

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MPIGI**  
**CIVIL SUIT NO. 04 OF 2016**  
*(Land civil suit No. 739 of 1997)*

**1. EDWARD MPOZA KATULUBA:PLAINTIFFS**  
**2. THE REGISTERED TRUSTEES OF THE SOCIETY OF**  
**THE MISSIONARIES OF AFRICA WHITE FATHERS**

**VERSUS**

10 **1. JOHN LUKOMA**  
**2. KALULE KASAKYA EDWARD**  
**3. SARAH**  
**NALULE:DEFENDANTS**

**BEFORE: HON. JUSTICE WILSON MASALU MUSENE**

**JUDGMENT**

**Introduction**

20 This is an old protracted case filed 20 years ago in 1997 at the Kampala High Court. The Plaintiffs, **Edward Mpoza and the Registered Trustees of the Society of the Missionaries of Africa (White fathers)**, filed the case initially against Dominico Kityo who died leaving the case

pending. He was succeeded by the present Defendants, **John Lukoma, Kalule Kasakya Edward** and **Sarah Nalule**. This same case has also been handled by five Judges while at Kampala. These were **Justice P.M. Tabaro, Lady Justice Mary Maitum, Lady Justice Anna Magezi** (who have since retired) and **Lady Justice Percy Night Tuhaise and Justice Bashaija Andrew** , who are still in service.

10 In February, 2017, it was transferred to Mpigi High Court circuit from the land division in Kampala .

The plaintiffs case against the defendants jointly and severally is for an order of removal of the caveats lodged by the Defendants predecessor on the land comprised in **Mawokota Block 195 Plot No.4** of which **Karoli Lutwama** was registered proprietor, and **Mawokota Block 195 Plot 3** of which the second plaintiff is the registered proprietor. The Plaintiffs further claim from the Defendants General damages for trespass and/or conversion, mesne  
20 profits and loss of earnings.

The Defendants on the other hand deny plaintiffs case and instead aver that the land comprised in **Mawokota Block**

**195 Plot 4 and plot 3** (Originally Mawokota Block 195 Plot 2) was and is **ancestral communal land** belonging to the ancestral lineage of **Lutiba Kyemwa** (Omutuba gwa Lutiba Kyemwa) to which all defendants belong.

The defendants further state that **Edward Mpoza Katuluba** does not belong to the ancestral lineage of **Lutiba Kyemwa**, but belongs to the ancestral lineage of **Kisumugungu** of Bunamwaya and so **Edward Mpoza Katuluba** cannot inherit and/or have interest in the  
10 disputed land. Finally, the Defendants filed a counter - claim which was refuted by the plaintiffs. In the counter claim, it is stated that the certificate of Title for **Mawokota Block 195 Plot 4** in the names of **Kaloli Lutwama** was fraudulent, and that the same be cancelled and registered in the names of the defendants as **Trustees for the lineage of Lutiba Kyemwa**.

### **Representation:**

The 1<sup>st</sup> Plaintiff was represented by **Mr. Kenneth Kajeke**,  
20 while **Mr. Fredrick Ssemwanga** was for 2<sup>nd</sup> Plaintiff. The three Defendants were represented by **Mr. Charles Ssemakula Muganwa, Mr. Asumani Basalirwa** and **Mr.**

**Ahmed Bamujje.** The Advocates filed written submissions which are on record.

### **Agreed facts:**

According to the records on the 17/5/2001 before Justice J.P.M. Tabaro the facts agreed upon were :

- 1 Currently the 1<sup>st</sup> Plaintiff is the registered proprietor of Mawokota Block no. 195 Plot 4.
- 2 The Second plaintiff is the registered proprietor of Mawokota Block No. 195 Plot No.3.
- 3 The first Plaintiff belongs to the order of the white fathers.
- 4 The second Plaintiff acquired the land as a gift from the first plaintiff.
- 5 The first defendant occupies part of the land in question within the definite grounds.
- 6 There are burial grounds on the land in issue, and the Plaintiffs do not dispute the presence of the said burial grounds.

### 20 **Issues**

1. The primary question is whether the first plaintiff was lawfully registered on 19/7/1958 or whether the registration was fraudulent.
2. If there was fraud, when was the fraud discovered?
3. Whether or not the defendant claim is time barred
4. Whether or not the parties are entitled to the remedies prayed for.

### **Issue No 1**

10 **The primary question is whether the first plaintiff was lawfully registered on 19/7/1958 or whether the registration was fraudulent.**

Counsel for the 1<sup>st</sup> Plaintiff submitted that PW1, **Nsubuga Justine** tendered before court exhibits PIA and PIB which is a succession Register dated 26/10/1957.

He added that Exhibit P1A and PIB detailed the children and the property left behind by the late **Andereya Sajjabi Kyemwa and Kaloli Lutwama** was listed as the second child of the late **Andereya Sajjabi Kyemwa**, who was appointed as the heir.

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It was also submitted that according to PW2, Nichols Wamboga, a Registrar of Titles tendered before court exhibit P2 and P3 which are certificates of title for land comprised in Mawokota Block No. 195 Plot No 3 and 4 respectively.

Counsel for the 1<sup>st</sup> Plaintiff maintained that the late **Kaloli Lutwama** got registered on Plot 4 on the 19.7.1958, and that Plot 3 was registered in the names of 2<sup>nd</sup> Plaintiff on 7.3.1989 as per exhibit P.2 . He challenged the Defendants allegations of fraud as false, reiterating that the burden of proof of fraud lies on the party alleging. Reference was made to **sections 110 and 111 of the Evidence Act** and the case **of R.G. Patel vs Lal Makanji [1957] E.A 314;**  
10 where it was held that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities.

Learned Counsel for the 1<sup>st</sup> Plaintiff further submitted that the Defendants have failed to prove that the original plaintiff, (**Kaloli Lutwama**) posed as a descendant **of Lutiba Kyemwa** as the name of Kyemwa belongs to members of Ngeye clan and any clan member can use the same. They  
20 referred to the testimony of PW3, **Edward Mpoza Katuluba** to the effect that the names of the original Plaintiff's father was **Andereya Sajjabi Kyemwa** of Ngeye clan. Counsel added that there is no evidence on the court record that the 1<sup>st</sup> original Plaintiff posed as a descendant of **Lutiba Kyemwa's** lineage in the Ngeye clan to which

the Defendants belong. Further submissions were that the Defendants have also failed miserably to prove that the Certificate of title for Plot No. 4 which is exhibit P3 is forged and that it is PW2 Mr. Nicholas Wamboga who produced before Court the white page and he availed Certified copies of the Certificate of title to Court. Emphasis was that forgery is a very serious matter which needs to be investigated and proved, which Defendants have failed to do. Counsel added that the allegation that the late **Anderea Ssajjabi** never owned land in Luwala village in Mawokota is not true. They added that it is through the evidence produced by PW1 from the office of the Administrator General which proved that the said land originally belonged to **Andereya Ssajjabi Kyemwa** and the original first plaintiff acquired the same as his inheritance. The allegations that the Second Plaintiff never paid any money to the first original plaintiff is not true. The said land was transferred to the second plaintiff as a gift as per the application for consent to transfer land and the evidence of PW4 the representative of the second Plaintiff.

The conclusion was that no fraud was committed by the first original Plaintiff and so the registration on 19.7.1958 was lawful.

Counsel for the Defendants on the other hand submitted that the Defendants' Pleadings disclose several specific grounds of fraud, namely:-

a) The first Plaintiff and the estate he represents did not belong to the lineage of **Lutiba Kyemwa**.

b) The suit land belonged to the lineage of **Lutiba Kyemwa** to which the Defendants belong.

10 c) The 1<sup>st</sup> Plaintiff's grandfather **Andereya Ssajjabi** having fraudulently taken over the leadership of the ancestral **Lutiba Kyemwa** was removed in 1953 by a sub-clan tribunal of Kawooya Bakazirwendo.

d) The 1<sup>st</sup> Plaintiff and his estate subdivided the suit land which was originally plot 2 into plots i.e 3 and 4

e) The 1<sup>st</sup> plaintiff and his estate having had no interest in the suit land, they couldn't subdivide the land legally.

f) After having sub divided it, the suit land was transferred to the 2<sup>nd</sup> plaintiff vide plot 3 while the residue remained in the names of **Kaloli Lutwama**.

20 Counsel added that whereas **Edward Mpoza Katuluba** states that he is the administrator of the Estate of **Kaloli Lutwama** who got registered on the suit land comprised in Mawokota Block 192 Plot 2 on 19.7.1958, that under paragraph 9, he states that **Andereya Kyemwa** from whom **Kaloli Lutwama** inherited acquired the said land



from his majesty's Government on 16.7.1934. Counsel for Defendants then made reference to the cross-examination of 1<sup>st</sup> Plaintiff (PW3) on pages 6-7 of the proceedings of 23.2.2017 where PW3 revealed that the head of his clan is **Kisumugungu**, who reports to **Bakazi Lwendo**, while the Defendants belong to **Lutiba Kyemwa lineage**. PW3, Edward Mpoza is also quoted to have testified that in the lineage of **Kisumugungu** where he and his father belongs, there is no one called Kyemwa as Kyemwa belongs to Ngeye  
10 clan. At the same time, counsel for Defendants made reference the supplementary witness statement of **Edward Mpoza Katuluba** of 4.12.2014 where he confirmed that the name Kyemwa is a title which the lineage of **Lutiba Kyemwa** uses.

Counsel made reference to paragraph 10 of Sarah Kalule's affidavit dated 5.11.2014, where she started:-

20 ***"10 Again from the clan records, I know that Anderea Ssajjabi after serving as a soldier during the Second World War of 1939 to 1945 was thereafter appointed the Ssaza Chief (county chief) of Mawokota assuming the title of Kayima as such, and I also know that Anderea Ssajjabi belonged to Ngeye clan in Buganda and that he was a member or a grandchild in the "Lineage of***

***Kisumugungu” whose ancestral land is located at Bunamwaya in Kyadondo County.”***

It was therefore reiterated that **Anderea Ssajjabi**, the grand father of **Edward Mpoza** belonged to the lineage of **Kisumugungu**, and that the lineages of **Lutiba Kyemwa** and **Kisumugungu** had separate burial grounds.

Further submissions by counsel for the Defendants were that from the testimony of PW3, **Edward Mpoza Mutuluza**,  
10 **Anderea Ssajjabi** was buried at Luwala and not on the burial grounds of **Lutiba Kyemwa**.

Counsel added that what PW3 stated about burial of **Anderea Ssajjabi** was also repeated by **Sarah Nalule** in her affidavit evidence, paragraph 14 (b) as follows:

20 ***“14 (b) when Anderea Ssajjabi died in July, 1957 he was buried outside the suit land far from the cemetery reserved for the Kyemwa’s burial and this fact was clearly pointed out to Lady Justice Tuhaise when she inspected the suit land. This fact proved that Anderea Ssajjabi had conceded that he was not Kyemwa and his relatives of the lineage of Kisumugungu recognized the same.”***

Counsel for Defendants also referred this court to the evidence at locus in quo on 5.7.2017 by this court where

PW3, **Edward Mpoza Katuluba** confirmed that **Anderea Ssajjabi** was buried on Block 196 and not Block 195 which is in dispute.

Counsel therefore invited this Court to find that the 1<sup>st</sup> plaintiffs predecessor, **Anderea Ssajjabi Kyemwa**, was not part of the lineage of **Lutiba Kyemwa**.

It was further submitted that evidence the Defendants belong to the lineage of **Lutiba Kyemwa** is overwhelming.  
10 That PW3 on page 7 of his cross examination proceedings confirms it.

He added that PW3 in his cross examination on 5/4/2017 , page 14 1<sup>st</sup> paragraph confirms that the suit land has bibanja of about 58 people in number including **Dominic Kityo**.

DW1 states in her examination in chief paragraph 2 of her witness statement, that she is a daughter to the late  
20 **Dominic Kityo**.

She further says that all her ancestors have their origin on the suit land and were buried on the same land, which is the ancestral land of the lineage of **Lutiba Kyemwa** who owns the same in trust for all the members of the lineage.

Counsel also referred to the evidence of **Sarah Nalule DW1** in paragraph 4 a gives the history of the acquisition of the suit land and she continues to corroborate the same under paragraph 4c,5a,7,9,10,11,13,14,15,16,17 etc. He concluded that the above testimony was never challenged during DW1's cross examination.

I have carefully considered the submissions on both sides as far as the first issue is concerned. I have also read and internalized the pleadings on both sides and the pertinent matters raised during the hearing.

In the first instance, I find that the issue of which lineage the 1<sup>st</sup> Plaintiff, **Edward Mpoza Katuluba and the Defendants (John Lukoma, Kalule Kasakya Edward and Sarah Nalule)** belong is important and fundamental. From the evidence on record and the submissions on both sides, my finding is that the 1<sup>st</sup> Plaintiff, **Edward Mpoza Katuluba**, his uncle **Karoli Lutwama** and grandfather, **Andereya Ssajjabi "Kyemwa"** was not or did not belong to the lineage of **Lutiba Kyemwa**. The testimony of **Sarah Nalule**, both in the affidavit and during cross examination is clear that she was born in 1953 at Luwala on the suit land now registered as **Mawokota Block 195** Plot 3 and 4. She was born to the late **Dominico Kityo Batambugwe**, son of

**Atanasi Musi**, the son of Ssebabenga. **Sarah Nalule** under paragraph 2 of her affidavit evidence confirmed that all her ancestors have their origin on the land in dispute and all their graves are on the same. When PW3, **Edward Mpoza Katuluba** was cross-examined by Mr. **Ssemakalu Muganwa Charles** for Defendants (on page 7 of the proceedings of 17.2.2017), PW3 stated that he is aware of the Lutiba Kyemwa lineage. PW3 added that he knows **John Lukoma and Sarah Nalule** and that the defendants  
10 belong to the **Lutiba Kyemwa** lineage. PW3 on the same page 7 added;-

***“The father of Kaloli Lutwama was Andereya Ssajabi Kyemwa. He is my grandfather. Andereya Ssajabi was a trustee of the lineage of Ssekiti. He was also a leader of the sub clan of Kidolindo.”***

And under the same testimony, PW3 stated that his grandfather, **Andereya Sajjabi Kyemwa** was of Kisumungungu lineage. The foregoing evidence therefore  
20 settles the fact that the 1<sup>st</sup> Plaintiff, Edward **Mpoza Katuluba** and the Defendants belonged to different lineages of **Kisumugungu** and **Lutiba Kyemwa** respectively.

The next issue to consider is whether the land in dispute belongs to the **Lutiba Kyemwa** clan or not. From the

supplementary witness statement of Edward **Mpoza Katuluba**, under paragraph 4, he stated that the suit land was originally owned by his majesty's Government as crown land and that it was given to **Andereya Ssajjabi Kyemwa** by His Majesty's government.

**Edward Mpoza** also added under paragraph 7 that Kaloli Lutwama, whom he succeeded never committed any fraud in applying for the Certificate of title for **Mawokota Block 195 No. 2, now Plots 3 and 4.**

10 He also added that the suit land has never been registered in the names of **Lutiba Kyemwa.**

However, during cross examination by counsel for the Defendants, PW3 Mr. Edward **Mpoza Katuluba** stated that he did not have any document showing that **Andereya Ssajjabi Kyemwa** ever owned the suit land. PW3 added:-  
***"I know the details of the land. Kalori Lutwama acquired that land as inheritance in a will of andereya Ssajjabi Kyemwa . I don't have the will."***

20 This Court found the above testimony of the 1<sup>st</sup> Plaintiff contradictory when the alleged **Will** was not produced. And as submitted by the Advocates for Defendants, PW1 on pages 5 of the proceedings of 9.9.2013, during cross examination confirmed that in 1967, when the files were transferred, there were no record of titles. And when the

same PW1 was asked whether in the lands office they had any records showing that **Andereya Ssajjabi** ever owned Plot 2 Block 195 Mawokota before July 1958, the response was “**No we don’t have.**”

Another question was asked, whether lands office had any record showing that the suit land was ever registered in the names of Andrew Ssajjabi in 1928 and his answer was a gain, “**No we don’t have.**”

10 Furthermore, much as the Plaintiffs’ case was that the land in dispute originally belonged to **Andereya Ssajjabi**, PW3, **Edward Mpoza** confirmed during cross examination in this Court that **Andereya Sssajjabi Kyemwa** died in 1957 and was not buried on the burial grounds of **Lutiba Kyemwa**. That is another point that **Andereya Sajjabi** the grandfather of the 1<sup>st</sup> plaintiff had no interest in the disputed land as claimed by the 1<sup>st</sup> plaintiff.

20 It is also on court record during cross examination of **Edward Mpoza** when he stated that he did not remember anything in the report of **Andereya Ssajjabi** when he died concerning **Lutiba Kyemwa’s** interest.

This Court on the other hand is inclined to believe the Defendants’ case about the origin of the land in dispute which according to Sarah Nalule’s evidence from paragraphs 4 up to 15 was very elaborate and consistent, even during

the rigorous cross-examination by advocates for the Plaintiffs. In summary, Sarah Nalule's testimony was that the land in dispute was given to Omutaka Lutiba, the head of the lineage of "**Lutiba Kyemwa**" by Ssekabaka Nakibinge who ruled Buganda between 1440 and 1490, and that the history of the suit land has been mailo and not crown land. She added that the Defendants and all the people they represent over the disputed land are members and children and grand children in the lineage of "**Lutiba Kyemwa**," located at  
10 Luwala in Mawokota County. Under paragraph 9, she testified that on the suit land, the lineage of **Lutiba Kyemwa** owns cultural sites, cultural offices (Embuga), shrines, grave yards, a cave and a landing site called Ssanya built by the great grandfather, **Ssanya Namugabo**. When this court moved to locus in quo on 5/7/2017, we started at Ssanya landing site and court was shown the burial grounds of "**Lutiba Kyemwa** lineage" which were not disputed by Mpoza Edward Katuluba , the 1<sup>st</sup> Plaintiff.

20 Under paragraphs 11, 12,13 and 14, **Sarah Nalule** testified that when **Andereya Ssajjabi** at one time started calling himself "**Kyemwa**", that one **Erasto Segirinya** representing all descendants of **Lutiba Kyemwa** filed a case against him in the sub-clan Tribunal of Bakazirwendo, which decided against **Andereya Ssajjabi**. She concluded that



**Andereya Ssajjabi** conceded defeat and when **Joseph Kasule** was officially installed as the rightful **Lutiba Kyemwa xv,**” both **Andereya Ssajjabi** and **Kaloli Lutwama** attended as witnesses. And an English translation of the document was tendered in and marked D5, Luganda version and D6, English translation. Again, that piece of evidence was not challenged in cross-examination by Counsel for the Plaintiffs.

10 Sarah Nalule’s evidence was ably corroborated by DW2, **Desderio Kawoya** who testified as follows:-

***“I recall attending a clan meeting in 1956. I also recall sitting in a clan Court. It is called a clan meeting. Sajjabi was claiming to be Kyemwa. He was told he was not Lutiba. I know Edward Mpoza. He is our brother in the clan but not from same lineage. Mpoza’s father was Katuluba. The grandfather was Sajjabi. Sajjabi never had land in our area.”***

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The conclusion of this court therefore is that the suit land belonged the lineage of **Lutiba Kyemwa**.

I now come to the issue of the registration of the land in dispute in 1958 in the names of Kaloli **Lutwama**, and the

issue of fraud. The law on fraud has been discussed in many cases including that of **F.I.K Zaabwe vs Orient Bank and 5 others, S.C.C.A NO. 4 of 2006.**

At page 28 Katureebe JSC in his lead judgment relied on the definition of fraud in Blacks Law Dictionary 6<sup>th</sup> Edition at page 660 to mean “An intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.” A false representation of a matter of fact, whether by  
10 words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.” I also refer to the case of **Kampala Bottlers Limited versus Damanico (U) Limited SCCA No. 22 of 1992** , where Wambuzi C.J on page 5 which held that :-“***Fraud must be attributed to the transferee. I must add here that it must be attributed either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act***  
20 ***or must have known of such act by somebody else and taken advantage of such act.***”

Counsel for the Plaintiffs submitted that the Defendants failed to prove that the 1<sup>st</sup> original Plaintiff, (**Kaloli Lutwama**) posed as a descendant of **Lutiba Kyemwa.**

They added that the defendants failed to prove that the Certificate of title for the disputed land were forged.

However, in the evidence of Sarah Kalule, under paragraphs 18 and 19. She stated that the original 1<sup>st</sup> Plaintiff, Kaloli Lutwama wrongly claimed the suit land as having been owned by his late father Andereya Ssajjabi which was not the case and that Kaloli Lutwama wrongfully posed as a descendant of Lutiba Kyemwa. Sarah Nalule under  
10 paragraph 20 stated and I quote:-

- “20 The Certificate of Title for Mawokota Block 195 plot 4 is a forgery because of the following:-**
- a)The Registrar of titles Kulumba Kiingi who signed the title was not a Registrar of titles in July 1958.**
  - b)The father of Kaloli Lutwama is shown as “A . S Kyemwa” but he was not Kyemwa.**
  - c)The district on the title called “West Mengo” was not in existence in 1958, it was created after the 1967 constitution when president Obote abolished Buganda kingdom.**
  - d)The Certificate of title is in the new Mailo system of county Block and Plot which started in September, 1958 under the law made by the**

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***governor then whereas the Certificate of Title was made on 19<sup>th</sup> July,1958."***

**Sarah Nalulwe** therefore gave particulars of fraud and during cross examination by counsel for the 1<sup>st</sup> Plaintiff, she stated that the white documents produced by **Mr. Mpoza** were a forgery as Mpoza is not in their clan. She also added that Kaloli Lutwama wrongfully gave out their clan land to Missionaries and that her predecessors did not get title as the land had been wrongfully taken.

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Sarah Nalule also stated under paragraph 21 that the Certificate of Title produced by the Plaintiff as "**Annexure F**". cannot be genuine because on 16.7.1934 when it was purported to have been issued, **Anderea SSajjabi** had not assumed the title of "**Kyemwa**", as he became an "**imposter Kyemwa** after 1945 after Second World War. She also added under paragraph 24 as follows:-

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***"24 Pere Kaloli Lutwama as an educated Catholic priest knew and ought to have known that his father Anderea Ssajjabi was sued in the sub-clan court of Kawooya Bakazirwendo for wrongfully taking over the leadership of the lineage of Lutiba Kyemwa and for assuming the title of "Kyemwa" and for purporting to take over the ownership of the suit land and that he lost this***

***case and that he was ordered to stop using and posing as Kyemwa and using his title of Kyemwa . Pere Kaloli Lutwama in fact attended the official installation of Joseph Kasule as Kyemwa XV together with his father.***

**Sarah Nalule** was not shaken during cross examination . And judging from her demeanor, **Sarah Nalule** impressed this Court as a truthful witness. And again, her evidence was supported by **Desderio Kawoya, DW2** who stated during cross examination that the title in possession of the 1<sup>st</sup> Plaintiff is a forged one and that they made a report to Mpigi Police about the forgery. Both **Sarah Nalule and Desderio Kawoyas'** evidence was not challenged and this Court believed the same.

Furthermore, whereas PW2, Wamboga Nicholas in examination in chief stated that **Kaloli Lutwama** (1<sup>st</sup> Plaintiff's predecessor in Title) was registered under instrument No. KLA 16114 on 19.7.1958, during cross examination and upon being asked whether he had instrument Number KLA 16114, he said he did not have. I also agree with the submissions of counsel for the Defendants that PW2 also failed to answer the crucial question as to whether he was aware that in 1958, the

system that was obtaining in land office was MRV, and not Block and plot which came after independence in 1962.

From the evidence of DW1, **Sarah Nalule** and DW2 **Desderio Kawoya**, and in the circumstances, this court is satisfied that **Kaloli Lutwama** was fraudulently registered on the suit land because he was registered on land which was not his and which did not belong to his father **Anderea Ssajjabi**.

10 The suit land, as already found and held belonged to the lineage of **Lutiba Kyemwa** to which **Anderea Ssajjabi** did not belong.

Secondly, no evidence was led by the Plaintiffs to show that the predecessor of **Kalori Lutwama, Andereya Ssajjabi** was ever registered in the Land Office. This Court therefore wonders how **Kaloli Lutwama** acquired the land in dispute and yet the person from whom he allegedly acquired, **Andereya Ssajjabi** was not registered so as to transfer the same to him. The witness called by the Plaintiffs, PW2,  
20 **Wamboga Nicholas** failed to adduce such evidence. I therefore agree with the submissions of Counsel for the Defendants that the circumstances leading to the creation of the title for Block 195 Plot 2 raises a lot of doubt, suspicion and was fraudulent as **Andereya Ssajjabi** could not give away what he did not own.

Furthermore, whereas PW3 in his examination in chief states that **Kalori Lutwama** inherited the suit land from his late father **Andereya Kyemwa**, who in turn acquired the same from the colonial government in 16.7.1934, this court cannot believe that the colonial government could give away land that was not crown land.

In any case no instrument was tendered in court to confirm the alleged acquisition from the Crown/Colonial government.

Both **PW3, Mpoza Edward Katuluba and PW2 Wamboga Nicholas**, the Registrar of titles during cross-examination admitted that they had no document to show that **Andereya Ssajjabi** ever owned the land in dispute.

And as noted earlier, PW3 stated during cross-examination that **Kalori Lutwama** acquired the land as inheritance in a **Will** of **Anderea Ssajjabi Kyemwa**, but failed to produce the **Will**. All that were manifestations of fraud.

Even if such alleged will was produced, in view of the earlier finding that the disputed land belonged to **Lutiba Kyemwa** lineage, then **Ssajjabi Anderea** could not give what was not his to **Kaloli Lutwama**. In such circumstances, the succession Certificate was irrelevant.

The transfer of land is governed by the Registration of titles Act in which it is provided under S. 92 of Cap 230 which is a replica of the RTO (Registration of titles ordinance) that.... The proprietor of land.....may transfer the same by transfer in

one of the forms in the 7<sup>th</sup> Schedule to the act. Under S. 92 b) of the same Act it is provided that “....**upon the Registration of the transfer, the estate and interest of the proprietor as set forth.....**” Shall pass to the transferee who shall thereupon become the proprietor thereof.

Under S. 64 (i).....the proprietor of land or of any estate or interest in land under the operation of this Act shall except in the case of fraud hold the land, or estate.....

10 Under Section 77 of the same law, any Certificate of title..... procured by fraud, shall be void as against all parties who are privies to the fraud. And that is exactly the situation obtaining in this case.

I also agree with counsel for the Defendants that Mengo Government having not been the registered owner of the suit land, it had no capacity to deal with the suit land and as such any instrument purportedly issued by Mengo in respect of the suit land was invalid and had no effect of transferring or  
20 otherwise dealing with the suit land as per the above sections of the law. Consequently, exhibit PIA and PIB have no relevance.

In the premises, the lands office could not have registered any document from Mengo to deal with the land in dispute.



It is the finding and holding of this court that the fraudulent misrepresentation from Mengo under the guise of a Certificate of succession was issued to defraud the Defendants' land /suit land). Besides, there was no **transfer form** registered in the land office as required under the law. And as already noted, **Andereya Ssajjabi's** alleged acquisition of the suit land from His majesty's Government had no **lota** of evidence.

It is therefore clear that the root of the title to the suit land was not proper and was marred by fraud.

In **Matovu & 2 others vs Ssenviri and another [1979] HCB 187**, it was held that when a person Procures Registration to defeat unregistered interest of others, then such person is guilty of fraud. It therefore follows that once such fraudulent registration is found out, then the Certificate in respect thereof is null and void and has to be cancelled under Section 177 of the R.T.A . The Defendants in this case lodged caveats in respect of the said land in dispute and which land is occupied by the Defendants and other family members of the lineage of **Lutibwa Kyemwa**. This was conceded by PW3, **Edward Mpoza Katuluba** who admitted that the disputed land has a bibanja people, who are over 58 in number, including **Dominic Kityo** (deceased) who lodged the caveat. And for emphasis, paragraph 24 of Sarah Nalule's affidavit evidence reveals that **Kalori Lutwama**

and his father **Andereya Ssajjabi** attended the official installation of **Joseph Kasule as Kyemwa XV** so **Kaloli Lutwama** had constructive knowledge that his father had fraudulently taken over the suit land after the decision of the sub-clan of **Bakazirwendo**.

And since 1<sup>st</sup> Plaintiff stepped in the shoes of late **Kalori Lutwama**, the same constructive knowledge is legally imputed on him. Issue no 1 is therefore resolved in the negative in that the 1<sup>st</sup> Plaintiff's registration was fraudulent.

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Having found and held that the Registration of the 1<sup>st</sup> Plaintiff and his predecessor Kaloli Lutwama was fraudulent, I now come to the 2<sup>nd</sup> Plaintiff, the Registered Trustees of the society of missionaries of Africa (white fathers).

Counsel for the 2<sup>nd</sup> plaintiff made reference to paragraph 9 of the amended plaint that the 2<sup>nd</sup> Plaintiff obtained land as a gift from **Karoli Lutwama** who succeeded his father **Andereya Ssajjabi Kyemwa**. They also referred to paragraph 11 of the amended Plaint that the land comprised in Mawokota Plot 3 was not in any way occupied by the defendant or any other person other than the Registered proprietor till 1996 when the Defendant started to claim ownership and lodged caveats. As to whether the registration of 2<sup>nd</sup> Plaintiff was fraudulent, counsel referred

to paragraph 2 of **Rev. Fr. Otto Katto Asimwe's** witness statement (PE4) to the effect that the late **Rev. Father Kaloli Lutwama** gave the 2<sup>nd</sup> Plaintiff the land in question as a gift, and thereafter, **Rev. Fr. Kalori Lutwama** executed transfer instrument dated 8.9.1987 (annexure "B") . fraud on the part of the 2<sup>nd</sup> plaintiff was denied. Counsel also made reference to the testimony of PW2, Nicholas Wamboga, a registrar of titles to the effect that the process of transfer of the land into the names of the 2<sup>nd</sup> Plaintiff was not fraudulent as alleged by Defendants.

Counsel also made reference to sections 110 and 111 of the evidence act as to where the burden of proof lies. Counsel for 2<sup>nd</sup> plaintiff reiterated that the allegations of fraud by the Defendants fell short of the principles laid down in the cases of **Fredrick Zaabwe vs orient Bank & 5 others , SCCA NO. 4 of 2006 and Kampala Bottlers vs Damanico (U) Ltd SCCA No. 22 of 1992 [1994-95] H.C.B. 49.**

They maintained that the land in question was given to the 2<sup>nd</sup> plaintiff as a gift. Reference was made to the transfer application form annexure "C" to PW4's witness statement.

Counsel for the Defendants on the other hand submitted that the transfer form by which **Kaloli Lutwama** transferred land to the 2<sup>nd</sup> Plaintiff had no seal or stamp of signatures of the society of white fathers. And that it meant the 2<sup>nd</sup> Plaintiff wasn't a party to the transfer form executed by the predecessor of 1<sup>st</sup> Plaintiff, **Kaloli Lutwama**. They wondered how the transfer to 2<sup>nd</sup> Plaintiff could have taken place without consent and without seal of the organization. Even the issue of stamp duty was raised, counsel for the  
10 Defendants wondering whether it was paid or not. Counsel for Defendants concluded that all the above matters and circumstances raised fraudulent dealings with regard to 2<sup>nd</sup> plaintiffs' title.

I have carefully considered the circumstances and submissions on both sides. Whereas the application for transfer form by **Kaloli Lutwama** marked as annexure C to PW4's witness statement, states that the land was undeveloped, and paragraph 6 of the statement is that  
20 **Dominico Kityo** and his successors have no interest in the said land, what transpired during hearing was different. During cross-examination of **Rev. father Otto Katto Asimwe**, PW4 by Counsel **Basalirwa Asuman**, PW4 admitted that there were people, whom he called squatters on the land in question. PW4 added that he did not know

whether the family of Kityo were on the suit land or not. In my view, those are double standards on the part of PW4, for on one hand, he states there were squatters and then adds it was un developed. Squatters are people and they were customary owners or bibanja owners but for one who has obtained certificate of title without their knowledge, he refers to them as squatters. In any case, the law recognizes both registered owners and bibanja holders or customary owners. So whereas counsel or the 2<sup>nd</sup> plaintiff's final  
10 submissions stated that the defendants could not claim that the said land belonged to Ngeye clan, the case of the defendants was that the entire land in dispute, Block 195, Plots 3 and 4 belonged to the lineage of **Lutiba Kyemwa**. Counsel for the 2<sup>nd</sup> Plaintiff reiterated that the 2<sup>nd</sup> Plaintiff, lawfully acquired the suit property from **Rev father Kalori Lutwama** who was the owner and registered Proprietor . Further argument was that 2<sup>nd</sup> Plaintiff acquired equitable interest in the said land. However, and as this Court has already held and found, **Kalori Lutwama**, himself having  
20 been fraudulent, had no proper title to pass on to the 2<sup>nd</sup> Plaintiff. Secondly, whereas Counsel for 2<sup>nd</sup> Plaintiff referred to the absence of the common seal on the 2<sup>nd</sup> Plaintiff on the transfer forms as a mere technicality under Article 126 (2) (e) of the constitution, it is this Courts' finding and holding that a common seal of an Association is not a mere technicality . It

is substantial as it embodies and carries the authority of the Association Registered under the Trustees Incorporation Act. Absence of the seal on the transfer forms to 2<sup>nd</sup> Defendant and authorized signatures and content of the controlling authority all implied or imputed fraud. Kaloli Lutwama, who has been found to be fraudulent cannot be held to have transferred proper title to 2<sup>nd</sup> Plaintiff in the circumstances as a gift. In **Mukula International vs His Eminence Cardinal Nsubuga & another court of appeal civil Appeal No. 4 of 1981**, it was held that a Court of law cannot sanction what is illegal, that an illegality once brought to the attention of court, overrides all questions of pleadings including any admission made. In **Uganda Railways Corporation vs Ekwaru & others [2008] HCB 61**, it was held that a trial Judge has a duty to use a judicial microscope to see all those illegalities that may not be seen by ordinary eyes of parties, including those of their counsel who may not have seen it.

20 So even if some irregularities were not pleaded, it is the duty of this court to use its Judicial microscope to point out those irregularities in the interests of justice.

Furthermore, both counsels for the Plaintiffs have emphasized Registrable interest of the Plaintiffs but the crucial question is how was the registrable interest arrived at. The process of acquiring registrable interest was flawed and was acquired to defeat customary interest hence fraudulent. And whereas it was submitted for the plaintiffs that the authority of **Marko Matovu & others vs Mohammed Sseviri and another** was distinguishable, the advocates for the plaintiffs did not substantiate. I wish to add that while referring to the signature of **Rev. Father Christian Gillain** on the acquisition and transfer, counsel for the 2<sup>nd</sup> Plaintiff submitted that the constitution of the 2<sup>nd</sup> Plaintiff provides for consent of any two of the trustees. However, the constitution of the 2<sup>nd</sup> plaintiff Association was not produced in evidence at the hearing.

Finally and as stated under paragraph 23 of Sarah Nalule's affidavit evidence, **Kaloli Lutwama** was a catholic priest and member of the Missionaries of Africa (white fathers) He was called "**Pere Kaloli Lutwama**" and he was therefore one of the 2<sup>nd</sup> plaintiffs and so had interest in **Mawokota Block 195 Plot 3**. In other words, the alleged gift to the 2<sup>nd</sup> Plaintiff was in essence a transfer to himself, giving with a right hand and taking with the left hand. All that were manifestations of fraudulent intentions to deprive or defeat

the unregistered interests of the Defendants. And the person who gave the gift did not have proper title then the gift cannot stand.

I therefore find and hold that the 2<sup>nd</sup> Plaintiffs' registration was fraudulent.

## **Issue No 2**

### **If there was fraud, when was the fraud discovered?**

10 Counsel for the 1<sup>st</sup> plaintiff submitted that Exhibit P4 which is the Certificate of Title for land comprised in Mawokota Block No. 195 Plot No.4 indicates that the land was registered in the names of the first original plaintiff on the 19/7/1958.

He added that under the limitation Act Cap 80 Section 5 states that ***"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or if it first accrued to some***  
20 ***person through whom he or she claims to that person."***

Counsel then submitted that the defendants in their second further Amended Written statement of defence have attached a letter dated 20/1/1997 written to the



commissioner of land registration by Kawooya Bakazirwendo at Bumpenje

He maintained that if it is this letter which the Defendants seek to rely on as confirming that the fraud was discovered by the late Dominico Kityo in 1996, they disagree with such proposition. That annexure D5 and D6 were never exhibited in this court indeed all the defence documents were never exhibited and given numbers what the defence  
10 did was to dump documents on the court record. These documents are therefore not exhibits. Further submissions were that the author of the letter dated 20/1/1997 was never produced in this court to tender the same. Section 63 of the evidence Act Cap 6 was referred to and it states that a document must except in cases referred to in Section 64 of the evidence Act Cap 6 be proved by primary evidence see the case of **DPP of Tanzania versus Nathan (1966) E.A 13**. He added that it is trite law as held in the case of **Biteremo versus Situma CA 15 of 1991 SC unreported**  
20 that an item tendered for identification does not become an exhibit until it is formally proved and admitted in evidence. It was submitted for the first plaintiff that annexure D5 and D6 attached to the Defendants Written Statement of defence and the witness statement save for the visitation to locus in

quo document attached as D2 to **Nalule Sarah** statement are inadmissible and are of no evidential value.

Counsel concluded that if any fraud was committed which is denied then the same ought to have been discovered in 1958 when the first original plaintiff acquired registrable interest in the suit land.

Counsel for the Defendants on the other hand referred to paragraphs 25 (a) of **Sarah Nalule's** witness statement that  
10 **Dominico Kityo** (previous defendant) searched the lands office in 1996 and found out that the suit land had been fraudulently registered by the Plaintiffs. They added that fraud was discovered in 1996 which was followed by the caveat of **Dominic Kityo** on the suit land dated 24.6.1997.

I have considered the submissions on this issue and for avoidance of doubt, I reproduce paragraph 25 (a) of Sarah Nalule's witness statement:-

20 ***“25(a) the original Defendant Dominico Kityo now deceased went to the land office in 1996 to make a search after learning that the original Plaintiff Kaloli Lutwama now deceased wanted to sell the ancestral land of Lutiba Kyemwa at Luwala and it is then that Dominico Kityo and other members of the lineage of Lutiba Kyemwa***

***discovered that kaloli Lutwama had caused himself to be registered as owner of the suit land fraudulently on 1.10.1986. Subsequently dominico Kityo lawfully lodged a caveat together with the supporting affidavit are herewith attached and marked together as "DII" and subsequently Kaloli Lutwama filed a suit against Dominico Kityo seeking the removal of his caveats on his land and the defendant Dominico Kityo filed a written statement of defense with a counter claim seeking to recover the suit land as belonging to the Lutiba Kyemwa lineage and therefore the defendant's counter - claim is not time barred."***

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Counsel for the second Plaintiff submitted that the Defendant did not exhibit any proof of when the fraud was discovered. However, it is the finding and holding of this court that the lodgment of the caveats in respect of both plots 3 and 4 was evidence that fraudulent registration had taken place. Even when **Rev. Father Otto Katto Assimwe** was being cross-examined by Defendant's counsel, he stated that the mutation form was made on 30.9.1986 by **Kaloli Lutwama** so the

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fraud could not have been discovered earlier and the caveats were lodged in 1997.

It is therefore the finding and holding of this Court, in agreement with counsel for the Defendants that the fraudulent registration was found out and caveats lodged in 1997.

### **Issue No. 3**

#### **10 Whether or not the Defendants claim is time barred?**

Counsel for the Plaintiffs submitted that the Defendant's counter claim for cancellation of the Certificate of title held by 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs should not be cancelled as 39 years have elapsed since 19.7.1958. Counsel for 1<sup>st</sup> Plaintiff quoted the case of **Muhammad B Kasasa vs Jasphar Buyonga Siraji Bwogi Court of appeal civil appeal No. 42 of 2008**, where it was held that a cause of action which is time barred should not be allowed.

20 Counsel for the Defendants on the other hand submitted that the general position of the law is that in cases of fraud, time starts running from the time the fraud is discovered. They made reference to Section 25 of the limitation Act, Cap 80 Laws of Uganda. They concluded that since fraud was established in 1996, it was immediately followed by caveats

which culminated in the instant suit, then the suit and counter claim is not time barred.

On this issue, Section 5 of the limitation Act provides for 12 years within which to recover land. Nevertheless and as correctly submitted by Counsel for Defendants, Section 25 of the Limitation Act provides for postponement of limitation period in case of fraud or mistake. For avoidance of doubt, I do hereby reproduce **Section 25 (a), (b) and (c)** .

10 ***“25 where, in case of any action for which a period of limitation is prescribed by this Act, either-***

***a)The action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent;***

***b)The right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) of this Section; or***

20 ***c)The action s for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake.”***

Since I have already found and held that caveats were lodged in 1997 after the discovery of the fraudulent registration of the land in dispute, and the main suit and

counter claim were filed that very year of 1997, then the Defendants counter-claim is not time barred.

#### **Issue No. 4**

#### **Remedies available to the parties.**

Counsel for the Plaintiffs had prayed for various remedies including an order for removal of caveats, general damages, loss of earnings, mesne profits, dismissal of the counter-claim and costs.

Since the Plaintiffs have lost in all issues as outlined above, then I do hereby dismiss their suit against the Defendants. I further do hereby make the following orders:

- i) I proceed under Section 177 of the R.T.A to order the cancellation of the certificates of title of the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff and nullify their registration as owners of **Mawokota Blok 195 Plots 4 and 3** respectively on account of fraud.
- ii) I order that the names of the defendants/counter claimants be substituted on the Certificates of title in respect of **Mawokota Blok 195 Plots 4 and 3** as trustees for the lineage of **Lutiba Kyemwa**
- iii) I award costs of the main suit and the counter claim to the Defendants.

.....  
**W. MASALU MUSENE**

**JUDGE**  
**31/10/2017**