

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]

CIVIL SUIT NO. 418 OF 1988

- 1. SOLOMON KADDU LUWAGGA**
- 2. TIMOTHY TAMALE**
- 3. RICHARD SEKIYIVU**
- 4. ANNA NAMAKULA**
- 5. JOYCE NAMISANGO**
- 6. ANNET NANTONGO**
- 7. SARAH NAKABUGO**
- 8. FRED KIKABI**
- 9. JOYCE BIRUNGI**

suving by her brother and next friend

(SOLOMON KADDU LUWAGGA) :::::::::::::::::::::::::::::::::::PLAINTIFFS

VERSUS

- 1. ARTHUR SEGAWA BALILUNO**
- 2. CHRISTOPHER KIWANUKA KAWAGAMA**
- 3. ALOYSIUS MUKWAYA LWANYA:::::::::::::::::::::::::::::::::DEFENDANTS**

BEFORE HOM. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

By a plaint dated 25th November 2015, the third Plaintiff Richard Sekiziyivu, sued the Defendants for his share in land comprised in Kyadondo Block 245 Plot 63; arising from the last Will of his late father; Edward B. M.L. Baliruno.

In the plaint by evidence in court, the said 3rd Plaintiff led evidence to show and prove that under the said Will, out of the 440 acres of land comprised in the said plot 63, the Plaintiff was given 1 (*one*) acre of land, which is squarely located and constituted in the portion of land comprised in plot 460 currently registered in the names of the 3rd Defendant. He averred in the plaint under paragraphs 4, 5, 6, 7 and 8 that around the 19th day of September 1986, the

late (1st Defendant) in his capacity as Executor and Administrator of the estate of the late Edward B. M. L. Baliruno fraudulently transferred all the land, then comprised in plot 63 Kyadondo Block 245 to the 2nd Defendant who wrongfully and fraudulently proceeded to cause the then plot 63 to be registered in his (2nd Defendant's) names on the 22nd day of September 1986.

The transfer was effected using a Power of Attorney issued purportedly by the 2nd Defendant to a one Christine Nabateregga dated 20th January 1987. Upon the subdivision of plot 63, the 3rd Defendant then fraudulently acquired plot 460 and had it registered into his names on 14th February 1996.

The third Plaintiff states that at all material times, he had no knowledge and did not consent to any sell and/or transfer of any part of which constituted his beneficial share in his father's estate of which he was defrauded. He gave the details of fraud against all the Defendants vide paragraph 8 of the plaint. He prayed for an order cancelling the transfer and registration of the suitland – Kyadondo Block 245 plot 460 in the names of the 3rd Defendant; an order for subdivision, or current market value of the 3rd Plaintiff's share, interest, general damages and costs of the suit.

During the hearing, the case for 1st, 2nd, 4th – 9th Plaintiffs was settled amicably by the 2nd Defendant compensating them. Only the 3rd Plaintiff who was ill, did not benefit from the settlement, hence this suit. The Plaintiff led evidence through five witnesses and several exhibits. It is also noted from the amended plaint that the 3rd Defendant was joined to the suit but did not attend Court for trial. The matter therefore proceeded *ex-parte* against him. The 1st and the 2nd Defendants attended the trial up to the testimony of PW4 through their lawyer Mr. Kawesa, but ceased attending Court. Mr. Kawesa also never attended the closing sessions of the Plaintiff's case, neither did he file any submissions in their defence. In light of the above, Counsel for the Plaintiff addressed Court in her submissions on 6 issues as herebelow;-

1. Whether the 2nd Defendant lawfully acquired the 3rd Plaintiff's share in the property comprised in Block 245 Plot 63 Kiwuliriza.

2. Whether the 3rd Plaintiff received consideration from the 2nd Defendant for the portion of land in issue.
3. Whether the Plaintiff's claim is barred by limitation.
4. Whether the 3rd Defendants' acquisition of land comprised in Block 245 Plot 460 at Kiwuliriza was tainted with fraud and illegality and should be cancelled.
5. What remedies are available to the parties

Resolution:

ISSUE No. 1: Whether the 2nd Defendant lawfully acquired the 3rd Plaintiff's share in the property comprised in Block 245 Plot 63 Kiwuliriza

There is evidence vide PEXI last Will of the late Edward B. M.L. Baliruno that Richard Sekiziyivu was given 1 acre to be demarcated from the 1st Defendant's boundary. It reads;

“1.00 acre for Richard Sekiziyivu, should be demarcated from Arthur's boundary, but should not go far”

The Plaintiff confirmed this through the evidence in Court by PW1 Richard Sekiziyivu; who referred Court to the contents of the Will. The Plaintiff led further evidence of PW2 – Nabaterregga Christine in proof that he was never party to the sale transactions between the 1st Plaintiff and 2nd Defendant. This witness by evidence, established that the Plaintiff has never been compensated by the Defendants, and that the 3rd Plaintiff has never received any money from the 2nd Defendant. PW2's testimony also contradicts the information contained in the transfer form for plot 63 Block 245, reflecting the consideration thereof as '*a gift*' (see PE4). This is because PW2; in testimony said that the consideration was shs. 100 million (*one hundred million shillings*) paid in two instalments. PW2 revealed in evidence that she was advised to write on the transfer '*Gift*' so that it lessens the stamp duty payable in lieu of the transfer upon purchase.

Its Counsel's contention that the use of the word '*gift*' on the transfer document as consideration was made fraudulently in order to defraud Government of revenue. From the evidence and the pleadings, I am convinced that the Plaintiff has satisfied the balance of

probability in proof of the fact that, the 3rd Plaintiff did not get his due share of his father's estate. It is proved that the 2nd Defendant unlawfully acquired the 3rd Plaintiff's share in the property comprised in Block 245 Plot 63 at Kiwuliriza. This issue terminates in the affirmative.

2. Whether the 3rd Plaintiff received consideration for the portion of land he was entitled to from the 2nd Defendant.

I have read the submissions by Counsel for the 3rd Plaintiff on this point and I agree with her that the evidence on record supports the finding that according to PW4; the Letters of Probate by which the 1st Defendant was declared an Executor of the will, had the Will annexed to them. The 1st Defendant therefore had clear notice of the Plaintiff's interest. The 2nd Defendant knew very well that he had not paid the 3rd Plaintiff, but went ahead to register all the suit land in his names and to hold out as the lawful owner. It has been further proved by evidence of PW2; Nabateregga that there were discrepancies in the Power of Attorney used to transfer to the 2nd Defendant. This was because whereas the Powers of Attorney of 24th January 1987, is in the favour of Charles Kawagama (PE3), the transfer was made for Christopher Kawagama as donee of the said powers. The dates of the execution are also shown to be problematic in that, well as the Powers of Attorney of 24th January 1987 donated by Charles Kawagama, appoints Nabateregga in 1984, she purported to execute the powers entrusted to her in favour of the 2nd Defendant on 22nd September 1986 (See PE3 & PE4).

The documentation is therefore rendered suspect. However, in further proof of their case, PW5, from the office of the Registrar of Titles, in his testimony told Court that the said transfer was not effective to vest the suit land in the names of the 2nd Defendant.

In his testimony in Court, the witness; Moses Sekitto stated thus

“I have not seen any other document to support the donee transactions. In these matters, a supporting document should be a Powers of Attorney, but it is not there, this one of 24th January 1987, yet the transfer is of 1986. It can't operate retrospectively...”

In view of the above evidence, it is my finding that the 2nd Defendant did not acquire the legal interest in the suitland and so could not transfer any legal title to any third parties; including the 3rd Defendant.

3. Whether the 3rd Defendant's acquisition of the land is tainted with fraud and illegality and should be cancelled.

From the evidence of PW5 alongside PW1, PW2, PW3 and PW4; it has been proved that the documents used to procure the land by the 2nd Defendant were irregular and false. There are glaring inconsistencies in the defences as filed with what actually is found on the application files. For instance the 2nd Defendant claimed that he bought from the 1st Defendant and the 2nd Defendant purportedly sold to the 3rd Defendant, yet the 2nd Defendant did not acquire any legal interest in this land.

It is stated in the 3rd Defendant's written Statement of Defence that he purchased the suitland for a consideration of shs. 25,000,000/- only (*twenty five million*), yet the transfer form for that transfer shows that only shs. 5,000,000/- (*five million*) was declared. This was untruthfulness, where the 3rd Defendant underdeclared the value to unfairly gain by paying less stamp duty. This was unfair to the Government which lost revenue. Is this conduct fraudulent to amount to such conduct as would be termed of such a nature as to lead to cancellation of the title?

Black's law Dictionary defines fraud at page 660 (6th Edition) as

“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 words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another....., it's 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 suggestion or by suppression of truth and renders all surprise, trick, cunning dissembling and any unfair way by which another is cheated....”

Also see the case of ***F. J. K Zaabwe vs Orient Bank & 5 Ors***

SCCANO. 04 of 2006 page 28 (lead judgment of Katureebe JSC at

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page 28) as;

In this case, the 3rd Defendant deliberately understated the value of the suit land to be only shs. 5,000,000/- (*five million*) yet, elsewhere (per plaint and sale agreements, the value is stated to be shs. 25,000,000/- (*twenty five million*).

The aim was to cheat government of revenue which is an act of fraud. The 3rd Defendant's title is therefore tainted with fraud and cannot pass the test of bonafide purchaser for value without notice.

This type of scenario was akin to the situation in *Samuel Kizito Mubiru & Anor versus W Byensibe & Anor HCCS No. 513 of 1982*, where the Plaintiff inserted shs. 5,000,000/- in the sale agreement as the purchase price for land when in fact he had paid

shs. 2, 400,000/- (*two million, four hundred thousand only*). Court held *inter-alia* that the mode of acquisition of the title was with fraud and illegality because bonafide included without fraud or without participation in wrong doing. That by the Plaintiff undervaluing the suit land, the design was to defraud the Government of its revenue by way of paying less stamp duty.

Furthermore from the evidence adduced by the witnesses, it was found that the Powers of Attorney relied on while transferring the land were not authentic. (See PW6's evidence and PW5's evidence in Court.) There is enough evidence as required in fraud cases to support the submissions by Counsel in this case that the 3rd Defendant is not a bonafide purchaser for value without notice of any fraud whose title would be protected by reason of fraud and yet the title fraudulently obtained ought to be cancelled.

4. Whether the 3rd Plaintiff's claim is barred by limitation.

Counsel for the Plaintiff referred to **Section 5 of the Limitation Act Cap 80**, and argued that the law is that;

'No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the cause of action arose'.

Counsel argued that this matter was filed in 1988 then adjourned *sine die* on 15th April 1991 to allow settlement to be reached between the 1st Defendant, 2nd Defendant and the Plaintiff's, save the 3rd Plaintiff, when the 3rd Plaintiff came back to Court to have the matter re-fixed in 2009, he was not bringing a fresh action, but was reviving a matter that was already in Court.

Counsel argued further that **Section 5 of the Limitation Act**, did not apply to this situation. I agree with that position.

Regarding adding the 3rd Defendant, Counsel argued that the 3rd Defendant acquired the contested interest in the suit land in 1996. The order to join the 3rd Defendant to the suit was made on 18th November 2015. Counsel argues that the suit against the 3rd Defendant is premised on fraud; which is an exception to the 12 year limitation period rule. This is because it is trite law that fraud ravel's all requirements of procedure.

The general rule on limitations of actions is contained in **Section 5 of the Limitation Act** thus;

'no action shall be brought by any person to recover any land after the expiration period of twelve years from the date on which the right of action occurred to him or her or, if it first accrued to him or her or, if it first accrued to some person through whom, he or she claims'

There are however exceptions to the above rule, provided for in respect of causes based on fraud. This is contained in **Section 25 of the same Act**. It provides that;

“Where a cause of action is founded on fraud in the acquisition of land sought to be recovered, time does not commence to run as against the Plaintiff until he or she becomes aware or could, with reasonable care known about the fraud. Section 25 (a) for action based on fraud the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or could, with reasonable diligence have discovered it.....”

This position is discussed in a number of case as in, *Mukasa Sendaula versus Christine Mukalazi (1992 – 1993) HCB* 179, Under **O.7 R6 of the Civil Procedure Rules**, it is a mandatory requirement that the suit instituted after limitation, the plaintiff shall show the grounds upon which exemption from the law is claimed. This position was considered in

Vicent Rule Opio versus Attorney General (1990 – 1992) KALR 68, and Onesiforo Bamuwayira & 2 Ors versus AG (1973) HCB 87 and John Oitamong versus Mohammed Olinga (1985) HCB 86,

The rule of law arising from the above, the cited cases is that ‘a suit which is barred by statute where the Plaintiff has not pleaded grounds of exemption from limitation in accordance with **O.7 r6 of the Civil Procedure Rules** must be rejected’.

This therefore leads to the consideration whether the 3rd Plaintiff in the amended plaint which brought in the 3rd Defendant pleaded the said exemptions to **Section 25 of the Limitation Act** as per **O.7 R6 of the Civil Procedure Rules**.

From the said plaint under paragraph 8; “Particulars of the 3rd Defendant’s fraud” and paragraphs 9, 10, 11, 12 and 13 thereof raised the said fact. In paragraph 10 and 11, he states, “The 3rd Defendant purported to acquire proprietorship, civil Suit No. 418 of 1988 was pending hearing in Court”.

In the premises, the 3rd Plaintiff contends that the aforesaid transfer of his 1 acre (one) comprised in PART of the former plot 63, and the said certificate of title in the names of the 2nd Defendant and subsequently in the names of the 3rd Defendant were and/or are void for fraud because the consent of the 3rd Plaintiff was never sought. Also in paragraph 12, “the 3rd Plaintiff shall further aver and contend that the 3rd Defendant acquisition of the suit land smacks of fraud and that the same was a fraudulent design meant to deprive the 3rd Plaintiff of his known interest in the suit land”.

The above elaborated statement of facts by the Plaintiff in the plaint clearly bring out the fact that the cause of action against the 3rd Defendant is premised on fraud. It goes further to elaborate that by the time the fraud came to the attention of the Plaintiff, the limitation had lapsed on account of the intricate fraudulent nature of the dealings between the different Defendants (D1, D2 and D3).

I am therefore satisfied that this is one of those cases where the exceptions under **Section 25 of the Limitation Act** are applicable.

I therefore do hold that the suit against the 3rd Defendant is not barred by limitation.

5. What remedies are available to the parties?

(a) Cancellation of title

The Plaintiff prayed that the 3rd Defendant's name on the title for Block 245 Plot 460 Kiwuliriza be cancelled, and an order issued directing the demarcation of the 3rd Plaintiffs portion amounting to 1 (*one*) acre from the said plot 460.

The Plaintiff has led evidence as per issues 1, 2, 3 and 4 and successfully showed that:-

- (i) The 3rd Plaintiff is a son of the late Edward B. M. L. Baliruno and a beneficiary under the Will for a portion of 1 (*one*) acre from Block 245 Plot 63 Kiwuliriza.
- (ii) The land was fraudulently transferred to the 2nd Defendant without compensating the Plaintiff for his share.
- (iii) The 3rd Defendant's acquisition of Plot 460 Block 245, formerly part of Plot 63 Block 245 Kiwuliriza was fraudulent.

Having found that this registration was procured by fraud, then the law under **Section 77 of the Registration of Titles Act** comes into play to render such a title *void*. *The section states that;*

“Any certificate of title, removal of encumbrance(s) or cancellation, in the Register Book procured or made by fraud, shall be void as against all parties or privies to the land”.

The 3rd Defendant's certificate of title for land described as Block 245 plot 460, formerly Block 245 Plot 63 Kiwuliriza, is accordingly void.

The law under **Section 177 of the Registration of Titles Act**, further empowers this Court to direct the Commissioner to cancel such a certificate of title.

The Plaintiff prayed in the alternative for compensation by the 3rd Defendant of the 3rd Plaintiff's market value of his share in the land at the current market value. He put the value at US\$. 1,000,000/- (*one million*), with interest of 24% per annum from 1996 till payment in full.

I did not find any supporting evidence to prove the current market price of this land. The valuation report was obtained in 2012 and this was in the amount of Ushs. 520,000,000/- (*five hundred and twenty million*) Uganda shillings. It is now 5 (*five*) years since then, this Court cannot speculate that the land is now worth the value alluded to it by the 3rd Plaintiff. This remedy is therefore not practical in the circumstances and will be rejected. Instead this Court orders that as per **Section 177 of the Registration of Titles Act**, the Commissioner should cancel the certificate of title obtained by fraud by the 3rd Defendant and substitute it with the original title reflecting the position before as Block 245 Plot 63. The Commissioner should also by order of this Court, demarcate 1 (*one*) acre off Block 245 Plot 63, and register it in the names of the 3rd Plaintiff, as his share (benefit) under the Will of the late Edward B. M. L. Baliruno.

b) General Damages

The Plaintiff referred to **Section 178 of the Registration of Titles Act** and argued that Court awards the Plaintiff general damages of shs. 600,000, 000/- (*six hundred million*) as compensation for inconveniences.

The law regarding general damages is that damages aim at placing the injured party in good a position so far as money can do it as if the matter complained of had not occurred. According to *Stroms versus Hutchinson [1905] AC 515*; *general damages are the direct natural or probable consequence of the act complained of*. The award of general damages is in Court's discretion. While special damages relate to past pecuniary loss calculable at the date of trial, general damages relate to all other items of damages whether pecuniary or non-pecuniary, which include anticipated future loss as well as damages for pain and suffering, inconvenience, and loss of amenity. In awarding general damages, Courts are usually guided by convention, comparison with previous awards, experience and intuition. **(Per the Uganda Civil Justice Bench Book; 1st Edn. Jan. 2016 – pages 207)**

I have perused the Judgments in other similar cases where damages were awarded. These cases restate that awards of general damages is in the discretion of Court and is always presumed to arise from the natural and probable consequence of the Defendants' act or

omission. (*See Charles Acire versus Myaana Engola HCCS NO. 143 of 1993, Kibimba Rice Ltd. versus Umar Salim SCCA No. 17 of 1992 and Uganda Commercial Bank versus Kigozi (2002), EA 305.*)

IN *UCB versus Kigozi (supra)*; it was restated that in assessment of quantum of damages, the consideration should mainly be the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of breach or injury suffered.

In this case therefore, the evidence has been laid before Court that the 3rd Plaintiff has been deprived of use, access and development of the said land since 1981.

I have considered the prayer by the 3rd Plaintiff for a compensation award of shs. 600,000,000/- (*six hundred million*) as general damages and compared it with other awards by different Courts under similar circumstances. I find the same to be excessively high and unreasonably exaggerated. I am of the inclination that if by 2012, the market value of the land was assessed at shs. 520,000,000/- (*five hundred and twenty million*). It then follows that if this value is retained as the working value of this land, arising from what's transpiring on the land as reported by the contents of EXP2 (valuation report), the land is developed with residential and commercial buildings. The anticipated value of the loss to the 3rd Plaintiff is the fact that perhaps he too could have used the land to set up a similar building.

Assuming the building is for commercial purposes, the same could have at least fetched for the Plaintiff shs. 300,000/- (*three hundred thousand*) per month which is shs. 3,600,000/- per annum. The period from 1981 to 2012 when valuation was done, is taken to include the time when these buildings were being constructed. If we assume that it took the Plaintiff 10 years to complete the house, then it can be assumed that by 1991 the construction would have been completed and earning would have began. Therefore from the year 1991 – 2018, is a period of 26 years. If we apply the multiplier of 3,600,000/- (per year), it translates to (26 x 3,600,000/-) (per year). It translates to (26 x 3,600,000/-) which equals to **shs. 93,600,000/-** (*ninety three million, six hundred thousand shillings*).

From the above calculations, I allow the 3rd Plaintiff to recover shs. 93,600,000/- (*ninety three million, six hundred thousand shillings*) as general damages from the Defendants – jointly and severally.

Costs:

Costs follow the event; as per **section 27(2) of the Civil Procedure Act**, the Plaintiff is awarded the costs as prayed.

For all reasons above, this Judgment is found in favour of the 3rd Plaintiff. The Plaintiff prayed for interest at 24% per annum from 1996 until payment in full. This prayer was not argued and is not substantiated. It is not granted.

The general damages will attract interest at Court rate from the date of judgment till the date of payment in full.

I so order.

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Henry I. Kawesa

JUDGE

4/4/2018

4/4/2018

Sarah Kisubi for the 3rd Plaintiff

3rd Plaintiff present.

Sarah – matter exparte against the Defendant. It is for Judgment.

Court: Judgment communicated to parties as above

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Henry I. Kawesa

JUDGE

4/4/2018