

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 0232 OF 2009

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| <ul style="list-style-type: none">1. MUDIIMA ISSA2. KYENDO AHMED3. MAYAMBALA HENRY4. WALAKIRA DEO5. MATOVU MICHAEL6. MUZULA ABDUL | } | :.....: PLAINTIFFS |
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VERSUS

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| <ul style="list-style-type: none">1. ELLY KAYANJA2. JENIFER KAYANJA3. MIRIAM KIKOMEKO | } | :.....: DEFENDANTS |
|---|---|---------------------------|

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

J U D G M E N T:

MUDIIMA ISSA, KYENDO AHMED, MAYAMBALA HENRY, WALAKIRA DEO, MATOVU MICHAEL, and MUZULA ABDUL (hereinafter referred to as the “*plaintiffs*”) brought this suit on their own behalf and on behalf of others against **ELLY KAYANJA, JENIFER KAYANJA, and MIRIAM KIKOMEKO** (hereinafter referred to as the 1st, 2nd, and 3rd “*defendants*” respectively) jointly and severally for a declaration that the plaintiffs are *bona fide* and /or lawful occupants on the land comprised in **LRV 1039 Folio 19, Block 303-305, Plot 17**

measuring approximately 53.64 hectares at Kabulegwa, Kyebando, in the Wakiso **District** (*hereinafter referred to as the “suit land”*), an order to the Commissioner for Land Registration to cancel the 1st and 2nd defendants’ title to the suit land, a permanent injunction restraining the defendants from interfering with the plaintiffs’ occupation of the suit land, general damages, interest on the same, and costs of the suit.

The 1st and 2nd defendants denied the plaintiffs’ claim and set up a counterclaim in which they sought orders of eviction against all illegal structures (sic), a declaration that the plaintiffs are trespassers on the suit land, an order of a permanent injunction restraining the plaintiffs, their agents and servants from trespassing on the defendants’ land, *mesne* profits, general damages for trespass, interest on *mesne* profits and general damages from the date of cause of action until payment in full and costs of the counterclaim. The 3rd defendant for her part did not file any defence despite being served with summons to do so. Accordingly, the matter proceeded against her under provisions of **Order 9 r.10 of the Civil Procedure Rules** as if she had filed a defence.

Background:

The suit land is part of a bigger parcel belonging to the Kabaka of Buganda. In 1978, one Kimomeko Cephas applied for and was granted a lease by Uganda Land Commission on the suit land for the initial term of five years expiring on 11/12/1983. This grant was vehemently opposed by the occupants on the suit land on grounds that it had been fraudulently acquired by Kimomeko Cephas whom they accused of falsifying a number of statements about the land leading to the grant of the lease to him. The said resistance led to a number of deaths among the residents and also claimed the life of Kikomeko Cephas who died in March 1983 before extending or renewing the lease which was due to expire later in September, 1983.

Later on 28/05/1997, the 3rd defendant obtained Letters of Administration for the estate of late Kikomoko Cephas and got registered on the title on 30/10/1997 by virtue of the grant. Her registration was also strongly resisted by the plaintiffs who, on many occasions, put her to task to defend the legality to her title, but she could not respond to them.

In 2002 the plaintiffs through their LC Committee hired a lawyer and complained in a petition to the Buganda Land Board, but the plaintiffs received no response to their petition. The plaintiffs then held several meetings with the 1st defendant, who was then holding a senior position in the security to help them sort out the dispute. The 1st defendant promised to help them by calling the 3rd defendant to one of the meeting with plaintiffs with the view to resolving the matters. However, sometime in 2003 the plaintiff were surprised to learn that the 1st defendant had instead bought the suit land from the 3rd defendant at a consideration of only Shs.10 million, and registered himself and the 2nd defendant his wife as proprietors. The plaintiffs then petitioned the President and the Inspector General of Government (IGG) but still got no settlement of the dispute.

The 1st defendant who had promised to sort the matter with the 3rd defendant in one of the meeting with the plaintiffs returned with the title in his and wife's names and ordered the plaintiffs to vacate the land that he was the new landlord. During the night of 21/01/2009, some people believed to be agents of the 1st and 2nd defendants stormed the land and razed down properties belonging to the plaintiffs. It was upon this incident that the plaintiffs filed this suit seeking the above declarations and orders.

In the joint Scheduling Memorandum, the following were agreed facts by the parties;

- i) The 1st and 2nd defendants are currently the registered proprietor of the suit land comprised inn LRV 1039 Folio 19, Block 303-305, Plot 17***

measuring approximately 53.64 hectares situate at Kabulengwa, Kyebando, in the Wakiso District.

- ii) The suit land was purchased from 3rd defendant who was the previous registered proprietor and transferred the title to the 1st and 2nd defendants on 11th day of August, 2003.*
- iii) The 1st and 2nd defendants have at all material times been aware that the land was occupied by persons who include the plaintiffs. The lease agreement drawn as early as 1978 also contemplated their existence and occupation of the suit land in clause 3 (iii) thereof.*
- iv) Prior to the sale-purchase and transfer of the suit land, the 1st and 2nd defendants did not own any Kibanja interest on the suit land or any interest at all.*
- v) Prior to the sale-purchase and transfer, the plaintiffs were not given any opportunity by the 3rd defendant to purchase their interest as required by law.*
- vi) Prior to the sale -purchase and transfer, the 1st and 2nd defendants did not carry out a survey of the suit land and none has ever been carried out to date.*
- vii) The value of the land indicated by the 1st and 2nd defendants in the transfer instrument on the occasion of the transfer of the land into their names was Shs.10,000,000.*
- viii) The parties have previously engaged several government bodies in an attempt to have their dispute amicably resolved but were not been meaningfully assisted.*

The following issues were framed for determination;

- 1. Whether the plaintiffs are the bona fide and/or lawful occupants on the suit land.**

2. *Whether the 1st and 2nd defendant's certificate of title to the suit land is liable to be cancelled on the ground of fraud and/or illegality.*

3. *What are the remedies available to the parties?*

M/s Crane Associated Advocates represented the plaintiffs while *M/s Nyanzi, Kiboneka & Mbabazi*, represented the 1st and 2nd defendants. Counsel filed written submissions to argue the case for their respective clients. The submissions are on court record and I will not reproduce them in this judgment. I will however make references to them when occasion demands so.

Resolution of Issues:

Issue No. 1: Whether the plaintiffs are the bona fide and/or lawful occupants on the suit land.

Section 1 (e), of the Land Act (Cap. 227) stipulates that;

“bona fide occupants” and lawful occupants” have the meanings assigned to them in section 29 of the Act.”

Under ***section 29 (1) (supra)***, it is provided that;

“(1) Lawful occupant” means—

(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or

© a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.”

(2) “Bona fide occupant” means a person who before the coming into force of the Constitution—

(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more...”

(5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.”

The above provisions have been considered and applied in a number of decided cases. See: ***Kampala District Land Board, & A’nor v. Venansio Babweyaka & 3 O’rs, S.C.C.A. No.02 of 2007; Kampala District Land Board, & A’ nor v. National Housing & Construction Corporation, S.C.C.A.No.02 Of 2004; and Godfrey Ojwang v. Wilson Bagonza, C.A.C.A. No.25 of 2002.***

In the instant case, Mudiima Issa testifying as PW1 stated that he and his entire family descendant lineage have lived on the suit land since the 18th Century to date. That personally he has lived on the suit land since 1970 and inherited interest in the land from his grandfather. He attached copy of Letters of Administration of the estate of his grandfather as *Annexure A* as proof of that fact. He went on to state that other people whom the plaintiffs represent have also lived on the suit land having been born there since the 1970s. PW2, Muzula Abdu 43 years, also testified that he was born and has lived on the suit land along with the other plaintiffs since the 1970s. He corroborated the evidence of PW1 that the plaintiffs and other occupants of the suit land whom they represent were born on the suit land and have been staying there since then.

Apart from the evidence above, it is an agreed fact by all the parties in the joint Scheduling Memorandum in *item (iii)* that the plaintiffs’ existence and occupation of the suit land was contemplated in the lease agreement drawn as early as 1978. In ***Stanbic Bank (U) Ltd. v Uganda Cros Ltd, S.C.C.A. No.4 of 2004; and Tororo Cement Co. Ltd. v Frokina Internationa Ltd., S.C.C.A. No. 02 of 2001*** it was held that the purpose of a Scheduling Conference is, *inter alia*, to sort out issues of agreement and disagreement by the parties so that those that are not disputed need not to be litigated over. This is in line with the purpose and effect of ***Section 57 of***

the Evidence Act (cap.6) and also the holding in the case of *Yusuf Ali Mohamed Osman v. DT Dobie & Co.(T) Ltd.[1963] EA 288*, that facts admitted need not be proved, but they are regarded as established. Therefore, to the extent that the parties in this case agreed to the fact that the plaintiffs have been on the suit land before 1978 the fact is taken as established and shall not be litigated upon and the parties are stopped from reneging on them.

By a tenant being either a lawful and /or a *bona fide* occupant on registered land it means his or her security is guaranteed under *Article 237(8) of the Constitution* and *Section 31 of the Land Act (supra)* and is deemed to be a tenant of the registered owner. *Section 64 (2) RTA(supra)* further makes any land included in any certificate of title subject to the interest of any tenant of the land, though it may not be specifically notified as an encumbrance on the certificate. Therefore, anyone who purchases such the land purchases it subject to the equities existing in the land. This point was emphasized in by the Supreme Court in the case of *Kampala District Land Board, &Chemical Distributors v. National Housing & Construction Corporation (supra)* that a *bona fide* occupant was given security of tenure and his interest could not be alienated except as provided by the law, and that while the land occupied by a *bona fide* occupant could be leased to somebody else, the first option would be given to the bon fide occupant, and if it is not done case, it means the suit land would not be available for leasing.

In view of the legal principles expounded upon above and the facts of this case, my view is that the plaintiffs and the others they represent in similar category qualify as of *bona fide* and/ or lawful occupants on the suit land. *Issue No.1* is thus answered in the affirmative.

Issue No. 2: Whether the 1st and 2nd defendant's certificate of title to the suit land is liable to be cancelled on the ground of fraud and/or illegality.

It is an agreed fact in item (i) of the joint Scheduling Memorandum that 1st and 2nd defendants are currently the registered proprietor of the suit land. Under **Section 59 of the Registration of Titles Act (supra)** possession of a certificate of title by a registered person is conclusive evidence of ownership of the land described therein. Further, under **Section 176 (c) (supra)** a registered proprietor of land is protected against an action for ejectment except on ground of fraud. The import of the provisions was considered in the case of **John Katarikawe v. William Katwiremu & A' nor [1977] HCB 187**, where 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] E.A.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.

It follows that for the plaintiffs to impeach the title of the defendants who are the registered proprietors of the suit land, they have to prove fraud to the required standard on part that the defendants in obtaining registration. **Section 101, 102, 103, and 106 of the Evidence Act (Cap.6)** impose the burden of proof on the plaintiffs who alleges the facts to exist. See also: **Sebuliba v. Co-operative Bank Ltd. [1987] HCB 130**. In addition, the standard of proof in cases of fraud is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt required in criminal cases. See: **Ratilal Gordhanbhai Makanji [1957] EA 314**.

Katureebe JSC, in the case of **FJK Zaabwe v. Orient Bank & 5 O' rs, S.C.C.A.No. 4 of 2006** (at page 28 of the lead judgment) relied on the definition of “fraud” in **Black's Law Dictionary, (6th Ed) at page 660**, which goes 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 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 fraud implies some act of dishonesty. I believe these authoritative definitions exhaustively encapsulate all aspects of what constitutes fraud.

Secondly, in *David Sejjaaka v. Rebecca Musoke, Civil Appeal No. 12 of 1985*, it was held 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 *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.

The plaintiffs in the instant case particularised facts of the alleged fraud by the defendants in paragraph 6 of the plaint as follows;

- a) Procuring the issue of a special certificate of title to the land by the 3rd defendant without the legal authority and / or power to do so.***
- b) Procuring and or causing the registration of the land into the names of the 3rd defendant without the legal authority and /or power to do so.***
- c) Procuring the registration of the land into the names of the 1st and 2nd defendants although with full knowledge that the transaction was tainted with fraud***
- d) Deliberately disregarding the interest of the bona fide and /or lawful occupants in the land although the same had been made known to the 1st and 2nd defendants.***
- e) Payment of a paltry UGX 10,000,000 as the purchase price for the land worth billions of shillings.***
- f) Registering and / or causing registration of transfer instruments knowing the same to be fraudulent or tainted with fraud.***
- g) Grossly undervaluing the land to cheat the Government of revenue.***

I will start with the allegation that the 3rd defendant procured the issue of a special certificate of title to the land without the legal authority and / or power to do so. The evidence of PW1 and PW2 is to the effect that when the father to the 3rd defendant Cephas Kimomeko obtained a lease in 1978, the plaintiffs and their predecessors in title resisted because Kikomeko had acquired the initial five year lease by making false statements about the land leading to the grant. As a result of the dispute some occupants and Kikomeko himself lost their lives. Kikomeko Cephas from who the 3rd defendant derived interest in the suit died on 20/03/1983 before the expiry of the initial term of the lease on 30/09/1983.

When the initial term lapsed the lease also expired. There is no evidence suggesting that Kikomeko Cephas during his life time applied for an extension, which could have only been possible when the initial term was still running. There is also no evidence suggesting that Kikomeko Cephas renewed the lease after the expiry of the initial term, since by the time the lease expired in September 1983, Kikomeko Cephas was long dead. It is hence inconceivable that the lease could purportedly be extended to a full term of 49 years when it expired after Kikomeko was long dead. An expired lease cannot lawfully be extended because in essence there is nothing to extend. The 3rd defendant as Administrator of the estate of late Kikomeko Cephas therefore could not lawfully have obtained the purported extension of the lease on the title for the suit land.

Having found as above, it follows logically that no special certificate of a lease with an extended full term of 49 years could be legally obtainable by the 3rd defendant. *Annexure B* to the plaint, which is a copy of the special certificate of title shows that it was issued on 31/01/1996 pursuant to **Section 70 of the Registration of Titles Act (supra)** the duplicate copy originally issued having been lost. Even if the title was lost, by the time it purportedly got lost the lease had expired and in effect there was legally no lease to be extended. It is mandatory

under **Section 70 (supra)** that a special certificate shall contain an exact copy of the certificate of title in the Register Book and of every memorandum and endorsement on it. On the facts of the present case, it meant that the special certificate which was issued should have been copy of the purportedly lost title which was for the initial five - year term that expired way back in September, 1983. By the time the special certificate of title was issued, the lease in respect of which it was issued had long expired and was not, and could not be extended nor was it renewed for the reasons I have assigned above. Therefore, the title now being waived around by the 1st and 2nd defendants was illegally and fraudulently obtained by the 3rd defendant.

It would appear that the 3rd defendant in collusion with someone in the Land Office simply endorsed the extension of 49 years on a fake title when the initial term had long expired yet the extension could only be made within the period of the initial term. Since there was no renewal of the lease, the purported extension to a full term is illegal and void.

Another allegation in the particulars of fraud is that the 1st and 2nd defendants procured the registration of the land into their names although with full knowledge that the transaction was tainted with fraud. It is trite law, See: **David Seijaaka v. Rebecca Musoke (supra)** that for the allegation of fraud to be sustained against the defendants it must be attributable to them either directly or by necessary implication as transferees.

The plaintiffs led evidence of PW1 and PW2 that the 1st defendant in 2002 visited the suit land with intention of buying it, but that the plaintiffs asked him, since at the time worked as senior person in the security to assist them to resolve their dispute with the 3rd defendant, which he promised to do. That in 2003, however, the plaintiffs were shocked when the 1st defendant instead come with a title in his

own and his wife's names saying that he had bought the land and was the new landlord, and he ordered them to vacate the suit land.

The plaintiffs maintain that the 1st and 2nd defendant did not physically inspect the suit land before buying it, and also did not carry out any survey and that if they had done so, they would have found that the plaintiffs were *bona fide* and/or lawful occupants on the suit land. Further, that up to date no physical inspection or survey of the entire suit land has ever been done by the 1st and 2nd defendants, and that it would be impossible to know that at the time they purchased the suit land there were only eleven occupants as alleged in the 1st defendant's evidence and pleadings.

The defendants, for their part, led evidence of DW1, Elly Kayanja, who denied the allegations, and in their counterclaim state that prior to purchasing of the land the defendants carried out due diligence and were satisfied that the land had only eleven persons as occupants of part of the suit land. DW1 further testified that immediately after the purchase the 1st and 2nd defendants sought a meeting with the eleven occupants but that instead the occupants invited a group of rouses from neighboring villages who insulted and blocked the defendants from taking effective possession of the suit land. Furthermore, that the subsequent meetings aimed at reopening boundaries also turned violent and the plaintiffs prevented the exercise from proceeding, and that as a result the defendants have never surveyed or re-opened boundaries of the suit land.

From the evidence above, it is clear to me that the 1st defendant held meetings with the plaintiffs in 2002 prior to the purchase of the land. He was informed of the subsisting dispute of ownership with the 3rd defendant. The plaintiffs sought the 1st defendant's help to resolve the dispute with the 3rd defendant, which the 1st defendant promised to do so, but that actually he never did. The 1st defendant's evidence itself confirms that he has never carried out a survey nor re-opened the

boundaries because he stated that he was prevented by the plaintiffs who turned violent. He also admitted in his evidence that he and his wife, the 2nd defendant have never lived on the suit land and had no interest in the suit land prior to the purchase. It is also an agreed facts in the Scheduling Memorandum in *item (iv)* that prior to the purchase and transfer of the suit land, the 1st and 2nd defendants did not own any *Kibanja* interest on the suit land or any interest at all.

Given the facts in evidence, and in light of the principles of fraud enunciated in the authorities cited above, it is evident that the 1st and 2nd defendants acted fraudulently in obtaining registration on the suit land. They did not carry out the necessary due diligence to establish the interests of the plaintiffs existing in the suit land before they purchased it. This too is an agreed fact in the Scheduling Memorandum in *item (vi)*. Kikonyogo, DCJ, in the case of ***Hajji Nasser Katende v. Vithalidas Halidas & Co. Ltd., C.A.C.A. No.84 of 2003*** quoting Okello JA, (as he then was) in ***Sir John Bageire v. Ausi Matovu, C.A.C.A. No.07 of 1996, at page 26***, emphasized the value of land and the need for thorough investigations before purchase, and held *inter alia* that;

“Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations not only of the land but of the sellers before purchase.”

Apart from the above, the 1st defendant in particular was put on notice in earlier meetings with the plaintiffs of the subsisting dispute over ownership with the 3rd defendant, and of the plaintiffs’ interests in the suit land. He pretended to help them resolve the dispute only to turn around and instead obtain registration of himself and his wife on the land. He came back later and asked the plaintiffs to vacate the land claiming to be the new landlord. To my mind, these acts and conduct of the 1st defendant were dishonest amounting to actual fraud. They were

calculated to deceive the plaintiffs. The 1st defendant brazenly took advantage of his knowledge of the plaintiffs' helpless situation and trust in his position in the security, but he betrayed their trust and instead got himself and his wife registered on the land, and then asked the plaintiffs to vacate the suit land.

In the ***F.J.K Zaabwe v. Orient Bank & 5 O' rs, case (supra)***, it was held, *inter alia*, that the conduct of a party calculated to deceive, whether by a single act or combination or by suppression of truth is dishonest and amounts to fraud. I find that the actions and conduct of the 1st defendant wholly falls within the ambit of actual fraud.

I have also taken into considered the parties' agreed fact in *item (ii)* in the joint Scheduling Memorandum that the 1st and 2nd defendants have at all material times been aware that the land was occupied by persons who include the plaintiffs, and that the lease agreement drawn as early as 1978 also contemplated the plaintiffs' existence on the suit land. Therefore, the 1st and 2nd defendant purchased the suit land well aware that it was in occupation by the plaintiffs with interest in the same. It was held in ***Nabanoba Desiranta & A'nor v. Kayiwa Joseph & A'nor, H.C.C.S. No. 496 of 2005*** per Opio Aweri J (as he then was) quoting the case of **UP&TC v. Abraham Katumba [1997]IV KALR 103**, that as the law stands a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser without notice. Relying on the case of **Taylor v. Stibbert [1803– 13] ALL ER 432**, the Learned Judge further held that the defendant failed to make reasonable inquiries of the persons in possession and as such his ignorance or negligence formed particulars of fraud.

I adopt the similar reasoning and hold that the 1st and 2nd defendants ought to have made thorough investigations not only of the land but of the vendor the 3rd defendant before committing themselves in the purchase. The defendants failed or simply deliberately ignored to do so, and fraud would be properly ascribed to them.

As was held in *David Sajjaka Nalima v. Rebecca Musoke case (supra)*, it was held, *inter alia*, that;

“If it be shown that (a purchaser’s) suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him.”

I wish to observe, for argument’s sake, that even if the 3rd defendant had any lawful interest in the land, she could not sell it to the 1st and 2nd defendants because under ***section 35 (2) of the Land Act (supra)*** the first priority should have been accorded to the plaintiffs as tenants in occupation the land. It is an agreed fact in the joint Scheduling Memorandum *item (v)* that prior to the sale-purchase and transfer the plaintiffs were not given any opportunity by the 3rd defendant to purchase their interest as required by law. Thus the sale to the 1st and 2nd defendants was not done in accordance with the law hence illegal.

In ***Kampala District Land Board & A’nor v. N H&CC (supra)*** the Supreme Court also held, *inter alia*, that registration of suit land in favour of a party in total disregard of the occupants’ unregistered interest which they were very much aware of and by failing to follow the right procedure prescribed by law for transfer of such unregistered interest the party being registered was guilty of fraud which defeats the act of registration.

Again I would adopt similar reasoning as in the above decision of the Supreme Court and hold that by the 3rd defendant selling the suit to the 1st and 2nd defendants without giving the first priority to the to the plaintiffs and the other occupants on the suit land purchase their interest as required by law amounted to fraud. I hasten to add that the fraud is attributable to the 3rd defendant as well as the 1st and 2nd defendants because all of them were aware of the fraud and took advantage of it as well as participated in it.

The plaintiffs also alleged in the particulars of fraud that the 1st and 2nd defendants grossly undervalued the land to defeat government revenue. It is an agreed fact in the joint Scheduling Memorandum *item (vii)* that the value of the suit land indicated by the 1st and 2nd defendants in the transfer instrument on the occasion of the transfer into their names was Shs.10,000,000/= only. This was consideration for land whose size is approximately 53.64 hectares (about 130 acres) at Kabulengwa in the vicinity of Kampala City.

It emerged from the evidence of the plaintiffs that the price of an acre of land in the same locality around the time of the purchase was between Shs.15 to Shs.25 million, and that it was not possible for the value of the whole land of more than 130 acres to have been just Shs.10 million only. This piece of evidence was not denied or rebutted. Only Counsel for the defendants attempted to suggest in cross – examination of the witness that the seller was free to sell at a price of her choice, and that there was no evidence to show that the land was not of the value at which it was bought.

With due respect, over 130 acres of land in the suburbs of Kampala City would not by any stretch of imagination go for a paltry value of Shs. 10 million, because even according to evidence of PW2 such value was not even half the price of one acre in the area. By indicating Shs 10 million only as the purchase price for the suit land in the transfer instruments, the 1st and 2nd defendants indeed deliberately grossly undervalued the suit land with the intention, *among others*, of defrauding Government of tax revenues payable on registration of land.

In the case of ***Samuel Kizito Mubiru & A'nor v.W Byensibe & A'nor. H.C.C.S. No.513 of 1982*** where a plaintiff inserted Shs. 500,000/= in the sales agreement as purchase price for land when in fact he had paid Shs.2, 400,000/=, the court held, *inter alia*, that the mode of acquisition of the title in question was tainted with fraud and illegality because *bona fide* included without fraud or without

participation in wrong doing. That by the plaintiff undervaluing the suit land; the design was to defraud the Government of its revenue by way of paying less stamp duty. Court further held that by public policy, any transaction designed to defraud the Government of its revenue is illegal, and that the effect of the illegality was to prevent the plaintiff from recovering under a contract which he secured illegally, and the title procured by the plaintiff was therefore void because of fraud.

In the instant case, I also find that the defendants deliberately understated the value of the suit land worth billions of shillings to be only 10 million shillings with the intention of cheating Government of the tax revenues payable on such transaction. The 1st and 2nd defendants' certificate of title to the suit land is therefore void because of the fraud. *Issue No.2* is answered in the affirmative.

Issue No.3: What remedies are available to the parties?

On basis of the above findings, judgment is entered in favour of the plaintiffs. The counterclaim is unsupported and therefore unsustainable. It is dismissed with costs. Further, the remedy where the 1st and 2nd defendants' certificate of title to the suit has been impeached on the ground of fraud lies under ***Section 177RTA(supra)*** which provides that;

“Upon the recovery if any land, estate or interest by any proceedings from the person registered as proprietor thereof, the High Court may in any case in which the proceedings is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require and the registrar shall effect to that order.”

Accordingly, the Registrar of Titles is directed to cancel the registration of the 1st and 2nd defendants from the Register Book. This also goes for the 3rd defendant

who obtained the extension of the lease without power and/ or authority to do so, and the special certificate of title illegally and fraudulently.

The plaintiffs prayed for an order of a permanent injunction restraining the defendants from interfering with their quiet occupation and possession of the suit land. Having found that the plaintiffs are *bon fide* occupants of the suit land, they are accorded the security on the land as by law required. Accordingly, an order of permanent injunction is issued restraining the defendants from interfering with the plaintiffs' quiet occupation and possession of the suit land.

The plaintiffs also prayed for general damages for inconvenience and interest on the same. The settled position stated in ***James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993; Erukan Kuwe v. Isaac Patrick Matovu & A'nor H.C.C.S. No. 177 of 2003 per Tuhaise J***, 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 and probable consequence of the defendant's act or omission. In ***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***, it was also held that 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 if she or he had not suffered the wrong.

Further, in ***Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305***, court gave guidance on how to assess the quantum of damages, that the consideration should mainly the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered.

In the instant case PW2 adduced evidence that the unlawful conduct of the defendants has caused the plaintiffs great suffering and inconvenience. That they were made go through a protracted trial, and had to pay the lawyer's fees, among

other expenses. Also, that the conduct of the defendants has been most arrogant, insolent, and malicious and caused the plaintiffs much anxiety. That the plaintiffs' properties were destroyed by agents of the defendants, and that all these taken together, the plaintiffs pray for general damages..

Indeed the plaintiffs merit the award of general damages. Taking into account all factors and circumstances of this case as enumerated in the evidence of PW2. Such the suffering and inconvenience occasioned to the plaintiffs at the behest of the defendants, particularly when their property on the suit land was destroyed in attempt to forcefully make them vacate. I consider *Shs.20,000,000 (Twenty Million only)* to be adequate general damages. The amount shall be payable by all the three defendants jointly and or severally. The plaintiffs are awarded costs of the suit. The net effect is that it is ordered as follows;

- 1. Judgment is entered for the plaintiffs.***
- 2. The counterclaim is dismissed with costs to the plaintiffs.***
- 3. An order of permanent injunction is issued restraining the defendants from interfering with the plaintiffs' quiet occupation and possession of the suit land.***
- 4. The plaintiffs are awarded general damages of Shs.20 Million which shall attract an interest at court rate of 6% per annum from the date of judgment till payment in full.***
- 5. The plaintiffs are awarded costs of this suit.***

BASHAIJA K. ANDRE
JUDGE
23/10/2014.

Mr. Kalule Ahmed Mukasa Counsel for the Plaintiffs present.

Mr. Muzula Abdul (6th Plaintiff) present.

Ms. Namutebi Aliziik holding brief for Mr. Kibeka Counse for the Defendants present.

Defendants absent.

Ms. Justine Namusoke Court Clerk present.

Court: Judgment read in open court.

BASHAIJA K. ANDRE
JUDGE
23/10/2014.