

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO 177 OF 2013

1. EVA LUBWAMA TAKIRAMBUDDE

(THE ADMINISTRATOR OF THE ESTATE OF THE LATE AGATI TIISA)

10 **2. KIGGUNDU DOUGLAS DEOGLOCIOUS ::::::::::::::::::::::: PLAINTIFFS**

VERSUS

1. BANK OF AFRICA (U) LTD

2. NABUGWAMU STEPHEN KIGGUNDU

3. SSENTONGO JOHN SALONGO

15 **4. NAMUGENYI JUSTINE**

5. SEWANONDA FRANCIS

}
} **::::::::::::::::::::: DEFENDANTS**

BEFORE: THE HON MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

Eva Lubwama Takirambudde (The Administrator of the Estate of the Late Agati Tiisa);
20 Kiggundu Douglas Deoglocious (*hereinafter referred to as the “1st” and “2nd” plaintiff respectively*) filed this suit against Bank of Africa (U) Ltd; Nabugwamu Stephen Kiggundu; Ssentongo John Salongo; Namugenyi Justine; and Sewanonda Francis (*hereinafter referred to as the “1st” , “2nd” , “3rd” , “4th” , and “5th” defendant respectively*) seeking a declaration that the mortgage lodged by the 1st defendant’s predecessor is null and void and the same be
25 cancelled; that the late Agati Tiisa is the owner of land comprised in Mawokota Block 39 Plot 56, and the late Kiggundu Joseph Salongo is the owner of land comprised in Mawokota Block 39 Plot 59 land at Jumba (*both plots of land hereinafter referred to as the “suit land”*); that the 2nd ,3rd , 4th and 5th defendants fraudulently acquired the suit land that their registration as

proprietors thereon be cancelled, and they deliver up the duplicate certificate of title to the suit land; a permanent injunction issues restraining the 2nd , 3rd , 4th and 5th defendants from trespassing on the suit land; general damages for trespass and inconveniences, loss of earning, sufferings, and mental anguish; punitive damages; interest and costs of the suit.

5 **Background:**

The late Agati Tiisa was formerly the registered proprietor of Mawokota Block 39 Plots 56 and 59 at Jumba. The late Kiggundu Joseph Salongo, who was father to the 2nd plaintiff, formerly owned a Kibanja interest in Plot 59. In 1981 Kiggundu Joseph Salongo purchased a legal interest in Plot 59 from the late Agati Tiisa. Together with his family, they occupied and utilized the suit
10 land until in 2010 when the family was evicted by the 2nd, 3rd, 4th and 5th defendants who happen to be close relatives of the 2nd plaintiff's family.

Prior to their eviction, the 2nd plaintiff sought to register Plot 59 in the name of the estate of his late father. He discovered that the suit land was mortgaged as security for a loan with M/s. Sembule Investment Bank (U) Ltd, whose assets and liabilities were taken over by the 1st
15 defendant in July, 1990. The 2nd plaintiff further discovered that the mortgage was not executed by the late Agati Tiisa the registered proprietor, but one Lubwama Jackson who was unknown to the plaintiffs. The suit land was subsequently sold to the 2nd, 3rd, 4th, and 5th defendants who vacated the caveat the 2nd plaintiff and his sister had lodged thereon. The defendants then got registered as proprietors on title to the suit land.

20 In their defence the defendants denied the plaintiffs' claim. The 1st defendant in particular averred that the suit land was mortgaged to its predecessor pursuant to a Power of Attorney which was donated by Agati Tiisa the registered proprietor. That when the mortgagor defaulted,

the bank pursuant to the terms of the mortgage deed, sold the suit land to the 2nd, 3rd, 4th, and 5th defendants.

For their part the 2nd, 3rd, 4th, and 5th defendants contend that they purchased the suit land pursuant to a mortgage. That they learnt that the suit land was under sale when some people
5 came and inspected it, and it had also been advertised for sale in the newspapers. They averred that they are *bona fide* purchasers for value without notice of any fraud, if any, and prayed that the suit be dismissed with costs

The case initially proceeded for hearing *ex parte*. Later Counsel for the defendants applied to have the *ex parte* order set aside; which was allowed, and the suit proceeded *inter partes*. Court
10 adopted the singularly filed scheduling notes by Counsel for the plaintiffs. Court had directed that the parties file a joint scheduling memorandum. Counsel for the plaintiffs complied but Counsel for the defendants never made any input. The following issues were framed for court's determination;

- 1. Whether the suit land was lawfully mortgaged to the 1st defendant's predecessors.**
- 15 **2. Whether the 1st defendant passed good title to the 2nd, 3rd, 4th, and 5th defendants.**
- 3. Whether 2nd, 3rd, 4th and 5th defendants are bona fide purchasers for value without notice of fraud.**
- 4. What remedies are available to the parties?**

It is observed that Counsel for the defendants made submissions on a plethora of issues beyond
20 those framed and adopted by court for determination above. I wish to clarify at the outset that Unless they are issues of law, the resolution will be confined only to the particular issues framed

in the scheduling notes alluded to because those are the very issues that were canvassed by evidence at the trial.

The parties led evidence to prove their respective cases through written statements. I will not reproduce the testimonies in detail but I will only make reference to the salient aspects when
5 evaluating the same relative to the issues raised and the law applicable.

Resolution of issues:

Issue No.1: Whether the suit land was lawfully mortgaged to the 1st defendant's predecessors.

The clear and undisputed inference from the evidence of both the plaintiffs and defendants is that the mortgage was not executed by the registered proprietor of the suit land. The mortgage deed
10 (Exhibit P4) only shows that it was executed by one Lubwama Jackson as mortgagor under a Power of Attorney purportedly donated by the registered proprietor Agati Tiisa. The 1st plaintiff (PW1) stated that Agati Tiisa her grandmother, was the registered owner of the suit land comprised in Block 39 Plots 56 and 59, and that she entrusted matters pertaining to the suit land to her agent one Serunkuma. According to the photocopy of the mortgage deed, which was the
15 only copy availed to court; the suit land was mortgaged to the 1st defendant's predecessors M/s Sembule Investment Bank (U) Ltd by one Lubwama Jackson who was not the registered proprietor. PW1 stated that Lubwama Jackson was also unknown to the plaintiffs - the Administrators of the Estate of the late Agati Tiisa who was the registered proprietor.

DW1 Grace Nabukenya, a Senior Legal Officer of the 1st defendant, testified that the borrower
20 Lubwama Jackson presented the bank with a Power of Attorney donated by the registered proprietor of the suit land; which authorized him to pledge the title of the suit land as security for a loan facility. That the bank advanced the loan facility of Shs. 400,000/- to Lubwama Jackson

and a legal mortgage was registered on the title of the suit land comprised in Block 39 Plot 56 and 59. That upon default by the borrower and registered proprietor, the bank served them with a Statutory Notice (*Exhibit D1*) dated 5th March 2007 requiring them to clear the outstanding loan balance within 30 days. That upon the failure by the borrower and registered proprietor to pay, 5 the bank had the suit property advertised in the *Daily Monitor* newspaper of 18th April, 2007 (*Exhibit D3*) and eventually disposed it through sale by private treaty to the 2nd, 3rd, 4th, and 5th defendants.

In determining whether the suit land was lawfully mortgaged to the 1st defendant's predecessor in title, the starting point is Section 115 of the Registration of Titles Act (Cap 230) which provides 10 for mortgages as follows;

“The proprietor of any land under the operation of this Act may mortgage that land by signing a mortgage of the land in the form in the Eleventh Schedule to this Act.”

Section 146 (1) (*supra*) further provides that;

15 ***“The proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage or otherwise dealing with it by signing a power of attorney in the form in the Sixteenth Schedule to this Act.”***

The above provisions are quite instructive as to who can mortgage property. Whereas Section 115 (*supra*) provides generally that only a registered proprietor of land may mortgage it, Section 20 146 (1) (*supra*) gives the exception that the proprietor may donate a Power of Attorney to anyone who, pursuant to the specific authority a Power of Attorney , may execute a mortgage with regard to the land. The rationale of Section 115 (*supra*) was stated by the Supreme Court in the

case of *Fredrick Zzabwe vs. Orient Bank Ltd & 5 Others SCCA No.4 of 2006*. Katureebe JSC (as he then was) at page 25 his judgment held that;

5 ***“There can only be one rationale for this requirement; to prevent fraudulent people from executing mortgages over property that are not theirs. It not only enables the Registrar to ascertain that the mortgagor is indeed the registered proprietor, but also enables third parties to know that it was properly executed with authority.”***

In the instant case, the 1st defendant states that one Lubwama Jackson was advanced a loan facility against the title of the suit land pursuant to a Power of Attorney donated to him by the registered proprietor. In effect the 1st defendant alleges that Lubwama Jackson was duly
10 authorized by the registered proprietor under Section 146 (1) (supra) to mortgage the suit land.

After carefully evaluating the evidence as a whole on this particular issue, I find that the 1st defendant’s contention is totally unsupported at all. Firstly, the purported Power of Attorney allegedly donated by Agati Tisa to Lubwama Jackson was not adduced in evidence, yet it is the very basis upon which the bank created a legal mortgage over the suit land. This was in spite of
15 the 1st defendant’s averments in its pleadings that it would rely on copy of the Power of attorney. It manifests the 1st defendant’s “Summary of Evidence” in its the written statement of defence, where it was categorically averred that;

a) *The 1st defendant shall adduce evidence to show that the registered proprietor of the land comprised in Plots 56, 59 Block 39 gave a Power of Attorney for a loan.*

20 b) *The 1st defendant will lead evidence to show that the Power of Attorney was given to Jackson Lubwama on the 26th day of May, 1989.*

c) *The 1st defendant will adduce additional evidence to show that the said Lubwama Jackson was borrower (mortgagor) under a Power of Attorney and the same was advanced on that basis.*

d) *The 1st defendant will lead evidence to show that it advanced a loan on the strengths of a Power of Attorney and land title which was deposited with it.”[Underlining for emphasis].*

Also in the list of documents the “Power of Attorney” was listed as one such document to be relied upon during the trial by the 1st defendant. This invariably shows that the Power of Attorney was so central to the entire mortgage transaction between 1st defendant and the borrower, and it could not have just been missed out in evidence. It was so crucial particularly to clarify the particulars of the donor and donee/borrower, the extent and duration of the authority, the precise details and description of the mortgaged property; among other things.

DW1 the Legal Officer of the 1st defendant, while conceding that she has never seen and nor does she know its content; she merely asserted without any basis whatsoever that the Power of Attorney exists. She further stated that they have failed to trace it, but that it exists because the Ministry of Lands any how registered the mortgage.

I find the evidence of the 1st defendant devoid of any weight. By failing to adduce in evidence a copy of the alleged Power of Attorney, the 1st defendant failed to prove its claim the bank advanced a loan to the borrower on strength of such a document donated by Agati Tisa the registered proprietor. The Evidence Act (Cap. 6) provides instances of parties on whom the burden of proof lies as follows;

“101. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of proof as to particular fact.

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The general principle that cuts across all the above provisions is that “he who alleges must prove.” In this instant case the 1st defendant alleged existence of the Power of Attorney and had the burden to produce it, but completely failed to discharge that burden. In the premise, it is unsustainable to argue that since it was the plaintiffs who doubted the existence of the Power of Attorney, it was up to them to adduce it in evidence and point out any defects.

DW1 also stated that the bank’s lawyer who was instructed to conduct the case failed to trace the copy of the Power of Attorney. Far from this being an excuse, it simply reinforces the finding that the purported Power of Attorney actually does not exist. A Power of Attorney is a public document in that for it to be effectual for purposes of being transacted upon, it must be registered pursuant to provisions of Section 146 (2) RTA which provides that;

5 ***“Every such power of attorney shall be registered in accordance with the Registration of Documents Act, and if so registered within four months after the date thereof shall be presumed to be in force at the time of its registration unless a revocation of that power of attorney has been previously registered under that Act; but nothing in this subsection shall diminish the force and effect of any power of attorney if registered after the expiration of that period of four months.”***

10 If indeed the 1st defendant failed to obtain a copy thereof from the Ministry of Lands as they claim, they could still have accessed and retrieved it from Uganda Registration Services Bureau (URSB), if it existed at all. Therefore, the position that they could not trace a copy from Ministry of Lands is hardly convincing at all.

15 It was further noted that the mortgage deed does not mention anything about the Power of Attorney. This reinforces the finding that no such a document was presented by the borrower to the 1st defendant’s predecessor. This raises very serious questions on the legal propriety of the entire mortgage transaction. In *Fredrick Zzabwe vs. Orient Bank Ltd & 5 others* case (supra) a similar issue of absence of any mention of a power of attorney in a mortgage deed arose and Supreme Court observed as follows;

20 ***“How would the Registrar, by looking at this mortgage deed know that the 2nd respondent had authority at this property? In my view this would have been simply solved by the mortgage deed clearly stating that the 2nd respondent was acting under a power of attorney issued in accordance with section 146 of the Act.”***

Similarly in the instant case, in the absence of the Power of Attorney, there is scarcely any basis or assurance whatsoever that the mortgage deed was lawfully executed.

Apart from the above, the RTA provides the format of a mortgage deed in the Eleventh Schedule. Although the format could be adopted with necessary modifications, there can be no compromise on the basic requirement that the intention of the parties must be established from the mortgage deed, and there must be a clear description of the property to avoid confusion on
5 the property being dealt with.

In the instant case there is acute ambiguity in the description of land that was purportedly mortgaged. Whereas the title - head of the mortgage deed shows that it was Block 39 Plot 56, the main body of the deed, at paragraph 3, describes the property mortgaged as Block 39 Plot 59. These are two different properties being referred to, and there is definite uncertainty as to which
10 of them was affected by the mortgage, if at all.

The other issue concerns the manner in which the attestation of the mortgage deed was done. Counsel for the plaintiffs submitted, and rightly so, that the mortgage deed contravened provisions of Section 147 and 148 RTA that require the attestation by the witnesses to be in Latin character and the capacity of the signatories to be disclosed. Counsel argued that the failure
15 to adhere to these requirements is fatal to the mortgage deed. Counsel also noted that the mortgage deed has no transliteration of the signatures of the bank officials. Further, that the capacity in which one Lucy Kasasira witnessed the deed is not indicated.

In reply learned Counsel for the defendants submitted that the specific rules governing signing company documents had to apply to determine the identity of the signatories and whether they
20 had the capacity to sign. Counsel submitted, and rightly so, that the rationale of Section 148 RTA for a signature be in Latin character must be to make clear to everyone receiving the document as to who the signatory is, and it can be ascertained whether he had the authority or the capacity to

sign. Counsel argued that in the instant case the witness signed in Latin character, and even indicated her name as Florence Kasasira and hence complied with Section 148 RTA (supra).

I wish to observe that the issue concerning signatures being in Latin character was not framed for court's determination but only came up in the submissions of Counsel. Being an issue of law,
5 however, the parties would not be precluded from raising it at any stage as long as it had a bearing on the case.

Section 148 RTA (supra) to which both Counsel referred provides that;

“No instrument or power of attorney shall be deemed to be duly executed unless either

—

10 ***(a) the signature of each party to it is in Latin character; or***

***(b) a transliteration into Latin character of the signature of any party whose signature is not in Latin character and the name of any party who has affixed a mark instead of signing his or her name are added to the instrument or power of attorney by or in the presence of the attesting witness at the time of execution, and beneath the signature or
15 mark there is inserted a certificate in the form in the Eighteenth Schedule to this Act.”***

In *Fredrick Zzabwe vs. Orient Bank Ltd & 5 others* (supra) the guiding principle and rationale for attestation of instruments in Latin character pursuant to Section 148 of the RTA, were set out. Katureebe JSC (as he then was) held that;

20 ***“In my view the rationale behind section 148 requiring a signature to be in Latin character must be to make clear to everybody receiving that document as to who the signatory is so that it can also be ascertained whether he had the authority or capacity to sign. When a witness attesting to a signature merely scribbles a signature without***

giving his name or capacity, how would the Registrar or anyone else ascertain that witness had capacity to witness in terms of section 147 of the Registration of Titles Act?”

In the case of *General Parts (U) Limited vs. Non Performing Assets Recovery Trust, Civil Appeal No 5 of 1999*, the effect of non compliance with provisions of Section 147 RTA (supra) was aptly stated. it was held that where the signature to a mortgage is not in Latin character, the mortgage is invalid.

Applying the principles in the above decisions to facts of the instant case, there could be no doubt that the execution of the mortgage by the 1st defendant’s predecessor never complied with the spirit and letter of Section 148 RTA (supra) and hence the mortgage deed was unlawfully executed. There was no transliteration into Latin character of the signatures of the bank officials. They just scribbled signatures but their names were not disclosed. Similarly, the attesting witness one Florence Kasasira did not disclose the capacity in which she witnessed the mortgage deed. All this was contrary to the mandatory requirements of the law.

I therefore respectfully disagree with the view of Counsel for the defendant that the case of *Fredrick Zzabwe* (supra) is distinguishable from the instant case. In as much as the facts in the two cases differ; and obviously no one case is exactly the same as the other on all the facts, the principle enunciated in the *Fredrick Zzabwe* case (supra) cannot be distinguished and it applies squarely to facts of the instant case. To the same extent, the decision in *General Parts (U) Limited vs. Non Performing Assets Recovery Trust* case (supra) applies that that such irregularity renders the mortgage invalid. The effect of a mortgage being invalid is that it is absolutely illegal and any transaction on it is null and void and cannot be sanctioned by court.

The 1st defendant alluded to the fact that it only inherited the loan from the now defunct M/s Sembule Investment Bank Ltd. That fact, however, cannot insulate the 1st defendant against having equally inherited all the infirmities inherent in the liability. Issue No.1 is thus answered in the negative.

5 ***Issue No.2: Whether the 1st defendant passed good title to the 2nd, 3rd, 4th, and 5th defendants.***

Having found that the 1st defendant had no lawful interest in the suit land and no lawful mortgage was created, the general principle applies that any transaction on the illegal and invalid mortgage was null and void. The exception would be where the third parties were bon fide purchasers of the mortgage property for valuable consideration without notice of infirmities, illegalities, fraud
10 or third party claims.

It is was evidently clear that Jackson Lubwama who mortgaged the suit land was not the registered owner, and he lacked the authority to do so. The bank failed to ascertain from Agati Tiisa the registered proprietor to satisfy itself on the genuineness of the purported Power of Attorney. By refraining from carrying out such vital inquiries, the bank ended up creating a sham
15 mortgage. On the whole the bank acted illegally and negligently to have advanced a loan to Lubwama Jackson well aware that he was not the registered proprietor of the suit land. Again with this actual knowledge of the facts, the bank went ahead to sell the suit land to the 2nd , 3rd , 4th and 5th defendants; which in law amounts to actual fraud on part of the 1st defendant.

On part of the 2nd , 3rd , 4th and 5th defendants, evidence clearly demonstrates that they were at all
20 material times aware or ought to have reasonably known that the 1st defendant did not have a good title to the suit property to pass to them. DW2 conceded that much in his evidence when he stated that he never read the mortgage deed or the Power of Attorney which was at any rate the

basis of the mortgage transaction, and that he only relied on the information from the 1st defendant. The 2nd to 5th defendants never bothered to know or inquire as to how the 1st defendant obtained the title to the suit land. It was, nevertheless, apparent on face of the certificate of title and the search they made in August, 2010, that there existed a mortgage by Lubwama Jackson and not the registered proprietor Agati Tiisa, who the evidence reveals was well known and related to the defendants.

Therefore, the knowledge by the 2nd to 5th defendants that the bank had no lawful interest in the suit property ought to have reasonably put them on notice that it could not pass good title in the suit property to them because it had none to pass. In *Bishopgates Motor Finance vs. Transport Brakes Ltd [1949] 1 KB 332, at page 336-7* it was held that;

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give better title than he himself possesses.”

That legal principle was emphasized by the Supreme Court in *Halling Manzoor vs. Serwan Singh Baram, SCCA No.9 of 2001*, that a person cannot pass title that he does not have.

I wish to observe that even assuming the mortgage created against the borrower Lubwama Jackson was valid, which it is not, there is no evidence to suggest that the subsequent sale would be valid because of the manner in which the foreclosure was done. Section 8(1) (2) and (3) of the Mortgage Act (Cap.229) which provides for foreclosure by order of court states as follows;

“8. Foreclosure.

(1) A mortgagee may apply to the court to foreclose the right of the mortgagor to redeem the mortgaged land anytime after the breach of covenant to pay.

(2) Upon an application by the mortgagee under this section, the court shall determine the amount due to the mortgagee and may fix a date, not exceeding six months from the date of the failure to pay, within which the mortgagor shall pay the amount due.

(3) If the mortgagor fails to pay on the date fixed by the court under subsection (2), the court shall order that the mortgagor be foreclosed of his or her right to redeem the mortgaged land and that the land be offered by the mortgagee for sale in accordance with section 9.”

Section 9 (supra) provides for the procedure of foreclosure and sale that a sale consequent upon an order of foreclosure shall be by public auction.

10 Counsel for the defendants submitted that what is pertinent is not about the legitimate interest but legal interest in the land. That in law a sale whether by public auction or private treaty destroys the equity of redemption in the mortgaged property. To fortify this position Counsel cited *Mbuthia vs. Jimba credit finance Corporation and another EALR (1986-1989) EA.340*, where it was held that the only obligation incumbent on a mortgagee selling under a power of sale is
15 that it should act in good faith for the purpose of realizing the security and take reasonable precautions to secure not the best price, but a proper price. Counsel for the defendants submitted that the plaintiff did not adduce evidence to prove that there was any bad faith during the sale of the suit property.

With due respect to Counsel for the defendants, this elaborate procedure for realizing the security
20 set out under the law was not followed. The defendants’ witnesses themselves, DW1 and DW2, confirmed that the sale was by private treaty. The bank’s claim that they wrote a notice to the mortgagor Lubwama Jackson and registered proprietor Agati Tiisa, was not backed by any proof to that effect. Even if the bank could have written the notice, there is no evidence that such it was

ever delivered to the address of the registered proprietor. This inevitably denied her the opportunity at that stage to probably redeem the security or to contest the mortgage. Issue No.2 is answered in the negative.

**Issue No.3: Whether the 2nd, 3rd, 4th, and 5th defendants are bona fide purchasers for value
5 without notice.**

A bona fide purchaser is defined in Black's Law Dictionary, 8th Edition, at page 1271 as;

***“One who buys something for value without notice of another claim to the property
and without actual or constructive notice of any defects in or infirmities, claims or
equities against the seller's title, one who has in good faith paid valuable consideration
10 for property without notice of prior adverse claim.”***

In *Hannigton Njuki vs. William Nyanzi HCCA No. 434 of 1996*. It was held that for one to qualify as a bona fide purchaser he or she has to prove that he or she holds a certificate of title; purchased the property in good faith; purchased for valuable consideration without notice of any fraud; and was not a party to the fraud.

15 In, *Simon Kato Bugoba vs. Samuel Kigozi & Mayanja Mbabali [2007]1 HCB 122* it was held that;

***“Bona fide purchaser is one without notice of fraud and without intent to wrongfully
acquire property. A bona fide purchaser acquires good title irrespective of the vendor's
defective title. The defendant knew or had cause to know that the 1st defendant was not
20 the right person to sell the land in view of the plaintiff's interest in it.”***

The questions to answer in the instant case are; did the 2nd to 5th defendants purchase the suit property in good faith? If there was fraud in their registration as proprietors would they derive good title at law from a transaction arising out of such fraud? Did they have knowledge of the fraud or was it brought home to them?

- 5 It is not disputed that the defendants are the current registered proprietors of the suit land. What raises issues is how they got registered. PW2 stated that his father lived on the suit land and built houses thereon and cultivated crops and grazed livestock; first as a Kibanja holder and later as mailo interest holder after purchasing the same from the registered mailo owner Agati Tisa. Proof if this is Exhibits P 6, 7, 8, 9, and 10, photocopies of the receipts of the purchase; which
- 10 incidentally the 2nd plaintiff obtained from the 2nd defendant.

PW2 further stated that even after their father disappeared in 1982, the family continued to be in possession of the suit land until they were evicted in 2010 by the 2nd, 3rd, 4th and 5th defendants who are their close relatives as first cousins. PW2 further stated that the defendants were even under the care of the 2nd plaintiff's father who looked after them as his own children after their

15 own father died much earlier. The defendants did not dispute this evidence. They only demanded for evidence of the original receipts of purchase from the 2nd plaintiff but not the authenticity of the photocopies. It is however inescapable that actually it was the defendants who were in possession or knew where of original receipts were.

There is also the unrebutted evidence that on several occasion the plaintiffs and 2nd to 5th

20 defendants held family meetings as shown by Exhibits P 1(a), P1 (b) P2 (a) and P2 (b) which are minutes of the various meetings, to resolve disputes concerning the suit land, but on all those occasions failed to come up with a resolution of the matter. It is against such a background that

the defendants still averred that they are bona fide purchasers of the suit land for value without notice of any fraud. As if to cover their heads in the sand, they further averred that they only got to know about the sale from a newspaper and when bank official went to inspect the suit land. They did not dispute the evidence that the 2nd plaintiff is their first cousin and that his late father brought them up on the very suit land. Actually it was corroborated with by DW2 during cross - examination that when their own father died, he was buried on Joseph Kiggundu's land, which is Plot 59 – that is part of the suit land. As earlier noted Joseph Kiggundu was the 2nd plaintiff's late father and therefore the younger brother of the 2nd to 5th defendants' late father. There was also additional unchallenged evidence that in fact the 3rd defendant actually started encroaching on the suit land in 1999 by planting the trees thereon. With this evidence, the 2nd to 5th defendants cannot claim not to have been aware of the interest of the plaintiffs' families in the suit land.

Besides the above, there is evidence showing that earlier on the 2nd to 5th defendants attempted vacate the caveat that was lodged by the plaintiffs, but failed in the attempt. Proof of this is Exhibit P.19 dated 17th March, 2011 where the Lands Office declined to remove the caveat for the reason that the defendants were not the registered proprietors. The defendants on 2nd May 2012 yet again lodged another notice through their lawyer falsely pretending that it was by the registered owner Agati Tiisa, and the caveat was successfully removed. Agati Tiisa died in 2003 and therefore the removal of the caveat purportedly by herself in 2012 when she was long dead was fraudulently done. The 2nd to 5th defendants are thus guilty of actual fraud and cannot be bona fide purchasers for value without notice of the fraud.

The fraud that is sought to impeach the title of the registered owner must be of the kind that is attributable to him or her. In *Kampala Bottlers Ltd. vs. Damanico (U) Ltd*, *SSCA No. 22 of 1992*, it was held that;

5 ***“Fraud must be attributed to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.... I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.”***

And in *Fredrick Zaabwe vs. Orient Bank Ltd & Others, SSCA No, 4 of 2006* Katureebe JSC (as he then was) cited *Black’s Law Dictionary* (supra) for the definition of fraud to mean;

10 ***“...to act with intent to defraud means to act willfully, and with the specific intent to deceive or cheat: ordinarily for the purpose of either causing some financial loss to another or bringing about some final gain oneself.”***

The act of attempting to vacate the caveat and get registered on the title and failing and trying again by impersonating the registered owner who had long died shows the intent by the 2nd to 5th defendants to defraud the plaintiffs of their interest in the suit land. In fact DW2 conceded that he 15 gave fresh instructions to the same lawyer who acted in the earlier failed attempt, to remove the caveat lodged by 2nd plaintiff and his sister. DW2 did not deny knowledge of the actions of his lawyer as his agent in the transaction to remove the caveat. As such the 2nd to 5th defendants cannot be heard to claim to have purchased the suit land in good faith.

In addition, the 2nd to 5th defendants had grown up with the 2nd plaintiff on his father’s land – the 20 suit land. Nothing was unknown to them as regards ownership of the suit land. I find that their actions of going behind the plaintiffs to purchase the suit land amounted to a high level of fraud, and no reasonable court properly directing its mind to the law and evidence would sanction their

actions. In the now *locus classicus* case of ***Makula International vs. Cardinal Emmanuel Nsubuga & Anor [1982] HCB 11 (CA)*** it was held that;

5 ***“Once an illegality has been brought to the attention of the court it cannot be ignored.... a court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleadings, including any admissions made thereon.... fraud is the worst form of illegality...”***

I find that the whole transaction was tinted with fraud and illegalities and as such cannot be left to stand.

Issue No. 4: Whether the plaintiff is entitled to the remedies sought.

10 Having found as above, it is declared that the mortgage lodged by the 1st defendant’s predecessor is null and void and the same is cancelled. The late Agati Tiisa is the lawful owner of land comprised in Mawokota Block 39 Plot 56. The late Kiggundu Joseph Salongo is declared the owner of land comprised in Mawokota Block 39 Plot 59 land at Jumba. Further, the 2nd, 3rd, 4th and 5th defendants fraudulently acquired the suit land. Accordingly, it is ordered that their
15 registration as proprietors of the suit land be cancelled and they deliver up to the Registrar of Titles the duplicate certificate of title of the suit land for appropriate action. A permanent injunction doth issue restraining the 2nd, 3rd, 4th and 5th defendants from trespassing on the suit land.

20 The plaintiffs prayed for the award of general damages for trespass and inconveniences, loss of earning, sufferings, and mental anguish. The position of the law is that general damages are awarded in the discretion of the court and are always as the law will presume to be the natural and probable consequence of the defendant’s act or omission. See: ***James Fredrick Nsubuga vs.***

Attorney General HCCS No.13 of 1993; Storms vs. Hutchison (1905) AC 515; and Kampala District Land Board & George Mitala vs. Venansio Babweyana Civil Appeal No. 2 of 2007.

Such consequences could be loss of use, loss of profits, physical inconvenience, mental distress, pain and/or any measure of suffering, among a multitude of others things.

- 5 In the instant case, the plaintiffs adduced in evidence as to how the 2nd plaintiff's family was forcefully evicted from the suit land by the 2nd to 5th defendants; the very people who had benefited from the magnanimity of the 2nd plaintiff's late father, and how the family has been denied of the use of the same. It was also shown that the said defendants had all along been bent on taking the suit land by trespassing on it in 1999 when the 3rd defendant even planted trees on it.
- 10 Family meetings to resolve the matter came to naught. This alone would entitle the plaintiffs to the award of general damages.

The test in determining the quantum or measure of damages was succinctly stated in the case of *Livingstone vs. Ronoyard's Coal Co. (1880) 5 APP. Case 259*. The measure of damages was defined as that sum of money which will put the party who has been injured, or who has

15 suffered, in the same position as he or she would have been in if he or she had not sustained the wrong for which he or she is now getting his or her compensation or reparation.

Taking into account all the circumstances of this particular case, I would consider UGX 50 million to be fair and adequate recompense and award the same amount as general damages to the plaintiffs.

- 20 The plaintiffs also prayed for punitive damages against the defendants. Such damages are awarded where the defendant has acted in a wanton, high handed, and unconstitutional manner against the plaintiff. In this case, although the bank committed illegalities by selling the suit land to the 2nd to 5th defendants, it was not wanton or high handed. The bank understandably was as

much as possible trying to recover the liability it inherited from its predecessor whose assets and liabilities the bank took over. As for the 2nd to 5th defendants, court considers that the award of general damages against them jointly and severally already made above would be sufficient. The plaintiffs being the successful parties are also awarded costs of the suit. In summary it is declared

5 and ordered as follows;

1. *The mortgage lodged by the 1st defendant's predecessor is null and void.*
2. *The late Agati Tiisa is the lawful owner of land comprised in Mawokota Block 39 Plot 56.*
3. *The late Kiggundu Joseph Salongo is the lawful owner of land comprised in Mawokota*
10 *Block 39 Plot 59 land at Jumba.*
4. *The 2nd, 3rd, 4th and 5th defendants fraudulently acquired registration on title to the suit land in their names.*
5. *It is ordered that the names of the 2nd, 3rd, 4th and 5th defendants on the title of the suit land be cancelled.*
- 15 6. *It is ordered that the 2nd, 3rd, 4th and 5th defendants deliver up to the Registrar of Titles the duplicate certificate of title of the suit land for appropriate action.*
7. *A permanent injunction doth issue restraining the 2nd, 3rd, 4th and 5th defendants from trespassing on the suit land.*
8. *The plaintiffs are awarded UGX 50 million as general damages at an interest rate of*
20 *8% per annum from the date of this judgment till payment in full.*
9. *The plaintiffs are awarded costs of the suit.*

BASHAIJA K. ANDREW

JUDGE

07/11/2016

Ms Suda Nsereko Counsel for the plaintiffs present.

Mr. Joseph Kiryowa Counsel for the 2nd to 5th defendants present.

Mr. Musa Sekana Counsel for the 1st defendant absent.

5 Mr. Godfrey Tumwikirize Court clerk present.

Ms. Hasipher Nansera Transcriber present.

Court: Judgment read in open court.

BASHAIJA K. ANDREW

JUDGE

07/11/2016

10