

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO. 384 OF 2008

1. MIVUMBI KATALE

2. ANNE NAMPEERA

3. NAKALEMA

BETTY

NAKACWA:.....PLAINTIFF

VERSUS

TAMALE ROSE:

:.....DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiffs sued the Defendants for;

- 1) Cancellation of a certificate of Title **comprised in private mailo – Busiro, Block 353 Plot No. 76, located at Budo, Busiro;**
- 2) General damages,
- 3) An order directing the Plaintiff's entry on the Certificate of Title,
- 4) Permanent injunction and;
- 5) Costs of the suit.

In the joint conferencing notes, facts of the Plaintiffs indicates that the Plaintiffs are the administrators of the estate of the late Mivumbi Bonifansi. The late Mivumbi Bonifansi and his estate were tenants of the estate of the late Nuwa Henry Mubiru Sematimba who was the former registered proprietor of **block**

353 – 356 Busiro. Mubiru Sematimba in his lifetime conveyed his interest in the land to the late Mivumbi Bonifansi and permitted the title on the land to be transferred to Mivumbi Bonifansi, which Mivumbi did not transfer. During the Plaintiff's course of administration of this estate, they discovered that the land had been registered in the name of Anton Tamale Tabula who fraudulently annexed the land belonging to the estate of the late Mivumbi Bonifansi to his plot.

The Plaintiffs on several occasions approached the Defendant and the other family members of the estate of the late Minton tamale Tabula family members to have the portion of the late Mivumbi Bonifansi cut off, but to no avail. The Defendants denied the allegations and also set up a counterclaim against the Plaintiffs.

In the joint scheduling notes, the Defendant's facts are that the Defendant is a co-administrator of the estate of the late Antoni Tamale Tabula. The suitland is and always has been part of the estate of the late Antoni Tamale Tabula and the same was lawfully acquired and that the Plaintiffs are not in occupation of the suitland. The Plaintiff's father had hence only a small portion of the land and the allegations that he owned 5 acres was a misconception and/or fabrication. The pleadings are contained in both the amended plaint and written statement of defence and reply to the amended written statement of defence.

The issues for determination were;

1. Whether the Plaintiffs have any enforceable interest in the suit land.

2. Whether part of the suit land was fraudulently registered as part of the Defendant's estate.
3. Whether the Plaintiffs have legal entitlement to the suit land.
4. Whether the Plaintiffs are entitled to the remedies sought.

The Plaintiffs in proof of their case led evidence as herebelow:

PW1; NAMPEERA ANNE KAHINDA aged 68 years stated that she knew Rose Tamale and further stated that **plot 76 Busiro Block 353** belonged to the late Nuwa Henry Mubiru Sematimba. When she got Letters of Administration, she tried to get the land registered, but discovered that the land was titled in the names of Tamale Tabula.

She confirmed that their father bought the kibanja before they were born and they grew up from that place. She confirmed that on the land, there was a big house and other buildings at the time of their residence thereon. The neighbours were Munywevu on the upper side, Kabugo (upper) Serunjogi (left) and Zibuye (right) and Kasalina (lower).

She also confirmed that they depended on a letter given to their late father to survey the land after payment. The letter was found on the file written by Sematimba, addressed to Kamya; the surveyor in the office of Balidawa. She clarified that she was suing Tamale for annexing her kibanja to her title, yet on this land there are even burial grounds for her parents and some

other relatives. The letter referred to was admitted on record as PE2.

In cross examination, she said that people at Entebbe Survey office told her that Tabula was a surveyor at Entebbe. That she got PE2 from Rebecca Kakingura and she conceded that Rose Namusisi sold part of the land. She said that plot 76 is about 4.59 hectares and their kibanja is 4.59 hectares.

PW2; Mivumbi Katale Paul 61 stated that Mivumbi **Bonifansi** was his father. He died in 1994 and that the land belonged to late Sematimba (Mubiru Nuwa). He lived there since 1937 and their neighbours were Ssali, Zibuye on the lower side, and they used to pay busulu. Some busulu receipts were exhibited and allowed as PW2.

He confirmed that the letter authorising the survey of the kibanja of Kivumbi written by the late Muusa Sematimba in 1985 was found after his death. They then went to the successor of the late Sematimba; a one; Rebecca Kakungulu who wrote and referred them to the family surveyor called Kakebe. When he surveyed, they found out that somebody else had surveyed in the year 2003. They also found that the land was registered in the names of Tamale Tabula. The witness insisted that Rose Tamale took their land title; and transferred all the plots in her names including the plot that belonged to them fraudulently.

During cross examination, she stated that there was a woman claiming to be the administrator of the late Anthony Tamale Tabula and they found out that most of the plots were in Tabula's

names. They therefore complained because plot 76 which Sematimba had given to their father should be in tamale's names and that it is the kibanja they are suing for.

PW3; Semwogerere Livingstone 68; stated that he knows Paul Katale and tamale and further said he is a born of Kisozi village and a neighbour to PW1 and PW2. He told Court that they have a kibanja measuring 4½ hectares and that he is a neighbour on the left from the eastern side, upper side is Kabugo, Kasalina on the lower side and zebeya Nantume on the lower side. The size is about 2 football fields. Bonifansi Mivumbi used to occupy this kibanja and that Tabula's kibanja does not boarder his kibanja; but Mivumbi's.

He stated that Mivumbi's children lived in the area, but the person who stayed in charge of Tamale's land got Mivumbi's kibanja and included it in his title.

In cross examination, he confirmed that Kakebe used to be Sematimba's surveyor. He also confirmed that upon birth, he found **Bonifansi** Mivumbi on this land and used to pay busulu to Sematimba. In defence, the evidence was as follows:

DW1: Nantongo Mariam; who stated that he knows and said that Tabula Sempa is her paternal grandfather; and her father was Anthony tamale. She said that the disputed land is at Kisozi on 11 acres and she described the boundaries as crossing Kisozi to Mr. Nsubuga to Sanya, then to Serunjogi, to Katanyanzi's land and then Kings College and to Kabugo.

To acquire it, his grandfather first obtained a kibanja from Noah Sematimba (late). After his the death; Anthony tamale became heir. He went to the late Sematimba to buy their interest. He then bought the interest and after tamale buying it, he got an agreement and gave him a copy being the eldest grandchild. The document was marked for identification as (ID_I). She also said that Nampera used to stay on our land. Bonifansi Mivumbi was staying on the kibanja; the size of ½ a football pitch.

During cross examination, she conceded that those of Mivumbi have a burial ground on the suit land.

DW2; George William Ssali 83, stated that since 1935, he had been living there since 1935 and they are on their grandfather's kibanja. He said he was assigned by the heir of Anthony tamale to be the caretaker of that land because he was a resident of that land. He further said that he was in possession of the land title for that land and his kibanja is on the same land.

The land formerly belonged to the late Sematimba who gave their father an authority letter to survey. He confirmed that his grandfather had a kibanja and the heir of that grandfather was Anthony Tabula tamale, who bought the legal interest in that kibanja and carried out a survey. He was one of the witnesses who were present when the letter authorising the survey was written and he was the one who carried it, having witnessed and signed it. The sale agreement was admitted on record as D₁D₁.

In cross examination, he confirmed that **Bonifansi** Mivumbi owned a small portion on the suitland under the licences of

Tamale, though his evidence was hearsay from Anthony Tamale. He also conceded that at the time of these transactions, he was young and didn't know much.

DW3; TAMALE MOSES TAWOMBE; 54 years stated that he was given 3 titles for Buddo, Busiro county for block 353, plot 77, 353, plot 74 block 357 plot 76. The registered proprietor on plot 76 was the late Antony Tamale having been registered in February 1986. Today, they have their burial grounds thereon and they have a building occupied by squatters.

There were no squatters on the land until 5 years ago when a one Namusisi; a daughter of the late Mivumbi and a sister to the Plaintiffs sold them the land. He claimed that part of their land is currently occupied by squatters.

Court visited *locus* and parties were given schedules in which to file written submissions. While the Plaintiff's Counsel never filed submissions in support of the case for the Plaintiffs, the defence Counsel however filed them. Counsel for the defence raised a preliminary objection on grounds of limitation. The defence's argument is that; it is trite law that actions for recovery of land have a fixed limitation period under Section 5 of the Limitation Act. The section provides that no actions for recovery of land shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right if action accrued to him or her or if it first accrued to some person through whom he or she claims to that person.

Given the arguments raised and arising from the pleadings, I notice that the suit was filed in 2008 under Civil Suit No. 384/2008. However, according to the plaint, this was after the Plaintiffs obtained Letters of Administration to the estate of the late Mivumbi **Bonifansi**. The realisation that the land was alienated by the Defendants was discovered by them in 2008 when they approached the registry to effect the registration and therefore notice was in 2008. The requirement in Section 15 of the Limitation Act is that if there is a limitation, the same should be pleaded by the Plaintiff. In this case the Plaintiff pleads that there was fraudulent transfer of the land. This pleadings places the time line to run from the period of discovery of the mischief. It is therefore wrong for the Defendant's Counsel to argue that the limitation period began running in 1986. There is therefore no merit in the preliminary objection and it is rejected.

The first issue for determination is;

Whether the Plaintiffs have any enforceable interest on the suit land.

From the evidence on the record, the following facts stand out as proved.

The evidence led by PW1; Nampeera Anne Kalinda, PW2; Mivumbi Katale Paul, PW3; Semwogerere Livingstone, DW1; Nantongo, DW2; George William Ssali, DW3; Tamale Moses Tawombe shows that Mivumbi Bonifansi owned a kibanja interest on this land which he resided on and it had a burial ground.

The evidence contained in the exhibited documents; PE1: (Letters of Administration) PE2; (Letters of 21st May 2003 from the heiress of the late Anthony Tamale Tabula, PE3; (Busulu receipts) DD1; (Letter from Nuwa H M Sematimba acknowledging receipt of shs. 100,000/- (*one hundred thousand shillings*) Antoni Tamale, all show that there were steps taken by Mivumbi Bonifansi and Tamale Antoni to regularise their respective tenancies by way of registrable interests. Actually the evidence by the Plaintiffs shows that they got Letters of Administration to the estate of the late Mivumbi Bonifansi, only to realise that part of the land was registered in the title of Tamale Tabula.

The evidence of PW1 shows that when they got married, they let Rose Namusisi on the ground, keeping the same until 2012 when the houses were demolished. PW1 told Court that when she contacted Rose Tamale, she said the land belonged to her father and that their land was the biggest of the kibanja on that land, but plot 76 is about 4.59 hectares and that it's now all in the names of Tamale Tabula and covers the whole of their kibanja.

PW2; Mivumbi Katale Paul said their father had land in their place neighbouring Ssali & Zibuye, while PW3; Semwogerere said the kibanja is about 2 football fields and Bonifansi had bought it from Sematimba. He grew up seeing Bonifansi Mivumbi occupying this kibanja. He said that the person who stayed in charge of Tamale's land got Mivumbi's kibanja and included it in their title.

All these facts show that the Plaintiffs, by virtue of the interests of Mivumbi, have an interest on this land.

This finding is further supported by the defence evidence which shows DW1; Nantongo who conceded that Mivumbi used to stay on the land (suitland) which she called her father's land; which was the size of ½ a football pitch and Bonifansi Mivumbi had a house on it. She conceded that Zibuye had a kibanja neighbouring this land and that her grandfather gave Bonifansi a piece to cultivate near Serunjogi. She also conceded that *'those of Mivumbi have a burial ground where their father was buried'*. That while still living, he had a banana and coffee plantation and that part of it was sold by her relatives.

DW2; George William Sali said their father was a kibanja holder and Bonifansi Mivumbi was known to him and was licensed by Tamale on a small portion to reside there until he gets his own land.

DW3; Tamale Moses Tawombe confirmed that there are squatters on the land for 5 years ago. All the evidence above, by the Defendants in a way acknowledges that there are rights on the land attributable to the late Mivumbi Bonifansi.

I therefore find this issue in the affirmative.

Issue No.2.

Whether part of the land was fraudulently registered as part of the
Defendant's estate.

As has been reviewed above, the evidence shows that the Plaintiffs inferred fraud from the facts surrounding the

registration of Mivumbi Bonifansi's kibanja interests within Tamale Tabula's title.

Whereas I agree with Counsel for the Defendants that proof of fraud has a strict liability, component, the definition of fraud was defined in the case of *Frederick Zaabwe versus Orient Bank & 5 Others; SCCA No. 04/2006* which attributes to it in **Black Laws Dictionary** to refer to the international perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him/her or anything calculated to deceive whether by a single act or by suppression of truth, or suggestion of what is false, whether it is by a single, direct falsehood or *innuendo*.....'

The definition of fraud is inclusive and embraces all incentives of untruth which are aimed at cheating another so as to gain from such false representation. It also includes the use of illegal means to obtain an advantage which, if not for the illegality could not have rightly accrued to the perpetrator of the illegality.

In the case before me, evidence has been put before Court showing that the certificate of title obtained by Tamale for the suit land has engulfed Kivumbi's kibanja of. Looking at the evidence on record, this illegal conduct was discovered and pointed out to Tamale even before the filing of the suit by the estate of the late Sematimba, from which he obtained the right to survey his own kibanja as revealed vide annexure 'C' to the plaint dated 21st May 2003 from Makemba Estate Lungujja signed

by RG Kakungulu (Mrs); executrix of the estate of the late Nuwa H. M. Sematimba which states as follows:

'I have discovered that when the late Tamale was surveying his land, he annexed the late Bonifansi Mivumbi's piece of land yet in the letter we issued to him, it only permitted him to survey only his plot. In that regard, we request that let the portion of the late Bonifansi Mivumbi be mutated from your plot 76 and be returned to his children's

This evidence is crucial in this case as it defines the root cause of the entire conflict between these parties I have come across.

This is given further weight by annex 'B' which is from Nuwa H.M. Sematimba to M/s. Balidawo and Co. Surveyors, permitting Bonifansi Mivumbi to survey this portion of land at Kisozi Budo. These pieces of evidence were not controverted by the defence though, they basically denied that Bonifansi Mivumbi ever owned registrable interest thereon.

However, they kept on contradicting each other on the type of interest. DW1 said he was owning a rented piece and DW2 said he was a mere licensee and DW3 said he did not have any known interest thereon.

The sum total of all the above is to lend credence to the fact that an illegality was committed by Tamale in the process of registering his interest by annexing the part which belongs to Kivumbi. This finding means that the title obtained by Tamale is tainted with illegality which is fraudulent. This Court found, in the case of **Edward Gatsinzi & Mukasanga Rita versus Lwanga**

Steven; Civil Suit No. 6990 of 2004 followed in Mayanja Hussein versus Mubiru Christopher; Civil Suit No. 0129 of 2018; that ‘fraud can be inferred from illegality’ The defence in submissions argued that since the Defendants are in possession of the certificate of title, then by virtue of *Section 59 of the Registration of Titles Act, which provides for the notion that possession of a title is by a registered person is conclusive evidence of ownership of the land described therein, then the Plaintiffs have no locus to sue them.* They sought further refuge in *Section 176 (c) of the Registration of Titles Act* that; ‘they are protected as proprietors of the land, save for fraud’.

I am satisfied that the evidence reviewed above, shows that the title was obtained with an illegality therein. The case of Makula International Ltd versus His Eminence Cardinal Wamala Nsubuga & Anor (1982) HCBII, comes in here to red flag the argument further as it provides that; ‘Courts of law cannot sanction what is illegal and an illegality once brought to the attention of the Court overrides all questions of pleadings, including admissions made therein. The impetus of an illegality is that; ‘once it is proved to be so and the Court notes as such, it cannot be ignored. It vitiates the proceedings as noted in National Social Security Fund and Another versus Alcon International Ltd; SCCA No. 15/2009 per Odoki CJ (as he then was)

“having found this glaring illegality which has been unexplained, this Court cannot turn aside and buy into the arguments raised by Counsel for the Defendants in submissions’

The evidence raised of sale of land is not on record and did not come up during the trial, is new evidence from the bar and does not help to redeem the Defendant's case. There is overwhelming evidence, which shows that the kibanja interest of Kivumbi was swallowed up in the titled land by Tamale. I therefore find that this issue has been proved.

Issue No.3

Whether the Plaintiffs have legal entitlements to the suit land

This issue has been answered in the findings under issue No. 1 and Issue No. 2 as is answered in the affirmative.

Issue No.4

Whether the Plaintiffs are entitled to the remedies sought

Having answered issues No. 1, No. 2 and No.3 in the affirmative, I do find that the Plaintiffs are entitled to the following remedies:

1. A declaration that part of the property **comprised in mailo land Busiro Block 353 Plot 76 located at Buddo, Busiro** belongs to the estate of the late Bonifansi Mivumbi.
2. The said land **Block 353 Plot 76 located at Buddo** in the names of Antonio Tamale Tabula be subdivided allowing severance therefrom the kibanja of Bonifansi Mivumbi **measuring 5.99 acres**.
3. The Registrar of Titles issue separate titles to each family after the subdivisions.
4. Costs of the suit granted to the Plaintiffs.

The suit is found for the Plaintiffs and the counter claim is dismissed with costs.

NB: all the illegal sales of the land which took place during the course of this trial were *null and void* and perpetrators must return the money to the buyers.

I so order.

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Henry I. Kawesa

JUDGE

5/06/20

Right of appeal explained.

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Henry I. Kawesa

JUDGE

5/06/20

5/06/20

Mr. Mayanja for the Defendant.

Defendants absent.

Counsel for the Plaintiffs absent.

Court:

Judgment delivered to the above parties in the absence of the opposite Counsel.

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Henry I. Kawesa

JUDGE

5/06/20