

## LAND DIVISION

**CIVIL SUIT NO. 223 OF 2011**

**AMINA KAKUZE:..... PLAINTIFF**

## VERSUS

**1. BUNNY WALLIA** (As Administrator of the estate of the late Sunder Kaka)

## 2. MUTASQ BHEGANI:.....DEFENDANTS

**BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW JUDGMENT.**

15 Amina Kakuze (*hereinafter referred to as the “plaintiff”*) a beneficiary to the estate of the late  
Mwana Isha Kahungu Kimandwa and the surviving Administrator of the estate of the late  
Fatuma Rubereti Hawa, brought this suit against Bunny Wallia, the Administrator of the estate  
of the late Sunder Kaka, and Mutasq Bhegani(*hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup>*  
*“defendant” respectively*) jointly and severally seeking an order for the protection and the  
20 recovery from the defendants of the title for land comprised in Kibuga Block 12 Plot 47 land at  
Mengo (*hereinafter referred to as the “suit land”*); a declaration that the suit land belongs to the  
estate of late Mwana Isha Kahungu Kimandwa, general damages, and costs of the suit.

**Background:**

Initially the suit land was a Kibanja. The late Fatuma Rubereti Hawa, mother to the plaintiff,  
25 constructed a house thereon which still exists. Upon Fatuma Rubereti Hawa's demise, her sister  
Mwana Isha Kahungu Kimandwa took over the Kibanja interest with the developments thereon.

Later in 1993 she purchased the mailo interest therein from the land owner one Dr. E.B.S. Lumu. The two executed a purchase agreement, and Mwana Isha effected part payment and jointly with the plaintiff obtained Letters of Administration for the estate of late Fatuma Rubereti Hawa.

30 That plaintiff's primary contention is that the late Sunder Kaka, the 1<sup>st</sup> defendant's father, being a close friend to the late Mwana Isha only contributed to the purchase price of the mailo interest but never purchased the suit land. That Sunder Kaaka did this on the understanding that he would recoup his financial contribution through rent collection from the premises on the suit land.

The plaintiff further avers that Dr. E.B.S. Lumu handed over the title together with the transfer  
35 forms to Sunder Kaka to deliver to late Mwana Isha. That Sunder Kaka instead pledged the suit land as security for a loan he obtained from the 2<sup>nd</sup> defendant, which he failed to pay. That upon Kaaka's failure to pay; the 2<sup>nd</sup> defendant transferred the suit land into his own names.

Subsequently the 1<sup>st</sup> defendant's father sued the 2<sup>nd</sup> defendant in the Commercial Court vide *HCCS No.223 of 2003* seeking the recovery of the suit land. Both parties, however, executed a  
40 consent judgment in which the 1<sup>st</sup> defendant's father agreed and repaid the loan and had the title transferred into his names. The plaintiff avers that the registration of the suit land in the names of the 1<sup>st</sup> defendant's father was procured through fraud. To that end the plaintiff seeks the reliefs stated above.

The 1<sup>st</sup> defendant denied all the plaintiff's allegations. He averred that late Fatuma Rubereti  
45 Hawa, who was a cousin to his late father Sunder Kaka and a sister to Mwana Isha, was on a sub-lease on land belonging to Dr. Lumu comprised in Kibuga Block 12 Plot 473. That when the sub lease expired in 1990, Dr. Lumu offered to sale the mailo interest to Mwana Isha but that she failed to pay the purchase price. That Dr. Lumu then passed on the offer of purchase to Sunder

Kaka who agreed and paid full purchase price. The 1<sup>st</sup> defendant further averred that his late  
50 father pledged the title and transfer forms to the 2<sup>nd</sup> defendant who transferred the suit land in his  
own names. That later after the 1<sup>st</sup> defendant's father repaid the loan; the suit land was  
transferred back to him by the 2<sup>nd</sup> defendant.

The 1<sup>st</sup> defendant also filed a counterclaim against the plaintiff for trespass to the suit land, and  
sought orders of vacant possession, a permanent injunction, special and general damages, and  
55 costs of the counterclaim. He averred that in 2001 the plaintiff without any right forcibly started  
collecting rent from the premises on the suit land even though the mutual tenancy between her  
Aunt Mwana Isha and late Sunder Kaka had been terminated. Further, that the plaintiff has since  
engaged in fraudulent actions to deny him enjoying proceeds from the suit land.

The 2<sup>nd</sup> defendant did not file a defence despite being duly served with summons. The case  
60 proceeded against him *ex parte* under Order 9 r. 10 of the Civil Procedure Rules (CPR). The  
parties filed a joint scheduling memorandum and agreed on the following facts;

1. *The 1<sup>st</sup> defendant is currently the registered proprietor of the suit land.*
2. *The plaintiff is and has been in occupation of the suit land since 2001.*
3. *The developments on the suit land were made by the late Fatuma Rubereti Hawa.*
- 65 4. *On 18<sup>th</sup> May, 1993, Dr. E.B.S .Lumu did execute an agreement for purchase of the suit  
land with the late Mwana Isha Kahungu Kimandwa*

The following issues were framed for court's determination;

1. *Whether the registration of the suit land in the names of Sunder Kaka was procured through fraud.*

70 2. *Whether the late Sunder Kaka purchased the suit land from Dr. E.S.B. Lumu.*

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

The parties adduced evidence by filing written witness statements. The plaintiff called two witnesses that is; herself as PW1 and Matilda Katabalwa the LC1 Chairperson of the area as PW2. For his part the 1<sup>st</sup> defendant called two witnesses that is; himself as DW1 and Hashim Gulam as DW2.

The plaintiff was represented by *M/s Kabega, Bogezi & Bukenya Advocates*, while *M/s. Kakuru & Co. Advocates* represented the 1<sup>st</sup> defendant. Both Counsel filed written submissions which I have taken into account in this judgment. Counsel for the 1<sup>st</sup> defendant raised an issue in his submission that the plaintiff has no *locus standi* to bring this suit which I will dispose of first.

80 Counsel for the 1<sup>st</sup> defendant argued that evidence led shows that even though the plaintiff claims to be a surviving beneficiary to the estate of the late Mwana Isha, there are other beneficiaries and that the plaintiff did not show that she obtained their authority to represent them or the estate. Counsel further argued the plaintiff did not adduce clear and justifiable reasons for bringing this action without Letters of Administration, and that as such this suit is incompetent  
85 and a nullity. To buttress this proposition, Counsel cited a plethora of cases of *Ingall vs. Morgan [1944]1 ALL ER 97; Burns vs. Campbell (1952)1 KB 15; and Caudle vs. LD Law Ltd [2008]1 WLR 1540*. The cross - cutting principle in all these cases is that before the grant of Letters of Administration a person has limited power to take essential actions to preserve and protect the

deceased's estate, and that unless proceedings are necessary for that purpose, a claimant has no  
90 right to commence proceedings before the grant, and that the court will refuse to grant reliefs in  
such proceedings.

In reply, Counsel for the plaintiff cited the case of ***Israel Kabwa vs. Martin Babona SCCA No. 52 of 1995*** to the effect that a beneficiary to the estate of an intestate has *locus* to sue in his own name to protect the estate of the intestate without first having to obtain Letters of Administration.  
95 Counsel also pointed out that the plaintiff in paragraph 1, of the amended plaint, described her capacity in the suit as a beneficiary to the estate of Mwana Isha, being her Aunt, and that the orders sought are for the protection the suit land for the benefit of the estate of the late Mwana Isha. That in any case, the 1<sup>st</sup> defendant in his amended written statement of defence admits to the plaintiff's averments in the amended plaint that she is a beneficiary.

100 This court has observed that on 19/3/2012 when the parties did the scheduling conference, Counsel for the 1<sup>st</sup> defendant raised this same issue of the plaintiff's *locus standi* as a preliminary objections, among others. Citing the case of ***Israel Kabwa vs. Martin Babona*** (supra) the court, on 24/4/2014, dismissed the objection as having no merit and that the plaintiff did not bring this action to establish her personal right over the suit land but for the protection and the recovery of  
105 the suit land for the benefit of the estate of late Mwana Isha. The court further held in respect of the preliminary objection that the issue whether no evidence was led so far proving that the plaintiff is a beneficiary was a fact that required to be canvassed by evidence during the hearing of the suit, and that such was an issue of fact and not of law.

A cursory perusal of the court record does not show that there was an appeal or an application for  
110 review against the above stated court's ruling on the preliminary objection. The 1<sup>st</sup> defendant is

therefore precluded by provisions of Section 7 of the Civil Procedure Act (CPA) which encapsulates the doctrine of *res judicata* from raising the same issue again.

The above point notwithstanding, it is not disputed from the evidence on record that the late Mwana Isha was Aunt to the plaintiff. This fact was corroborated by the 1<sup>st</sup> defendant himself.

115 He stated that when Mwana Isha's health deteriorated the late Sunder Kaka took her to Mbarara to receive proper care and invited her niece, the plaintiff, to support her. The capacity in which the plaintiff brought the suit is quite distinctively and correctly stated in her pleadings and buttressed by evidence on both sides. She brought the suit as a beneficiary of the estate of late Mwana Isha. It is now settled that a beneficiary of an estate can in his or her own name bring  
120 action in respect of his or her interest in an estate without having to first obtain Letters of administration. This position was well stated by the Supreme Court in the case of ***Israel Kabwa vs. Martin Babona*** (supra). Therefore, the point raised by Counsel for the defendants inn that same regard is devoid of any merit and is accordingly dismissed.

***Issue No.1: Whether the registration of the suit land in the names of Sunder Kaka was***  
125 ***procured through fraud.***

***Issue No. 3: Whether the late Sunder Kaka purchased the suit land from Dr. E.S.B. Lumu.***

I will resolve both issues together because they essentially have a bearing on the same point. The position of the law as to what amounts to fraud is well settled. In the case of ***Fredrick J. K. Zaabwe vs. Orient Bank & 5 O'rs, SCCA No. 4 of 2006***, (at page 28 of the lead judgment)  
130 Katureebe JSC, relied on the definition of fraud in ***Black's Law Dictionary, (6<sup>th</sup> Ed) at page 660*** and held, *inter alia*, that fraud is an intentional perversion of the truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a

legal right. Further in the case of *Kampala Battlers Ltd vs. Damanico (U) Ltd., SCCA No. 22 of 1992*, Wambuzi, CJ (at page 5 of his judgment) stated that;

135           ***“It is well established that fraud means actual fraud or some act of dishonesty.”***

In the case of *Waimiha Saw Milling Co. Ltd. vs. Waione Timber Co. Ltd. (1926) A.C 101* at page 106, it was similarly held that fraud implies some act of dishonesty. Also in *Assets Co. vs. Mere Roihi (1905) A.C 176*, it was held that fraud in actions seeking to impeach a registered person’s title means actual fraud, dishonesty of some sort not what is called constructive fraud.

140   In the instant case, PW1 adduced evidence that the Kibanja which subsequently constituted the suit land, initially belonged to Fatuma Rubereti. That upon her demise Mwana Isha assumed the control and executed a purchase agreement with Dr. Lumu over the suit land in which she purchased the legal interest. Mwana Isha with Sunder Kaka contributed Shs. 4 million each and Sunder Kaka was supposed to recoup his money by collecting rent from the premises on the suit  
145   land. PW1 further stated that Sunder Kaka recouped his money, but she was not quite sure how much or whether all of it had been recouped.

PW1 further stated that Dr. Lumu handed the title and signed blank transfer forms for the suit property to Sunder Kaka to be transmitted to Mwana Isha the purchaser. DW2 who testified for the 1<sup>st</sup> defendant corroborated this fact that the blank signed transfer forms were handed over to  
150   Sunder Kaka by Dr. Lumu in his presence. Also PW2 the LC1 Chairperson of the area corroborated this evidence and stated that around 2000 they received a complaint from Mwana Isha and the plaintiff against Sunder Kaka for refusing to surrender to them the suit property and its title. PW2 stated that Dr. Lumu confirmed to the LCs that he had sold the suit land to Mwana

Isha and surrendered the title and blank signed transfer forms to Sunder Kaka for transmission to  
155 Mwana Isha.

PW2 also stated that in one of the meetings, figures were reconciled with Sunder Kaka and it was established that he had recouped his contribution. PW2 tendered in *Exhibit P.5* a document with the figures, but it was later rebutted because she could not remember when the meeting took place and whether Sunder Kaka was present. The document also showed that the alleged  
160 accountability on it started from way back in 1993 yet Sunder Kaka was known to have started recouping the money from the premises on the suit land in 1994.

For his part, DW1 testified that his late father and Mwana Isha agreed that his late father pays for the suit land because she could not raise the money to pay for it. That having paid the money Sunder Kaka could own the suit land after that. Further, that Mwana Isha was to occupy part of  
165 the premises on the suit land as a tenant unless she paid the purchase price at an interest rate of 25% per annum. DW1 also stated that his late father paid the 1<sup>st</sup> installment of Shs. 4 million by cheque of Greenland Bank on 18/5/1993 which was duly acknowledged by the vendor Dr. Lumu. DW1 also produced in evidence other receipts marked *Exhibit D.2, D.3, D.4 and D.5* respectively.

170 DW2 who testified for the defendants stated that in 1993 the late Sunder Kaka instructed him to prepare two cheques in the names of Dr. Lumu for Shs. 2 million each drawn on Greenland Bank. That the late Kaka informed him that he was purchasing Dr. Lumu's property through Mwana Isha who had failed to raise the purchase price.

The 1<sup>st</sup> defendant also adduced in evidence letter *Exhibit D.6* from *M/s Sendege, Senyondo & Co. Advocates* dated 5/1/2001 addressed to Mwana Isha. Its contents are to the effect that the lawyers  
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were acting on behalf of Sunder Kaka and reminded Mwana Isha that she had failed to raise a deposit of Shs. 8 million to Dr. Lumu and as a result entered into an arrangement with Sunder Kaka to pay the amount which she would repay to Kaka with an interest of 25% per annum. The letter goes on to state that the arrangement would see Sunder Kaka manage the property and get repaid from the rent collections. The letter further informed Mwana Isha that the plaintiff now was interfering in the rent collections telling tenants to stop paying rent. The 1<sup>st</sup> defendant relied on this letter as proof that the late Sunder Kaka had purchased the suit property.

*Exhibit P1*, the purchase agreement, clearly shows the vender of the suit land as Dr. Lumu and the purchaser as Mwana Isha. Sunder Kaka is not mentioned anywhere in the agreement. The only instance Sunder Kaka's name came up was in the evidence on both sides that he contributed to the purchase price in an arrangement with Mwana Isha that he would recoup his money from rent collection from the premises on the suit land. Although it is no clear whether Kaka recouped all his money, what is certain from the evidence is that he was not the purchaser of the suit land. How he came to be registered on the suit land is not known and it is the very subject of investigation by court in this case and it will determine the issue whether or not he obtained registration through fraud.

The 1<sup>st</sup> defendant gave evidence that his late father and Mwana Isha agreed that his father pays for the suit land because Mwana Isha could not raise the money to pay for it, and that Sunder Kaka could own the suit land after that. I find this claim unsupported in light of the clear terms of the purchase agreement. Section 91 of the Evidence Act, Cap 6, precludes a person from adducing any evidence in proof of the terms of a contract that is reduced in writing except from

the contract itself. The provision was amply expounded upon by the Supreme Court in the case of *Uganda Revenue Authority vs. Stephen Mbosi*, SCCA No. 26 of 1995 that;

200        *“The principle under section 90 (now 91) of the Evidence Act is that when the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary*  
205        *evidence is admissible...”*

As applicable to the facts of the instant case, the purchase agreement speaks for itself that the suit land was purchased by Mwana Isha Kahungu Kimandwa and not Sunder Kaka. No amount of explanation or oral submissions would vary, alter, or amend the terms of the agreement reduced in writing in that regard.

210    The implications of the above stated position of the law to the facts of the instant case are that the act of Sunder Kaka of procuring registration on the suit land when he was not the purchaser or contemplated by the terms of the agreement as such amounted to fraud. In the terms of the holding in the *Kampala Battlers Ltd vs. Damanico (U) Ltd.* case (supra) he committed actual fraud when he received the transfer forms and title from Dr. Lumu for onward transmission to  
215    Mwana Isha the purchaser but instead pledged them as security for a loan to the 2<sup>nd</sup> defendant. In the context of *Waimiha Saw Milling Co. Ltd. vs. Waione Timber Co. Ltd.* case (supra) he acted of dishonesty.

Regarding *Exhibit D.6* the letter from late Sunder Kaka's lawyers, it is clearly not proof at all that Sunder Kaka purchased the suit property. It only serves to establish that Mwana Isha  
220 appealed to Sunder Kaka for financial assistance to enable her pay the purchase price to Dr. Lumu for the suit land. It was on the understanding that Sunder Kaka would recoup his money with interest by managing the property and collecting rent. In fact under *Exhibit D.6*, Sunder Kaka's lawyers expressly demanded for the immediate payment of the balance of the money Sunder Kaka had lent to Mwana Isha since the plaintiff had interfered with management of the  
225 suit property.

Without doubt *Exhibit D.6* illustrates that the late Sunder Kaka and Mwana Isha entered into some sort of loan arrangement with collection of rent from the suit premises at an interest by Sunder Kaka as security separate from the purchase agreement. Just because Sunder Kaka raised part of the consideration, it did not automatically render him the purchaser of the suit land.  
230 Similarly, the separate financial arrangement between the two did not constitute or amount to a purchase agreement between them or between Sunder Kaka and Dr. Lumu for the suit land. The terms of *Exhibit P1 (D.1)* are very clear on who the purchaser of the suit land was. It states in the relevant parts as follows;

*"3.The vendor gives warranty and covenants with the purchaser as follows:-*

- 235           (i)       *The vendor shall upon receipt of the full purchase price execute a transfer of the land to the purchaser.*
- (ii)       *The vendor shall not engage in any act or omission which may result in the defeat of the purchaser's interest in the land.*

4. Upon payment in full the property shall pass to the purchaser and the vendor shall  
240 execute a transfer of the land in favor of the purchaser free of incumbrances.”

Therefore, Sunder Kaka acted fraudulently by securing registration of himself on the suit land well aware that Mwana Isha Kahungu had obtained proprietary interest therein. Similarly, the mortgaging of the suit land as security for a loan to the 2<sup>nd</sup> defendant well aware that it was the property of Mwana Isha also amounted to fraud. The fraud is further manifested in that when  
245 Kaka entered into a consent judgment with the 2<sup>nd</sup> defendant in the Commercial Court case and repaid the loan, he never transferred the suit land to the rightful owner. He instead got himself registered on the title to defeat the unregistered interest of the owner.

In the case of ***Katarikawe vs. Katwiremu & Another SCCA No. 2 of 1977***, it was held, inter alia, that if a person procures registration to defeat an unregistered interest on the part of another  
250 person of which he is proved to have had knowledge, the registration of the property is procured through fraud.

It is clear enough that Sunder Kaka procured registration on the suit land through fraud directly attributable to him as a transferee. He therefore falls within the ambit of the holding in ***David Sejjaka vs. Rebecca Musoke Civil Appeal No. 12 of 1985***, that fraud must be attributable to the  
255 transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and participated in it or taken advantage of it.

*Issue No.1* is answered in the affirmative that the registration of the suit land in the names of Sunder Kaka was procured through fraud Having found that Kaka procured registration on the

260 suit land through fraud, *Issue No.2* is also answered in the negative that late Sunder Kaka never purchased the suit land from Dr. E.S.B. Lumu.

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

Having found as above, the plaintiff is entitled to the remedies she sought in the plaint. However, although she also prayed for general damages, it is noted that she never adduced evidence upon  
265 which court could base for award of general damages. In the case of ***Takiya Kashwahiri & A'nor vs. Kajungu Denis, CACA No. 85 of 2011***, it was held, inter alia, that there should be evidence upon which court can award general damages to restore some satisfaction, as far as money can do it, to the injured plaintiff. In this case none was adduced and court is reluctant to award the same. In summary it is declared and ordered as follows;

- 270 1. ***The land comprised in Kibuga Block 12 Plot 47 at Mengo belongs to the estate of late Mwana Isha Kahungu Kimandwa.***
2. ***The Chief Registrar of Titles is ordered to register the land comprised in Kibuga Block 12 Plot 47 land at Mengo in the names of the estate of late Mwana Isha Kahungu Kimandwa.***
- 275 3. ***The registration of the 1<sup>st</sup> defendant on the suit land by virtue of Letters of Administration of the late Sunder Kaka is hereby cancelled.***
4. ***The 1<sup>st</sup> defendant's counterclaim is dismissed with costs to the plaintiff.***
5. ***The plaintiff is awarded costs of the suit.***

***JUDGE***

***31/01/2017***

Mr. Hamza Muwonge Holding brief for Mr. Musa Kabega Counsel  
for the plaintiff present.

285 Mr. Amos Musheija Counsel for the defendants present.

Parties absent.

Mr. Godfrey Tumwikirize Court Clerk present.

Court: Judgment read in open Court.

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***BASHAIJA K. ANDREW***

***JUDGE***

***31/01/2017***