

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MPIGI

CIVIL SUIT NO. 49 OF 2017

PROSPER NDYABAHIKA:.....PLAINTIFF

Versus

- 1. AGABA STEVEN**
- 2. REV. NATUKUNDA NATHAN:.....DEFENDANTS/COUNTER CLAIMANT**

10 (Administrators of the late Erimiya Kamuza Vide High court Administration Case No. 591

AND

- 1. PROSPER NDYABAHIKA:.....DEFENDANTS TO COUNTER CLAIM**
- 2. THE COMMISSIONER LAND REGISTRATION**

BEFORE: HONOURABLE JUSTICE WILSON MASALU MUSENE

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JUDGMENT

This case was initially filed in Nakawa Court as **HCCS NO. 028 of 2011**, in the names of **Prosper Ndyabahika vs Erimiya Kamuza**.

After the dissolution of Nakawa court, it was transferred to the land division and Registered as HCCS NO. 2390 of 2016. In March, 2017, it was transferred to Mpigi High Court Circuit and registered as HCCS NO. 49 of 2017. By that time, **Erimiya Kamuza** had died and was substituted by the Administrators to his estate, namely **1. Agaba Steven and 2. Rev. Natukunda Nathan**.

Representation:

The Plaintiff, **Prosper Ndyabahika** was represented by M/S Pearl Advocates and Solicitors, while the Defendants/Counter claimants were represented by M/S Stanley Omwony Co. Advocates.

Brief background facts:

The Plaintiff's case is that he is the owner of the suit land comprised in **Gomba Block 3, Plot 1**, land at Kyamukama measuring approximately 561 acres. And the plaintiff averred that he purchased the suit land from prince David Namugala Mawanda on 22/8/2005 which Prince
10 was beneficiary and son of the late George William Mawanda who was owner and registered proprietor since 10/12/1945.

Prosper Ndyabahika further pleaded that the title was transferred into his names on 9.2.2006 and since then, he is in possession of the Certificate of title.

It was further the Plaintiff's case that at the time of purchase, the late **Erimiya Kamuza** was introduced as a squatter but the same **Erimiya Kamuza** has claimed to be a registered owner with a Certificate of Title.

It was also Plaintiff's case that by the time the Plaintiff purchased the suit land, the special certificate of title in the names of **Erimiya Kamuza** had been cancelled by commissioner Land Registration in the year 2002 on 15/2/2002, under instrument No. KLA 233477 and George
20 William Mawanda was reinstated on the title.

The Defendant, the late **Erimiya Kamuza** on the other hand claims to have purchased the suit land from **George William Mawanda** in the year 1982, and that the payment in respect, thereof was in form of cows. The Defendant, the late **Erimiya Kamuza** averred in his written statement of Defence that he paid cows to **George William Mawanda** and that in the year 1986 got the title transferred into his names and a special certificate was issued in the year 2000. The Defendant's case was that he is in occupation of the disputed land not as a squatter but as the owner.

The second Defendant/by counter claim, the commissioner for land registration filed a defence to the effect that the transfer of the title to the Defendant in 1986 was in error as the registered proprietor G.W Mawanda had lodged a caveat on his title in 1981 under instrument No. Kla 97711 of 11/3/1981 and secondly there were no documents in lands to support the transfer of the land by **G.W Mawanda to Erimiya Kamuza**

In a joint scheduling memorandum filed on 25.6.2013, the following facts were agreed upon:-

- 10 i) That according to the photocopy of title presented by the Defendant, he got registered on 12/12/1986, under instrument No. Kla 21947 as transferee from George William Mawanda.
- ii) The Defendant is in possession and occupation of the suit land.
- iii) In the year 2000, the counter claimant was granted a special Certificate of title by commissioner Land Registration under instrument No. Kla 215935 the duplicate Certificate of title having got lost. N.B. Whereas at scheduling , the Defendant presented the fact that the duplicate title issued on 12/12/1986, was lost, when the photocopy of the special certificate was attached to the witness statement of **Agaba Stephen** as exhibit D1, issued under instrument No. Kla 21935 of 15/6/2000, the title clearly showed the special certificate was issued because the original duplicate certificate of title which was originally issued had been **“obliterated”** and not lost.
- 20 iv) In 2002, the special certificate of title issued to Erimiya Kamuza (Defendant/counter claimant) was cancelled and reinstated into the names of George William Mawanda on 15/2/2002 under instrument No. Kla 233477.
- v) The Certificate of title for **Gomba Block 3, Plot 1** was on 25/7/2002 under instrument No Kla 23904 / registered in the names of the Administrators to the estate of the late **George William Mawanda**.
- vi) On 25/7/2012, under instrument No. Kla 239042, the Administrators to the Estate of G.W Mawanda transferred the title into the names of **Prince David Namugala Mawanda** son of G.W Mawanda and beneficiary.

- vii) On 9/2/2006, under instrument No. Kla 28978, the Plaintiff was registered on the Certificate of title for Gomba Block 3 , Plot 1 as owner thereof after purchase on 22/5/2005.

Issues:-

- 1) Whether the Plaintiff acquired the suit land fraudulently?
- 2) Whether the 2nd Defendant to the counter claim rightly cancelled the counter claimant's name from Certificate of title?
- 3) Whether at the time of purchase of the suit land by the Plaintiff, the suit land was part of the estate of the late George William Mawanda?
- 10 4) What are the remedies available to the parties?

A number of Exhibits were were also agreed upon and will be referred to in the submissions by both sides and the decision of the court. These were:-

Plaintiff's Exhibits

- 1). Certificate of title for Gomba Block 3 Plot 1 at Kyamukama – P. Exh 1.
- 2) Letters of Administration in Administration Cause No. 7622 of 2000- P. Exh 2.
- 3) Application by Administrators to be registered on the suit property P. Exh 3.
- 4) Transfer forms for the suit land in favour of David Namugala Mawanda-P. Exh 4.
- 20 5) application for special certificate of title and gazette dated 17/11/2002 P.Exh 5.
- 6) Public Notice to the defendant by Commissioner for land registration for cancellation of title P. Exh 6.
- 7) Will of the late George William Mawanda P. Exh 7.
- 8) Sale agreement between David Namugala Mawanda and the Plaintiff P. Exh 8.
9. Caveat lodged by George William Mawanda (incomplete) P. Exh 9.
- 10 Caveat lodged by David Namugala Mawanda P. Exh 10.

Defendant's/ Counter claimants Exhibits:

- 1) The special Certificate of title for Gomba Block 3 Plot 1 at Kyamukama admitted as “D. Exh 1” .
- 2) DPP’s Letter dated 28/09/2010 admitted as “D. Exh 2
- 3) The defendant’s lawyer’s letter admitted as “D. Exh3.”
- 4) *Copy of the will of the late George William Mawanda admitted as Exh .D4.”*
- 5) Complaint to the DPP admitted as “Exh. D5.”
- 6) Police report dated 24/2/2012 upon a complaint by the Plaintiff and Defendant consolidated admitted as “Exh. D6.”

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Issue No. 1:

Whether the Plaintiff acquired the suit land fraudulently?

The Plaintiff presented three witnesses, namely **Prosper Ndyabahika** as PW1, **Kalyango Freddie** as PW2 and **Prince David Namugala** as PW3, on top of documentary exhibits.

Counsel for the Plaintiff submitted that the Defendant, the late **Erimiya Kamuza** has always been a squatter on the land in dispute formerly owned by the late **George William Mawanda**. He added that the Plaintiff purchased the suit land in 2005 and transferred the title in the year 2006. It was also submitted that the Plaintiff visited the land before purchase and the Defendant was introduced by Kalyango Freddie (PWII) agent for Prince David Namugala and he was introduced as a squatter.

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Counsel also maintained that the Defendant/counter claimant has no title and from the evidence of PWII and PWIII, the Defendant has no evidence to prove he purchased land from the late George William Mawanda. He added that from the Defendants own evidence, the defendant lacks any evidence to show he purchased land from G.W. Mawanda.

Further that the Defendant did not give any evidence in support of his defence and counter claim that he bought the land.

Counsel for the Plaintiff referred to the evidence of Agaba Stephen whereby in the statement to the Director of Public Prosecutions, dated 20.9.2010, he stated that he was a son to **Erimiya Kamuza**, while under paragraph 2 of the witness statement in court **Agaba Stephen** stated that he is a farm manager of the Defendant, **Erimiya Kamuza**. He submitted that it was a false hood in the Defendant's case which should be noted seriously.

Counsel also submitted that it is not indicated anywhere in Agaba Stephen's Witness Statement that **Erimiya Kamuza** used cows to pay the purchase price for the land in dispute and that none of the defence witnesses witnessed the alleged sale and exchange of cows.

- 10 Counsel for the Plaintiff further submitted that whereas the report was attached to the witness statement of Agaba Steven, the same is suspect and they prayed that court ignores it, as it's not proved by whoever made the investigation and report and Agaba is not competent to exhibit it as he cannot be cross examined on the investigations.

He added that the alleged investigator states in paragraph 4:13 that two special certificates of title were in existence yet evidence before Court is very clear that the special certificate of title issued to the Defendant was cancelled.

- 20 Counsel concluded that DWI Agaba confirms clearly the evidence of PWII, Kalyango and PWIII David Namugala and Nicholus Wambuga (Registrar of titles) that the Special Certificate of title for Erimiya Kamuza was cancelled by commissioner Land Registration and it's the reason the Defendant/Counter claimant filed a counter claim against the Commissioner Land Registration.

It was also the Plaintiff's submissions that PWII, (Kalyango Fred) testified and exhibited P. 14 whereby the Defendant received the notice of Commissioner Land Registration dated 17/10/2011 and the same was witnessed by Francis Mubiri the Sub County Chief.

Further submissions were that whereas the reason for issuance of Certificate of title in favour of George William Mawanda in 2002 was that the original was lost as seen from Exhibit P.I now registered in the names the plaintiff the photocopy of the special Certificate of title issued to the Defendant that was cancelled by the Commissioner Land Registration, **clearly shows that the reason for issuance was that the “original previously issued was obliterated.”**

And that the title being obliterated and being lost are clearly different circumstances and reasons for issuance of a special certificate of title.

Counsel for the Defendant on the other hand submitted that the Defendant pleaded particulars of fraud against the Plaintiff and the commissioner for land Registration and went ahead to prove them by way of evidence beyond the balance of probabilities.

He reproduced the particulars in paragraph 7 of the written state of defense and counter claim as follows: **“Particulars of fraud against the Plaintiff**

- a) In collusion with one David Namugala, tampering with the land office record to cause cancellation of the Defendant’s land title;
- b) Causing the commissioner for Land Registration to cancel the defendant’s title without giving the Defendant a hearing;
- c) In collusion with a one David Namugala claiming that the suit land was part of the deceased’s (George William Mawanda’s) estate whereas not;
- 20 d) Purchasing land of the Defendant without inspecting it and failing to confirm that it was already sold to the defendant over 12 years before;
- e) Abstaining from conducting the usual searches on the ground knowing the defendant’s ownership would be revealed.
- f) Purchasing land fully occupied by the Defendant and deliberately refusing to establish the Defendant’s rights on the land;

He further stated that under paragraph 12 of the written statement of defence and counter claim, the particulars of fraud were pleaded as follows:

“Particulars of fraud against the Commissioner for land Registration”

- i) Cancelling the counter claimant's names from the Certificate of title without affording him a hearing well aware that he had been lawfully registered way back in 1986,
- ii) Illegally reinstating George William Mawanda who had transferred the suit land to the counter claimant in 1986 without his authority or consent;
- iii) Endorsing transfer of the suit land into the names of George William Mawanda and subsequently the alleged executors of the said George William Mwanda deliberately to dispossess the counter claimant.
- 10 iv) Irregularly processing special title in 2002 in favour of George William Mawanda well aware that he had lawfully been issued with another special to the counter claimant in the year 2002 to the same land.
- v) Generally conniving with the Plaintiff and his predecessors in title to defeat the interest of the counter claimant.

Counsel for the Defendant further quoted Section 64 (1) of the R.T.A which provides:-

20 *“Notwithstanding the existence in any other person of any estate or interest, whether derived by grant or otherwise, which but for this act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in the land under the operation of this Act shall except in the case of fraud, hold the land or estate or interest in the land subject to the encumbrances as are notified on the folium of the Registrar Book constituted by the certificate of title but absolutely freed from all other encumbrances.”*

It was further submitted that a prudent purchaser would not have relied on the representations of PW2 and PW3. That a prudent purchaser would not have taken those representations at face value and should have instead carried out independent investigations to verify those facts. Failure to do so was simply a fear to know the truth which he either knew prior to purchase or would have known had he been more prudent. That PW1 totally failed to justify why he did not make inquiries from the local council of the area. He quoted the case of **Kampala District Land Board & Another vs Venansio Baweyaka & 3 others SCCA No. 2/2007** which cited

with approval the earlier decision **Kampala District Land Board & another vs national Housing & Construction Corporation**, where court held that although mere knowledge of equitable interest cannot be imputed as fraud under the Act, where such knowledge is accompanied by wrongful intention to defeat such existing interest amounts to fraud.

Counsel for Defendant added that the moment the Plaintiff was told that Erimiya Kamuza was a squatter, he would have made independent investigations. He added that although at the time the Plaintiff got registered the Defendant's name had been cancelled, if the Plaintiff had conducted inquiries on the ground with all the background information he had, he would have
10 discovered that the defendant was not a squatter as alleged and that the defendant had been registered on the suit land in 1986. The Plaintiff was obliged to inquire into the registration of his immediate predecessors in the title which coupled with findings on the ground would have unearthed the basis of the defendant's occupation and usage of the entire suit land.

The submissions by Counsel for the 2nd Defendant to the counter claim (Commissioner for land Registration) were that in the year 2001 an anomaly claim/ complaint was raised by Prince David Namugala Mawanda accompanied by his estate Manager Kalyango Freddie (PW2) to Commissioner Land Registration. And that upon receipt of thereof and perusal of the Register, the commissioner for Land Registration realized that the Defendant/counter claimant was
20 registered in error in 1986 for two reasons viz;-

1. That at the material time, there was existing caveat by George William Mawanda, date 11th March 1981 under Inst. No. KLA 97711, the Registered Proprietor (then).
2. There was no documents in support of the transfer to the Defendant/counter claimant .
In consideration of the above, the commissioner for Land registration issued a notice, to the defendant/counter claimant, dated 17th October, 2014, of the intention to cancel:-
 - The entry of the name of the Defendant/counter claimant and remove it from the register book.

- The special Certificate of title issued to the Defendant/counter claimant under Inst. No. KLA 215935 dated 15th June 2000 was cancelled for having been registered in error and wrongly obtained

It was further submitted that the above notice was served to defendant/counter claimant using two modes namely:-

- 1) Personal service by a sub-county chief one Mubiri in presence of PW2 Kalyango Freddie on 2/11/2001.
- 2) Through advertisement in Bukedde News paper, dated 6th November, 2001, a local news paper that is widely circulated in Buganda Region where the Defendant/counter claimant lived.

After considering but rejecting the objection of the Defendant/counter claimant, the commissioner for Land Registration on 10th December 2017 communicated his decision to put the intention to cancel into effect and called for a special certificate of title in possession of defendant/counter claimant for cancellation, which he (Defendant) did not deliver.

Further submissions were that the communication was also served on and received by the defendant by personal service that was witnessed by Kalyango Freddie (PW2). Following the above events and apparent satisfaction by the Defendant/counter claimant with decision of the 2nd Defendant to the counter claim, the register was accordingly rectified.

- 20 Counsel for the 2nd Defendant further submitted that whereas it is true that the Defendant/counter claimant pleaded particulars of fraud against commissioner of Land Registration as per this submission, that it is not true that they went ahead to prove the alleged particulars by way of evidence beyond balance of probability or at all.

They added that on the contrary the alleged particulars of fraud were not strictly proved to the standard required by law for the following reasons

- i) Cancellation of the counter claimant's names from the certificate of title was done after effective communication from that of the Notice of Intention to cancel. Refer to Exhibits PExh 6 and PExh 13.
- ii) Reinstatement of George William Mawanda was done following the procedures of rectification of register as provided for under Section 91 of the Land Act. 1998 as amended by Land (Amendment) Act 2004.
- iii) There was no deliberate intention to dispose the counter claimant or at all, as the rectification was a matter of reinstatement of the previous registered proprietor, George William Mawanda who was succeeded, by executors, on Certificate of the title in question.

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Further submissions were that as it was communicated by commissioner Land Registration, processing a special Certificate of title in 2002 in favour of Defendant/counter claimant was done in error hence subsequent cancellation to rectify the register. While processing of a special Certificate of title in favour of George William Mawanda was done after the said cancellation and following all the procedures. Therefore no two special certificate of titles existed at the same time as the defendant counter claimant appear to suggest in their submissions.

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Counsel for the Commissioner for Land registration emphasized that there was no connivance with the Plaintiff or any of his predecessor in title. And that on the contrary the 2nd Defendant to the counter claim acted independently pursuant to the claim/complaint as per evidence of **PW2 Kalyango Freddie**, in his witness statement and upon discovery of an error on the title register. This was in exercise of the powers provided by law under Section 91 (2) of the Land Act 1998 as amended by Land (Amendment) Act 2004 which is equivalent provisions of Section 69 of R.T.A, applicable then.

They also made reference to the case of **Kampala Bottlers vs Dominico (U) LTD, SCCA NO. 27 OF 2012** where fraud was discussed. They concluded that no fraud was proved against the 2nd Defendant.

I have carefully considered and internalized all the submissions on record as far as the first issue is concerned. The Plaintiff, **Prosper Ndyabahika** in his witness statement reiterated that he is the current registered proprietor of the Land in dispute comprised in **Gomba Block 3 Plot 1, land at Kyamukama**. The Land title was exhibited during the hearing and marked **PEXH.1** It was also Plaintiff's evidence that he purchased the land in question from **Prince David Namugala Mawanda** on 22.8.2005 and at a consideration of UGX 32,000,000/=. The sale agreement between **David Namugala Mawanda** and the Plaintiff was tendered in as **P.EXH.8** it is also not disputed that prince **David Namugala Mawanda** was the Registered proprietor of the land on 25.7.2002 before he sold to the Plaintiff.

10 The sale agreement was concluded in the chambers of M/S Jombwe & Co. Advocates.

PW1 **Prosper Ndyabahika** also testified that at the time he bought, **David Namugala** confirmed to him that **Erimiya Kamuza** was a squatter who was occupying 10 acres. PW1 wanted to compensate **Erimiya Kamuza** as a squatter but he is said to have declined, stating that he also had title. It was also the Plaintiff's testimony under paragraph 10 of his witness statement that the biggest part of the land he purchased of about 561.0 acres was free and covered with bush, save for 10 acres where **Erimiya Kamuza** had a mud and wattle house, improved with bricks and where he was using for open grazing plus three gardens of beans, potatoes and cassava around Defendant's home. The Plaintiff, under paragraph 6 of his witness statement stated:-

20 *“6. That before I purchased the suit land, I first searched in land registry and the Certificate of title had no encumbrance registered by Erimiya Kamuza. The caveat earlier registered by the Defendant on 18/3/2002 had been cancelled by the Registrar as having been registered in error. The only caveats that were on the title was for David Namugala that was selling to me and that of his late father one George William Mawanda.”*

So when the Defendant, in the particulars of fraud against the Plaintiff alleged that Plaintiff colluded with one **David Namugala** to cause the cancellation of Defendant's Title, I find and hold that it is not true as evidence on record reveals that by the time prince **David Namugala** sold to the Plaintiff in 2005, the title of the Defendant had already been cancelled.

Consequently, the Plaintiff could not even have colluded with the Commissioner for Land Registration to cancel Defendant's Title as the commissioner acted in exercise of their powers under Section 91 (2) of the Land Act 1998 as amended in 2004.

Furthermore, I find and hold that the cancellation of Defendant's Title was done after the notice given to the Defendant from the Chief Registrar of titles dated 17.10.2001. That was long before the Plaintiff purchased in 2005 and so the Plaintiff could not be said to have colluded with **David Namugala** or Commissioner for Land Registration to cancel the Defendant's Title. I therefore agree with the submissions of counsel for the Plaintiff that when the Plaintiff purchased the suit land in 2005, and as per paragraph 18 of his witness statement, he could not have known about the Defendant's Land and title as he had no interest in the said land when Defendant's Title was cancelled in 2002.

Counsel for the Plaintiff also referred to the evidence of PW2 (Kalyango) and exhibits P14, 15 and P16 which revealed that Kalyango knew the land he showed the plaintiff.

I therefore find and hold that the alleged fraud by the Defendant that Plaintiff colluded and/or connived with David Namugala in 2001 and 2002 was not proved as the Plaintiff could not have participated in the cancellation of the Title, which process started in 2001 and ended in 2002. The Plaintiff was not in picture by then.

In **Fredrick J.K. Zaabwe vs Orient Bank & others SCCA NO. 4 of 2006**, fraud was defined as :-

20 *“ An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belong 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 so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture.....A generic term, embracing all multifarious, means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of*

truth, and includes all surprise, trick, cunning, dissembling , and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated. “ Bad faith” and “fraud” are synonymous, and also synonymous of dishonesty, infidelity, faithfulness, perfidy, unfairness, etc.

10 *As distinguished from negligence, it is always positive, intention. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by work or mouth, or by look or gesture.....”*

I have had to quote the holding in the above case in detail to show that there was no evidence on record to show that Plaintiff who purchased in 2005 acquired the land in dispute fraudulently.

20 In another Supreme Court of **Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 2012.** Wambuzi C.J, as he then was, held that **Fraud that vitiates a land title of a Registered Proprietor must be attributable to the transferee and that fraud of a transferor not known to the transferee cannot vitiate the title.** It was also emphasized that fraud must not only be pleaded, but must be proved and that the standard of proof is higher than on the balance of probabilities.

In the present case, none of the Defendants witnesses, either DW1, Agaba Stephen, DW2, Kashashari Godfrey or DW3, Flora Kamuza testified about any alleged fraud on the part of the Plaintiff in the process of acquisition of the land in dispute in 2005. None at all. So all the alleged particulars of fraud against the plaintiff have not been proved.

And as correctly submitted by counsel for the Plaintiff, DW1, Agaba Stephen stated that he is a son of Erimiya Kamuza on 20.9.2010 at police, while under paragraph 2 of his witness statement, he states:-

“ 2. That I am a farm manager of the defendant and his duly appointed Attorney. The Defendant is now aged 100 years of age. A copy of Powers of Attorney is on Court record.”

During cross-examination, he maintained that he is the Farm manager. This Court notes that such a witness, DW1, Agaba Stephen is not a truthful witness because he is not a son of Erimiya Kamuza . This is what Court found out during the locus in quo. Secondly Agaba added that
10 he has been a farm manager of Erimiya Kamuza since he was 12 years old by 1982. And yet he did not know where Kamuza was coming from in 1982. Those were inconsistencies in a testimony of a witness who cannot be believed by Court.

Further more, one wonders how a boy of 12 years could be a farm manager, and this Court also doubts why the police officer who made a report after investigations was not called as a witness. Why was the alleged report attached to the statement of Agaba Stephen as if he was the author of the Police report. All that casts doubt in the Defendant’s case. As already noted, the Defendant’s case contrasts with that of the Plaintiff, PW1, who maintained that he physically inspected the land before purchase in 2005, did a search with land office and acquainted himself with the history of the land. When PW1 was told Kamuza Erimiya was a squatter, he
20 made an attempt to compensate his interest, which Erimiya Kamuza is reported to have refused. His testimony was strongly and consistently supported by PW2 and PW3. This court also finds and holds that there is no evidence by way of purchase agreement or otherwise as to how Erimiya Kamuza bought the land. There was no member of the family of George William Mawanda who witnessed the late Erimiya Kamuza purchase the land and paying consideration of cows. That therefore remained hearsay and left the late Erimiya Kamuza in possession as a squatter on part of the land.

The submissions by counsel for the Defendant that the Plaintiff was guilty of willful blindness and should not have believed PW2 and PW3 who told him that Erimiya Kamuza was a squatter

are rejected by this Court. The Plaintiff was not only showed the location of the land, but the Certificate of title in the names of prince David Namugala Mawanda registered on 25.7.2002.

That was a confirmation that the person who sold to the Plaintiff was the Registered Proprietor . In such circumstances, it was not necessary for the plaintiff to make inquiries beyond prince David Namugala's name on the Certificate of title.

In any case the alleged particular of fraud "***that the Plaintiff was guilty of will full blindness for fear of finding the truth which amounted to fraud....***" was not pleaded.

10 It is now settled law that parties are bound by their pleadings and no departure there from can be allowed.

Issue No1 is therefore hereby resolved in the Negative.

Issue No 2.

Whether the 2nd Defendant to the counter claim rightly cancelled the counter-claimant's name on the Certificate in Title.

20 Counsel for the Defendants/counter claimants submitted that since the late Erimiya Kamuza acquired the land in dispute in 1982 and transfer into his names effected much later in 1986, then the irregularity of having a caveat on the white page could not be blamed on the late Erimiya Kamuza. He added that the late Erimiya Kamuza believed that everything was in order and that it was the Commissioner for land Registration who was practicing double standards.

Counsel also submitted that if any documents such as transfer forms from George William Mawanda to Erimiya Kamuza were missing from the Registry, then the Defendants/ Counter claimants were not to blame.

Further submissions were that the claim by PW2 to have served Notice upon the late Erimiya Kamuza in the presence of the sub-county chief of Maddu should not be believed as there was no return of service on the land Registry file, hence no evidence of service of Notice of

cancellation of Erimiya Kamuza's Title. Counsel for the Defendants therefore concluded that the commissioner for Land registration acted without Jurisdiction when cancelling the Defendant's names. He added that Section 91 of the land Act upon which the Commissioner for Land Registration relied on was never intended to abolish the concept of indefeasibility of title. And that the alleged errors, illegalities and frauds in the earlier Registrations of Erimiya Kamuza did not entitle the Commissioner for land Registration to cancel registration of the Defendant as he did.

Counsel for the Plaintiff on the other hand made reference to Defendant/counter claimants paragraphs 12 (i)-(v), on the following alleged particulars of collusion and fraud between
10 Plaintiff and commissioner for land Registration (2nd Defendant to counter- claim).

- i) Cancelling counter claimants names from the certificate of title without affording him a hearing well aware that he had been lawfully registered way back in 1986.
- ii) Illegally reinstating George William Mawanda who had transferred the suit land to the counter claimant in 1986 without his authority or knowledge.
- iii) Endorsing transfer of the suit land into the names of George William Mawanda and subsequently the alleged executors of the said George William Mawanda to deliberately dispossess the counter claimant.
- iv) Irregularly processing special title in 2002 infavour of George William Mawanda well aware that he had issued another special title to the counter claimant in the year
20 2002 to the said suit land.
- v) Generally conniving with the plaintiff and his predecessors in title to defeat the interest of the counter claimant.

Counsel for the Plaintiff 1st Defendant to counter claim added that prosper Ndyabahika had nothing to do with the suit land before the year 2005, and that to allege any collusion on his part on the happenings in the year 2001 and 2002 was baseless and un fair.

He added that no particulars of connivance or collusion were pleaded and/or proved before Court, to show that Prosper Ndyabahika and Commissioner for Land Registration worked together in 2001 and 2002.

Counsel made reference to the evidence of PW2, Freddie Kalyango and PW3, David Namugala who testified as to what happened in the year 2000 when G.W Mawanda (Father) of David Namugala died up to July, 2002 when David Namugala was registered on the Certificate of title, having obtained transfers from the executors of the late father G.W Mawanda who was registered owned since 11.12.1945.

It was further submitted that the Defendant was notified about the intention to cancel his title and his objection was rejected by the commissioner for land Registration.

Reference was made to the evidence of Nicholas Wamboga under paragraph 8 where he stated
10 that there were no evidence of transfer documents in favour of Kamuza. Counsel for the Plaintiff submitted that in the notice exhibit P14, which Kamuza received in the presence of Francis Mubiru Senyonga, the sub-county Chief of Maddu, he was notified that his transfer in 1986 lacked supportive documents, and that the special Certificate issued under Kla 205935 on 15.6.2000 was illegally and wrongly obtained.

Counsel for the 2nd Defendant/Counter claimant submitted on the 2nd Issue that the office of commissioner for Land Registration is mandated to rectify the Register, correct errors of entries thereon and cancellation of title. They referred to section 91 of the land Act as amended by the land (Amendment Act 2004).

Counsel further submitted that following anomalies/ claims/ complaint was raised by Prince
20 David Namugala Mawanda and his Estate Manager, Freddie Kalyango (PW2) to the then commissioner land registration, Mr. Tibisasa Jonathan.

They added that a Notice on intention to rectify the Register by cancelling the entry of the Eriya Kamuza and special Certificate issued in his favour was issued. The Notice was served to the defendant/counter claimant vide 2 modes Viz;

- i) Personal service that was witnessed by PW2 (Freddie Kalyango). Refer to paragraph 14 of his witness statement and exhibit P6 (i)
- ii) Notice issued vide advertisement in Bukedde News papers dated 6/11/2001 Exhibit P.6 (ii).

Further submissions were that the Defendant counter claimant raised objection which was rejected. And that it was unfortunate that a copy of reply by defendants/cancellation where the objection was raised mysteriously got missing from the file. However with due regard to the contents of notices of the decision taken by the Commissioner Land registration (Exhibit P 15), they submitted that the objection existed and was considered but accordingly rejected.

Counsel for Commissioner added that the decision by 2nd Defendant counter claim was served to the defendant/counter claimant by (PW2 Freddie Kalyango) and was accordingly received as evidenced by acknowledgement using his thumb print.

- 10 And finally that the Defendant/counter claimant did not appeal or in any other way contest the decision of the 2nd Defendant to counter claim, implying that he was satisfied with the decision.

Counsel for commissioner for land Registration concluded that there were no supporting documents from the late Erimiya Kamuza. That the Defendant/counter claimant failed to produce the person who witnessed the alleged transfer and no document or evidence of purchase.

- 20 I have considered the submissions from all sides with regard to the 2nd issue as to whether the Commissioner for Land Registration rightly cancelled the counter claimant's special Certificate of title.

I have also considered the evidence of witnesses from both sides. For avoidance of doubt, I shall reproduce sections 91 (1) , (2) (3), (4) and (5) of the Land Act as follows:

Section 91 special Powers of Registrar.

(1) Subject to the registration of titles Act, the Registrar shall, without referring a matter to a court or a district land Tribunal, have power to take such steps as are necessary

to give effect to this Act, whether by endorsement or alteration or cancellation of Certificates of title, the issue of fresh certificates of title or otherwise.

(2) The Registrar shall, where a Certificate of title or instrument

- a) Is issued in error,**
- b) Contains a misdescription of land or boundaries.**
- c) Contains an entry or endorsement made in error;**
- d) Contains an illegal endorsement;**
- e) Is illegally or wrongfully obtained; or**
- f) Is illegally or wrongfully retained.**

10

Call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the property party.

(3) If a person holding a Certificate of title or instrument referred to in sub section (2) fails or refuses to produce it to the registrar within a reasonable time, the Registrar shall dispense with the production of it and amend the registry copy and where necessary issue a special certificate of title to the lawful owner.

(4) The Registrar may

- (a) Correct errors in the Register Book or in entries made in it;**
- (b) Correct errors in duplicate Certificate or instruments and**
- (c) Supply entries omitted under this Act.**

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(5) The Registrar may make amendments consequent upon alterations in names or boundaries but in the correction of any such error or making of any such amendment shall not erase or render illegible the original words.

The exercise of the powers of the commissioner for Land Registration are therefore provided for under the Law.

3. The commissioner is in such circumstances bound to conduct a hearing in accordance with the principles of natural Justice and to communicate his/her decision in writing which was done in the instant case. I shall refer to paragraphs 4,5,6,7,8,9 and 10 of the

witness statement of (DW4) Wamboga Nicholas from the Commissioner land Registration. He stated as follows:-

4. **That I have studied and understood the history of block 3 Plot 1 land at Kyamukama and other related documents connected with the instant case hence this witness statement.**
5. **That the commissioner land Registration in year 2000, realized that the Defendant counter claimant was registered in error in 1986 names under transfer from previous Registered proprietor Prince George William Mawanda because there was existing caveat registered in 1981 under inst. NO. KLA97711 OF 11TH March 1981 and there were no documents in support of transfer.**
6. **That in accordance with the law, the commissioner Land Registration (2nd Defendant to counter claim) notified the defendant (counter claimant) of his intention to cancel title the same having been registered in error and wrongly obtained copy of notice attached and marked Annexure “A1”.**
7. **That the same notice was published in Uganda Gazette of 6/11/2001 at page 20 by the 2nd Defendant to counter claimant . A copy attached and marked annexure “A”.**
8. **That the Defendant counter claimant’s claim could not be sustained in absence of fact that at the time of registration of the counter claimant the caveat that had been registered by George William Mawanda (the purported transfer or vide inst KLA 97711 of 11.3.81 was still on the Certificate of title and there were no signed transfer forms. The same information was communicated to counter claimant a copy of a c letter attached and marked annexure “B”.**
9. **That is was on the above basis that the registrar book was amended, special certificate of title of the counter claim cancelled and George William Mawanda reinstated.**
10. **That the said cancellation was made in accordance with established law and procedure as per the above mentioned notices.**

From the testimony of DW4, Nicholas Wamboga, it is clear that a transfer of interest in land can be effected by having a caveator consenting by writing a letter or signing of transfer forms.

In the present case, the defendant did not prove that there was a signed transfer form or letter by George William Mawanda. Therefore the transfer to Erimiya Kamuza was irregular and the Registrar for land Registration properly exercised his powers to cancel the same. And this followed a Notice issued by Registrar under Regulation 72 of the land Regulations of 2001 dated 17th October, 2001 and signed by Jonathan N Tibisaasa, Commissioner for Land Registration.

10 So whereas Erimiya Kamuza claimed to have purchased the land in dispute in 1982 from George William Mawanda and claimed to be in occupation as owner and not a squatter, this court finds and hold that there was no purchase agreement from George William Mawanda exhibited in court as Documentary evidence. There was no evidence on the part of the Defendant as to how much the consideration was and who was present during the alleged purchase in 1982. **Those are pertinent issues which cannot be swept under the carpet as it is not enough to enter land of a Registered absentee landlord as was apparent in this case, construct new structures here and there is different corners of the land and claim ownership thereof.** The Courts of law in this country will not allow such high handed land grabbing under the guise of being in possession piecemeal by piecemeal as that alone does not confer ownership of over 1 sq. mile of land (561 acres) when there is a plaintiff who
20 properly purchased and has a Certificate of title.

Further still, the counter-claimant did not produce evidence to the satisfaction of this court as to how the title originally issued to him (Erimiya Kamuza) got obliterated as the reason for getting the Special Certificate of title, apart from paragraph 5 of Agaba Stephen's witness statement that the Certificate of title was kept by Erimiya Kamuza in a wooden suit case and was stolen in 1999. That statement was not substantiated and/or proved at all. And Moreover evidence from land office revealed that original title had been obliterated. **One must therefore go to equity with clean hands. Lack of documents of sale or transfer from George William Mawanda to Erimiya Kamuza shows that there was something fishy with the purported purchase and transfer of the disputed land from George**

William Mawanda to Erimiya Kamuza. It was an allegation as already noted where no scindila of evidence was brought before this Court. And whereas the counter claimant (Erimiya Kamuza) claimed he purchased the disputed land in 1982, one of his children, George Mucucura now aged 55 years testified at the locus in quo that he was produced on the disputed land. **For somebody to be aged 55 years in 2017 means that he was born in the year 1962, which is 20 years before 1982.**

10 This court was left wondering how Erimiya Kamuzu's son Mucucura had been born on the land in dispute 20 years before his father moved or acquired the same. That was a total contradiction and obvious lie which discredited the Defendant/counter claimant's case. The case of the Defendant/counter claimant was therefore left naked. And apart from being in occupation of part of the land as a squatter, albeit for over 20 years, there was no evidence to support Erimiya Kamuza's claim that he owned the disputed land. This Court therefore agrees with the submissions of counsel or the Commissioner for land Registration that the contentions raised by the Defendant/counter claimant (Erimiya Kamuza) were an afterthought and wishful desire to unjustifiably discredit the office of the Commissioner for land registration and to defeat the ends of Justice.

In the premises, I find and hold that the 2nd Defendant to Counter claim rightfully and lawfully cancelled Erimiya Kamuza's special Certificate of title.

20 **Issue No. 3 whether at the time fo purchase of the suit land by the plaintiff, the suit land was part of the estate of George William Mawanda.**

Counsel for the Plaintiff under this issue submitted that both the Plaintiff, prosper Ndyabahika and PW2, Freddie Kalyango and even PW3, David Namugala clearly testified as to how the Title moved from George William Mawanda to the Executors of of his **WILL** and then to David Namugala as a beneficiary. On the issue of lawyers for the Estate of Erimiya Kamuza trying to create an impression that the disputed land was not part of the estate of the late George William Mawanda as the **WILL** had many crossings, counsel for the plaintiff submitted that PW2, David Namugala testified that his father's **WILL** was proved before Court and it resulted into grant of letters of probate under probate and

administration Cause No. 762 of 2000 in favour of Joseph Ssempebwa, Prince Kassim Serufusa Zake Ferikitunsi Kaziya Nabisenke and Namukabya Natamba, executors to the **WILL** of Prince George William Mawanda Chwa. The same was granted by Justice S.B. Bossa as she then was, (now Justice of the International Criminal Court, ICC at the Hague).

Counsel for the Plaintiff added that there were no proceedings to challenge the said **WILL** and that exhibit P2 was a copy of the said letter of probate.

Counsel for the Plaintiff further submitted that the evidence of PW2 was clear that by the time he sold the land to the Plaintiff, the same was registered in his names.

10 Counsel concluded that by the year 2005, the land in dispute was no longer part of the estate of George William Mawanda but belonged to David Namugala Mawanda as owner and being a beneficiary to his father's Estate. They added that the Defendant/ Claimants had ceased to be registered owner in February 2000, when his names was cancelled, and that nothing was done challenging the decision of the Commissioner for land Registration that year of 2002. The conclusion was that by the time of purchase, the suit land belonged to David Namugala and it had only one certificate of title which was transferred to the Plaintiff by David Namugala.

20 Counsel for the Defendant counter-claimants on the other hand submitted that the land in dispute was not mentioned in the **WILL** of late George William Mawanda because the late George William Mawanda knew it did not form part of his Estate. They also alleged that the **Will** was massively altered.

Counsel for commissioner for land Registration Associated themselves with the submissions of counsel for the Plaintiff. They emphasized that at the time of the transfer of the Certificate in title to the plaintiff/ 1st Defendant to counter claim, Prince David Namugala Mawanda (Transferor) was the Registered proprietor. The conclusion was that the land had ceased to be part of the Estate of George William Mawanda.

I shall not waste much time on this issue because PW2, told court that he was heir to his father, the late George William Mawanda. Then under **clause 7 (d) of the will dated**

12/6/1994, all land that belonged to George William Mawanda that was not specifically mentioned in the will was bequeathed to him (Prince David Namugala Mawanda).

It was also prince David Namugala 's testimony that after the last funeral rites of his father in 2000, he discovered that most titles left by his father were not seen. He instructed his agents to search in the lands registry to establish the status of his father's estate. Then under paragraph 5 of his witness statement, he testified that what he established in respect of the land in dispute was that his father had not sold the suit land.

I therefore find and hold that by the time of purchase, the suit land belonged to David Namugala and it had only one Certificate of title which is the same position at this point in time. The only available title is that of the plaintiff as transferred from David Namugala.

In any case, the Defendant/counter claimant does not dispute that David Namugala was heir to George William Mawanda.

Remedies available to the parties.

This Court has exhaustively discussed all issues in this case and decided that the Plaintiff, **Prosper Ndyabahika is the lawfully registered Proprietor and owner of the land in dispute, and therefore landlord under mailo tenure.** This followed failure by the Estate of the late Erimiya Kamuza to prove on the balance of probabilities that the late Erimiya Kamuza bought the land in dispute from the late George William Mawanda and so his son and heir, prince David Namugala sold to Prosper Ndyabahika for valuable consideration and as a bonafide purchaser for value. This Court has also found and held that **the Commissioner for land Registration proved to the satisfaction of the Court and on the balance of probabilities that due process was followed in the cancellation of Erimiya Kamuza's special Certificate of title in 2002.** That was before the land in dispute was sold to the Plaintiff, Prosper Ndyabahika in 2005.

Nevertheless, this court is not only a court of law, but it is a court of Justice. I visited the land in dispute and saw what was on the ground. So whereas the Plaintiff, Prosper Ndyabahika is decreed as the lawfully Registered proprietor of the land comprised in Gomba Block 3 Plot 1, land at Kyamukama, the estate of the late Erimiya Kamuza have stayed and used part of the land for over 20 years . It would definitely be very unfair and unrealistic for this court to order their eviction after such a fairly long stay and use of part thereof.

I therefore proceed under **Section 29 (2) (a) of the land Act**, Cap 227, laws of Uganda to declare the Defendant's estate as bonafide occupants on part of prosper Ndyabahika's land .

10 Section 29 (2) (a) provides: “ ***Bonafide occupant***” means a person who before the coming into force of the constitution-

(a) ***Had occupied and utilized or developed any land un challenged by the registered owner or agent of the registered owner of twelve years or more; or***

Going by the evidence on record that the late Erimiya Kamuza came on part of the land in question in 1982, then by 2002 when his special Certificate of title was cancelled, he had been on part of the disputed land for 20 years. The late Erimiya Kamuza and his estate therefore qualify to be bonafide occupants under the laws stated, but on that portion of land occupied which going by what I saw during the locus in quo, I estimate it to be 50 acres now.

20 I therefore do hereby decree that the defendant's estate are entitled to stay and live on only 50 acres where the deceased had **his homestead and was buried**.

They are to stay as bonafide occupants on the 50 acres, well knowing that their landlord is Prosper Ndyabahika. They will therefore be governed by the laws and Regulations relating to Registered proprietors and bonafide occupants. And for avoidance of doubt, the 50 acres decreed to Erimiya Kamuza's Estate shall start where Erimiya Kamuza was buried, and the surrounding homestead and will cover only 50 acres, extending to one of the water Dams for their cattle. The rest of the land is for the sole and exclusive use of the Registered proprietor Prosper Ndyabahika .

In summary and for avoidance of doubt, and pursuant to Section 29 (2) (a) of the Land Act, and in the exercise of this Court's powers under section 98 of the civil procedure Act and Section 33 of the Judicature Act, it is hereby confirmed and decreed as follows:

1. The Plaintiff, Prosper Ndyabahika is the lawful owner and Registered Proprietor of all that parcel of land comprised in **Gomba, Block 3 Plot 1, land at Kyamukama.**
2. The Estate of the late Erimiya Kamuza are entitled to stay and utilize only (fifty) 50 acres of the land in question as already described above as **bonafide occupants.**
3. The family and estate of the late Erimiya Kamuza are therefore relocate and share out the
10 50 acres decreed to them as bonafide occupants.
4. The rest of the land and water dams shall be for the exclusive use and possession of the Registered Proprietor, Prosper Ndyabahika. Any scattered settlements there on by members of the family and estate of Erimiya Kamuza are to be vacated.
5. In view of the equitable remedy granted to the estate of the Defendant as bonafide occupants on 50 acres (fifty) out of Prosper Ndyabahika's land, I shall not condemn them in costs.
6. I accordingly order that each party meets their own costs.

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Wilson Masalu Musene

Judge

08/01/2018