Bad faith” and fraud are synonymous and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness etc. As distinguished from negligence, it is always positive intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo by speech, or by silence by word of mouth or by look or gesture”.

Also in the case of *Kampala Bottlers Ltd v. Daminico Ltd*, S.C.C.A No. 22 of 1992, Wambuzi, CJ (at page 5 of his judgment) quoting the trial judge on the definition of fraud stated that; *“It is well established that fraud means actual*

fraud or some act of dishonesty.” The trial judge in that case had relied on the case of ***Waimiha Saw Milling Co. Ltd v. Waione Timber Co. Ltd (1926) A.C 101 at page 106***, quoting Lord Buchmaster that; ***“Now fraud implies some act of dishonesty.”*** I believe these authoritative definitions exhaustively encapsulate all aspects of what constitutes fraud.

Secondly, it was held in ***David Sejjaaka v. Rebecca Musoke, Civil Appeal No. 12 of 1985*** that fraud must be attributable to the transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and participated in it or taken advantage of it. Thirdly, in the case of ***J.W.R Kazzora v. M.L.S Rukuba, S.C.C.A No. 13 of 1992*** it was held that fraud must be specifically pleaded and strictly proved and cannot be left to be inferred from the facts. In ***Ratilal Gordhanbhai Makanji [1957] EA 314*** it was held that the standard of proof is beyond mere balance of probability required in ordinary civil cases though not beyond reasonable doubt as required in criminal cases. Also as was held in ***Sebuliba v. Co-operative Bank Ltd [1987] HCB 130*** and as it is stipulated in ***Section 101, 102 and 103 Evidence Act (Cap.6)*** the burden of proof of lies on the person who alleges the facts to exist. It follows that the onus of proving the particulars of fraud in this case lies on the defendants/counterclaimants.

I will start with the allegations that both counterclaim defendants connived and registered the suit land and superimposed ***FRV 45, Folio 2*** on the mailo interest comprised in ***Block 372 – 373, Plot 2***, and thus annexing more land to create 2948.15 acres well knowing that the ***Block 372 – 373, Plot 2***, land at Nakigalala did not form or constitute part of the suit land; and that they illegally amalgamated land comprised in ***FRV 45, Folio 2*** with land comprised in ***Block 372 – 373, Plot 2*** measuring 669.52 acres.

To prove these allegations, the 1st defendant/counterclaimant adduced evidence through DW1, the 2nd defendant Moses Walugembe and DW2 Ojera Venancio. DW1 who is also the 2nd defendant/counterclaimant testified in the capacity as the 2nd defendant and holder of Power of Attorney from the 1st defendant his father. The Power of Attorney was exhibited as *Exhibit D3* and there is need to address it first as it raises particular issues of admissibility.

A reading and contextualizing of *Exhibit D3* brings to fore the inevitable conclusion that the 2nd defendant was in fact not vested with the mandate and authority to represent the 1st defendant and to give evidence his behalf in this case. *Exhibit D3* only confers the power and authority on the 2nd defendant to pursue and follow up criminal and civil cases against the 1st defendant in respect of **Block 532 Plot 3** which is a different piece of land from the one in issue in this case.

Clause 2 thereof which the 2nd defendant, claimed bestowed on him the authority to pursue this case on behalf of the 1st defendant states that; “*To administer and manage all my estate.*” This clause must be read in the context of the whole document and in particular with *Clause 1* which confers general powers on the donee. Clearly no such power is given to the 2nd defendant as concerns this case. This finding is reinforced by the fact that *Exhibit D3* was made on 18/02/2013, and there is nothing in it that suggests that it had a retrospective effect to include this suit which was instituted in 2012. “*To administer and manage all my estate*” in *Clause 2* in a Power of Attorney made in 2013 could not include the filing of a defence in the suit in 2012. It makes no logic at all.

As was held in the case of ***F.J.K Zaabwe v. Orient Bank Ltd. (supra)*** provisions of a power of attorney must be construed strictly. The authority and mandate conferred by a power of attorney is only that which falls within the four corners of the instrument, either in express terms or by necessary implication. Nothing should

be read into it that would render the purpose and effect of the instrument either to go beyond or contrary to that intended.

Having stated as above, however, this case being a land matter the dictates of justice make it imperative and incumbent upon this court that it ought to be determined purely on merits. I will, therefore not belabor the effect of the power of attorney on the standing of the 2nd defendant in this case, beyond stating that it does not vest the 2nd defendant with power and the mandate to represent the 1st defendant in this case. I will now concentrate on the merits of the evidence adduced in regard to the allegations of fraud.

DW1 testified that the suit land is a mailo interest comprised in **Block 372 – 373, Plot 2** measuring 948.15 acres. Further, that it belonged to the Late Sir Daudi Chwa who bequeathed it to the 1st defendant. DW1, however, conceded that he does not have any proof or document showing that his father, the 1st defendant, was given the suit land by Late Sir Daudi Chwa nor that the suit land was mailo land. When asked to avail the certificate of title from which he based his claim of ownership, DW1 also conceded that he did not have it. Apparently, he conceded to not having any personal knowledge of the material facts pertaining to the suit land he was testifying upon.

These concessions by DW1 are in no doubt quite honest and a genuine admission of his ignorance of material aspects pertaining to the suit. His father the 1st defendant, David Alexander Simbwa did not testify in person in the matter. Indeed when questioned on the issue of ownership of the suit land, DW1 exhibited a total lack of knowledge of facts relating to the same and could at most only hazard a guess and hearsay evidence. **Section 59 of the Evidence Act (supra)** makes hearsay evidence generally inadmissible, and requires that oral evidence must, in all cases whatever, be direct. Accordingly, DW1 was thus not a helpful witness to court in proving the alleged particulars of fraud.

DW2 Ojera Venancio, a Senior Cartographer in Wakiso District, stated that his schedule of duties is primarily to carry out cadastral mapping and issuance of plot number after subdivision of land. He further stated that he knows **Block 372-372 Plot 2** to be mailo land owned by the 1st defendant, and that his source of information was the *Blue Page* which he has seen in the computer system at Wakiso District Land Office. When pressed further to explain as to whether his job description involves authentication of ownership of land or nature of tenure, DW2 answered in the negative, and stated that it is the duty of the Registrar of Titles.

DW2 further explained that for the unascertained tracts of land, such as those that appear on the *Blue Page*, the precise legal ownership is only ascertained after a survey has been done and the land registered on the *White Page* and a title made. He further stated that he did not have any proof of such a title for the 1st defendant/counterclaimant because when their office tried to carry out a survey and subdivision of the suit land in order to get titles, they were stopped and directed by Commissioner for Land Registration, in letter *Exhibit P9*, to cancel the subdivisions and survey because the land already had a title claimed by the plaintiff/ 1st counterclaim defendant. DW2 conceded that the Commissioner for Land Registration is the chief custodian of all titles in Uganda and best placed to confirm ownership and tenure of any given land.

It is worth revisiting contents of *Exhibit P9* because they have a strong bearing on the issue of ownership and tenure of the suit land. It is dated 03/10/2013 and addressed to the 1st defendant. It was also copied to *M/s. Kampala Associated Advocates*, the lawyers of the plaintiff among others, and it states as follows:

“RE: BUSIRO BLOCK 372 PLOT 2 LAND AT WASOZI

You claim to be a registered proprietor of the above land and in that respect you applied for a subdivision which subdivision was received by Wakiso to create plots 3 - 14.

We have searched the register and found your claim to be erroneously. (sic) Our records do not show any registry copy registered in your names instead the records show that this land is registered as a freehold under FRV 45 Folio 2.

The request to survey was also erroneously passed and the officer who handled it has recommended for its cancellation. Since you do not have titles to this land I am requesting the District Staff Surveys to cancel the Survey and reinstate it to Plot 2.

I have been availed a photocopy of a document you claim to be your title. From the fact of it this document is not authentic and was not issued by the office of titles. You are therefore advised to stop laying any claim on this land based on this document.

By copy of this letter Kampala Associated Advocates are informed and in response to their letter dated 20th September, 2013.”

Exhibit P9 was a follow – up on an earlier letter, Exhibit P8, also written by the Commissioner for Land Registration, dated 03/01/2013 addressed to the Commandant Land Protection Police Unit Criminal Investigations & Intelligence Directorate Headquarters, and copied to the 1st defendant among others. It states as follows;

“ALLEGATION OF CRIMINAL TRESPASS AND FRAUD ON SALE TO THE PREJUDICE OF MADHIVANI GROUP OF COMPANIES (KAKIRA SUGAR WORKS (1985) LIMITED) BY PRINCE SIMBWA DAVID ALEXANDER, KALUMBA BENJAMIN SEBULIBA AND HAJI SAAVA NSANJA CIID HQS LPPU REF: 677/2012

Reference is made to your letter dated 27th December 2012 in respect of the above subject.

I have availed you certified copies of the document you requested for but some need interpretation by this office since they refer to mailo records which were either closed or cancelled.

This office is aware of claims by Prince Simbwa David Alexander regarding Nakigalala land. We have even come across a photocopy of a title for Busiro Block 372 Plot 2 allegedly in the names of Prince Alexander Simbwa. But as an Office of Titles, we are not aware of any valid title for Prince Alexander Simbwa.

You and the general public are put to notice that the title being waved by Prince Alexander Simbwa is not genuine and authentic, and people should desist from committing themselves on transactions basing on it.

By copy of this letter, Prince Alexander Simbwa is accordingly informed and urged to authenticate his claims, if any, over the land with this office.

There is also another claim for Muwanga Omuwesi based on a grant by the Governor dated 20th October 1913. Indeed this grant by the Governor culminated into a mailo title Mailo Register Volume 21 Folio 18 which was first registered on 20th October, 1913. This mailo title however, was terminated on 22nd May, 1931 and the land therein then transferred to FRV 2 Folio 23 and FRV 34 Folio 9. Attached is a photocopy of this cancelled MRV title. The title being held by the Muljibhai Madhivani are authentic and duly issued by this office.

The land claimed by Muwanga Omuwesi was the land comprised in MRV 21 Folio 18 which was cancelled and terminated and later registered as FRV 2 Folio 23. Any claim by Omuwesi or a people deriving title from him is therefore wrong outrageous and misplaced and is not supported by the land records that we have. ”

The above letters authored by the chief custodian of all titles of land well versed with the issues pertaining to the tenure and ownership of any given land in Uganda, in my view, effectually and authoritatively should put to rest any question on the tenure and ownership of the suit land. The letters in no uncertain terms state that the plaintiff/ 1st counterclaim defendant is the duly registered owner of the suit land. They also unequivocally clarify that the 1st defendant/counterclaimant does not own the suit land nor hold any genuine title to it, and that he is simply making false claims of ownership over suit land.

In the other hand, the plaintiff/1st counterclaim defendant supported its claim of ownership of the suit land with copy of a freehold title *Exhibit P3* known as **FRV 45 Plot 2**. A cursory look at the title shows that it was issued on 08/06/1960 to M/s. Madhivani Sugar Co. Ltd., and has since been in existence without being challenged or cancelled for any reason. PW1 testified that the plaintiff /1stcounterclaim defendant acquired the suit land for valuable consideration from M/s. Kakira Sugar Works (1985) Ltd, and was registered as proprietor on 02/02/2012 under *Instrument No.4623012*. No evidence was adduced by the defendants/counterclaimants showing how or that the plaintiff/1st counterclaim defendant acquired the suit land through fraud. Also, no evidence of fraud was adduced showing how or that there was any fraud in the acquisition of the title to suit land by the 1st counterclaim defendant's predecessors in title. The net effect is that the counterclaimants have dismally failed to prove the allegations of fraud in counterclaim. They have also completely failed to establish their claim of ownership of the suit land.

The counterclaimants also alleged that the 1st counterclaim defendant illegally used repossession certificate in the names of M/s. Muljibhai Madhivani & Co. Ltd on the 06/03/1991 (a different company) to repossess land that belonged to M/s. Madhvani Sugar Works Ltd. If I understood these allegations correctly, the

counterclaimants fault the repossession by M/s Muljibhai Madhivani Co. Ltd, which they insist is a non - existent company, and maintain that it had no right to repossess the suit land that belonged to M/s. Madhivani Sugar Works Ltd.

I have, however, not found anything in the evidence of the counterclaimants to show that M/s Muljibhai Madhivani & Co. Ltd is a non-existent company. No record from the Companies' Registry was brought to support these allegations. The 1st counterclaim defendant, on the other hand adduced in evidence in *Exhibit P10*, a certificate of incorporation of M/s Muljibhai Madhivani Co.Ltd, showing that the company was duly incorporation on 28/12/1948. Even if the 1st counterclaim defendant had no duty to prove the existence or non existence of the company, *Exhibit P10* served to lay bare the counterclaimants' allegations in that regard as wild, untrue and completely baseless. I have not found a single instance of anything wrongful in the acquisition and registration process of M/s. Madhivani Sugar Works Ltd as proprietor of the suit land in 1960.

On the allegations that M/s. Muljibhai Madhivani & Co. Ltd had no right to repossess land that belonged to M/s. Madhivani Sugar Works Ltd, I fail to see how this has any connection with the 1st counterclaim defendant or how it concerns the counterclaimants. The aggrieved party in that case would be M/s. Madhivani Sugar Works Ltd and not the counterclaimants who have not shown that they have any interest in the company that would give them a right to complain on the company's behalf. The counterclaimants have no *locus standi* whatsoever to question the repossession.

Again looking at the issue of repossession substantively, the ***Expropriated Properties Act (Cap 87)*** and the ***Regulations*** made thereunder vested the Minister with the statutory power as a quasi judicial authority to make decisions to grant repossession. Under ***Section 15*** thereof a person aggrieved with the Minister's decision could challenge it by lodging an appeal within thirty days of the decision.

It is in the appeal that issues of fraud in repossession by M/s. Muljibhai Madhivani & Co. Ltd would have been raised.

In the present case repossession was granted to M/s. Muljibhai Madhivani & Co. Ltd on 09/03/1991. There was no appeal against the decision to repossess. The counterclaimants are thus precluded from attempting to challenge the repossession twenty –three years later on. In any case, no evidence was laid to show that the repossession by M/s. Muljibhai Madhivani & Co. Ltd in 1991 was fraudulent. The allegations are simply without foundation.

Before taking leave of this point, I wish to observe that M/s. Muljibhai Madhivani & Co. Ltd and M/s. Madhivani Sugar Works Ltd; though predecessors in title to the 1st counterclaim defendant are separate legal entities existing separately from one another. It has not been shown nor has 1st counterclaim defendant indicated that it represents the others in any way. The other two companies were not sued before this court. It was hence unfair for the counterclaimants to accuse the companies of committing fraud well knowing that they could not be heard on their defence on the allegations against them.

The counterclaimants also alleged that the 1st counterclaim defendant intentionally omitted to present to court the deed plan of its title which would have shown the exact acreage and location of the land. To them this is evidence of and /or amounts to fraud. To dispel these allegations, PW1 K.P Eswar gave evidence that *Exhibit P3* that was exhibited in court is copy of a special certificate of title that was issued after the duplicate (owner's) copy got lost during the 1972 Asians expulsion from Uganda. The plaintiff's predecessors in title were among the expelled Asians, and that as a result when *Exhibit P3* was issued as a special certificate it did not contain the deed.

In my considered opinion, evidence of PW1 on this point satisfactorily explains the absence of the deed plan from the title. If indeed the contention of the

counterclaimants is about the total acreage of the suit land, still there is ample material evidence from which one can tell and prove the same. *Exhibit P3* shows the total acreage of **FRV 45 Plot 2** is 948.15, and the authenticity of the title is vouched for by the Commissioner for land Registration. One cannot claim the acreage on basis of **Busiro Block 372 – 373, Plot 2 Land at Wasozi** because no title by that description was produced in evidence in court. Indeed no such title exists according to the evidence of DW1, and any such purported title was discredited by the Commissioner for Land Registration. Given these facts, I do not find that the absence of a deed plan in the title is evidence of fraud.

Finally on the issue of fraud generally, it was held in the case of **David Sejjaka Nalima v. Rebecca Musoke(supra)** fraud must be attributed to the transferee, who must have known of the fraud and either participated in it or taken advantage of it. In the present case even assuming, for arguments' sake, that the plaintiff's/1st counterclaim defendant's predecessors in title were fraudulent, the counterclaimants still had the onus to prove that the 1st counterclaim defendant knew of the fraud and or participated in it and or took advantage of it. No evidence was led to that effect. *Issue No.2* is answered in the negative that the plaintiff never fraudulently acquired the suit land.

Issue No. 3: Whether the defendants jointly and/or severally trespassed on the suit land.

In the case of **Justine E.M.N Lutaaya v Stiriling Civil Engineering Co. Ltd., S.C.C.A. No. 11 of 2002**, it was held that trespass to land occurs when a person makes unauthorized entry upon land, and thereby, or portends to interfere with another person's lawful possession of that land. In that case the Supreme Court cited with approval **Moya Drift Farm Ltd. v. Theuri (1973) E.A 114, at page.115** per Spry V.P which also supports the position that possession does not mean physical occupation but includes constructive possession. On the issue of

possession Mugenyi J. in ***Ddungu Lillian v. Marc Wandera & Anor, H.C.C.A.No. 38 of 2009***, held that;

“In light of the foregoing provisions, it would appear to me to be clear that a certificate of title inter alia represents two positions. First, it is conclusive evidence of the registered proprietor’s ownership thereof and secondly, such registered proprietor is by virtue of the certificate of title seized with possession of the land stated therein.”

In the present case, the plaintiff adduced evidence of PW1, PW2 and PW3 to prove that it is the registered proprietor and owner of the suit land. Further, the evidence showed that the plaintiff has at all material times been in possession of the suit land carrying on various activities of tea farming among others. On basis of this evidence, I find that actual possession and legal ownership by the plaintiff as the registered proprietor of the suit land invariably gives the plaintiff the right to sue the defendants jointly and/or severally for trespass.

The plaintiff was able to demonstrate the defendants’ activities on the suit land since sometime in 2012 which amount to trespass. For instance, in *Exhibit P5* the 1st defendant purported to give away to the 3rd defendant as gift part of the suit land and thereby to grant him rights of ownership and possession of the same. Further, in application ***H.C.M.A No. 0821 of 2013, Mukuye Steven & 73 Others v. Madhivani Group Ltd***, the 4th and the 73 defendants were added as defendants to this suit claiming interest through purchase of the various pieces of land from the 1st and the 3rd defendants in sale agreements ***Exhibits P6, P7, P13, P14***. Also in his testimony DW1 confirmed the fact of the purported sale of part of the suit land to the other defendants. I find that the acts of buying and selling the suit land falls nothing short of trespass by the defendants upon the suit land.

The plaintiff further adduced evidence showing that after the said purchases, the defendants entered the suit land and carried out activities, which include clearing

of vegetation, cutting down trees, grading roads, and sub dividing the land into small plots. The plaintiff adduced proof of these activities in photographs taken of the same in **Exhibit P4**. Further according to **Exhibit P1 and P2** the defendants surveyed the suit land with the intention of obtaining certificate of title. This fact was confirmed by DW2 in his testimony that a survey and subdivision of the suit land into several plots and preparation for several titles was in process of when they were stopped. The plaintiff also adduced in evidence a court order of temporary injunction, **Exhibit P12**, restraining the activities of the defendants and further trespass on the suit land. The total sum of this evidence leaves no doubt that the defendants' activities on the suit land interfered with the plaintiff's right of possession of the suit land, and amounted in law to the tort of trespass. *Issue No. 3* is answered in the affirmative that the defendant jointly and /or severally trespassed on the suit land.

Issue 4, 5, and 6 are interrelated in that they all concern the issue as to whether the defendants jointly and/or severally have the *locus standi* to bring the counterclaim against the plaintiff; whether the counterclaim discloses a cause of action; and whether the counterclaim is barred by statute. I will therefore resolve them simultaneously starting with the issue of *locus standi*.

In **Kampala Bottlers Ltd v. Daminico Ltd. (supra)** it was held that the only person who can sue to impeach a title of a registered proprietor is the person who has been deprived of the land by fraud. This holding was based on provisions of **Section 176(c) of the Registration of Titles Act (supra)** which protect the registered proprietor of land against ejectment of other action for the recovery of any land, except on ground of fraud.

The counterclaimants in their pleadings sought for orders and declaration, *inter alia*, that the land belongs to them, and that the 1st counterclaim defendant's certificate of title be cancelled for fraud. However, applying the principles of the

law cited above to facts of this case, the counterclaimants do not qualify as such persons deprived of the land by fraud. I have already made a finding in *Issue No.2* above that the 1st counterclaim defendant did not obtain registration of the suit land by fraud. It follows logically that the counterclaimants lack the necessary *locus standi* to bring a suit against the registered proprietor to impeach the title since they are not persons who were deprived of land by fraud. Similarly, without the *locus standi*, the counterclaimants have no cause of action against the counterclaim defendants. The counterclaim ought to be struck out under ***Order 7 r.11 (c) of the Civil Procedure Rules (S.I. 71 -1)***.

On the issue of whether the counterclaim is time barred, ***Section 3 of the Limitation Act (Cap.80)*** stipulates that actions founded on tort must be brought within six years from the date the cause of action arose. Also under ***Section 15 of the Expropriated Properties' Act (supra)*** any person aggrieved by the decision of the Minister made under the Act, granting repossession had a right to appeal against the decision within thirty days from the date of the decision.

In the present case the counterclaimants allege that the 1st counterclaim defendant's certificate of title was illegally or fraudulently created over the 1st counterclaimant's mailo land in June to 1960, when the said certificate of title was registered and issued to the plaintiff's predecessors in title. It means that the suit for the recovery of the land should have been filed within six years from 1960, which was not done, which renders the counterclaimant statute barred. I also find that the same applies to the allegations of wrongful repossession of the suit land by M/s. Muljibhai Madhivani & Co. Ltd under ***Section 15 of the Expropriated Properties Act (supra)***. Such a claim should have been instituted by way of an appeal within thirty days of the grant to repossession by the Minister, but it was not done and cannot be entertained in this suit as it time barred.

Furthermore, **Order 7 R.11 (d) CPR (supra)** provides that a suit which is barred by statute must be rejected. Since the counterclaim is a suit in its own right, it falls under the said provisions. It is the established law that a suit which is time barred by statute must be rejected because in such a suit the court is barred from granting a relief or remedy. See: **Iga v. Makerere University [1992] EA 65, at page 66; Vincent Rule Opio v. Attorney General, [1990-1991] KALR 68; Onesiforo Bamuwayira & 2 Or's v. Attorney General (1973) HCB 87.**

Even in a situation where a party has substantive rights, if the suit is barred by statute, the party cannot enforce them through a court action. As was held by the Court of Appeal in the case of **Mohammad B. Kasasa v. Jospher Buyonga Sirasi Bwogi, C.A CA No. 42 of 2008**; quoting Lord Green M.R. **Hilton v. Satton Steam Laundry [1946] IKB 61 at page 81**, statutes of limitations are by their nature strict and inflexible enactments. Their overriding purpose is interest *republicae ut fins litum*, which means that litigation shall automatically be stifled after a fixed length of time irrespective of the merits of the particular case. Statutes of limitation are not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights.

I am acutely alive to the fact that the counterclaim is premised on grounds of fraud and that fraud is an exception to the limitation period under **Section 25 of the Limitation Act (supra)**. However, for a party to benefit from the postponement of limitation under said section, he or she must state when the alleged fraud came to his or her attention. In the present case, it is not stated, and the presumption is that the counterclaimants were aware of it at all times. *Issue No.4 and No.5* above are answered in the negative, and *Issue No. 6* in the affirmative. This renders the entire counterclaim unproven, and it is accordingly dismissed with costs.

Issue No. 7: Whether the Parties are entitled to the remedies sought?

The plaintiff in the main suit seeks for the a declaration that the defendants jointly and/or severally are trespassers on the suit land, an order of eviction to issue against the defendants jointly and/or severally together with their servants, agents, employees, assignees and/or any other person deriving any purported title or interest on the suit land from them, evicting them from the suit land; an order of permanent injunction to issue against the defendants jointly and/or severally together with their servants and/or agents restraining them from trespassing and/or continuing to trespass on the suit land. From the foregone evidence the plaintiff has proved to the required standard and to the satisfaction of court that it is entitled to the reliefs. I grant the remedies as prayed above.

The plaintiff also prayed for general damages. The position of the law is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural consequence of the defendant's act or omission. See: ***James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993***. It was also held in ***Robert Cuossens v. Attorney General, S.C.C.A. No. 08 of 1999*** that;

“The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered....”

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong. See: ***Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992***.

In this case the plaintiff through PW1 was able to show that they suffered general inconvenience as a result of the trespass to their land by the defendants jointly and/or severally. Also, that the suit land has been degraded, and tress cut, vegetation cleared, and sand excavated there from. Construction and building

materials have been deposited on various parts of the suit land In my view, this warrants the award of general damages.

In determining the quantum of damages, the guiding principle is that the party claiming general damages is expected to lead evidence or give an indication as to what amount of damages sought to be awarded on inquiry as the quantum. See: ***Robert Cuossens v. Attorney General, S.C.C.A No. 8 of 1999; Ongom v. Attorney General. [1979] HCB 267.*** Further, courts are also guided mainly by the value of the subject matter, the general economic or social or other inconvenience or loss that the party was put through at the instance of the opposite party, and the nature and extent of the breach or injury. See: ***Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305.***

In the case of ***Kibimba Rice Company Ltd v. Umar Salim(supra)*** it was held that inconvenience though not specifically proved, can be inferred from circumstances adduced in evidence. Similar stance was taken in the case of ***UCB v. Kigozi (supra).***

In the present case the plaintiff has shown generally the inconvenience it has suffered at the instance of the defendants. The plaintiff has been denied it the use and development of its land which it acquired for valuable financial consideration for almost two years now. Besides, the defendants have degraded and destroyed vegetation on the suit and the suit land and the plaintiff will have to incur substantial expenses of restoration of the same. Taking all these factors together, I find that Shs. 200,000,000= (Two hundred million only) is appropriate general damages, and I award the same.

On the issue of costs, ***Section 27(2) CPA (supra)*** stipulates that costs are awarded in the discretion of court and follow the event unless for good reasons the court directs otherwise. See: ***Jennifer Rwanyindo Aurelia &A' nor v. School Outfitters***

(U) Ltd., C.A.CA No.53 of 1999; National Pharmacy Ltd. v.Kampala City Council [1979] HCB 25. In the instant case, the plaintiff has succeeded on all the issues, and is awarded costs of this suit. Accordingly, it hereby declared and ordered as follows;

- 1. The plaintiff M/s. Madhivani Group Ltd id the lawful and registered owner of the suit land comprised in FRV 45 Folio 2 Land at Nakigalala and Kansiri Estates.*
- 2. The defendants jointly and or severally are declared trespassers on the suit land belonging to the plaintiff.*
- 3. An order of eviction is issued against the defendants jointly and or severally together with their servants, agents employees, assignees and/or any other person deriving any purported title or interest on the suit land from them.*
- 4. An order of a permanent injunction is issued against the defendants jointly and/or severally together with their servants or agents restraining them from further trespassing on the suit land.*
- 5. The defendants jointly and/or severally pay as general damages Shs. 200,000,000= (Two Hundred Million Only) to the plaintiff.*
- 6. The counterclaim is dismissed with costs to the 1st counterclaim defendant.*
- 7. The plaintiff is awarded costs of the suit.*



BASHAIJA K. ANDREW

JUDGE

30/09/2014

Mr. Paul Kuteesa, Counsel for the Plaintiff/1st Counterclaim Defendant: present.

Mr. R. Mugerwa, Counsel; for the 1st 2nd and 3rd Defendants/Counterclaimants: present.

Mr. K.P.Eswar, Director Corporate Affairs of the Plaintiff/1st Counterclaim Defendant: present.

Mr. Bamwite Edward, Counsel for the 4th and 73 Other Defendants: absent.
Defendants; all absent.

Ms. Namusoke Justine Court Clerk: present.

Court: Judgment read in open court.



BASHAIJA K. ANDREW
JUDGE
30/09/2014