

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL SUIT No. 0001 OF 2011**

**WEST NILE TEACHERS SAVINGS & CREDIT  
COOPERATIVE SOCIETY LIMITED ..... PLAINTIFF**

**VERSUS**

**TABU DAVID ..... DEFENDANT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

By a plaint dated 14<sup>th</sup> April 2011 and filed in court on 14<sup>th</sup> April 2011, the plaintiff sued the defendant for trespass to land, seeking an order vacant possession of land and a commercial building, a permanent injunction, special and general damages, interest at a commercial rate and costs. The plaintiff provided a background to the suit which was that during 1979, the plaintiff together with a one Agotre Charles, the father of the defendant, were tenants on a commercial building located at plot 3, LRV Volume Folio 10 Aduni Road in Arua Municipality which at the time was under the management of the Departed Asians Custodian Property Custodian Board (DAPCB). They each rented half of the building until the death of Agotre Charles in 1989.

Upon Agotre Charles' death, his brother and uncle to the defendant, a one Wadria Charles, assumed the tenancy of his deceased brother and continued paying rent to the Departed Asians Custodian Property Custodian Board, in the name of his deceased brother. During the year 1995, the Departed Asians Custodian Property Custodian Board advertised the property comprised in plot 3, LRV Volume Folio 10 Aduni Road for sale, with the first option to purchase being offered to sitting tenants. The plaintiff together with Wadria Charles presented a joint bid for purchase of the property, only that Wadria Charles' bid was in the name of his late brother,

Agotre Charles. Their joint bid emerged successful and they were notified by the DAPCB that the purchase price would be shs. 11,155, 000/=. An agreement of sale and Certificate of purchase to that effect were duly executed between the plaintiff and Wadria Charles (on behalf of Agotre Charles) on the one part and the DAPCB on the other.

It was tacitly agreed between the plaintiff and Wadria Charles that they would contribute in equal shares to the purchase price but due to financial constraints, Wadria Charles contributed only shs. 1,500,000/=. The plaintiff paid the balance of the purchase price in full. Having failed to raise the balance due on his half share of the purchase price, on or around 4<sup>th</sup> August 2000 Wadria Charles demanded for a refund of the sum he had paid from the plaintiff and the plaintiff duly refunded it. Wadria Charles handed over vacant possession of the property to the plaintiff but later that year, the defendant forcefully recovered the part his uncle Wadria Charles had occupied, and let it out to his own tenants and he still occupies that part to-date hence the suit.

In his written statement of defence dated 16<sup>th</sup> May 2011 and filed in court on 19<sup>th</sup> May 2011, the defendant denied the accusation of trespass to the disputed land. He contended that his late father was the sole tenant of the building and the plaintiff was sub-letting from his late father. He contended further that it is his uncle, Wadria Charles, who had unlawfully sold the property to the plaintiff. He therefore counterclaimed for an order of vacant possession, general damages, mesne profits, interest and costs.

The plaintiff called four witnesses in support of its case. P.W.1 Abamile Justo, a former treasurer of the plaintiff, testified that the plaintiff started renting the contested building in 1972 and a one Agotre Charles in 1984 until 1989 when he died. During the year 1995 the DAPCB advertised it for sale. It was listed as No. 15 in the advertisement. The building had been partitioned into two parts, "A" and "B" with the plaintiff occupying the former and Wadria Yowana the latter. They decided to present a joint bid in the plaintiff's names and those of Agotre Charles, where each would retain the part they occupied eventually. A partnership agreement was drawn up between the two of them on 3<sup>rd</sup> March 1995 (Exhibit P.E.1) by which they agreed to contribute to the purchase price in equal shares. When their bid succeeded, they were required to pay 10% of the purchase price immediately and the balance over a period of sixty days. A sale agreement was

signed on 6<sup>th</sup> April 1995 (Exhibit P.E.2). The agreed purchase price of shs. 11,155,000/= was paid in a series of instalments between 13<sup>th</sup> April 1995 and 13<sup>th</sup> May 1997 (Exhibits P.E.3 - P.E.11). Of this, Wadria Yowana paid only shs. 1,500,000/= and later because of financial constraints he was facing, asked the plaintiff to refund that sum which was done in instalments the last of which was paid on 4<sup>th</sup> August 2000 (Exhibit P.E.13) and the receipts indicating the various instalments (Exhibit P.E.14). Upon payment of the full purchase price to the DAPCB, the plaintiff was issued with a certificate of purchase (Exhibit P.E.12). The defendant later came up with a claim to part “B” of the building as having belonged to the estate of his late father Agotre Charles. He forcefully took possession of that part of the building and let it out to tenants. He ignored all notifications from DAPCB to vacate the building (Exhibit P.E.15). He rejected attempts by the RDC to settle the matter out of court (Exhibit P.E.16). Wadria Yowana died during the year 2012.

P.W.2 Andebo Santos, the plaintiff’s Manager since 1992, testified that the plaintiff is the rightful owner of the contested property because it paid the full purchase price. He was one of the signatories to the agreement between the plaintiff and Wadria Yowana for presenting a joint bid for purchase of the property. When the bid was won, the plaintiff proceeded to pay the 10% down payment and the balance of the purchase price in instalments. Wadria Yowana paid only shs. 1,500,000/= and failed to raise the balance of his 50% contribution to the purchase price. He later sold off his share in the building to the plaintiff. He was one of the signatories to the agreement of refund. The plaintiff could not occupy the entire building because the defendant started to lay claim to it. He ignored the letter of clarification from the DAPCB. He even refused to heed the advice of the RDC, hence the initial suit before the Magistrates’ Court, which was dismissed for want of prosecution and the plaintiff made to pay costs amounting to shs. 5,153,145/= (Exhibits P.E.18 - P.E.20).

P.W.3 Abima Stephen, a nephew to the late Agotre Charles and son of the late Wadria Yowana knew a one Tidir as the original tenant of the contested property. When Tidir defaulted on rent, the DAPCB allocated the building to the late Agotre Charles who paid rental arrears left by Tidir and henceforth paid rent as the sitting tenant for one part while the other part was rented by the plaintiff. When Agotre Charles died in 1989, Wadria Yowana took over until 1995 when the

property was advertised by the DAPCB for sale. Wadria Yowana presented a joint bid with the plaintiff and he was one of the witnesses to the mutual agreement of 10<sup>th</sup> March 1995 that preceded that bid. The parties agreed to share equally the cost of the building and all the costs that would be involved in the acquisition. Wadria Yowana contributed shs. 1,500,000/= towards the purchase price and having failed to raise the balance, sold off his interest to the plaintiff, who refunded his 1,500,000/= and thereby became the sole owners of the building. Wadria Yowana vacated part “B” of the building but the defendant forcefully occupied it claiming it was owned by his late father.

P.W.4 Augusto Osoa, a businessman dealing in hardware who worked with the late Wadria Yowana as a tenant on part “B” of the contested building from 1990 after the death of Agotre Charles, testified that Wadria Yowana occupied that part after he had cleared outstanding rental arrears left by the late Agotre Charles. When the building was advertised for sale, Wadria Yowana presented a joint bid with the plaintiff. He was one of the witnesses to the mutual agreement of 10<sup>th</sup> March 1995 that preceded that bid. Having failed to raise their part of the purchase price, he and Wadria Yowana accepted a refund of the shs. 1,500,000/= they had paid and relinquished their interest to the plaintiff. He was one of the signatories to the agreement of refund. The defendant evicted the plaintiff from part “B” of the building claiming that the building belonged to his late father.

On his part, the defendant testified and called two other witnesses to support his defence. In his testimony, D.W.1. Tabu David stated that he was not a trespasser on the contested property. The property was previously occupied by his late father Agotre Charles who died on 6<sup>th</sup> April 1989 at which time the defendant was 11 years old. On 28<sup>th</sup> June 2000 the defendant was granted letters of administration to the estate of his father (Exhibit D.E.1). His late father used to rent the property from the DAPCB and he operated business thereon of general merchandise. When he died, his brother Wadria Yowana took over the property and sublet it to other tenants. He sold off some items of the estate of the deceased such as the pick-up and a tractor to raise money to pay the purchase price after it had been put up for sale. Wadria Yowana bid for the property as caretaker on behalf of his deceased father. The certificate of purchase was issued jointly in his late father’s names and those of the plaintiff (Exhibit D.E.2) and so was the title deed (Exhibit

D.E.3). When he obtained the letters of administration, he asserted his interest in the property by notifying the tenants. He opposed the purported sale by Wadria Yowana of his father's interest in the building and on 15<sup>th</sup> September 2000 he took over management of the part that belonged to his father. The plaintiff wrote him a letter claiming that it had bought the entire building (Exhibit D.E.4).

D.W.2 Lifu Yowana a brother of the defendant testified that Agotre Charles died on 6<sup>th</sup> April 1989 but before his death he was a businessman dealing in general merchandise at the building now contested. After his death, Wadria Yowana took over and managed the business. When the defendant became of age, he occupied the building.

D.W.3 Okwonga Oyake Justin was the in charge of rent collection on behalf of the DAPCB in West Nile, as a clerk with M/s Rwingweji and Company Advocates, a role he began to discharge in 1986. At the time, the plaintiff was renting plot 3A while 3B was being rented by Agotre Charles. In 1997, the plot was advertised for sale. The plaintiff and the late Agotre Charles presented a joint bid which turned out to be successful. It is him who advised the plaintiff and Wadria Yowana to bid in the name of the deceased Agotre Charles because he was the known sitting tenant and priority would be given to sitting tenants. They paid the purchase price jointly and DAPCB issued a certificate of purchase in their joint names. He handed the building over to both purchasers but a dispute erupted later between them which the RDC attempted to settle without success.

In his final submissions, counsel for the plaintiff argued that the plaintiff is the lawful owner of the land and building because the other party in the joint bid was dead at the time of the transaction. Using his name in the transaction was on basis of wrong advice given to the plaintiff by the DAPCB and D.W.3. This was a mistake of fact which did not vitiate the transaction. It is the plaintiff who paid the entire purchase price and the estate of the defendant's father did not contribute anything. The amount Wadria Yowana had paid was refunded to him and therefore the defendant has no basis for claiming any interest in the property and his presence thereon constitutes trespass to the land. In the event of annulling the transaction, each party should bear its costs. On his part, counsel for the defendant, Mr. Okello Oyarmoi submitted that whatever the

decision of court on the substantive issues, the costs of the suit should be awarded to the defendant.

In their joint scheduling memorandum, the parties agreed on the following issues;-

1. Whether the plaintiff is the owner of the suit land.
2. Whether the defendant is a trespasser on the plaintiff's land.
3. What remedies are available to the parties?

Regarding the first issue, proof of ownership of registered land is by way of presenting a valid certificate of title since according to section 59 of *The Registration of Titles Act*, a certificate of title is 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 photocopy of the title to the contested land in this case was attached to the plaint and marked as annexure "D" and eventually tendered in court as exhibit D.E.3. It is in respect of Leasehold Register Volume 61 folio 10 Plot 3 Adumi Road and it was issued on 30<sup>th</sup> November 1926. According to the *habendum* clause on the face of the title, the lease was to run "for 49 years from the first day of September 1926." That being the case, on the face of it the title expired on 1<sup>st</sup> September 1975, upon effluxion of the term of the lease. At common law, the lease simply ends at midnight on the last day of the term (see *Re Crowhurst Park [1974] 1 WLR 583*).

That notwithstanding, this property was vested in government and entrusted to the management of DAPCB by sections 2 and 3 of *The Assets of Departed Asians Act, Cap 83* and for that reason this common law principle did not apply to it. This is because according to section 2 (2) (b) of *The Expropriated Properties Act, Cap 87*; -

where any property affected by this section was at the time of its expropriation held under a lease or an agreement for a lease, or any other specified tenancy of whatever description, and where the lease, agreement for a lease or tenancy had expired or was terminated, the same shall be deemed to have continued, and to continue in force until the property has been dealt with in accordance with this Act, and for such further period as the Minister may by regulations made under this Act prescribe.

The contested property in this suit having been expropriated property, the lease which expired on 1<sup>st</sup> September 1975, was by operation of the law deemed to have continued in force and managed by the DAPCB until the property was dealt with by the Minister of Finance in accordance with the Act. This dealing occurred on 3<sup>rd</sup> July 1997 when the Minister issued a Certificate of Purchase in the joint names of Agotre Charles and the plaintiff, as tenants in common in equal shares (Exhibit P.E.12). That became the commencement date for the extended term “for such further period as the Minister may by regulations made under this Act prescribe.”

According to regulation 13 of *The Expropriated Properties (Repossession and Disposal) (No.1) Regulations S.I. 87-8*:-

For the purposes of section 2 (2) (b) of the Act, every expired lease, agreement for a lease or other tenancy shall be deemed to continue, after the property has been dealt with in accordance with the Act, for a further period of two years or a period equivalent to the unexpired period of the lease, agreement for a lease or tenancy at the time of expropriation of the property whichever is the greater period.

Since the expropriation of this property occurred in 1973 with the coming into force of *The Assets of Departed Asians Decree, 1973*, at which time the lease was left with two years to run, the two year extension conferred by the above provision means that the lease finally expired on 3<sup>rd</sup> July 1999, being two years after it was dealt with by the Minister.

The lease was subsisting at the time the last entry of 6<sup>th</sup> November 1998 was made by virtue of which the plaintiff and Agotre Charles became the registered proprietors. During the trial, the plaintiff however did not adduce any evidence of any extension of that term that has ever been made since then. On the face of these facts, the plaintiff commenced the suit under a misapprehension that the leasehold subsisted whereas not. I have no basis upon which to infer that the expired leasehold was revived or extended. When a lease expires, the land automatically reverts to the owner (see *Dr. Adeodanta Kekitiinwa and three others v Edward Maudu Wakida, C.A. Civil Appeal No 3 of 2007*) and this would deprive the plaintiff of *locus standi* to commence this suit as owner of the property.

The contested land in this suit comprised a leasehold on former Crown Land which by virtue of *The Public Lands Act, 1969* became public land, managed either by The Uganda Land Commission or the urban authority in Arua, as the designated controlling authorities under the Act. Either way, considering that Article 286 of *The Constitution of the Republic of Uganda, 1995* abolished statutory leases to urban authorities, and that section 59 (8) of *The Land Act, Cap 227* authorised the District Land Board to hold in trust for the citizens, the reversion on any lease to which subsection (1) (c) relates and to exercise in relation to the lease and the reversion the powers of a controlling authority under the *Public Lands Act, 1969*, as if that Act has not been repealed, the reversion in respect of this land is vested in the Arua District Land Board. Section 59 (1) (c) of *The Land Act, Cap 227*, authorised the District Land Board to “take over the role and exercise the powers of the lessor in the case of a lease granted by a former controlling authority,” where section 1 (m) of the same Act, defines a “former controlling authority” to mean the Uganda Land Commission or a designated authority in existence before the coming into force of the Constitution. For all intents and purposes therefore, when the extended term of the lease expired on 3<sup>rd</sup> July 1999, the reversion vested in the Arua District Land Board and the plaintiff ceased to have any legal interest in the land.

That aside, the circumstances surrounding the plaintiff’s acquisition of the property were tainted by fraud which on its own would justify the cancellation of this title, had the lease been still running. Although none of the parties pleaded fraud, it is trite law that “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 admissions made thereon,” (see *Makula International Ltd v His Eminence Cardinal Nsubuga and Another [1982] HCB 11*).

According to section 77 of *The Registration of Titles Act*, any certificate of title, entry, removal of encumbrance, or cancellation, in the Register Book, procured or made by fraud, is void as against all parties or privies to the fraud. Similarly, section 176 (b) of *The Registration of Titles Act* allows actions for recovery of land against the person registered as proprietor under the Act where that person was registered as proprietor of that land through fraud. For that reason, any person who fraudulently procures, assists in fraudulently procuring or is privy to the fraudulent procurement of any certificate of title or instrument or of any entry in the Register Book, or



knowingly misleads or deceives any person authorised to require explanation or information in respect to any land or the title to any land under the operation of the Act in respect to which any dealing is proposed to be registered, that person commits an offence by virtue of section 190 (1) of *The Registration of Titles*. The combined effect of all these provisions is that fraud in the transaction will vitiate a title.

For fraud to form the basis of impeaching a title, it must meet the requirement stated in *Kampala Bottlers Limited v Damanico (U) Limited, S.C. Civ. Appeal No. 22 of 1992*, where it was held that such fraud must be:

attributable 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. ... Further, 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.

Fraud in land transactions has been variously defined as; “fraud implies some act of dishonesty,” (see *Waimiha Saw Milling Co. Ltd. v Waione Timber Co. Ltd. [1926] AC 101 at p. 106*), “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 suggestions or suppression of the truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated,” (see *Frederick Zaabwe v Orient Bank and five others, S.C. Civil Appeal No. 4 of 2006*), “dishonest dealing in land or sharp practice intended to deprive a person of interest in land, including unregistered interest,” (see *Kampala District Land Board and another v Venansio Babweyaka and others, S.C. Civil Appeal No.2 of 2007*) and “fraud is defined as an act or conduct of obtaining a material advantage by unfair or wrongful means. It involves moral obliquity... Fraud is proved when it is shown that a false representation has been made (a) knowingly or (b) without belief in its truth or (c) recklessly, careless whether it be true or false,” (See *Imelda Ndiwalungi Nakedde v Roy Busulwa Nsereko and another, [1997] HCB 73*). The list goes on but the essence is that material dishonesty will constitute fraud.

In the instant case, whereas the plaintiff had by the agreement dated 10<sup>th</sup> March 1995 (Exhibit P.E. 1) arranged with Wadria Yoana to jointly purchase the property, the plaintiff instead chose from that point forward to name a one Agotre Charles as its co-purchaser yet it was aware at all material time that Agotre Charles had died six years earlier, on 6<sup>th</sup> April 1989. The plaintiff nevertheless went ahead to make a joint bid with “him” (see the testimony of P.W.1 – P.W.4), paid for the bid documents with “him” (Exhibit P.E. 17), executed the sale agreement with “him” named as a party (Exhibit P.E. 2), made a refund of the purchase price to “him” through Wadria Yoana (exhibit P.E. 13), and this culminated in the issuance of a certificate of purchase (Exhibit P.E. 12) where the deceased was named as co-purchaser of the property and finally a title deed (Exhibit D.E. 1) issued in the joint names of the plaintiff and the deceased, Agotre Charles as tenants in common in equal shares. All this was done initially to enable the plaintiff to get advantage over other potential bidders as a sitting tenant, to secure registration as proprietor of the property and eventually to defeat the claim by the defendant as the administrator of the estate of the late Agotre Charles. Presenting a deceased person as a party to the transaction not only involved a suppression of the truth but also a misrepresentation of a material fact by which an entry in the Register Book was practically procured or made by fraud. That this conduct was based on advice of the DAPCB or its officials does not absolve the plaintiff from complicity in having knowingly made that false representation throughout the transaction. The plaintiff not only knew of the fraud but actively perpetrated it and took advantage of it. The fraud has been proved to the standard required and it is directly attributable to the plaintiff. This would justify cancellation of the plaintiff’s title.

On the other hand a deceased person lacks contractual capacity and a contract made in the name of a deceased person will be void. It was therefore erroneous to involve Agotre Charles in the transaction leading to the acquisition of the title. Conveyancing registered land for the benefit of an estate of an intestate deceased person can only be done by a holder a grant letters of administration. There is no evidence that Wadria Yoana was the holder of such grant when he executed documents in the name of, for and on behalf of the deceased Agotre Charles. The grant in respect of his estate was made to the defendant on 28<sup>th</sup> June 2000 (Exhibit D.E.1).

Even then, assuming for the sake of argument that the title was not vitiated by fraud, the plaintiff still owned it as a tenant in common with Agotre Charles and not solely. Tenants in common who survive the death of any other tenant do not have a claim to the deceased tenant's share simply because they are surviving joint owners. When a tenant in common dies, that tenant's share of the property becomes an asset of the deceased owner's estate and is transferred to the heirs designated in the deceased owner's will or under the intestate law. In this case it was the intention of the plaintiff, through its collaboration with Wadria Yoana, to revive and convert what had hitherto been Agotre Charles' right *in personam* as tenant to the DAPCB that terminated upon his death, into a registerable interest in the land as a tenant in common. The consideration paid by Wadria Yoana was on behalf of and in the name of Agotre Charles, doubtful as it may be that such a feat could be achieved lawfully.

Nevertheless, when the plaintiff's purpose was achieved, Agotre Charles' interest as a tenant in common devolved onto his legal representative and not Wadria Yoana. According to section 192 of *The Succession Act*, letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death. The defendant therefore would have been entitled to claim as the legal representative of the deceased Agotre Charles and the purported refund to Wadria Yoana would be of no legal consequence since Agotre Charles' registration as proprietor would then only be vitiated by fraud or illegality attributable to him. In that case, the plaintiff's claim against the defendant would be for the balance due from the estate of Agotre Charles towards the purchase price rather than an action for recovery of the land. But as matters stand, all this now is moot.

The reality is that there is no valid leasehold title to the contested land as a result of which the first issue must be answered in the negative. This being an action for trespass to land and recovery of land hinged on proof of title, rather than the tort of trespass as a wrongful entry onto the land in possession of the plaintiff, failure by the plaintiff to prove title is consequentially a failure to prove trespass. The second and third issues are consequently decided in the negative. The plaintiff has not proved trespass by the defendant and is therefore not entitled to any of the reliefs sought. In the suit and counterclaim, both parties set out to seek the aid of court to assert claims founded on a fraudulent transaction in respect of property whose title has long expired.

The process of court cannot be used to perpetuate an illegality or fraud. By operation of the law, the contested land vests in the Arua District Land Board in trust for the citizens and it is that Board that has power to deal with the land. None of the parties has established lawful claim to it. For the foregoing reasons, both the suit and the counterclaim are hereby dismissed. Since both parties' hands are soiled, each party is to bear its costs.

Dated at Arua this 3<sup>rd</sup> day of November 2016.

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Stephen Mubiru

Judge