

ERNEST KABYANGA :::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

BEFORE: JUSTICE IMACULATE BUSINGYE BYARUHANGA

- a) A declaration that the plaintiff is a bonafide purchaser/ owner of the land comprised in Gomba Block 28 plot 1.
- b) A declaration that the registration of land in dispute in the names of the 1st and 2nd defendants and subsequent land titles created out of Block 28 plot 1, that is Block 28 plot 2, block 28 plot 2, Block 28 plot 4 and Block 28 plot 5 in the names of the 1st, 3rd, and 4th defendants is null and void having acquired the respective titles through fraud.
- c) Further orders against the 5th defendant for cancellation of all the registration that were created out of Block 28 plot 1 which was originally in possession of Nagadya Yulita who sold the suit land.
- d) A declaration that the 1st, 2nd, 3rd and 4th defendants are not bonafide purchasers/ owners of the land comprised in Gomba Block 28 plot 1 and are not protected by the Registration of Title Act.
- e) A declaration that the 1st and 2nd defendants having obtained the title by fraud could not pass a good title to the 3rd and 4th defendant.
- f) A declaration that the 3rd and 4th defendants having constructive and actual knowledge that the land was bought by the plaintiff from Yulita Nagadya and was

in actual possession of the same cannot be bonafide purchaser for value without notice and cannot be bonafide purchasers for value without notice and cannot be protected by the Registration of Title Act.

- g) An order directing the 5th defendant to cancel all transfer of the 1st, 2nd, 3rd and 4th defendants in the Register book.
- h) An order directing the 5th defendant to directly register the plaintiff as the proprietor on all titles created out of the original Block 28 plot 1.
- i) A permanent injunction restraining all the defendants from occupying, trespassing or interfering with the plaintiff's quiet enjoyment of the said property.
- j) An eviction order against the 1st, 2nd, 3rd and 4th defendants who constructed shanty grass thatched structure where their herdsmen stay.
- k) Mense profits and damages of wrongful occupation and use of the plaintiff's land until vacant possession is obtained.
- l) General and exemplary damages.
- m) Interest at the rate of 23% per annum from the date of filing the suit till full payment.
- n) Any other relief Court may deem fit in circumstances of this case.

BACKGROUND

According to the amended plaint filed on 9th August 2012, the plaintiff claims that he is the bonafide purchaser of the land comprised in Gomba Block 28 Plot 1. The plaintiff claims that he purchased the land on the 8th day of February 1992 from Yulita Nagadya who was the daughter and successor of the late John Baptist Kagolo who originally owned the suit land. The plaintiff claims that he had been occupying the suit land as a squatter since 1982.

That the 1st and 2nd defendants pretending to have instructions from the plaintiff, approached Yulita Nagadya and paid her monies for her to sign transfer forms for the land to be put in her names from her late father's names.

That the 1st and 2nd defendants led the plaintiff to **M/s Tibamanya Urban Advocates** who made Yulita Nagadya sign a sale agreement in English in favour of the 1st and 2nd defendant without it being translated into Luganda which was the only language that the plaintiff understood. Yulita was paid Ugx 1,000,000. Due to the delay, Yulita requested a

one Daudi Nabangi to translate the document she had just signed and she was informed that she had sold the land to the 1st and 2nd defendants.

The plaintiff's claim against the 3rd and 4th defendants is that they knowingly purchased a portion of the suit land and yet they were aware that the plaintiff had been a squatter on the suit since 1982 and later a bonafide purchaser of the suit land in 1992.

The plaintiff claims that the 1st and 2nd defendants acquired the suit land by fraud and as such they could not pass good title to the 3rd and 4th defendants.

On the 28th August 2012, the 1st, 3rd and 4th defendants jointly filed their written statement of defence and the 1st defendant pleaded that he bought the suit land from Getrude Nalwoga Basimbize and Yowasi Kazooba Nsubuga (holders of letters of administration for the estate of the Late John Baptist Kagoro) on the 17th day of October 2005.

The 1st defendant further claims that because of Yulita's fraudulent actions, the Commissioner of Land Registration cancelled all transactions on the suit land and new entries were made which prompted the 1st defendant to deal with the true registered owners.

In the counter claim, the 1st, 3rd and 4th defendants claim that the plaintiff who claims to have bought the suit land from a one Yulita Nagadya who is a fraudster, has continued to trespass on the suit land without a colour of right.

Court directed the parties to file a joint scheduling memorandum, trial bundles and witness statements which was done. At the scheduling, the parties agreed on the following issues;

- a) Whether the plaintiff acquired proper interests in the suit land.***
- b) Whether the defendants acquired proper interest in the disputed land.***
- c) Whether the registration of the defendants on the suit land was proper.***
- d) Whether the parties are entitled to the remedies sought in their pleadings.***

The plaintiff adduced evidence of six witnesses Ernest Kabyanga (**Pw1**), Guma John (**Pw2**), Rwamushode Amos (**Pw3**), Elfazi Kuteesa (**Pw4**), Assistant Superintendent of Police Kagurukye Yona (**Pw5**), and Detective AIP Mwendo Daniel (**Pw6**). On the 31st day of August 2018, while Hon. Lady Justice Alexander Nkonge was still hearing this matter,

she made a Ruling giving her reasons for not admitting Pw5 and Pw6's evidence and held that the plaintiff and his Counsel kept missing Court and Her Lordship stated that Pw5 and Pw6 were not cross examined and as such no weight was given to their evidence. The plaintiff's case was closed and the defence case was opened.

On the other hand, the defendants led evidence from five witnesses namely Gertrude Nalwoga Basimbize (**Dw1**), Sanyu Patrick (**Dw2**), Mwesigye Amos (**Dw3**), Sebutama Francis (**Dw4**), and Gabulira John (**Dw5**).

Court visited locus in quo in pursuant to **Practice Direction No. 1 of 2007** which requires that courts handling land matters should as so far as possible, physically visit properties under dispute before pronouncing themselves on the proprietary rights of the parties. The following were my findings from the locus visit;

- a) The suit land is occupied by the plaintiff, 1st defendant and the 4th defendant.
- b) The plaintiff's home is on the southern part of the suit land on which he has his homestead, his cattle kraal with cattle and a banana plantation.
- c) The 1st defendant occupies a portion of the suit land that is north from the plaintiff's home. His portion is largely undeveloped with two grass thatched huts that house his herdsman and an empty kraal.
- d) The 4th defendant's home is further north from the 1st defendant's home. The 4th defendant has a bigger permanent house (bungalow) on the suit land, smaller bungalow, two grass thatched houses located in the eastern direction from the bigger permanent house and a cattle kraal with cattle.
- e) The 3rd defendant's home is located on the opposite parcel of land opposite the suit land. There is a government road that separates the suit land and the land occupied by the 3rd defendant.
- f) On the 3rd defendant's land, there is a permanent house (bungalow), cattle kraal, and a plantation.
- g) A bigger part of the suit land is covered by grass, shrubs and trees.

At trial, **Counsel Turinawe Julius of M/s Turinawe, Kamba & Co Advocates** represented the plaintiff while the defendants were represented by **Counsel Byekwaso Godfrey and Counsel Katamba Godfrey both of M/s Owiny Dollo & Co Advocates**.

Counsel filed written submissions in respect of this case, which I have taken into consideration before arriving at the final decision.

Burden and standard of proof in Civil Cases.

In civil cases just like this one, the burden of proof lies on the plaintiff. In civil matters like the instant case, the burden of proof rests on the plaintiff and the standard of proof is on a balance of probabilities.

According to **Section 101(1) (2) of the Evidence Act Cap.6 Laws of Uganda,**

“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.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 of the Evidence Act goes on to provide that *“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side and **Section 103** provides that “the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that proof of that fact shall lie on any particular person”*

Since the cause of action in the instant case is fraud, it is important to understand the standard of proof in such cases. According to the case **Sebuliba versus Coop Bank Ltd. (1987) HCB 130**, *the proof of fraud requires a standard beyond the balance of probabilities.* It is stated that;

‘The standard of proof in fraud cases is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases.’

Resolution of issues

Issue No 1: Whether the plaintiff acquired proper interests in the suit land.

Mr. Turinawe Julius in his submissions argued that the plaintiff acquired an equitable interest in the suit land which he bought from a one Yulita Nagadya, the biological daughter of the Late Kagoro who was the proprietor. Counsel for the plaintiff went ahead

to submit that the Late Yulita Nagadya had a certificate of succession and as such was authorized to sell land using the same to plaintiff.

On the issue of the alterations made to the sale agreement on the part of the description of the suit land from Gomba Block 23 plot 1 to Gomba Block 28 plot 1, Counsel submitted that this alteration was minor and did not go to the root of the contract. He further submitted that the sale agreement was made by the Resistance Council (RC) secretary, a one Musingo Joseph who made an error and once Yulita found the error, the same was corrected. Counsel submitted that Pw4 (Elfazi Kuteesa the Resistance Council 1 member) testified the Block 23 was owned by a one Rwamasonde Amos who purchased the same in 1998 and that by the time he came to purchase his plot of land, the plaintiff was already in occupation of Block 28.

In the alternative, Counsel submitted that the plaintiff should be protected as a bonafide occupant under **Section 29 (2) of the Land Act** since he had used, developed and occupied the suit land for twelve years before the coming into force of the 1995 Constitution without interruption.

In response, Counsel for the defendants submitted that the burden of proof lies on the plaintiff as issues relating to fraud are serious and ought to be proved beyond a balance of probabilities.

Counsel further submitted that the plaintiff has failed to prove that the person that sold to the plaintiff possessed legal interest for her to be in position to give good title to the plaintiff since Yulita Nagadya's certificate of succession that she received in 2001 was not legal since the Local Administration (Performance of Functions) Instrument of 1967 was repealed.

On the issue of being a bonafide occupant, Counsel submitted that the plaintiff did not bring satisfactory evidence that that he occupied the entire 510.4 acres but rather that he occupied about 30 acres as per the locus visit.

Analysis of evidence

Pw1 testified that he has been in continuous occupation of the suit land comprised in Block 28 plot 1, Gomba District since 1982 which he purchased from a one Yulita Nagadya (*the biological daughter of the Late Kagolo who was the proprietor of the suit land*) in 1992. This evidence is corroborated by Pw2 who testified that he is the biological son of the plaintiff. During cross examination, Pw2 testified that he was around 13 years when they shifted to suit land in 1982 because they were relocating from a nearby area.

Pw1 also testified that he made the sale agreement with Nagadya in the presence of Amos Rwamashodi (Pw3) and the RC members. Pw1 further testified that he was not able to transfer the land into his names because Yulita Nagadya died before the process could be completed. Pw3 testified that he was present when the plaintiff purchased the suit land from the late Nagadya Yulita and that he signed as a witness.

I have studied the original sales agreement dated 8th February 1992 [Exh. P1 (b) and Exh. P1 (A)], between the plaintiff and the late Yulita Nagadya and my findings are that, Yulita had promised to give the plaintiff the transfer forms on the 30th day of August 1992. According to the agreement the plaintiff paid the consideration for the suit land in full and it included 40 cows and Ugx 300,000/= (Uganda shillings three hundred thousand) .

According to the case of **H.M Kadingidi v. Essence Alphonse, H.C.C.S. No.289 of 1986, Ntagoba PJ.** (as he then was) held that;

*“A purchaser who has concluded a sale agreement with the owner, immediately becomes the owner of the land and the vendor becomes his trustee in title. This is because the purchaser is potentially entitled to the equitable remedy of specific performance. He obtains an immediate equitable interest in the property, for he is, or soon will be, in a position to call for it specifically. It does not matter that the date for completion, when the purchaser may pay his money and take possession, has not yet arrived. Equity looks upon that as done which ought to be done, and from the date of contract the purchaser becomes owner in the eyes of equity. (**Lysaght v. Edwards (1876)2 Ch.D.499 at pp.506 – 510.**)*

A similar position as above was confirmed by the Supreme Court in **Ismail Jaffer Allibhai & 2 O'rs v. Nandlal Harjivan Karia & Anor, S.C.C.A. No. 53 of 1995**, that in a sale of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable interest in the property and the vendor becomes a trustee who holds the property in trust for the purchaser.

In the instant case, Counsel for the defendants submitted that the Late Yulita Nagadya was not the lawful owner of the suit land because she held a certificate of succession that was issued in 2001 long after the Local Administration (Performance of Functions) Instrument, SI No. 150 of 1957 had been repealed by the Local Governments Act Cap 243 which commenced on the 24th of March 1997.

According to the proceedings, Pw1, Pw2, Pw3 and Pw4 testified that they knew the Late Yulita Nagadya as the daughter of the Late John Baptist Kagolo. The Pw1 testified that Nagadya showed him the certificate of title of the land in John Baptist Kagolo's names before he purchased the suit land. In her witness statement, Nalwoga Gertrude (Dw1) testified that in 2005 she was approached by the 1st defendant who informed her that he had purchased the suit land from her sister who had a certificate of succession to their father's estate.

Dw1 stated that although Nagadya was her sister, she had no right over the estate of their late father as she and her brother (Yowasi Kazooba) were in the process of getting letters of administration. It should be noted that Dw1 told court that her biological father was the late Baziliryio Kategaya and that she had her father's letters of administration. (Exh. P17). She further told court that the late John Baptist Kagolo was her uncle and she knew Yulita Nagadya as her sister, having told court that the late John Baptist Kagolo was also father. (Proceedings of 15th November 2019). This implies that this is not a truthful witness and her evidence is questionable.

Dw1 further told court that she could not remember when she sold the suit land to Sanyu Patrick (1st defendant) and neither could she remember the witnesses to the agreement. Dw1 equally told court that she had never seen the Late John Baptist Kagolo and she could not describe him and neither did she bury him. This makes her evidence about the suit land unreliable.

In addition, Dw1 told court that she sold the Late John Baptist Kagolo's land on the 17th of October 2005 to the 1st defendant before she obtained letters of administration in respect of the Late Kagolo's estate on the 10th November 2005. In reply to questions by court, Dw1 admitted that she had applied for letters of administration in respect of the estate of Kagolo as daughter and not niece. This implies that this sale was not authorized by law.

According to Pw3 and Pw4 who were secretary and Vice Chairperson of Nabuguyo Resistance Council 1 respectively at the time of sale of the suit land in 1992, they both testified that they only knew Yulita Nagadya as the daughter of the late Kagolo and as such the owner.

My interpretation of this evidence is that the plaintiff purchased the suit land with the honest belief that the suit land was owned by the Late Nagadya as a daughter and beneficiary of the Late John Baptist Kagolo who was the registered proprietor. Furthermore, the certificate of succession came into the question in 2001 long after the plaintiff had purchased the suit land in 1992 and as such it is of no consequence at hand. This evidence proves that the plaintiff was a bonafide purchaser for value. The plaintiff (PW1) testified that at the time when he occupied the suit land in 1982, the land was vacant and was not occupied by anyone else. **In accordance with the case of Ismail Jaffer Allibhai & 2 Ors v. Nandlal Harjivan Karia & Anor, (supra), the plaintiff has an equitable interest in the suit land having purchased the same from the beneficiary of John Baptist Kagolo as the registered proprietor. There is no evidence on record indicating that Yulita Nagadya was not the daughter of the Late John Baptist Kagolo.**

Furthermore, it is important that we consider the issue of being a bonafide occupant. According to **Section 29 (2) (a) of the Land Act** a bonafide occupant is defined as;

“as a person who has occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years before the coming into force of the Constitution.”

The plaintiff (Pw1) testified that he came on the suit land 1982 with his family as a pastoralist. He further testified that he stayed on the suit land alone without any

interference until 2001 when the 1st and 2nd defendants started interfering with the plaintiff's quiet possession. In corroboration, Pw3 testified that he bought Block 23 Plot 1 which neighbours the suit land in 1988 and found the plaintiff already living and utilizing the suit land (**Block 28 plot 1**).

During the locus visit, Pw1 told court that him and his family live on the suit land draw sustenance from the suit land where they have a banana plantation and they also graze cattle. According to the unchallenged evidence of the plaintiff, he has lived on the suit land since 1982. This implies that he has occupied, utilized and developed the suit land without interruption from the registered owner for a period of 12 years before the coming into force of the 1995 Constitution and therefore qualifies to be a bonafide occupant under Section 29 (2) (b) of the Land Act. Therefore, the plaintiff is a bonafide and equitable owner of the suit land.

My Learned Brother, Hon. Justice Henry I Kawesi in Bugembe Kagwa Segujja versus Steven Eriaku & Anor H.C.C.S 202 of 2016, had this to say on bonafide occupant;

"I agree with Counsel for the Plaintiff in his assertion that Article 237(8) of the Constitution, Sec 31 of the Land Act, (supra), and Section 64 (2) of the Registration of Titles Act Cap 230, recognize the security of tenure of a bonafide occupant on land. Such tenant is deemed to be a tenant of the registered owner. The security of this tenancy was discussed in Kampala Distributors versus National Housing and Construction Corporation SCCA No. 2 of 2007. The Supreme Court postulated that a bonafide occupant was given security of tenure and his interest could not be alienated except as provided by the law ..."

In the case of **Mulata Joseph versus Katamba Sylvano S.C.C.A No. 11 of 1999**, the Supreme Court held that a person who occupied land unchallenged by the registered owner 12 years before the coming into force of the 1995 constitution, qualifies to be a bonafide occupant.

I find that the evidence on record proves that the plaintiff is a bonafide occupant on the suit land by virtue of having stayed and utilized the suit land since 1982 and was never

challenged by the owner of the suit land. Secondly, the evidence on record also proves that the plaintiff also has an equitable interest of the suit land because he had fully paid for the suit land according to Exh. P1 (A) and Exh. P1 (B) and as such his equitable interest in the suit land is protected.

Counsel for the defendants raised an issue that the plaintiff is only occupying about 30 acres of land and not the entire 510.4 acres. According to the proceedings, Pw1 and Pw2 testified that in 2006 they were attacked by the defendants who came with soldiers carrying guns and they forcefully occupied their land. According to the locus visit, I found out that the 1st defendant and the 4th defendant had occupied the suit land and had structures on the suit land.

During the locus proceedings, the plaintiff (Pw1) testified that he purchased the 510.4 acres where he used to use the bigger portion of the suit land to rear his cattle but since the attack by the 1st defendant, he was relegated to the portion that he is currently settled on.

Furthermore, during the proceedings as well as the pleadings, Counsel for the defendants did not raise the issue of occupation on the suit land but rather raised the issue as an alternative argument in his submissions. Therefore, I find that the plaintiff is a bonafide purchaser for value, a bonafide occupant on Block 28 plot 1 as referred to in Exh P1 (A) and P1 (B) admitted on the 20th November 2015.

On the issue of alterations to the agreement in as regards the description, the evidence on record shows that the plaintiff has always occupied Block 28 plot 1. Furthermore, Pw3 and Pw4 who were present when the said agreement was being written testified that when the agreement was read back to Nagadya, she made the necessary clarifications and the corrections were made to the agreement and the description was corrected from Block 23 plot 1 to Block 28 plot 1. This is what is clear in Exh P1 (A) and P1 (B). Therefore, I find this alteration to be minor in nature and does not go to the root of the agreement.

Accordingly, the plaintiff acquired proper interest in the suit land as a bonafide occupant and an equitable owner.

Issues No. 2 and 3

Whether the defendants acquired any interests in the suit land and Whether the defendants' registration on the suit land was proper.

I shall resolve these two issues jointly as submitted on by Counsel for the defendants.

Counsel for the plaintiff submitted that the 5th defendant forfeited his opportunity of being heard when he refused to file his defence despite being served. As for the 1st defendant, Counsel submitted that the 1st defendant admitted in court that when he came to purchase the suit land he found the plaintiff rearing his cattle on the suit land and that the instant suit had already be filed and was in progress.

Counsel further submitted that the 1st defendant claimed to have purchased the suit land from a one Nalwoga Gertrude on the 17/10/2005 and yet she got letters of Administration on 10/11/2005. In addition, Counsel submitted that the 1st defendant registered his interest illegally with an intention of defeating the plaintiff's equitable interest that he knew about and as such acted fraudulently.

As for the 2nd defendant, Counsel for the plaintiff submitted that the 2nd defendant claimed that he purchased his land from the Late Yulita Nagadya but the same certificate of title was cancelled and as such he was left without an interest and hence moved to Maddu. Therefore, he could not possibly pass good title to the 4th defendant whom he claimed to have sold to.

Counsel submitted that the 3rd and 4th defendants don't equally have proper interests in the suit land as they did not conduct proper due diligence before purchasing the suit land and as such cannot claim to be bonafide purchasers for value.

Lastly, Counsel also submitted that the registration of the 1st defendant was illegally done since he was registered on the suit land before the said Gertrude Nalwoga was given letters of administration as such the said registrations are illegal.

In response, Counsel for the defendants submitted that the 1st and 2nd defendants tried to acquire their interest in the suit land from the late Yulita Nagadya but when they found out that she did not have the authority to sell, that transaction was cancelled and the 1st

defendant purchased the suit land from the rightful administrators of the estate of the late John Baptist Kagolo.

Furthermore, Counsel for the defendants submitted that the plaintiff did not attack the late John Baptist Kagolo's administrators' letters of administration in the pleadings and as such, Counsel for the plaintiff is estopped from bringing up this issue at this point. Secondly, Counsel for the defendant claims that the administrators of the Late Kagolo's estate were not added as defendants and as such no claim can be raised against them at this point.

In rejoinder, Counsel for the plaintiff submitted that a certificate of succession in accordance with law operates and has the same effect as letters of administration and until the same is revoked, it remains valid. Furthermore, Counsel submitted that the plaintiff had a right to sue the defendants over the administrators of the late Kagoro's estates because it was the defendants who trespassed the plaintiff's land. More to that, Counsel submitted that the 1st defendant purchased the plaintiff's suit land in 2005 well knowing that **Civil Suit No. 304 of 2002** had already been filed and as such acted fraudulently.

Counsel also submitted that the 2nd defendant was not sued wrongly because it was only during cross examination that he informed Court that he had lost interest in the land and moved to Maddu, however prior to that the pleadings and witness statement had legal effect.

Decision

As I had earlier decided, the plaintiff had a valid equitable interest in the suit land that the 1st defendant was well aware of before he purchased the suit land. Furthermore, as I had earlier mentioned the plaintiff purchased his suit land in 1992 from the Late Yulita Nagadya who was the daughter of the late John Baptist Kagolo as per the evidence of Pw3 and Pw4 who were the local leaders of the area where the suit land is located.

As alluded to by Counsel for the plaintiff, on page 48 of the record of proceedings, the 1st defendant (Dw2) testified that when he purchased the suit land in 2001 from Nagadya Yulita, the plaintiff was occupying the suit land (Block 28 plot 1). He further testified that

he purchased the suit land from Nalwoga (one of the Late Kagolo's Administrators) and was registered on the suit land on the 29th of December 2005, while Civil Suit No. 304 of 2002 had already been filed.

I shall not dwell on the issues relating to the Nalwoga Getrude and Yowasi Nsubuga Kazooba's letters of administration because the same were not pleaded to by the plaintiff in his pleadings or witness statements.

But that being said, I find that the 1st defendant acted fraudulently by knowingly purchasing the suit land from Yulita Nagadya well knowing that the plaintiff was in occupation of Block 28 plot 1 and further more becoming registered proprietor well knowing that the plaintiff had an equitable interest in the suit land. According to the locus visit, the homestead of the plaintiff neighbours the homestead of the 1st defendant. There is no way how the 1st defendant could have purchased the suit land without establishing the interests of the plaintiff in respect of the suit land. In addition, according to the evidence of Dw1, who later on sold to the 1st defendant as the holder of letters of administration for John Baptist Kagolo's estate, she testified that she did not even know the location of the land and had never visited the same. This indicates that the 1st defendant bought the suit land with fraudulent intentions aimed at defeating the equitable interest of the plaintiff in the suit land.

In the case of **Balamu Bwetegaine Kiiza & Another versus Zephania Kadooba Kiiza, CACA No. 59 of 2009**, it was stated that;

"It would appear to us that there are two claims of competing interests regarding the suit land by both parties to this appeal. The determination of these competing interests is a point of law though it will also be necessary in resolving this to consider the facts of this appeal.

Under classical land law, there are two interests that the law recognizes. These include legal and equitable. According to D. J. Bakibinga, Equity & Trusts, (Law Africa, 2011), at Pages 46 & 47, it is generally recognized that a legal interest is valid and enforceable against the whole world (in rem). This means that if, subsequently, a person obtains a legal or equitable interest in the same property, his or her interest is subject to the interest

of the first owner. Equitable interests however, are enforceable as against another claimant (in personam).

Where there are competing equities therefore, the maxim qui prior est tempore, potior est juelle (he who is first in time has the stronger right) becomes applicable. It deals with priority where there is a conflict between two competing equitable interests in property and the general rule is that equitable interests in property take priority according to the order in which they are created.”

This principle was reiterated in **John Katarikawe versus William Katwiremu Anor H.C.C.S No. 2 of 1973** while dealing with Section 145 of the RTA (the now Section 136 of the RTA), it was held that;

“Although mere knowledge of unregistered interest cannot be imputed as fraud under the Act, it is my view that that where such knowledge is accompanied by a wrongful intention to defeat such an existing interest that would amount to fraud. Fraud shall on the part of a person obtaining registration include a proven knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by such registration.”

According to Section 176 of the Registration of Titles Act,

“No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as a proprietor under this Act, except in any of the following cases;

(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona-fide for value from or through a person so registered through fraud.

In the instant case, according to the record of proceedings the 1st defendant while in the company of the armed soldiers chased the plaintiff from part of the suit land and yet he had been on the suit land since 1982. The 1st defendant went ahead to admit that he was registered on the suit land well aware that this suit had already been filed in this Honorable Court.

I find these actions to be fraudulent in nature and as such the 1st defendant does not have a proper and legal interest in the suit land and his registration on the same is equally improper.

I now turn to the 3rd and 4th defendants, the 3rd defendant (Dw3) testified that he bought 400 acres of the suit land from the 1st defendant of which he admitted that he sold 100 acres to the 4th defendant (Dw5). I find that the 3rd and 4th defendants were negligent in as far as not conducting proper physical due diligence before purchase of the suit land. The 3rd and 4th defendants claim that they found the suit land vacant before they purchased the same from the 1st defendant.

The 3rd defendant/ Dw3 testified that in 2006, he first bought 300 acres from the 1st defendant who was the registered proprietor. He further testified that he opened the boundaries and subdivided Block 28 plot 1 to form Block 28 plot 2.

Dw3 further testified that in 2010, he bought 100 acres from the 1st defendant which was comprised in Block 28 plot 4. Dw3 also testified that at the time he purchased the suit land, the plaintiff was no longer in occupation.

On the other hand, the 4th defendant/ Dw5 testified that he purchased the suit land from the 3rd defendant in 2011 and the said land was vacant. Dw5 testified that upon purchase, he constructed a permanent house, built a dam, planted Eucalyptus trees and uses the rest for livestock farming.

In the case of ***Hajji Abdu Nasser Katende vs Vithalidas Haridas & Co. LTD Court of Appeal (Civil Appeal NO. 84 of 2003)*** the Court of Appeal while discussing the *doctrine of a bonafide purchaser for value without notice* stated the position of the law as follows at pages 21-22 of the lead Judgment of L.L M. Mukasa –Kikonyogo DCJ (as he then was);

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*“It suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine as was held in case of **HANNINGTON NJUKI VS WILLIAM NYANZI H.C.C.S NO. 434 /1996** must prove that;*

- a) he holds a certificate of title
- b) *he purchased the property in good faith*
- c) *he had no knowledge of the fraud*
- d) *he purchased for valuable consideration*
- e) *the vendors had apparent title*
- f) *he purchased without notice of any fraud*
- g) *he was not party to the fraud*

A bonafide purchaser of a legal estate for value without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can.” (Emphasis added)

After studying this evidence, I find that the 3rd and 4th defendants were negligent while purchasing the suit land. According to the locus visit, the homes of the 3rd and 4th defendants are in the same LC with the home of the plaintiff. How could they purchase the suit land without establishing the interests of the plaintiff who was in occupation of the suit land? This implies that they did not go to inquire from the local leaders about the status of the suit land. They just purchased registered land without any inquiry. It is only prudent that any intending purchaser of land not only inspects the suit land but also pays the local government offices a visit so as to conduct thorough due diligence.

In the case of **Nabanoba Desiranta & Another vs. Kayiwa Joseph & Another, HCCS No. 496 of 2005** quoting the case of **UP&TC vs. Abraham Katumba [1997] IV KALR 103**, it was held that as the law now stands, a person who purchases an estate which he knows to be in occupation and use of another other than the vendor without carrying out the due inquiries from the persons in occupation commits fraud. Further citing **Taylor vs. Stibbert [1803 – 13] ALL ER 432**, the court held that the failure to make reasonable inquiries of the persons in possession and use of land or the purchaser’s ignorance or negligence to do so formed particulars of fraud. Similarly, in the case of **Hajji Nasser Katende vs. Vithalidas Halidas & Co. Ltd., CACA No.84 of 2003** citing the case of **Sir John Bageire vs. Ausi Matovu, CACA No.07 of 1996**, at page 26, Kikonyogo, DCJ, quoting

Okello JA. (as he then was) emphasized the value of land property and the need for thorough investigations before purchase, and held inter alia that;

“Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations; not only of the land but of the sellers before purchase.”

In the instant case, the 3rd defendant (Dw3) testified that he only made a search at the land registry and then purchased the suit land from the 1st defendant (Dw2). The 4th defendant (Dw5) on the other hand testified that he exchanged his 100 acres in Kalungu with the 3rd defendant for 100 acres on the suit land.

There is no evidence on record that the 3rd and 4th defendants made any physical inquiries on the suit land before they purchased the said land. Had they done so, they would have discovered that there were existing land wrangles and that there was even a suit in court over the suit land. With these gaps in the evidence, the 3rd and 4th defendants cannot claim to be bonafide purchasers for value. Therefore, since the 1st defendant's registration on the suit land was improper, he could not have passed good title to 3rd defendant who in turn did not pass proper title to the 4th defendant.

As for the 2nd defendant/ Dw4, there is overwhelming evidence that he and the 1st defendant knowingly purchased the suit land well knowing that the plaintiff was a sitting tenant on the suit land. The difference between the two parties is that when the 2nd defendant's title was cancelled, he lost interest in the suit land and moved to Maddu. Therefore, the 2nd defendant is discharged.

The 5th defendant was duly served on the 12th of November 2015 however he refused to file his Written Statement of Defence. Therefore, it would seem the Commissioner Land Registration never intended to challenge this suit and the suit proceeded exparte against him.

Issue no. 4

Whether the parties are entitled to the remedies sought in their pleadings.

Section 177 RTA (supra) provides that;

“Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order.”

Accordingly, the plaintiff has a valid equitable interest in the suit land, the 1st defendant should be evicted from the suit land and his parcel of land comprised in Block 28 plot 3 should be given and registered in the names of the plaintiff because he acquired the said land fraudulently. The Commissioner for Land Registration is ordered to cancel the certificate of title in the names of the 1st defendant in respect of Gomba, Block 28 plot 3, land at Nabuguyo, Ssaabaddu.

The plaintiff is equally awarded general damages for any discomfort suffered. It is trite that general damages are compensatory in nature. The 1st defendant has been interfering with the plaintiff's quiet possession of the suit land since 2001 to date and so have the 3rd and 4th defendants who came onto the land in 2006 and 2011 respectively. This is a very long time and the plaintiff ought to be compensated for this discomfort caused and for depriving him from use of his land. Therefore, the plaintiff is awarded general damages of Ugx 90,000,000 (Uganda shillings ninety million) whereby the 1st defendant, 3rd and 4th defendants should each pay Ugx 30,000,000 (Uganda shillings thirty million) to the plaintiff.

The plaintiff also sought for Exemplary or punitive damages.

Counsel for the plaintiff submitted that punitive or exemplary damages are awarded to punish, deter, express the outrage of court at the defendant's egregious, malicious and

vindictive conduct. Pw1 and Pw2 testified that in 2006, the 1st defendant came with armed soldiers who beat up the plaintiff and his family.

Hon. Mr. Justice Musa Ssekana has this to say about exemplary damages in the case of **Luzinda Marion Babirye versus Ssekamatte & ors H.C.C.S No. 366 of 2017**.

*“The rationale behind the award of exemplary damages is that they should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct. An award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal. **Per Spry V.P. in Obongo Vs Municipal Council of Kisumu [1971] EA 91**. All circumstances of the case must be taken into account, including the behavior of the plaintiff and whether the defendant had been provoked. See *O’Connor Vs Hewiston [1979] Crim. LR 46, CA; Archer Brown [1985] QB 401*.*

However, it should be noted that exemplary and punitive damages are normally awarded where there is proof of breach of human rights. They usually arise from constitutional issues. Given this background, I am reluctant to award punitive damages.

Mesne profits

In **Section 2 (m) of the Civil Procedure Act (CPA)**, Mesne profits are defined as those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession.

In the instant case the 1st defendant illegally possessed the plaintiff’s land. The 1st defendant went ahead to sell the suit land to the 3rd defendant for a profit. I find that the plaintiff has proved that the 1st defendant earned a profit from the suit land, therefore the plaintiff is entitled to **mense profits of Ugx 20,000,000 (Uganda shillings twenty million)**.

Costs

Section 27(2) of the Civil Procedure Act Cap 71 provides that the effect that costs shall be in the discretion of the court and shall follow the event unless for good reasons court directs otherwise. Even though the plaintiff's pleadings do not show costs as a prayer, the cited provision as to costs is that they "shall follow the event"; which means that the successful party, in absence of any order of court to the contrary, shall necessarily be entitled to costs.

In summary, it is ordered as follows;

1. The plaintiff is an equitable owner of Gomba, Block 28 plot 1 land at Nabuguyo. Block 28 plot 1.
2. The plaintiff has an equitable interest in respect of Gomba, Block 28 plot 1 at Nabuguyo.
3. The 1st and 2nd defendants acquired the suit land and were registered on the same through fraud.
4. The 1st defendant should be evicted from Gomba, Block 28, plot 3 at Nabuguyo.
5. The 5th defendant is ordered to cancel the 1st defendant's title in respect of Gomba, Block 28 plot 3 Nabuguyo and register the same in the plaintiff's names.
6. The 3rd defendant is ordered to pay Ugx 50,000,000 in compensation to the plaintiff due to his negligence least his title in respect of Gomba, Block 28, -plot 2 Nabuguyo be canceled and he faces execution.
7. The 4th defendant is ordered to pay Ugx 50,000,000 in compensation to the plaintiff due to his negligence least he be evicted from Gomba, Block 28 plot 4 Nabuguyo.
8. The plaintiff is awarded Ugx 90,000,000 in general damages against the 1st, 3rd and 4th defendants each paying a sum of Ugx 30,000,000.
9. The plaintiff is awarded Ugx 20,000,000 in mesne profits against the 1st defendant.
10. A permanent injunction be issued against the defendants from trespassing on the plaintiff's land situated at Gomba Block 28, Plot 3 Nabuguyo.
11. The Costs of this suit are awarded to the plaintiff and shall be paid by the 1st, 3rd and 4th defendants.

I SO ORDER;

Judgment delivered at High Court, Land Division this 27th day August 2021 by email.



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IMMACULATE BUSINGYE BYARUHANGA

JUDGE