THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 132 OF 2011

CONSOLIDATED WITH HCCS NO. 57 OF 2011.

KANSIIME K. ANDREW:: PLAINTIFF

VERSUS

HIMALAYA TRADERS & 7 OTHERS :::::::::::::::::: DEFENDANTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

J U D G M E N T:

This is judgment in *HCCS No. 132 of 2011* consolidated with *HCCS No. 57 of 2011*. Kansiime K. Andrew, the plaintiff in the former suit and defendant in the latter suit, sued M/s Himalaya Traders Ltd, Kamu Kamu Associates Ltd, Treasure Trove (U) Ltd., Tejwant Singh, Gulzar Singh, Jamil Kiyemba, the Commissioner for Land Registration, and the Uganda Land Commission(ULC) *(the 1st – 8th defendants respectively)* jointly and severally. He seeks a declaration that he is the rightful owner of land now comprised in in Plots 20-30 Saddler Way Lugogo Bypass Naguru *(hereinafter referred to as the "suit land")* a permanent injunction restraining the defendants, their agents and or servants from evicting him from the suit land and from further registering or transferring any leases, selling, or otherwise alienating the suit land, a declaration that the 1st – 6th defendants procured their respective leases through fraud, an order directing the 7th defendant to cancel the certificates of title in respect of LRV 4105 Folio 3 Plots 20 – 22, LRV 4172 Folio 5 Plot 30, LRV 4172 Folio 5 Plot 24, LRV 418 Folio 9 Plot 28 Saddler Way Lugogo Bypass, and to effectively register the said leases in the plaintiff's name, general damages, interest, and costs of the suit.

Background:

That plaintiff's case is that he has since 1994 occupied and utilized the suit land measuring approximately 3.0 acres for sustenance. That he thereby acquired a customary interest and/ or as a Kibanja holder and a bona fide occupant thereon. He further averred that the High Court granted him the suit land by a decree in *HCCS No. 284 of 2008,* in which it declared, inter alia, that is the rightful owner of the suit land which exclusively belongs to him. The court also issued a permanent injunction restraining the ULC from granting a lease of the suit land to any other persons, an order that the plaintiff's possession should not be interfered with specifically that part on Saddler Way opposite Kampala Parent School, Naguru measuring approximately 2.0 acres.

The defendants in *HCCS No.284 of 2008* were one Tom Butime and ULC. Tom Butime in 2006 or thereabout, applied for a lease for land adjacent to the suit land and included part of the suit land in the application. During the hearing of the suit, however, Tom Butime consented with the plaintiff and excluded the part claimed by the plaintiff from the lease application. It is upon that suit that the court issued the decree.

The plaintiff contends that despite being served with the said decree, ULC went ahead to grant leases to the 1st 2nd 3rd and 6th defendants in the suit land. Also, that the 7th defendant with no lawful reason and in concert with ULC went ahead to execute and register leases in the defendants' respective names ignoring the plaintiff's lawful interest in the suit land.

The plaintiff further contends that he has since obtaining the said decree tried to register his interest. That he obtained recommendations from the LCs of the area to the Area Land Committee; which advised him to forward his application through ULC, which has, however, constantly frustrated his effort to apply and register a lease in the suit land he has developed from

approximately 2.0 acres to now about 3.0 acres after complying with the National Environmental Management Authority (NEMA) regulations.

The plaintiff also avers that he has invested heavily in reclamation, drainage and landfill of the suit land to the tune of UGX 280,000,000=, and that he is in effective occupation thereof operating a car washing bay licensed by Kampala City Council. Further, that he was advised by the Kampala District Land Board (KDBL) that the suit land belong to the Board, and that it was an error for him to have referred his application to ULC. That actually KDLB granted him a lease which he accepted by paying premium and ground rent of UGX 220,000.000=. That the Commissioner Land for Administration, however, advised that the grant by KDLB was erroneous as the Board did not own the suit land. That ULC was the proper authority that owns the suit land, which could regularize and issue a proper lease to the plaintiff.

The plaintiff alleges that the 1st - 6th defendants obtained leases in the suit land by fraud as they had both actual and constructive notice of his occupation and developments thereon. Further, that the 7th defendant fraudulently and in collusion with ULC issued leasehold certificates of title in the suit land to the 1st 2nd, 3rd and 6th defendants without any lawful reason. Also that ULC in utter contempt of court order alienated the suit land by granting leases to the said defendants, and that the respective lease titles should be cancelled on account of fraud and the plaintiff's name be registered thereon instead.

The defendants in their respective defences denied the plaintiff's claim and allegations of fraud against them. The 1st defendant averred that it properly acquired Plot 20 -22 in the suit land by applying to the rightful occupiers and owners; Kololo S.S.S, the Ministry of Education, and ULC. That the 1st defendant became registered thereon for value without any fraud on its part. Further, that the decree in *HCCS No 284 of 2008* is null and void as ULC which was party in that

suit was never served with any court process. That the plaintiff simply compromised with one of the defendants therein, Tom Butime, which could not bestow any right on the plaintiff in the suit land. Also that at the time the 1st defendant applied for and got issued with a lease on the suit land, the plaintiff was not in occupation nor had he fully developed that particular Plot 20 -22 as he claims. The 1st defendant totally denied the plaintiff's claim of bona fide occupancy on the suit land.

The 2nd defendant also averred that it acquired the lease in in Plot 30 in the suit land bona fide. That the plot is, however, now unlawfully occupied and developed by the plaintiff. That Plot 30 did not form part of the 2.0 acres which the plaintiff claims to have been decreed in *HCCS No. 248 of 2008*. Further, that Plot 30 is not specifically opposite Kampala Parents School, and is it therefore different from what is stated in the decree. The 2nd defendant denied that the plaintiff is a bona fide occupant or customary tenant on the suit land.

The 3rd defendant averred that it lawfully acquired a lease in the suit land from ULC for Plot 24 bona fide for value without notice of any fraud or competing claims. That in due course, without any incumberances or notice of any equitable claims or estate whatsoever, the 3rd defendant sold and transferred its interest to the 4th and 5th defendants. The 3rd defendant specifically avers that it entered upon Plot 24 in February, 2011 when the plaintiff was not in occupation or utilization of that particular plot. The 3rd defendant denied having had any notice of the plaintiff's interest in Plot 24 as the same never brought to their attention. That also the decree in *HCCS No 218 of 2008* was never registered as an incumbrance on the Register of Titles.

The 4th and 5th defendants contended that they are bona fide purchasers for value for Plot 24 from the 3rd defendant without notice of fraud, if any. That the sale and hand over to them of Plot 24 was witnessed, on 19/12/2010, by PW2 the LC1 Chairman of Kiwalimu Village Naguru under

which the suit land falls. That neither at the said hand over or subsequently; did the LCs or anybody else mention or indicate or protest that Plot 24 was a Kibanja or customary interest of the plaintiff or anyone else.

As can be seen, the parties adduced evidence by themselves and their respective witnesses. It is on court record hence it is not necessary to reproduce it in detail in this judgment. The plaintiff was represented by Mr. Geoffrey Nangumya, the 1st defendat by Dr. Byamugisha Joseph, the 2nd and 6th defendants jointly by Mr. Lwanyaga Moses and Mr. Swabur Marzuq, the 3rd, 4th and 5th defendants by Mr. Kalenge. Counsel for the parties argued the case by filing written submissions. I am thankful to them for supplying to court the authorities they relied on. They also filed a joint Scheduling Memorandum and agreed on the following issues for determination;

1. ***Whether Kansiime K. Andrew had occupied and utilised the suit land since 1994.***
2. ***Whether the plaintiff became a customary tenant or bona fide occupant of the suit land.***
3. ***Whether the 1st – 6th defendants obtained their titles in the respective plots through fraud.***
4. ***Whether the 7th defendant committed any fraud in the issuance of the respective certificates of title.***
5. ***What reliefs are available to the parties?***

Resolution of the issues:

Issue No.1: Whether Kansiime K. Andrew had occupied and utilized the suit land since 19994.

This is essentially an issue of fact and evidence. The plaintiff's contends that that he had occupied and utilised the suit land since 1994. It should be noted that the suit land in contention is about 3.0 acres. PW1, Hajji Ahmed Matovu, the LC1 Chairman of Kiwalimu Village Naguru

in Nakawa Division, testified that the plaintiff has been in occupation cultivating land on Saddler Way next to Kololo S.S.S and Kampala Parents Primary School since 1994. That later in 2007 the plaintiff extended and developed the land by back -filling it with murram because it is a wetland. That he later fenced it off in addition to constructing a building there. PW1 confirmed that the plaintiff compensated neighbors who also later on sold to him land and he expanded the area he was using.

PW2 Kanyonyi Mobone Charles testified that he had been cultivating on the suit land since 1999 having got it from his brother who also used to cultivate it since 1969, but left it to him. That he sold his portion of about an acre to the plaintiff who started using it since then. That he sold the land to the plaintiff for Shs.200,000/= without the permission of anyone. That being a wetland, PW2 had all along thought it was a "no man's land", with no owner. PW2 noted that the part he sold was partly opposite Kampala Parents School near the drainage.

PW3 Mpambala John Kabusha, a KCCA Physical Planner testified that in 2008, along with a team of NEMA officials from Nakawa Division visited land now comprised in Plots 20-30 Saddler way Lugogo Bypass opposite Kampala Parents School. That the visit followed a complaint against the plaintiff for back -filling a wetland with murram to set up a car bond, yet he had only been permitted by Nakawa Division authorities to put up a car washing bay. That the back - filling raised environmental concerns as it was close to Lugogo channel hence the plaintiff was stopped until NEMA gave clearance. PW3 stated that at the time of inspection of the suit land in 2008, the plaintiff had just erected a metallic chain link fence and a small wooden office on an area of about 3.0 acres.

PW4 Ogwang Peter also testified that in 2007, he sold a portion on the suit land measuring less than one - third of an acre to the plaintiff and Mr. Butime. That since then, the plaintiff took over the use and occupation of that part of the land.

The defendants, for their part, led evidence of DW1 Kisampalli Koeswara Radhayan, the Director of the 1st defendant company. He testified that prior to the approval by ULC of the 1st defendant's application for a lease on part of the suit land in 2010; he inspected the land and found it empty. That it was a marshy area only with bushes and garbage being dumped there. The evidence of DW1 was corroborated by DW2 Kintu Ssemakuku Balaam Mubbala, the former Secretary of ULC at the time. He stated that around 2010 after receiving the application of the 1st defendant, among other applications, for a lease on the suit land, the Commission members visited the land and found it vacant and not utilized by anybody. That it was an empty marshy area with only bushes.

DW3 Lucy Kabenge, a Valuation Surveyor in both Government and private practice, testified that in 2010 she visited the suit land on instructions of the 1st defendant to value the 1st defendant's land in Plot 20 -22 for mortgage purposes. That she found the land all bushy and not under occupation or utilisation of anybody. DW3 made a report; *Exhibit P7* dated 15/06/2010, to which is attached a photograph of the 1st defendant's land and the surrounding area taken while at the site. It shows the status of the suit land as empty and bushy with trees.

DW4 Paul Idude, a Principal Land Officer, and Acting Secretary ULC, also testified that in 2010, when ULC received various applications for leases on the suit land from the defendants, the ULC members visited and inspected the suit land; part of which was later plotted as Plot 20-30 Saddler Way Lugogo Bypass. PW4 stated that the whole of the suit land was at the time vacant and not utilized or occupied by anyone.

The evidence on this issue evaluated together manifests a largely consistent and distinctively common element that as of 2010, the suit land was not under occupation or utilisation of anyone. It would also appear quite clearly from the evidence of PW1 that the only portion of the suit land the plaintiff is stated to have acquired in 1994 was less than a third of an acre. While it is less than clear as to whether the particular portion was under any occupation by the plaintiff, it is quite evident that in 1994 or soon thereafter, the plaintiff did not occupy the whole of 3.0 acres now comprised in Plots 20 – 30; which is in dispute. This inference is drawn, inter alia, from *Exhibit P1* a letter by the LC1 Chairman of the area recommending the plaintiff to the Land Board for allocation of a lease on the suit land. It is date 26/08/2008. It is also noted that PW1 witnessed on other *Exhibits P13 (a) & (b);* all of which are dated in 2008. PW1 is in evidence as having been present on 19/12/2010 and even witnessed the handover of Plot 24 by the 3rd defendant to the 4th and 5th defendants. He did not stop the transaction between the 3rd , 4th and 5th defendants in Plot 24 or make mention of the plaintiff as owner of that part of the land yet Plot 24 is an integral part of the suit land now under contention. These facts invariably contradict any claim of the plaintiff of having been in occupation utilising the suit land any time prior to 2008.

The conclusion above is further fortified by plaintiff's pleadings in his reply to the Written Statement of Defence, particularly of the 6th defendant. The plaintiff avers therein having enlarged the size of the suit land in 2008 by the inclusion of land now in Plots 28 and 30, which he concedes he reclaimed from the surrounding wetland. That admission reinforces the view that he did not; and could not have occupied the entire 3.0 acres of the suit land in 1994 or any time prior to 2008. The plaintiff is thus estopped from attempting to depart from what he pleaded to claim the contrary that he occupied all of the 3.0 acres in 1994. Order 6 r.7 of the Civil Procedure Rules (CPR) embeds a rule against departure from pleadings as follows;

"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

This provision was duly considered and applied in ***Struggle (U) Ltd vs. Pan Africa Insurance Co. Ltd (1990) KLR 46-47,*** where it was held that parties are bound by their pleadings and cannot be permitted to depart from what they have pleaded. The plaintiff has failed to prove on balance of probabilities that he occupied the "suit land" in 1994. *Issue No.1* is answered in the negative.

Issue No. 2: Whether the plaintiff became a customary tenant or bona fide occupant of the suit land.

Customary tenure is defined under Section 1 (l) of the Land Act Cap 227 as follows;

"(l)"customary tenure" means a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which are described in section 3…"

Section 3 (supra) to which above definition makes reference provides for incidents of forms of customary tenure as follows;

"3. Incidents of forms of tenure.

(1) Customary tenure is a form of tenure—

(a) applicable to a specific area of land and a specific description or class of persons;

(b) subject to section 27, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;

(c) applicable to any persons acquiring land in that area in accordance with those rules;

(d) subject to section 27, characterised by local customary regulation;

(e) applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land;

(f) providing for communal ownership and use of land;

(g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and

(h) which is owned in perpetuity."

Going by the above stated incidents of customary tenure it is clear enough that customary tenure applies to a specific area and specific group of people and can be established by any activity on the land. It is, however, not sufficient for a person merely to carry out activities on land for however long the period, but a person claiming to be a customary tenant must prove that in that area, it is a custom that whoever carries out certain activities for a specific period of time becomes a customary owner. This position was re- affirmed by the Supreme Court in the case of ***Kampala District Land Board & Another vs. Venansio Babweyaka & 3 Others SCCA No.2 of 2007.***

Furthermore, Section 46 of the Evidence Act, Cap 6, provides that where a court has to form an opinion as to the existence of any general custom or right, persons who would be likely to know of its existence, are relevant. A similar stance was taken in ***R. vs. Ndembera S/o Mwandewale (1947) 14 EACA 58,*** where it was held, inter alia, that native custom must be proved in evidence and cannot be obtained from assessors or supplied from the knowledge and experience of the trial judge.

Section 101(1) and (2) of the Evidence Act also encapsulate the principle which has come to be that "he who alleges must prove". In the instant case, the burden of proving that he occupied and or utilized the suit land as a customary tenant lies on the plaintiff who alleged the same. It noted that no particular or specific evidence was led by the plaintiff in proof of this issue. The plaintiff primarily relied on PW8, Moses Kamoga who testified that he was the Chairman of the Area Land Committee Nakawa Division who recommended the plaintiff to KDLB in letter dated 31/10/2009, as owner and occupant of the Kibanja on the suit land.

From the definition of customary tenure, a Kibanja is not defined as one of the incidents of customary tenure. It should be emphasized that merely being a Kibanja holder does not *perse* establish customary tenure in the land. Cogent evidence must be adduced within the requirements of Section 46 of the Evidence Act (supra) for one to fall within the ambit of the legal definition of customary tenant. Therefore, the testimony and contents of the letter by PW8 are not relevant to the issue.

Counsel for the plaintiff, Mr. Nangumya, submitted that the plaintiff proved having acquired and occupied the suit land in 1994 having acquired it from predecessors who occupied it since 1969 about 24 years before the coming into force of the 1995 Constitution. That he developed and utilized the suit land unchallenged by the registered owner thus he become a bona fide occupant /tenant by occupancy/customary tenant. Mr. Nagumya also asserted that the evidence of PW1, PW2 PW3 and PW7 as well as DW1 and DW5 proves the plaintiff as a bona fide occupant

I find these arguments rather erroneous and misleading. Firstly, counsel seems to make no clear distinction between a customary tenant and bona fide occupant, yet the two are legally provided for differently. Secondly, his assertion that the evidence of PW1, PW2 PW3 and PW7 as well as

DW1 and DW5 proves the plaintiff as a bona fide occupant or customary tenant is not true at all. The reading of their evidence does not lead to any such conclusion that plaintiff is either a bona fide occupant or customary tenant on the suit land. In their respective testimonies none of them ever at any one time even remotely allude to any type of tenure of land holding by the plaintiff on the suit land. It was improper to attempt to attribute evidence to them which they never adduce at trial.

In the case of ***Kampala District Land Board vs. Vanancio Babweyaka & O'rs*** (supra) the Supreme Court gave guidance that that where customary law is neither well - known nor documented, it must be established for court's guidance by the party intending to rely on it. Further citing the case ***Ernest Kinyanjui Kimani vs. Muira Gikanga [1965] EA 735,*** the learned Justices of the Supreme Court went on to hold that as matter of practice and convenience in civil cases, relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties.

As these principles apply to the instant case, the plaintiff has not shown that he falls within any of the incidents of customary tenure described under the law. There is no evidence to suggest that he was part of; or that there was a class of persons who utilised the suit land under a certain particular custom or culture. None of the witnesses rendered opinion as an expert or as a person proving the customary use of land in the very area where the suit land is situate. The plaintiff's evidence totally failed to establish his interest in the suit land as a customary tenant.

It is necessary also to point out that as an established fact, the suit land is located in an urban area in Kampala City. The plaintiff could not purport to have acquired land under a customary tenure on land in an urban area from his predecessors in 1994. The law in force at that time was the Public Land Act 1969 and Land Reform Decree 1975. Section 24(1) (a) of the Public Land Act

(supra) specifically prohibited customary tenure on land in urban areas. This prohibition could be extended to other areas, especially rural areas by the Minister responsible pursuant to the Public Land (Restriction of Customary Tenure) Order 1969, SI 103 of 1969.

Mostly importantly, Section 5(1) of the Land Reform Decree (supra) declared all land in Ugandan to be public land to be administered by the ULC in accordance with the Public Land Act 1969, subject to such notifications as may be necessary to bring that Act into conformity with the Decree. The Decree allowed the system of occupying public land by customary tenure only at sufferance. Any such land could be granted by ULC to anyone in accordance with the Decree.

On the same point, under the Land Reform Regulations 1976, a person wishing to obtain permission to occupy public land by customary tenure had to apply to the sub-county chief in-charge of the area where the land is situate, and after processing the application, it had to be sent to the sub-county Land Committee for approval.

In the instant case, even assuming that the plaintiff acquired all the 3.0 acres of the suit land in 1994, which is not the case, he could not have acquired customary ownership given the legal regime existing as at that time. The legal restriction on customary tenure under the Public Land Act (supra) and the Land Reform Decree (supra) continued to apply to all types of public land. For one to acquire fresh customary tenure, one had to apply to the prescribed authorities and obtain approval of his or her application.

In the instant case, there is not a shred of evidence of such an application to the prescribed authorities by the plaintiff or his predecessors to acquire fresh customary tenure. Similarly, there is no evidence of approval of the plaintiff's application or that of his predecessors to acquire

fresh customary tenure in accordance with the land Reform Decree (supra) for them to have qualified as customary tenants in 1994.

The same principle applies to the less than one - third of an acre which the plaintiff is stated to have purchased from PW1. It too could not be held under a customary tenure for the same reasons assigned above. Most importantly, customary tenure being a form of tenure owned in perpetuity in accordance with Section 3 (h) of the Land Act (supra) it could not legally be held on a freehold tenure which is tenure also owned in perpetuity. The two are cannot legally co-exist, them being interest that are legally mutually exclusive. Therefore, the plaintiff could not have legally acquired customary tenure in an urban area in Kampala City on a freehold titled land prior to the enactment of the 1998 Land Act. He fails the legal test as a customary tenant.

The second limb of the issue pertains to the plaintiff's claim as a bona fide occupant. Section 29(2) of Land Act defines a bona fide occupant as follows;

> ***"(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;…"***

As already found under *Issue No. 1* above, the suit land covers an area of about 3.0 aces comprised in Plot 20 -30 Saddler Way Lugogo Bypass, Naguru. PW1 stated that he sold to the plaintiff a small part of the suit land in 1994 prior to the coming into force of the 1995 Constitution. Evidence of other witness on both sides amply shows that the plaintiff extended and laid claim to other pieces on the suit land; for which he applied to KDLB for a lease, only in 2008 and thereafter. The plaintiff concedes to have reclaimed these other pieces from the surrounding marshy area after compensating the former occupants whose sale agreements further prove that the plaintiff extended the suit land in 2008 and thereafter. Therefore, apart from the

part which the plaintiff purchased from PW1, which was less than one - third of an acre, he could not have been in occupation of the remaining part of the suit land twelve years prior to the coming into force of the 1995 Constitution for him to qualify as a bona fide occupant.

Even for the part PW1 sold to the plaintiff, there is hardly any evidence to suggest that PW1 himself occupied it or owned it lawfully to have passed a lawful interest therein to the plaintiff. By operation of the law in force at the time, PW1 was occupying registered land for which he required the consent of the registered proprietor. He did not adduce any evidence to show that he occupied that part of the suit land with the consent of the registered proprietor ULC.

Similarly, PW4 who sold to the plaintiff in 2007 also did not show that he occupied or transferred to the plaintiff with consent of the registered owner the ULC. In fact PW4 did not even know who the land was titled land and belonged to ULC. He thought the suit land was "no man's land" and belonged to no one. This is what invariably informed his thinking in selling to the plaintiff in 1994. However, as it is now known, the suit land was, and is registered land under the operation of the Registration of Tiles Act (supra). It is not even public land. It has a freehold title registered in the name of the ULC for land comprised in FRV 219 Folio 20 Plot 41, 59 and Plot 60-68 Lugogo Bypass, restricted to the user "Ministry of Education & Sports, Kololo S.S.S".

Even assuming that PW4 had obtained the consent of the registered owner, which he did not, he would still not qualify as a bona fide occupant within the context of Section 29 (2) (supra) as he fell outside the required twelve years prior to the coming into force of the 1995 Constitution. Therefore, he too had no lawful interest in the suit land which he could pass to the plaintiff in 2007.

Regarding the other purported vendors, it variously featured in their respective compensation agreements, *Exhibits P.13 (a)* and *(g)* that the plaintiff compensated them for their respective portions on the suit land in 2008. Like in case of PW4, there is no evidence that they came on to the suit land or sold land to the plaintiff with the consent of ULC the registered owner. Merely having been on land for however long the period would not in itself confer on them the right to sell and transfer land to the plaintiff without the consent of the registered owner. Since they had no lawful interest in the suit land which they could pass to the plaintiff, the purported sale to the plaintiff was rooted in illegalities hence void *ab initio*.

The importance of prior consent of the registered owner of land was underscored by the Supreme Court and the Court of Appeal in their respective decisions in ***Kisseka Saku vs. Seventh Day Adventist church SCCA No.8 of 1993;*** and in ***Buwule M vs. Asumani Mugenyi CACA No. 24 of 2010.*** Both Superior Courts held to the effect that any transfer of Kibanja or customary holding without giving notice to the prescribed authority as registered owner renders such a transfer void.

On strengths of the above decisions, the purported vendors could not lawfully sell land to the plaintiff without the consent of the registered owner or prescribed authority. Therefore, the purported sale or transfer is void. The plaintiff would not be accorded the protection of the law under Section 29(2) (v) of the Land Act (supra). *Issue No. 2* is wholly answered in the negative.

Issue No.3: Whether the 1st – 6th defendants obtained their titles in the respective plots through fraud.

The term "fraud" was given judicial interpretation by the Supreme Court in ***Fredrick J.K Zaabwe vs. Orient Bank& Others, SCCA No.4 of 2006***, per Katureebe JSC (as he then was), as;

"…Anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood ... 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 by suppression of truth….and an unfair way by which another is cheated, …. As distinguished from negligence, it is always positive, intentional. It involves all acts…. involving breach of a legal duty or equitable duty resulting in damage to another."

In the earlier decision, the court in ***David Sejjaaka vs. Rebecca Musoke, Civil Appeal No. 12 of 1985*** adopted more or less similar definition of "fraud" in Black Law Dictionary 6th Edition**,** at page 660, as;

> ***"A generic term embracing all multifarious means which humans ingenuity can devise and which are resorted to by one individual to get advantage of another by false suggestions or by suppression of the truth and includes all surprise, trick cunning, dissembling and any other way by which another is cheated."***

In ***Kampala Bottlers Ltd vs. Damanico (U) Ltd, SCCA No.22 of 1992,*** it was also held that fraud must be particularly pleaded and strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters. It was held further held that;

> ***"The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; 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."***

From the evidence on record, the 1st 2nd, 4th 5th and 6th defendants each has in their possession a certificate of title in their respective names for their respective leases on the suit land. Section 59 of the RTA expressly stipulates that the certificate of title;

> ***"…shall be received in all courts <u>as evidence of the particulars therein set forth</u> and of the entry thereof in the Register Book"*** (emphasis is added).

Possession by the defendants of the certificates of title therefore constitutes conclusive evidence of their ownership of the leases on the suit. The onus is thus on the plaintiff who seeks to impeach their titles on account of fraud to adduce evidence proving the alleged fraud to the required standard.

The plaintiff pleaded and particularized fraud in his amended plaint in paragraph 15(a) – (i) against each of the 1st – 8th defendants. The cross – cutting factor is that the 1st – 6th defendants applied for and/ or acquired leases on the suit land when they were fully aware that it was owned, occupied and fully developed by the plaintiff as a bona fide occupant. Secondly, that the defendants disregarded and/or were in contempt the decree in *HCCS No.284 of 2008* in which the High Court had granted ownership of the suit land to the plaintiff. The others is the exclusion of LCs and neighbors and Area Land Committee in the process of applying and granting the leases on the suit land to the defendants.

The latter particulars of the alleged fraud are out rightly dismissed as having no merit at all. There is no legal requirement that a registered owner needs the involvement of LCs or Area Land Committee to create leases on land already registered in his or her name. As earlier noted the suit land is part of land registered as a freehold tenure with a title in the name of ULC restricted for the user of Ministry of Education Kololo S.S.S. Section 64(1) RTA recognises the estate of the registered proprietor as paramount and of priority against all interests or other estates of any

other person in registered land. Therefore, whatever their interest, the LCs and the Area Land Committees have no business whatsoever in titled land which is already registered in the name of a registered proprietor.

Apart from the above, the plaintiff testifying as PW7 stated that one Kalema a Director of the 3rd defendant company hid behind the company he owned called M/s. Treasure Trove, and used his position as Area Land Committee Chairman of Nakawa Division, and instead of processing title for the plaintiff took unfair advantage and issued title to himself and helped all others to get titles from ULC. Other than the plaintiff himself, there is no other witness who testified proving the particulars of the alleged fraud. Mr. Nangumya however, maintained in his submissions that all the defendants had actual and constructive notice of the plaintiff's possession but instead acquired leasehold titles to defeat his interest in the suit land.

At the risk of repetition, the plaintiff has been found to be neither as a bona fide occupant nor a customary tenant on the suit land in *Issue No. 2* above. It has also been found that as at the time the defendants applied for their respective leases, the suit land was not under the occupation or utilisation by the plaintiff or anyone else. Even for the portion the plaintiff purchased in 1994, he illegally acquired it as the person from whom he acquired it had no lawful interest in it to pass to him. Therefore, the question of defeating the plaintiff's interest in the suit land does not arise as he had no lawful interest in the suit land to be defeated.

For their part the defendants adduced evidence as to how each acquired their respective leases. There is no trace of any of the alleged particular fraud that can be even remotely detected in the process leading up to the acquisition of their respective leases and certificates of title. DW1 the Director of the 1st defendant company testified as to how he applied for its part of the lease on the suit land. The Permanent Secretary, Ministry of Education, which is restricted user on the

freehold title of the ULC, gave a "no objection to the allotment of part of the suit land to the 1st defendant. On 24/02/2010, ULC responded, in letter *Exhibit D7,* that they had complied and allotted one acre of the suit land and approved it under *Minute No. 13/2010/39* in their meeting of 4/2/2010. In the due course the 1st defendant was issued with title for Plot 20-22 Saddler Way Lugogo Bypass approximately 0.323 hectares after paying the necessary dues.

DW1 maintained that at the time the 1st defendant was granted the lease, the suit land was unoccupied and had wild grass and was uneven. His evidence was corroborated by DW2, the Valuation Surveyor who confirmed having visited Plot 20 – 22 in 2010 to value the same for mortgage purposes. She confirmed the same having been vacant land with the bulk of the surrounding areas bushy and unutilised. This evidence further dispels the plaintiff's allegations that the defendants were well aware of his occupation and developments at the time, because he was not on the suit land.

DW2 the former Secretary to ULC also confirmed that the when the Commission received the 1st defendant's application for a lease along with applications of the other defendants, ULC sought a "no objection" from the user Ministry which was granted by the PS Ministry of Education & Sports. ULC went ahead and granted a lease to the 1st defendant. DW2 confirmed that the 1st defendant lawfully obtained the lease title for Plot 20-22 Saddler Way. This evidence was corroborated by PW4 the Ag. Secretary ULC corroborated. That the respective leases in Plot 20 – 30 were issued to the defendants in their respective names by the 7th defendant. PW4 identified the respective lease certificates of title and confirmed that they were properly obtained after the defendants duly complied with the legal procedures and requirements which included surveys and payment of Government dues.

PW5, the Registrar of Titles also stated that the defendants lawfully obtained registration on their leases. He clarified that although not noted as incumbrances on the freehold title of ULC; the defendants' leases are not defective on that account, and the omission is rectifiable under Section 91 of the Land Act (supra).

DW6 Tejwant Singh testified that with one Gulzer Singh, they acquired Plot 24 from the 3rd defendant by purchase in 2010. That at that time the 3rd defendant only had a lease offer by ULC. That it was initially for five years and was later extended. That prior to purchasing, they inspected the suit land and found it bushy with rubbish dumped thereon. DW6 maintained that the 4th and 5th defendant are bona fide purchasers for value without notice of fraud, if any.

On strength of all the above evidence on this issue, it is clear that the plaintiff whose duty it was to prove the fraud he alleged against the defendants failed to discharge the burden. As already the plaintiff is neither a customary nor bona fide occupant. He is simply in illegal occupation and cannot claim to own any legally recognisable interest in the suit land.

It has also been shown that the 1st 2nd, 4th, 5th and 6th defendants are the currently the registered proprietors with leases granted by the ULC and certificates of title duly issued by the 7th defendant. Evidence of the Registrar of Tiles put to rest the omission to note the leases as incumbrances on the freehold title. It is legally rectifiable and does not go to the root and cannot impeach the lease titles of the defendants.

The lease titles were further confirmed by PW6, the Commissioner for Land Administration, as having been issued following the due process of survey. This legally gives the titles good root as was held in ***Fr. Narsensio Begumisa & O'rs vs. Eric Tibebaga SCCA No.17 of 2002*** that a proper and lawful survey is the foundation for good root of a registered title.

PW6 also stated that the lease titles were duly issued by the Registrar of Titles. That no law requires the Commissioner for Land Administration to make an input in the process of creating titles. Most importantly, PW6 confirmed that the freehold title is registered in the name of ULC which granted the respective leases to the defendants. It would follow that the plaintiff has failed to discharge the burden of proving any of the particulars of fraud he alleged against the defendants in the process of granting the leases, issuance of titles or acquisition of registration on the lease titles in the suit land.

Mr. Nangumya raised an issue concerning the decree the plaintiff herein obtained in his favour in *HCCS No. 284 of 2008.* He submitted that the court by that decree granted 2.0 acres of the suit land to the plaintiff which he developed. That the decree was served on ULC but that they ignored it and went ahead to grant leases to the defendants. Further, that the issuance of leases and their subsequent extensions by the ULC was done in utter contempt of court and that the defendants have not purged themselves of the contempt to be accorded equity by this court.

Mr.Nangumya's arguments, however strong, are beset with a number of insurmountable problems. Firstly, the said decree was issued pursuant to a suit filed by the plaintiff against Butime and ULC. None of the other current defendants were parties to that suit hence they could not bound by the terms of the order; more so when they were not aware of it. In addition, the decree was never noted as an incumbrance on the freehold title to bar any further dealings in the suit land. Therefore, third parties had no actual or constructive notice of the decree.

Secondly, some of the defendants were allocated leases long before the decree was issued on 15/07/2009. For instance, the 6th defendant's lease for Plot 28 was granted by ULC under *Minute No. 14/2008 (a)(124)(c)* of 5/6/2008. The decree had no retrospective effect to affect leases granted before it could be issued.

Further to note is that whereas the court order in the suit decreed only 2.0 acres to the plaintiff located opposite Kampala Parents School, the plaintiff currently lays claim on an area of about 3.0 acres. Therefore, he cannot claim the size of the suit land that is at odds with what the decree mandates.

Also to note is that the locus in quo visit by this court established that Plots 28 and 30 are actually not directly opposite the school. Plots 20 – 22 near the mosque areas are also not exactly opposite the school. The built up area only covers Plots 24 and 26 right from the road to Naguru opposite the school down to the channel. These observations confirm the 6th defendant's claim that Plot 28 and 30 lay outside land decreed to the plaintiff. The observations further confirm that part of the suit land now claimed by the plaintiff in excess of 2.0 acres was not the subject of *HCCS No 284 of 2008* and was thus not affected by the decree.

Thirdly, it is clear on the evidence of all the parties that the plaintiff only increased the land in 2008 from the initial one third of an acre he purchased in 1994. This is the same land for which the plaintiff sued ULC in *HCCS No. 284 of 2008*, yet there is no evidence to show that he had occupied it and/or increased its size with consent of the registered owner ULC. He is thus illegally in occupation which inevitably renders him a trespasser on the suit land.

Finally on this point, *HCCS No. 284 of 2008* and the decree therefrom easily show that they were all *ex parte*. ULC denied having ever been served with summons in that case. Against the background that the plaintiff is a trespasser and is illegally on the suit land, he lacked the locus to institute proceedings against the registered owner. Any order of court pursuant to such illegally initiated proceedings would automatically be rendered null and void to that extent. It is trite law that a null and void order/decree, no matter how precisely and technically correct, will be declared null and void not only by the court that rendered the order or decree but in any other

court it is presented. This position was re- affirmed in ***Livingstone M. Sewanyana vs. Martin Aliker, SCCA No.4 of 1991,*** to the effect an order of court improperly obtained either through fraud or illegal means cannot be left to stand by a court in which it is sought to be enforced. See also: ***Fam International Ltd & Another vs. Mohamed Hamid El – Fatih SCCA No.16 of 1993.***

That is precisely the fate of the decree in *HCCS No. 284 of 2008.* Once an order is illegally obtained, a court of law cannot close its eyes the moment it is brought to its attention. Such illegality supersedes all matters of pleadings, admissions on pleadings or procedure. See: ***Makula International Ltd vs. His Eminence Cardinal Nsubuga & O'rs [1982] HCB 11.***

The fourth and most crucial reason is that the plaintiff having been in illegal occupation and utilisation of the suit land cannot use court to lend itself to his illegality. It was in bad faith that the plaintiff clothed with an illegal status on the suit land could sue the lawful owner and obtain a decree with the effect depriving the owner of its land to the extent of 2.0 acres. This is further exacerbated by the fact that the decree in that suit was issued without according the registered owner a hearing as noted above.

It is settled law that any decision made by a person or authority or body exercising judicial or quasi-judicial power without according the parties affected a hearing cannot stand as such a decision would be contrary to the principles of natural justice. See: ***Sharp vs. Welefield (1981) A.C 173*** cited in ***Re: Interdiction of Bukeni Fred HC Misc. Application No.139 of 1991,*** per *Musoke – Kibuuka* J; ***Education vs. Rice, (1911) AC 179*** at page 182; and ***Musinguzi Asaph vs. Kiruhura District Local Administration. HCT – 15 – CV – MA – 193 – 2011.***

Clearly, the plaintiff cannot be permitted to benefit from having knowingly misled court into issuing an *ex parte* decree by withholding from court facts of his illegal acquisition, occupation, and utilisation of the suit land. The court acting properly in the set judicial process would not

grant a registered owner's land to another person who had illegally occupied it in the first place. Courts do ordinarily not issue decrees with the effect of ratifying illegalities. On the strength of the evidence available, the plaintiff has failed to prove that any of the defendants committed any of the pleaded particulars of fraud alleged against them. *Issue No. 3* is answered in the negative.

Issue No. 4: Whether the 7th defendant committed any fraud in the issuance of the respective certificates of title.

PW5, the Registrar of Titles, stated that ULC being the registered proprietor of land comprised in FRV 219 Folio 20 Plot 41, 59 and Plot 60-68 Lugogo Bypass could lawfully lease part of it to anyone. PW6 the Commissioner for Land Management also confirmed that ULC is the registered proprietor of the freehold in the suit land. She also stated that the plaintiff erroneously applied to KDLB for allocation of a lease but that she advised him that ULC is the rightful owner and Controlling Authority, and that he channels his application to the Commission. PW6 also stated that the lawful authority that issues certificates of title upon grant of any registerable interest in land is the Commissioner for Land Registration.

PW4, Ag. Secretary ULC stated that upon receipt of the various applications of the defendants, ULC first sought and obtained permission in writing of the registered user, the Ministry of Education, before considering the allocation of the leases on the suit land. DW4 was corroborating evidence of DW2 former Secretary ULC on that same point.

The position of the law stated in ***Kampala Bottlers vs. Damanico (U) Ltd*** (supra) is that the office of the Registrar of Titles is mandated to process and issue certificates of title upon the instructions of the Controlling Authority; which in the instant case is ULC under whose control and management is the suit land. PW5 stated that the office of the Registrar of Titles prepared the leasehold certificates of title for the defendants upon the grant of leases by ULC. PW5

clarified that the omission to note the leases as incumberences on the freehold title does not invalidate the titles as the omission is rectifiable under Section 91 Land Act (supra).

It is also noted the plaintiff faults ULC for not acting on the recommendation by the Commissioner for Land Administration to consider his application. However, PW6 conceded that ULC is not legally obliged to take recommendations by the Commissioner for Land Administration in the process of granting of leases.

Clearly, the 7th defendant was simply performing its statutory duty when it issued the lease certificates of title to the defendants upon the grant of leases by ULC. Not an iota of evidence of the plaintiff attributes fraud to the 7th defendant in the process of issuing the titles. *Issue No.4* is answered in the negative.

Issue No. 5: What reliefs are available to the parties?

(i) The plaintiff is a trespasser and has no any lawful interest whatsoever in the suit land.

(ii) The plaintiff's occupation and continued stay on the suit land is illegal and unlawful.

(iii) The 1st, 2nd, 4th, 5th and 6th defendants are the lawful registered proprietors of their respective plots of land in the suit land as reflected in their respective lease certificates of titles.

(iv) The 1st, 2nd, 4th, 5th and 6th defendants are entitled to quiet possession of their respective plots of land without any disturbance or interference from the plaintiff or such other person claiming interest under him.

(v) The plaintiff is ordered to give vacant possession of all the suit land to the defendants as reflected in their respective lease certificates of title; the failure of which he shall be lawfully evicted there from.

(vi) The plaintiff shall pay costs of the suit.

BASHAIJA K. ANDREW
JUDGE
14/07/2007

Mr. Albert Byamugisha for 1st defendant in court

1st defendant's representative present

Mr. Swabur Marzuq with Mr. Moses Lwanyaga counsel for the 2nd and 6th defendants present.

Plaintiff present

Court Clerk Mr. G. Tumwikirize present

Judgment read in open court.

BASHAIJA K. ANDREW
JUDGE
14/07/2007