

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

**CIVIL SUIT NO. 298 OF 2008**

<b>1. CHARLES OTEMA OPOKA</b>	}		
<b>2. LUCY ADONG OPOKA</b>			
Administrators of the Estate			

**PLAINTIFFS**  
of the Late Francisco Obuli

**VERSUS**

<b>1. PAMELA WATUWA</b>	}		
<b>2. MOSES BYARUGABA</b>			

**DEFENDANTS**

**JUDGMENT**

**BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA**

[1]. In the amended plaint dated 05<sup>th</sup> January, 2015 filed in court on 07<sup>th</sup> January, 2015, the 2 Plaintiffs **Charles Otema Opoka** and **Lucy Adong Opoka** (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively) who are **administrators of the Estate of the Late Francisco Obuli** sued the Defendants; **Pamela Watuwa** and **Moses Byarugaba** (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) jointly and severally for **recovery of land and house comprised in Block 244 plot 1111** at Muyenga, **cancellation of the 1<sup>st</sup> Defendant's name from the register** as proprietor of the same, **special and general damages** for the **illegal take over and occupation** of the said property and **costs** of the suit.

[2]. The Plaintiffs' case is that by **Agreement dated 08<sup>th</sup> September, 1989**, the late **Francisco Opoka Obuli** purchased the suit property comprised in **Block 244 plot 1111** from a one **Emmanuel Semujju** at a consideration of **UGX 47,000,000/-**. The late **Emmanuel Semujju**

passed away in **1992** before completion of transfer of the Certificate of title into the names of **Francisco Opoka**. Further, the title to the land was in possession of a Financial Institution, **SUN FINANCIAL SERVICES LTD** to which the property had been mortgaged by the **vendor, Emmanuel Semujju. Francisco Opoka** passed away in 1992 (the same year the vendor Emmanuel Semujju also passed on) after clearing the mortgage on the suit property but having not secured a transfer of the same into his names.

[3]. In 1996, the **1<sup>st</sup> Plaintiff** as heir to the late **Francisco Opoka** took possession of the suit premises and lived there with his family until the **17<sup>th</sup> day of July 2008** when he was evicted by court brokers in the company of the **2<sup>nd</sup> Defendant**. After the eviction of the **1<sup>st</sup> Plaintiff** from the suit premises, the Plaintiffs realized that the **1<sup>st</sup> Defendant** had filed a suit in the Chief Magistrate's Court (**Civil Suit No. 42 of 2008**) at Nakawa against a one **Annet Kusasira** for an eviction order under the claim that the **1<sup>st</sup> Defendant** had purchased the said land and house from **Annet Kusasira** who had refused to hand over vacant possession. The **1<sup>st</sup> Defendant Pamela Watuwa** obtained an **exparte Decree** for eviction of **Annet Kusasira** and the Defendants used the said Decree to evict the **1<sup>st</sup> Plaintiff** who was in occupation of the suit premises.

[4]. It is the Plaintiffs' contention that the eviction of the **1<sup>st</sup> Plaintiff** from the suit premises was masterminded by the **2<sup>nd</sup> Defendant** who immediately occupied the same house and has since resided therein. The Plaintiffs aver that **Civil Suit No. 42 of 2008** was fraudulently engineered by the Defendants to evict the **1<sup>st</sup> Plaintiff** out of the house which the Defendants have now registered in their names. That

the defendants' actions of evicting the 1<sup>st</sup> Plaintiff and acquisition of the suit property were fraudulent.

[5]. The Plaintiffs particularized the fraud as follows:-

- a. Obtaining a Special certificate of title in the names of the Late **G. Semujju** when he was already dead and without following due process of the law.
- b. Registering a one **Sunday Miiro** on the Special certificate of title the same day it was issued and in the names of **fictitious persons** with intent to defeat the Plaintiffs' interest in the land.
- c. Commencing a suit in imaginary **fictitious names** and as such obtaining a **Decree** to evict the 1<sup>st</sup> Plaintiff from the suit property.
- d. Swearing and filing false documents in court for the purpose of evicting the 1<sup>st</sup> Plaintiff from the suit property.
- e. Using a nonexistent firm of Advocates to file and pursue the said suit.

[6]. The Plaintiffs contend and maintain that the suit land belongs to the Estate of the late **Francisco Opoka**, that the Defendants are not known to them and the Plaintiffs pray for judgment against the Defendants jointly and severally for:-

- i. A declaration that the land and house comprised in **Block 244 plot 1111** is part of the Estate of the late **Francisco Opoka** under the Plaintiffs' administration.
- ii. Cancellation of the **1<sup>st</sup> Defendant's** name from the register and Certificate of title to the suit land and registration thereto of the Plaintiffs' names.
- iii. An order for eviction of the Defendants and/or their agents from the suit premises.

- iv. **Mesne profits** of US\$2,000 per month from the date of eviction until the date of judgment, **general and punitive damages** for loss and inconvenience caused and then, costs of the suit.

[7]. On the other hand, it is the Defendants' case that the Plaintiffs' claims and allegations are denied and they contended as follows:-

- a. That the eviction on the suit properties was carried out by authorized court bailiffs in fulfillment of an order of court and under strict police supervision and that to date **the Plaintiffs have never sought any relief from the said court and its decision is still subsisting.**
- b. That the Defendants have never been involved in the application and acquisition of a Special certificate of title to the suit land.
- c. The Defendants aver that the 1<sup>st</sup> Defendant purchased the suit property from **Annet Kusasira** who was in possession of a Special certificate of title duly registered in her names and that she therefore, bonafidely acquired the suit land for value without notice of previous fraud, if any.
- d. The 1<sup>st</sup> Defendant contends further that at the time of purchase of the suit property, she inspected the same with **Annet Kusasira** who was conversant with the occupants and there was no doubt, the same was being owned by her.

[8]. In their final submissions both Counsel submitted on the following issues for determination:-

1. Whether **Francisco Opoka Obuli** purchased the suit land.
2. Whether the Plaintiffs have locus to sue for ejection and recovery of the suit land.
3. Whether the Defendants obtained the suit land by fraud.

4. Whether the 1<sup>st</sup> Defendant is a bonafide purchaser for value without notice.
5. What remedies are available to the parties.

[9]. From the pleadings and evidence on record, it is clear that the Plaintiffs claim to derive interest in the suit land from the **purchase Agreement dated 08<sup>th</sup> September, 1989 (P. Exh.1)** where their father, the late **Francisco Opoka Obuli** purchased the suit land from the late **Emmanuel Semujju**. The Defendants on the other hand claim to derive their interest in the suit land from the **purchase** agreement dated 30<sup>th</sup> August, 2007 and **Judgment and Decree** dated 08<sup>th</sup> April, 2008 in the 1<sup>st</sup> Defendant's favour vide the Nakawa Chief Magistrate's Court **C.S. No. 42 of 2008 (P. 4(a))**.

- [10]. The foregoing in essence narrows the issues to only 2 and these are:-
1. As of the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant, who is the lawful owner of the suit property.
  2. What remedies are available to the parties.

**[11]. BURDEN OF PROOF:**

In all civil matters, the Plaintiff bears the burden to prove his/her case on a balance of probabilities. The Plaintiff in this case therefore, by virtue of **Sections 101, 102 and 103 of the Evidence Act** has the burden to prove the facts alleged by him in the plaint. **Section 101 of the Evidence Act** in particular provides that;

*“whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he or she asserts must prove that those facts exist.”*

**[12]. ISSUE NO. 1:**

**Whether the plaintiffs are the lawful owners of the suit property:**

**[13]. A. Purchase agreement dated 08<sup>th</sup> September, 1989 (P. Exh. 1);**

It is the Plaintiffs' case that the late **Francisco Opoka Obuli** purchased the suit property from the late **Emmanuel Semujju** as per the purchase **Agreement dated 08<sup>th</sup> September, 1989 (P. Exh. 1)** at a price of Ugx 47,000,000 (Forty seven million). The purchase Agreement was drawn by the late **Nicholas Lwanga** of Nicholas Lwanga & Co. Advocates, Agip House, 1<sup>st</sup> Floor, Plot 9 Kampala Road. On the other hand, Counsel for the Defendants submitted that the sale agreement in question speaks for itself. That the purchaser in the Agreement is **Francis Opoka** and not **Francisco Opoka Obuli**. That therefore, this court should interpret the agreement as it is and uphold **Francis Opoka** as the purchaser and reject the Plaintiffs' oral evidence that **Francisco Opoka Obuli** is the purchaser; *Sections 91 and 92 of the Evidence Act* and *URA VS. STEPHEN MABOS 1 S. C. CIVIL APPEAL NO. 26 OF 1995*.

**[14]. Secondly**, that on the Agreement, the name **Francis Opoka** appear written with a pen evidently **as a witness** below the typed name of Francis Opoka, the purchaser. That therefore, if at all the agreement is genuine, **Francisco Opoka Obuli** aka **Francisco Opoka** was a mere witness and not the purchaser.

**[15]. Then, thirdly**, that the Plaintiffs did not prove that **Semujju Emmanuel** executed the said agreement. That due execution of a document can only be done by an attesting witness, handwriting expert and a person familiar with the question signature or handwriting. That the Plaintiffs are none of the above and neither of them saw **Semujju Emmanuel** sign that agreement. That they did not bother to call **Semujju** or a member of Semujju's family or an

expert witness to prove that Semujju signed it as vendor. That therefore, on the authority *OF S. C. C. A. NO. 63 OF 1998; AZIZ KALUNGI KASUJJA VS. NAKAKANDE*, they failed to prove that **Semujju** signed the Agreement.

[16]. He concluded that for the above 3 reasons, the Plaintiffs have failed to prove that the deceased purchased the suit land under the Agreement of sale, **Exh. 5**.

[17]. I have carefully looked at the Agreement in question (**P. 1**), the vendor is clearly indicated as **Emmanuel G. Semujju** while the purchaser is indicated as **Francis Opoka** but when it came to endorsements on the agreement at its last page, the purchaser's name was type written as **FRANCIS OPOKA** but when it came to endorsing, the purchaser signed and wrote his name below (following the style of the vendor) as **Francisco Opoka**. On the other hand, the signature of the witness, it is identical as on the part of the vendor and the part of the purchaser. It is the contention of the Plaintiffs' Counsel that the witness signature was of the **late Nicholas Lwanga**, the lawyer who drafted the agreement.

[18]. As correctly put by Counsel for the Defendants, the Plaintiffs described their dead father as **Francisco Opoka Obuli** and **Francisco Opoka** interchangeably but the fact remains that the names refer to one person, the purchaser of the property. The name **Francis** is a diminutive of the name **Francisco**; **Wikipedia Encyclopedia**. The name "**Francis**" is therefore a shortened form of the name "**Francisco**", typically used informally and this is clearly reflected in the Agreement in question where the draftsman of the Agreement typed the purchaser's names as "**Francis Opoka**" but

when it came to endorsement, the purchaser upon signing, wrote his names as “**Francisco Opoka.**”

- [19]. I, from the foregoing find and hold that the name “**Francis**” is a shortened form of the name “**Francisco**” and in the context of this case, the names **Francis Opoka** and **Francisco Opoka** referred to one and the same person, the purchaser of land comprised in **Kyadondo Block 244 plot 1111** land at Kisugu.
- [20]. The claim by Counsel for the Defendants that the Plaintiffs have not proved that **Semujju Emmanuel** executed the said agreement lack merit because, under ***Section 102 of the Evidence Act***, once the 1<sup>st</sup>Plaintiff presented a purchase Agreement that his late father purchased the suit property, then in my view that sufficiently discharged his burden of proving purchase unless, the vendor denies endorsing the agreement and thereby necessitating the Plaintiffs to seek aid of a handwriting expert or a person familiar with the questioned signature or handwriting etc as the case may require to rebut the vendor’s denial.
- [21]. In the instant case, it has not been shown that the vendor ever denied executing the purchase agreement in question. Upon the Plaintiff producing the purchase agreement in question, then, under ***Section 102 of the Evidence Act***, it is the Defendants to show by way of evidence that Semujju never executed the Agreement in question.
- [22]. In conclusion from the foregoing, I find that the Plaintiffs have proved that the deceased **Francisco Opoka Obuli** purchased the suit property under the sale Agreement (**P. Exh.1**).

[23]. It is the contention of the Plaintiffs that according to the agreement, the late Opoka was supposed to pay the purchase price into the vendor's Bank Account. The Certificate of title to the land would then be placed in the hands of **M/s Nicholas Lwanga & Co. Advocates** who would pass it on to the buyer once payment of the whole purchase was confirmed. The 1<sup>st</sup> Plaintiff further contended that the late **Francisco Opoka** paid the vendor all the purchase price but the **vendor Emmanuel Semujju** passed away in 1992 before handing over the Certificate of title to the late **Francisco Opoka** and effecting transfer thereof into the names of **Francisco Opoka**.

[24]. In his submissions, Counsel for the Defendants submitted that the Plaintiffs' exhibits presented as payment receipts, payment vouchers and cheques (**P. Exh. 2a - e**) are not backed by evidence that Semujju's (the vendor) Account was credited with the cheques and deposits since no Bank statements were tendered in court for that purpose. It is his contention therefore that **P. Exh. 2a - e** are of no evidential value and in particular, he highlighted **P. Exh. 2(d) the Nile Bank Ltd cheque leaf dated 22<sup>nd</sup> January 1990** which had the word "canceled" on the face of it as evidence that those exhibits are of no evidential value.

[25]. With the exception of **P. Exh. 2(d), the cancelled cheque**, it is my finding that the exhibits are proofs of payment to the vendor of the installments of the purchase price. Whoever is of a contrary view has the burden of proving otherwise with evidence (**Section 102 of the Evidence Act**). Once the Plaintiffs proved banking of a cheques by the purchaser for payment of the vendor of the suit property,

that is sufficient. The onus is on the Defendants to lead evidence that the cheques in question were not honoured.

[26]. The Defendants' claim that the Plaintiffs' exhibits i.e. payment vouchers, cheques and deposits (**P. Exh. 2a - e**) added up to 27,397,575/- yet the purchase price is 47,000,000/- is not true. A close look and study of the entire attachments reveal otherwise. The deceased purchaser paid the entire purchase price and the agreed upon penalties of payment out of the schedule. Besides, the payments were being made to the vendor, Semujju and it has not been shown that either Semujju or his estate deny receipt of the entire purchase price.

[27]. What is not clear is why the vendor Emmanuel Semujju refused and or failed to **release** and **transfer** the title of the suit property into the names of the purchaser, **Francisco Opoka** upon completion of payment of the purchase price. The situation, as the 1<sup>st</sup> Plaintiff put it, became complicated upon the death of the vendor, **Emmanuel Semujju** in 1992 and then later in the same year, of the purchaser, **Francisco Opoka**. The back of the horse broke when **Advocate Nicholas Lwanga** also passed away yet as per the purchase Agreement, the Certificate of title of the suit property had to be deposited with him awaiting final payment of the purchase price from the purchaser so as it be handed over to him.

[28]. **B. The deceased Francisco Opoka's Will and the Plaintiffs' Probate;**  
It is the Plaintiffs' case that they are children and administrators of the Estate of the late **Francisco Obuli Opoka** who died in 1992. They applied and obtained **Probate/Administration** in respect of their father's estate (**P. Exh. 6**). The Grant of Probate in question (**P. Exh. 6**) was in favour of **Charles Otema** (1<sup>st</sup> Plaintiff), **Margaret**

**Ayera and Lucy Adong** (2<sup>nd</sup> Plaintiff) who were the Executors named in the **last Will of Francisco Opoka Obuli**. Though the year this Probate was issued appear faint on the photocopy exhibit, it is evident that it is dated 02<sup>nd</sup> July, 1992 and not **1993** as stated by the Plaintiffs. The clearer certified copy is contained in the initial Plaintiffs' trial bundle where it is marked **P. 4**. The challenge with this **Grant of Probate** however, is it lacked a **Registration or Reference Court Administration cause number**. As a result, on **16<sup>th</sup> March, 2020**, at the commencement of the hearing of this suit, Counsel for the Defendants raised a preliminary objection, Inter alia, that the **Probate** had no court number and that for that reason and other reasons advanced in the preliminary objection, it was suggested that the Plaintiffs were wanting on the side of locus.

[29]. This court rejected the Defendants' preliminary objection raised in this aspect basically because the **Assistant Registrar** of the High Court, a designated court official, had certified it as a true copy. The certification of the Probate as a true copy by a designated court official and in this case, the Assistant Registrar of High Court, raised a presumption that this Probate was lawfully issued by the High Court of Uganda and it would remain so until that presumption is rebutted.

[30]. In its format, the Probate nevertheless remained suspect. The Plaintiffs had however been given an opportunity to prove their claims on a balance of probabilities by court rejecting the Defendants' preliminary objection and at the same time, an opportunity to elucidate on the validity of the **Grant of Probate** they based their capacity to sue. In their bid to do so, Counsel for the Plaintiffs **Mr. Musisi Mike** insisted that this **Probate** had been

used by parties in other suits and it had never been challenged. In due course, he provided pleadings in **H. C. C. S. No. 184/2005** where the present **Plaintiffs** and **another administrator** had been jointly sued as **administrators of the Estate of the late Francis Opoka vide Administration Cause No. 266 of 1992** (copy of Grant of Probate attached marked “B”). The pleadings of **H. C. C. S. No. 184/2005** were received by this court and put on record as **court Exh. No. 1**.

[31]. Upon directives of this court, the Deputy Registrar of this court was required to ascertain the status of the above **administration cause**. On **16<sup>th</sup> March, 2020**, the Deputy Registrar sought from the Deputy Registrar High Court (Family Division) certified copies of the **Grant of Probate and administration of H. C. Administration Cause No. 266 of 1992; Francisco Opoka Obuli (deceased)**. On **23<sup>rd</sup> March, 2020**, the Deputy Registrar High Court (Family Davison) replied as follows:-

***“RE: HCFD/AC/266/1992 - The Estate of the late Gerald Martin Ogutu. Reference is made to the above matter. Our HCFD/AC/266/1992 is not for the estate of the late Francisco Opoka Obuli as indicated in yours, but for the estate of the late Gerald Martin Oguti where Letters of administration were granted to Christine K. Ogutu as per the certified copy of the Grant hereto annexed.”***

[32]. It now became apparent that the presumption that the Probate in question (**P. Exh. 4**) had been lawfully issued by the High Court was rebutted. It is this “Probate” that gave rise to the locus standi of the Plaintiffs to sue since they were suing as **Administrators of Francisco Opoka Obuli’s estate** for recovery of the suit land.

[33]. **Section 2(s) of the Succession Act** provide that:

*“Probate” means the grant by a court of competent jurisdiction authorizing the executor named in the testator’s last Will to administer the testator’s Estate.”*

[34]. In the instant case, there is no evidence that the “**Probate**”, **P. Exh.6** was granted by the High Court of Uganda, a **court of competent jurisdiction**. The other possible piece of evidence that would prop up the presumption that the Probate in question was lawfully issued by the High Court of Uganda would be **Francisco Opoka Obuli’s Will** which the Plaintiffs would show as proved by the High Court upon which it issued out and granted the **Probate Administration** in question. During cross examination, the **1<sup>st</sup> Plaintiff/PW<sub>1</sub>** revealed that his late father **Francisco Opoka Obuli** left a **Will**. This **Will** was not included as part of evidence of the Plaintiffs in this suit. The existence and exhibition of the Will would have gone a long way, **first** to prop up the presumption that the **Probate in question** was lawfully issued by the High Court of Uganda since it is expected that such a Will would first be proved in court before the Grant. **Secondly**, the Will would cast some shade as to whether the deceased owned the suit property or not since it would be expected that the deceased would list the suit property among his other properties in the Will so as to have it form part of the deceased’s estate.

[35]. The Plaintiffs were at liberty to rely and base their claim on any evidence they deemed fit available to them because it is their case and it would be in their interest that they successfully litigate over the suit property. In this case, the Plaintiffs did not find it proper and fit to exhibit the **Will** and opted to rely on other evidence to

make and prove their case. As a result, this court is entitled to impute the Plaintiffs' failure to exhibit the Will of their late father as evidence that the suit property had not been listed or included among the properties left by the deceased.

[36]. Back to the authenticity of the Grant of Probate in question, the court registration/reference number of any matter in court is vital and its importance cannot be over emphasized for majorly 2 reasons;

- i. Location of the court matter; it is the court registration/reference number of the matter that locates it from court and in the court system. Without the court registration/reference number, neither the parties to the matter nor the other members of the public who may be affected by the outcome of the matter can access it.
- ii. Management of the court matter; it is through registration/reference numbers that files are managed in the court system ie Registration, allocation, statistical and information generation and archiving.

[37]. From the foregoing therefore, I would say that the Grant of Probate Administration lacking the Court Administration registration/reference number as evidence of its registration and location in court and the court system is invalid and therefore void. The Probate Administration relied on by the Plaintiffs regarding the estate of **Francisco Opoka Obuli** in this case is in the circumstances found invalid and void and it therefore, conferred upon the Plaintiffs no powers of administration of the estate of the deceased. The fact that the parties have been relying on it in other

suits, without it being challenged is not evidence that it is valid or be lawful ground that it cannot be declared invalid.

[38]. **Whether the 1<sup>st</sup> Defendant is the lawful owner of the suit property:**

[39]. According to the **1<sup>st</sup> Defendant**, she is the registered proprietor of the suit property comprised in **Kyadondo Block 244 plot 1111Kisugu**, having bought it from a one **Annet Kusasira**. It is the Defendants' case that at the time of the purchase, the suit land/property was being occupied by the said **Annet Kusasira** and not the **Plaintiffs**. That however, upon purchase of the suit property, **Annet Kusasira** refused to hand over vacant possession and as a result, the **1<sup>st</sup> Defendant** successfully sued her for vacant possession vide **Nakawa Chief Magistrate C. S. No. 42 of 2008** and the order for vacant possession was executed as per the warrant of eviction and Bailiff's return exhibited as **D. Exh. 4 (i) (l), (m) and (k)**.

[40]. The **1<sup>st</sup> Defendant** argued that **Francisco Opoka Obuli** never purchased the suit land in 1989 and according to the Certificate of title, she listed her successors in title as (a). **Annet Kusasira** registered on 03<sup>rd</sup> August, 2007; (b). **Sunday Miiro** registered on 26<sup>th</sup> July, 2007; (c). **Emmanuel G. Semujju** registered on 15<sup>th</sup> December, 1986; (d). **Essence Alphonse B.** registered on 11<sup>th</sup> May, 1984 and **Francisco Sekiwunga** registered on 16<sup>th</sup> August, 1968.

[41]. It is the Defendants' Counsel's submission that the **1<sup>st</sup> Defendant's** predecessors in title are not parties to this suit. Initially, the **Plaintiffs** sued the **1<sup>st</sup> Defendant** together with **Sunday Miiro** and **Annet Kusasira** on 28<sup>th</sup> July, 2008. That however, on **07<sup>th</sup> January, 2015**, they filed a 2<sup>nd</sup> amended plaint excluding **Sunday Miiro** and **Annet Kusasira**. On **30<sup>th</sup> March, 2015**, they formally abandoned their fraud

claims against **Annet Kusasira** and **Sunday Miiro** in this court, which then struck off **Annet Kusasira** and **Sunday Miiro** from the suit. That under *Order 25 rule 5 Civil Procedure Rules*, the Plaintiffs could have filed a fresh suit against **Sunday Miiro** and **Annet Kusasira** subject to the *Limitation Act* but they chose not to. As for **Semujju**, the **Plaintiffs** have never sued him even upon learning that the suit property had been sold and transferred to **Sunday Miiro** and later to **Annet Kusasira** in August 2007.

[42]. According to Counsel for the Defendants, the foregoing meant that the Plaintiffs do not challenge the sale and transfer by **Semujju** to **Sunday Miiro** and therefore the entries of **Sunday Miiro** and **Annet Kusasira** as proprietors remain absolute, unimpeachable and indefeasible. That under *Sections 59, 64, 176 and 177 Registration of Titles Act*, a Certificate of title is paramount and conclusive proof of ownership which can only be impeached for fraud; *KAMPALA BOTTLERS LTD VS. DAMANICO (U) LTD S. C. C. A. NO. 22 OF 1992*.

[43]. On the other hand, Counsel for the Plaintiffs explained in his submissions that whereas it is true that the suit was originally commenced by the 1<sup>st</sup> Plaintiff against 4 Defendants, including **Annet Kusasira** and **Sunday Miiro**, the said **Sunday Miiro** and **Annet Kusasira** could not be located for purposes of service of Summons. That later, it was established that **fraud** was entirely committed by the **Defendants** (1<sup>st</sup> and 2<sup>nd</sup> Defendants) and that the other parties mentioned in the fraud were most likely not physically existent. It is his submission that as was pleaded under paragraph 13 of the plaint, the said **Sunday Miiro** and **Annet Kusasira** were **imaginary fictitious persons** and therefore, it was not necessary to pursue them but it was necessary to pursue this case against the present 1<sup>st</sup> and

2<sup>nd</sup> Defendants as it became clear that the forgeries complained of were perpetrated by them.

**[44]. ALLEGATIONS OF FRAUD:**

The Plaintiffs pleaded and particularized fraud by the Defendants as follows:-

- a. Obtaining a Special certificate of title in the names of the late **G. Semujju** when he was already dead and without following the due process of the law.
- b. Registering **Sunday Miuro** on the Special certificate of title the same day it was issued and registering names of fictitious persons thereon with intent to defeat the Plaintiffs interest in the suit land.
- c. Commencing a suit in imaginary fictitious names and as such obtaining a Decree to evict the 1<sup>st</sup> Plaintiff from the suit property and swearing and filing false documents in court for purposes of evicting the 1<sup>st</sup> Plaintiff from the suit property.
- d. Using a non-existent firm of Advocates to file and pursue the said suit.

**[45]. The law on fraud is as follows:-**

- a. **The cardinal principle of registration of titles** is that a Certificate of title is conclusive evidence of ownership by the person named in the certificate' ***Section 59 Registration of Titles Act, Cap 230***. It is also well settled that a Certificate of title is only indefeasible in a few instances which are listed in ***Section 176 of the Registration of Titles Act***. The Section protects registered proprietors against ejectment except in cases of fraud, among others; **KASIFA**

**NAMUSISI & 2 ORS. VS. M. K. NTABAZI S. C. CIVIL APPEAL NO. 4 OF 2005.**

Consequently, from the foregoing, once the suit property was transferred and duly registered in the names of **Sunday Miiro** and later **Annet Kusasira** through whom the **1<sup>st</sup> Defendant** derive ownership, then the onus is on the Plaintiffs to prove, first of all that the registration of the late **G. Semujju** on the Special certificate of title and the transfer and registration to **Sunday Miiro** and later to **Annet Kusasira** were fraudulent.

- b. **Burden of proof in fraud;** It is now the law that fraud must be proved strictly, the burden **being heavier** than on a balance of probabilities generally applied in civil matters: **KAMPALA BOTTLERS LTD VS. DAMANICO (U) LTD S. C. CIVIL APPEAL NO. 22 OF 1992.** The Plaintiff therefore in addition to pleading fraud, is enjoined to strictly prove it, the burden being heavier than on a balance of probabilities.
- c. **Definition of fraud;** In **FREDRICK ZAABWE VS. ORIENT BANK LTD & ORS; S. C. C. A. NO. 4 OF 2006**, Hon. Bart Katureebe JSC cited **Black's Law Dictionary** to define **fraudulent** as *"To act with intent to defraud means to act willfully and with specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another or bringing about some final to oneself."*

In **KAMPALA BOTTLERS LTD** (supra);

*"Fraud must be attributed to the transferee ... either directly or by necessary implication ... the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act ..."*

[46]. Applying to the above principles to the present case, whereas it is not in dispute that the 1<sup>st</sup> Defendant is the incumbent registered proprietor of the suit property, it is the Plaintiffs' case that the 1<sup>st</sup> **Defendant's** predecessors save for **Emmanuel Semujju**, are imaginary fictitious persons including **Annet Kusasira** against whom she opened a case vide **Nakawa C. S. No. 42/2008; Pamela Watuwa Vs. Annet Kusasira**. Counsel for the Plaintiffs submitted the following grounds for support of this proposition as:-

- i. In the transfer of land from **Annet Kusasira** to the 1<sup>st</sup> **Defendant**, the address in the application for consent to transfer is that of **Annet Kusasira** but elsewhere in the pleadings the same address was used by the 1<sup>st</sup> **Defendant** signifying that the 1<sup>st</sup> **Defendant** was the author of transfer of land and not **Annet Kusasira**.
- ii. That the signature of the 1<sup>st</sup> **Defendant** is similar to those of **Annet Kusasira** as displayed during the process of transfer and acquisition of the suit land by the 1<sup>st</sup> **Defendant**.
- iii. That the 1<sup>st</sup> Plaintiff and his family were the ones in occupation of the suit property but the 1<sup>st</sup> Defendant well knowing of that fact, went ahead to purport to purchase the suit property from **Annet Kusasira** and proceeded to obtain a warrant of eviction of **Annet Kusasira** when there was no **Annet Kusasira** at the suit premises. It is the Plaintiffs' contention that the above is proved by the affidavit of a one **Mambuka Digrecy M'ordecai** dated 21<sup>st</sup> April, 2008 who in paragraph 4 stated thus:-

***“That upon reaching the premises of the Defendant, I and one Byarugaba (2<sup>nd</sup> Defendant) we asked for the Defendant Annet Kusasira who wasn't at the premises at***

*the time. We found one gentleman who introduced to us as Charles. I explained the purposes of my visit to him, which he seemed to understand and he refused to accept the service and he told me that he doesn't know anything and he did not know Annet Kusasira."*

[47]. According to Counsel for the Plaintiffs, the deponent above show that the suit premises were occupied by **Charles** (1<sup>st</sup> Plaintiff) who did not know **Annet Kusasira**. That therefore, the 1<sup>st</sup> Defendant knew that the occupant of the house was **Charles**. That however, in a very absurd way, it was alleged that **Charles** was a boyfriend to **Annet Kusasira**. That therefore, it was clear that by the time of filing the suit up to the eviction of the 1<sup>st</sup> Plaintiff, it was known that the house was being occupied by the 1<sup>st</sup> Plaintiff and his family.

- iv. That the Defendants employed services of a law firm known as **Lexis Africa Advocates and Solicitors** whose address was **3<sup>rd</sup> Floor Suite 10 Kirumira Towers, Plot 14 William Street**. That this law firm as per a letter from Law Council dated 30<sup>th</sup> October, 2008, there was no such law firm approved as **Lexis Africa Advocates & Solicitors**.
- v. That the **transfer** form allegedly signed by the late **Emmanuel Semujju** on the 18<sup>th</sup> of December, 1996, the **application for consent to transfer** which is not dated and **Release of mortgage** also submitted for embossment on 15<sup>th</sup> June, 2007 all in favour of **Sunday Miir** tell lies about themselves because, they are shown to had been made under the ***Registration of Titles Act (Cap 203)*** which at the time was ***Cap 205*** and not ***Cap 203***.

- vi. That the sequence of transactions ie **Application for a Special certificate of title, transfer and the Release of mortgage** were lodged for registration in the Land Registry on the **26<sup>th</sup> July, 2007** and on the same day, a **Special certificate of title** was issued and **Sunday Miiro** was registered on the said title as proprietor. Then one week later on **03<sup>rd</sup> August, 2007**, **Annet Kusasira** was registered on the said title as proprietor. Then, one month later on **06<sup>th</sup> September, 2007**, the **1<sup>st</sup> Defendant** was registered on the Certificate of title as proprietor.

[48]. It is the Plaintiffs' contention that the above series of events flouted ***Section 70 of the Registration of Titles Act*** which require the **Commissioner Land Registration** to give at least one month's notice in the Gazette of his intention to issue a Special certificate of title upon receiving the application to do so. That ***Section 70 of the Registration of Titles Act*** is intended to safeguard other people who may have an interest in the land and therefore prohibit forgeries. That in this case, the **Special certificate of title** was issued the very day the application was lodged with the Commissioner and thereafter a series of transactions went on with respect to the land ending in the **1<sup>st</sup> Defendant's** acquisition of title. That the Defendant therefore, if she was a diligent purchaser, she ought to have established that the Certificate of title she was dealing with had been obtained only 30 days before and without due process. Counsel for the Plaintiffs relied on the authority of ***MPAGAZIHE & ANOR. VS. NCHUMISI (1992 - 93) HCB*** where it was held that;

*“a purchaser who without investigating whether his predecessor had any title or Power of attorney to sell the land could not be held as a bonafide purchaser.”*

- [49]. He also cited **HAJI ABDU NASSER KATENDE VS. VITHALIDAS HARIDAS & CO. LTD, CIVIL APPEAL NO. 84 OF 2003 (C.A)** where officials in the Land Registry were found to have aided the perpetrators in interfering with the process in the Land Registry, it was held that the whole process was fraudulent.
- [50]. As regards transfer from **Sunday Miir** to **Annet Kusasira**, Counsel for the Plaintiffs submitted on the following as the evidence of fraud;
- i. That the undated transfer was lodged for embossment at the URA office on the 02<sup>nd</sup> of August, 2007 and was filed in Land office on the 03<sup>rd</sup> of August, 2007 and the said **Annet Kusasira** was registered on the same day. That such transactions are rare in the Land Registry and are not practicable.
- [51]. As regards transfer from **Annet Kusasira** to **Pamela Watuwa** (the 1<sup>st</sup> Defendant), Counsel for the Plaintiffs submitted the following as evidence of fraud:
- i. The stamp of URA Domestic Taxes Department where the transfer was lodged for payment of stamp duty shows that it was received on the **14<sup>th</sup> of August, 2007** and released on the **15<sup>th</sup> of August, 2007** meaning that the document was submitted for payment of taxes before it was actually executed. That this defeats the provisions of **Section 20 of the Stamp Act** which presupposes that an Instrument of this nature must be executed before it is presented for payment of stamp duty.

- ii. That there is no consideration stated in the transfer document for the purchase of the suit property though the purported agreement of sale to the 1<sup>st</sup> Defendant stated shs. 55,000,000/-. That in the application for consent to transfer, the consideration was stated as shs. 30,000,000/- which prompted the Government valuer to put the value of the property at that amount. That under declaration or the failure to declare the value of a property in order to dodge taxes is a fraudulent act. He cited the case of *MUBIRU & ANOR. VS. BYENSIBA & ANOR. (1985) HCB 106.*

[52]. As regards fraud by the 2<sup>nd</sup> Defendant, Counsel for the Plaintiffs submitted the following as evidence of fraud;

- i. That the 2<sup>nd</sup> Defendant is a boyfriend to the 1<sup>st</sup> Defendant and a beneficiary and that he actively participated in the fraud to acquire the suit property as he is the one who has lived in the suit premises since the eviction of the 1<sup>st</sup> Plaintiff.
- ii. That the 2<sup>nd</sup> Defendant knew lawyer **Charles Mbogo** who initiated the fraud for the Defendants by making an application for a Special certificate of title in the names of **Sunday Miro** and lawyer **Sharon Tem** who witnessed the caveat lodged by the 1<sup>st</sup> Defendant on the suit land and who signed the plaint in the **Nakawa C. S. No. 42 of 2008**. That the roles of these lawyers are clear as they executed the documents to perpetrate this fraud on behalf of the Defendants.

[53]. In the instant case, it is not in dispute that the 1<sup>st</sup> Defendant is the registered proprietor of the suit property and therefore protected against ejection except in cases of fraud, among others; *KASIFA NAMUSISI* case. The 1<sup>st</sup> Defendant derived her title from **Annet**

**Kusasira.** Counsel for the Defendants submitted that to recover the suit land from the **1<sup>st</sup> Defendant**, fraud must be proved against her predecessors in title. However, it is the Plaintiffs' case that the **1<sup>st</sup> Defendant's** predecessors save for the late **Emmanuel Semujju**, are all none existent and therefore fictitious. This court has therefore to investigate the **1<sup>st</sup> Defendant's** acquisition of title and the existence or none existence of her predecessors in title.

[54]. **CONSIDERATION OF THE ALLEGATIONS OF FRAUD:**

The **1<sup>st</sup>** point raised by the Plaintiffs is the **1<sup>st</sup> Defendant's** use of the address of **Annet Kusasira** in the transfer of the suit land from **Annet Kusasira** to herself. The Plaintiffs did not demonstrate or show court how irregular is this kind of arrangement considering the fact that at the time of transfer from **Annet Kusasira** to the **1<sup>st</sup> Defendant**, the parties were not adversaries until when the said **Annet Kusasira** failed and or refused to hand over vacant possession and a suit had to be filed by the **1<sup>st</sup> Defendant** against her for eviction.

[55]. The **2<sup>nd</sup>** point raised by the Plaintiffs is that the signatures of the **1<sup>st</sup> Defendant** are similar to those of **Annet Kusasira** as displayed during the process of transfer and acquisition of the suit land. In this case, the Plaintiffs did not adduce evidence that the signatures alleged to be similar were authored by the **1<sup>st</sup> Defendant**. The **1<sup>st</sup> Defendant** denied being the author of the signatures though she conceded that some of them in some incidences were similar to hers. Court cannot fit in the handwriting expert's position to be able to analyze the various signatures as Counsel for the Plaintiffs appear to demand and reach a conclusion that the signatures in question were authored by the **1<sup>st</sup> Defendant**. This appears to be the position of the court in **AZIZ KALUNGI KASUJJA VS. NAUME TEBEKANYA S. C. CIVIL APPEAL NO. 63**

**OF 1998** where Justice Karokora JSC held that the onus was on the Appellant to adduce expert evidence (handwriting expert) to state that the handwriting and signature appearing on the exhibit was of the Respondent. The trial Judge, not being a witness and moreover an expert witness on handwriting, his comparison of the handwriting and signature on the exhibit with the Respondent's samples would not help the Appellant's case. In any case, the onus was on the Appellant to request for handwriting samples of Respondent to be compared with the signatures on exhibit, which with respect, he never did.

[56]. The 3<sup>rd</sup> point raised by the Plaintiffs is that the **1<sup>st</sup> Defendant** purchased the suit property which she knew to be in occupation and use by the 1<sup>st</sup> Plaintiff and family other than the vendor without carrying out the due inquiries from the person in occupation and use thus she committed fraud as pronounced in ***NABANOHA DESIRANTA & ANOR. VS. KAYIWA JOSEPH & ANOR. H. C. C. S. NO. 496 OF 2005.***

[57]. The 1<sup>st</sup> Defendant led evidence that before purchase, the vendor **Annet Kusasira** led her in inspection of the suit property as the owner and occupant. The Plaintiffs claim that the affidavit of service by **Mambuka Digrecy M'ordecai** dated **21<sup>st</sup> April, 2008** (marked "g" in the Plaintiffs' trial bundle) reveal that the **Charles** they found in the premises and who introduced himself as so, was the 1<sup>st</sup> Plaintiff. I don't find this as sufficient evidence to prove that, the said **Charles** was the **1<sup>st</sup> Plaintiff** and secondly, that he was the one in occupation and not **Annet Kusasira** who as per the 1<sup>st</sup> Defendant, had taken her on inspection of the property.

[58]. If what the Plaintiffs claim was the true position, then upon being evicted, one would have been able to see the 1<sup>st</sup> Plaintiff take certain decisive steps to regain possession and have his destroyed furniture recovered. Neither in the pleadings nor in the trial, did the Plaintiff plead and adduce evidence that upon his being violently evicted as he claims, he made any complaint or report to either the local authorities or to police to that effect. I don't think and believe that the 1<sup>st</sup> Plaintiff would in an ambush manner, be evicted by strangers from the house he had stayed in with his family for a period of 12 years and with evidence of the previous occupation by his late father and his wife Busingye and then stop at not reporting such to the authorities. The Plaintiff stated in evidence that upon purchase of the suit property, it was occupied by his father and the wife **Hope Busingye** and when he, the Plaintiff returned from abroad, he took possession until when he was violently evicted by the Defendants. It follows therefore, the Plaintiffs' case required the evidence of the said step mum **Hope Busingye** to support and corroborate his claims of occupation of the suit properties. There is no evidence on record as regards the whereabouts of the said **Hope Busingye** or reasons why she was not scheduled on the list of the Plaintiffs' witnesses.

[59]. The fourth point raised by the Plaintiffs is that the Defendants employed services of a non-approved law firm, **Lexis Africa Advocates & Solicitors**. This is not an act of fraud on the part of the 1<sup>st</sup> Defendant. The fact that the Law Council revealed that there was no law firm approved as **Lexis Africa Advocates & Solicitors** does not mean that the firm was not in existence. It means that as under ***Rule 3 of the Advocates (Inspection and Approval of Chambers) Regulations, SI 65/2005***, at the time, the Chambers of the firm of

**Lexis Africa Advocates & Solicitors** had not been approved and it was therefore not on the list of the approved firms. This cannot be fraud attributed to the client, the **1<sup>st</sup> Defendant**. It is the law firm in question to be penalized for conducting business when it had not been approved to do so.

[60]. The other point raised by the Plaintiffs is the mode and use of the **undated transfer, application for a Special certificate of title by Sunday Miro and the Release of mortgage** which were lodged in the Land Registry upon which the Lands office processed conveyancing up to when the **1<sup>st</sup> Defendant** got to be registered on the Certificate of title on the 06<sup>th</sup> of September, 2007. It is the contention of Counsel for the Plaintiffs that the various steps taken from the transfer from the initial owner of the suit land, application for the Special certificate of title and further transfers by the 1<sup>st</sup> Defendant's predecessor in title up to the registration of the 1<sup>st</sup> Defendant on the suit property title were tainted or illustrate fraud. That in fact, the 1<sup>st</sup> Defendant colluded with officials of the Land office registry in the entire process up to the registration of her names on the suit Certificate of title in perpetrating fraud.

[61]. On the other hand, Counsel for the 1<sup>st</sup> Defendant vehemently argues that the 1<sup>st</sup> Defendant had no notice of the fraud if any. That she is a bonafide purchaser for value without notice. The Certificate of title in her names is conclusive evidence of ownership. It is unimpeachable under **Section 59 of the Registration of Titles Act**.

[62]. **Section 59 Registration of Titles Act** provide as follows:-

*"No Certificate of title issued upon an application to bring land under this Act shall be impeachable or defeasible by reason or on account of any informality or irregularity in the application and*

*in the proceedings previous to the registration of the Certificate and every Certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the Certificate in the Register Book, and shall be conclusive evidence that the person named in the Certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the Certificate is seized or possessed of that estate or interest or has that power.”*

[63]. In the instant case, the Plaintiffs can only succeed to impeach the 1<sup>st</sup> Defendant’s Certificate by proving any underlying fraud in the acquisition of her title and for this, they have to show that there were serious omission and irregularities which must be such that they went to the root of the title so as to amount to or reflect fraud. Otherwise, as per Platt J.S.C in the case of **KAMPALA BOTTLERS VS. DAMANICO (U) LTD (C.A) NO. 22 OF 1992**, “Registered title cannot be set aside for mere irregularity in the preliminary stages (see **Section 5 of the Registration of Titles Act**).”

[64]. As regards the complaint of use of **undated transfer** by the 1<sup>st</sup> Defendant’s predecessors in title ie transfer from **Sunday Miiro** to **Annet Kusasira** (P. 14) and from **Annet Kusasira** to the 1<sup>st</sup> Defendant **Pamela Watuwa** (P. 13), I find it being no irregularity from which to infer fraud. It is such a mere minor irregularity because in my view, the relevant dates can be got or ascertained from the date when stamp duty was paid since the Uganda Revenue Authority (URA) Stamp duty has the embossment of the date of stamping. In the instant case, it can safely be taken that the transfer from **Sunday Miiro** to **Annet Kusasira** was lodged in the Land Registry on 02<sup>nd</sup> August, 2007 (P. 14)

and that of **Annet Kusasira** to the **1<sup>st</sup> Defendant Pamela Watuwa** on 14<sup>th</sup> August, 2007 (P. 13). Other irregularities alluded to by the Plaintiffs regarding the **mode and procedure of the application for the Special certificate of title by Sunday Miiro and the Release of mortgage** which was lodged in the Land office to enable the processing of the Certificate of title, it has not been clearly and satisfactorily shown how they are such serious to go to the root of the title as to amount to fraud. These may be such mere irregularities in the preliminary stages insufficient to cause the setting aside of a registered title. For example, the specific complaint by the Plaintiff as put across by **Counsel Musisi** in his submission that the impugned documents to wit, for example application for issuance of a Special certificate of title by **Sunday Miiro** (P. 17), the Release of mortgage (P. 16) purported to be processed under ***“Registration of Titles Act, Cap 230, then 203*** and that this is proof of fraud merely because by then, at the time, no such **Cap 230 and 203** existed, in my view is a fallacy. This is so because it is not uncommon for printers of standard form documents to error and type wrong numbers or figures in documents. Besides, the Release of mortgage document (P. 16) originated from **SUN FINANCIAL SERVICES LTD** where the initial proprietor for the suit property **Mr. Semujju** had pledged it as security. The Plaintiffs themselves conceded to this. To attribute such error to the user of the document, the **1<sup>st</sup> Defendant** would be unfair and would lead to miscarriage of justice.

- [65]. I conclude on this aspect by observing that the above Land Registry complained of documents are generated and issued by the Land office for any Applicant to fill in his or her relevant information regarding what is being sought. If there are any anomaly with the document as highlighted by Counsel for the Plaintiffs in this case, it should be Land

Registry officials to be called or summoned to appear before court and explain. Then, if the explanation is adverse to a party, then the burden would shift to require that party to rebut the position given by the Land Registry official.

- [66]. A large part of **Mr. Musisi**, Counsel for the Plaintiffs submission consist of evidence from the bar. The Plaintiffs did neither sue the **Commissioner Land Registration** nor cause for the appearance of a Land Registry official in court and explain any anomalies identified in the Land Registry documents for purposes of establishing the allegations of fraud by the Plaintiffs. It is the duty of the Plaintiffs to establish the fraud so as to require the defendants bring or present evidence in rebuttal. For example, in this case, there has been no element of either forgery, false entry, defective transfer or mis-description of the land in the registered title illustrated by the Plaintiff. These are some of the main recognizable instances which courts and the ***Registration of Titles Act*** impute fraud.
- [67]. There is however, the allegation that the 1<sup>st</sup> Defendant evaded to pay Government revenue when a different figure of consideration of the suit property was reflected on the application for **consent to transfer** from **Annet Kusasira** to the **1<sup>st</sup> Defendant** (P. 15). That the stating of shs. 30,000,000/- in the application for consent to transfer (P. 125) prompted the Government valuer to put the value of the property at that amount instead of shs. 55,000,000/- the consideration reflected in the purchase agreement. He concluded that under declaration or the failure to declare the value of a property in order to dodge taxes is a fraudulent act. He relied on the authority of ***MUBIRU & ANOR. VS. BYENSIBA & ANOR. [1985] HCB 106 at 108*** where it was held;

*“The mode of acquisition of the title deed in question was tainted with fraud and illegality because bonafide includes without fraud or without participation in wrong doing. When the 2<sup>nd</sup> Plaintiff inserted shs. 500,000/- as the consideration for the land and factory where he had paid shs. 2.4m/- for the design was to defraud the government of its revenue by way of paying less stamp duty. Furthermore, by public policy, any transaction designed to defraud the government of its revenue is illegal.”*

- [68]. There is quite some debate that has however been generated by the decision of the Court of Appeal: ***HAJI NUMANI MUBIAKULAMUSA VS. FRIENDS ESTATE LTD CIVIL APPEAL NO. 104 OF 2018*** wherein their Lordships argued and observed that stamp duty payable upon purchase of land is not computed out of the purchase price of the land as agreed to by the parties; but it instead is assessed from the value given to the land by the Government valuer, see also the decision in ***DAVID KIZITO KANONYA & ORS. VS. BETTY KIZITO (C.A) CIVILAPPEAL NO. 187 OF 2012*** where it was held that it is superfluous to say the least, that the purpose of stating the consideration, among others is to help determine the value of the property as the Government valuer is required to physically inspect the property in issue in every application for transfer and ascertain its value, which value is endorsed on the transfer form under his or her signature. Indeed, one wonders how consideration can be the basis of valuation of the property when consideration agreed upon by the parties is in most cases determined by the various factors not limited to the needs of the purchaser or the desperation of the vendor to secure money.
- [69]. The above notwithstanding, on appeal, the Supreme Court in ***BETTY KIZITO VS. DAVID KIZITO CIVIL APPEAL NO. 8 OF 2018*** held that the

concealment of the consideration amounted to fraud while citing ***MUBIRU & ANOR. VS. BYENSIBA & ANOR. [1985] HCB 106*** relied on by the Plaintiffs in this case, as still good law. This court is bound by the same Supreme Court precedent though, however, even if one is to find that the 1<sup>st</sup> Defendant's stating of 30,000,000/- as consideration for the purchase of suit property amounted to fraud since as per her own admission the purchase price was shs. 55,000,000/- hence under payment of Government revenue thus rendering the transfer void, this cannot benefit the Plaintiffs. This is so because the Plaintiffs are not persons deprived of land by fraud or as persons deriving their interest from the proprietor (***Section 176(c) Registration of Titles Act***). In this case, the deceased **Semujju** whom the Plaintiffs claim to derive interest from did not transfer the suit property in favour of their father **Francisco Opoka Obuli** and he had therefore never been a registered proprietor of the suit property. The predecessor in title of the 1<sup>st</sup> Defendant is Annet Kusasira who got registered thereon on 03<sup>rd</sup> August, 2007. The Plaintiffs' father **Francisco Opoka Obuli** and the Plaintiffs missed out and eventually lost the equitable interest in the suit property from 1990 - 1992 when, as they allege, payment of the purchase price had been concluded but failed to secure transfer of the suit property in favour of **Francisco Opoka Obuli** when **Semujju** was still alive and later into their names or the estate of the late **Francisco Opoka Obuli**. Besides, upon failing to secure the transfer of the suit property, neither their late father **Francisco Opoka Obuli** between 1990 - 1992 when both the vendor and the purchaser were still alive sued the vendor **Semujju** for recovery of the suit land or for specific performance and/or acquisition of its documents of title nor the Plaintiffs themselves sued the **estate of Semujju** for the same. The Plaintiffs to merely emerge after 18 years in 2008 and file this suit

against the 1<sup>st</sup> Defendant calls for many questions that remain unanswered. Accordingly, the Plaintiffs' equitable claims and interests allegedly existing before the registration of the 1<sup>st</sup> Defendant's title cannot have priority over her registered interest.

- [70]. **Bonafide purchaser:** In her acquisition of the suit property, the 1<sup>st</sup> defendant deny any wrong doing or notice of any wrong doing by some other person; thereby raising the claim that she is a bonafide purchaser thereof for value without notice of any circumstance that would have restrained her from the acquisition of the suit property.
- [71]. As already stated in the beginning of this judgment, the evidential burden to prove a claim of fraud lies on the Plaintiff and the standard of proof required is at a higher level than that of balance of probability required for proof in an ordinary civil suit. On the other hand, the evidential burden to prove the contention that one is a bonafide purchaser of the suit property without notice of any wrong dealing with that land, however, lies on the person who pleads so. The standard of proof required to prove the contention that one is a bonafide purchaser of land for value, without notice of any wrongdoing is the standard applied in ordinary civil claims ie balance of probability.
- [72]. The 1<sup>st</sup> Defendant therefore in this case has a lesser burden than the Plaintiffs. It is the duty of the Plaintiffs to first establish the fraud to the required standard of proof.
- [73]. In this case, there were a series of previous transfers of the title of the incumbent registered proprietor and to impeach it, there is a requirement that the previous frauds must be brought to the knowledge of the person concerned. But if it be shown that her

suspensions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to her; ***ASSETS & CO. VS. MERE ROIHI [1905] AC 176.***

[74]. The above has not been shown or established by the Plaintiffs or that it is the case in the present suit. The claim that a successful plea of bonafide purchaser for value cannot be sustained on evasion to pay Government revenue, I have already alluded to it that in this case, such established evasion to pay Government revenue by the defendants cannot go to benefit or bolster the Plaintiffs and their case since they are not the persons deprived of land. In the instant case, the Certificate of title that was duly issued to the 1<sup>st</sup> Defendant cannot be impeached or be defeasible by reason or on account of any infirmity or the alleged irregularities, as I have already discussed and found in this judgment, in the proceedings to the registration of the Certificate of title (***Section 59 Registration of Titles Act***).

[75]. The foregoing principles go to protect the 1<sup>st</sup> Defendant in this case unless it is shown by evidence that she participated or got involved in the fraudulent dealings complained of. In the instant case, none of the complained of alleged fraudulent dealings were shown and proved to the satisfaction of court save for the concealing of the consideration hence the underpaying of Government revenue but for which consequence or effect does not affect the Plaintiffs as they are neither persons deprived of land or deriving interest from the registered owner.

[76]. **Whether the 1<sup>st</sup> Defendant's predecessors in title were fictitious:-**

- [77]. The Defendants complain that the Plaintiffs did not or failed to sue the 1<sup>st</sup> Defendant's predecessors in title and asked court to interpret that to mean that they did not challenge the sale and transfer by **Semujju** to **Sunday Miiro** hence it was valid and therefore the subsequent transfers up to the 1<sup>st</sup> **Defendant** remain absolute, unimpeachable and indefeasible.
- [78]. The Plaintiffs on the other hand assert that they could not sue them because the 1<sup>st</sup> Defendant's predecessors in title were fictitious. The basis for this assertion is that when this suit was initially filed, the Defendants included **Annet Kusasira** and **Sunday Miiro** but the 1<sup>st</sup> **Plaintiff** found that they could not be located for purposes of service of Summons. Secondly, that the 1<sup>st</sup> **Defendant** had filed a suit against **Annet Kusasira** vide **Nakawa Chief Magistrate's Court C.S. No. 42/2008** claiming that she had purchased the suit property from her but that the latter had refused to hand over vacant possession despite the fact that she had executed a transfer in her favour and surrendered her Certificate of title to her; (**P. 4(a)**). That the review of the documentation exhibited in that suit from the Land office established that the fraud was entirely committed by the 2 Defendants and the other parties mentioned in the fraud were **most likely not physically existent** as it was clearer then that the **forgeries** complained of were perpetuated by the current Defendants. That it was therefore only necessary to pursue this case against the Defendants who are actually existing.
- [79]. As I already indicated previously in this judgment, the Plaintiffs failed to show by evidence that there was any forgery conducted during the process of acquisition of title by the 1<sup>st</sup> Defendant and any of her predecessors in title. Secondly, if it is true that the initial Defendants

ie **Annet Kusasira** and **Sunday Miiro** could not be located for purposes of service of Summons, the Plaintiffs were at liberty and had the option of making an application to serve them court process by way of substituted service so that they are able, at the end to secure a default judgment in respect of these Defendants for their failure to file their respective defences. The failure therefore to locate **Sunday Miiro** and **Annet Kusasira** for purposes of service of Summons is not sufficient proof that they were none existent or fictitious.

[80]. **The effect of the decree vide Nakawa Chief Magistrate's Court; Pamela Watuwa Vs. Annet Kusasira C.S. No. 42 of 2008:**

[81]. The 1<sup>st</sup> **Defendant** sued **Annet Kusasira** for vacant possession of the suit premises comprised in **Block 244 plot 1111 land at Kisugu (P. 4(a))**. She obtained a decree to that effect (**P. 4(i)**). It is the contention of the 1<sup>st</sup> Plaintiff that he and his family were evicted using that decree yet they were not parties to the suit. The decree is dated 10<sup>th</sup> April, 2008 and the 1<sup>st</sup> Plaintiff claim that he was violently evicted on 17<sup>th</sup> July, 2008 by bailiffs using that decree. The Plaintiffs have however never bothered to have this decree **judicially** set aside. A judgment of court that lapses into finality becomes immutable and unalterable. It can neither be modified nor disturbed by courts in any manner even if the purpose of the modification is to correct perceived errors of facts or law. It remains binding to the parties and any other person that may be affected by it until court is moved to set it aside judicially. The 1<sup>st</sup> Plaintiff on discovery of the existence of this judgment had the option of having it set aside by way of **Review** under **Section 82 Civil Procedure Act** and **Order 46 rule 1 Civil Procedure Rules**.

[82]. **Order 46 rule 1 Civil Procedure Rules** provides thus:-

“Any person considering himself or herself aggrieved,

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order was made, or on account of some mistake or error apparent on the face of the record, or for **any other sufficient reason**, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.

[83]. See also *RE. NAKIVUBO CHEMIST (U) LTD (1979) HCB 12*.

[84]. It follows from the above that the Plaintiffs therefore in this case, did not take advantage of the option open to them of applying for review of the judgment of the **Nakawa Chief Magistrate’s Court C.S. No. 42 of 2008** but chose to file the present suit.

[85]. Even though it is contended that the suit was filed against a fictitious defendant, for which there is no proof, though the Plaintiffs were not parties to the proceedings, they are bound by the judgment until it is lawfully set aside or overturned. In effect, it is a judgment in rem which binds all the parties to the suit and 3<sup>rd</sup> parties including the Plaintiffs; **GEORGE WILLIAM KATEREGGA VS. COMMISSIONER LAND REGISTRATION & 12 ORS. H. C. M. A NO. 347 OF 2013 (LAND DIVISION)**; See also

***SAROJ GANDESHA VS. TRANSROAD LTD S. C. C. A NO. 13 OF 2009.***

- [86]. In conclusion therefore, I find and hold that the Plaintiffs' **Probate Grant of administration** upon which they sued the 1<sup>st</sup> Defendant were invalid and therefore void for there is no evidence that it was lawfully obtained from any courts of law with jurisdiction to grant it. The Court Registries keep Registers in which is entered the registered numbers, names of the parties, the date and nature of the grant and the date of registration. The Register is open to the public who may be interested in the grants and the estate and any grant therefore that lacks the registration number of the court system is no grant at all for it is not recognized by any issuing court.
- [87]. The Plaintiffs are not persons deprived of land by fraud or as persons deriving their interest of the suit land from the registered owner, transferee bonafide for value etc (***Section 176(c) Registration of Titles Act***) so as to be able to sue the Defendants for fraud for Semujju, the initial registered proprietor or his estate from whom they claim to derive interest did not **transfer** the suit land either to their late father **Francisco Opoka Obuli** or to his estate upon his demise. Their equitable claim could therefore not defeat the 1<sup>st</sup> Defendant, a subsequent purchaser who got registered as proprietor without even prior notice of the Plaintiffs' claimed equitable interest. Not even their **claim of adverse possession**, for there was no proof of it, and even if there was, it is in favour of the 1<sup>st</sup> Defendant by virtue of the decree vide **C. S. No. 42 of 2008** which is still subsisting and binding on the parties and others affected by it.

- [88]. The Plaintiffs are therefore, from the foregoing, not entitled to any of the reliefs sought and the suit against the Defendants is accordingly dismissed with costs.
- [89]. Dated at Kampala this 10<sup>th</sup> day of **December, 2020.**

Byaruhanga Jesse Rugyema

**JUDGE**