

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
HIGH COURT CIVIL SUIT NO. 0197 OF 2009
ERICK KIMBOWA :::::::::::::::::::::::::::::::::::PLAINTIFF
VERSUS
BERNARD KASITRO :::::::::::::::::::::::::::::::::::RESPONDENT
BEFORE: HON: JUSTICE NYANZI YASIN
JUDGMENT

1. The facts of the case are that; the plaintiff is the heir of Eriya Sonko. Eriya Sonko was the registered proprietor of the land comprised in Kibuga Block 28 plot 724 situate at Makerere from his plaint he claimed that he acquired the suit land as his share in the estate of his grandfather the said Eriya Sonko as his heir and that he has been living on that land since 1989.
2. On the death of Eriya Sonko he was survived by two biological daughters apparently born to the same father with the father of the plaintiff. These were Joyce Nakayi and Victor Nakiwala. The two are said to have executed a deed of gift in favor of the plaintiff to take part of the land comprised in KB 28 Plot 724 which is the suit land now. The two according to the plaint engaged a surveyor who planted mark stones thereby portioning off the plaintiff's land.
3. The plaintiff further pleaded that he constructed a house on the land now lent out to Makerere University students. However, in October 1999 his tenants received a letter threatening to evict them from the premises. The eviction was threatened by the defendant.
4. On 8/11/1999 the plaintiff conducted a search at the land registry and discovered that the defendant one Benard Kasitro was the registered owner of the whole piece of land under KB 28 Plot 724 which included the plaintiff's portion vide instrument No. KLA 208956 dated 30/11/1999. He lodged a caveat on the title and on 5/01/2000 started the current proceedings.

5. On the other hand the defendant denied the above events. Through his written statement of defence filed by Muhimbisa & Co. Advocates pleaded that (see paragraph 3) he is the registered owner of the whole land under KB 28 Plot 724 situate at Makerere which he purchased from one Joyce Nakayi when the land was not at all encumbered (no caveat lodged)
6. He pleaded he is a bona fide purchaser for value without notice of any earlier claims. He denied any acts of fraud that had been alleged against him in the amended plaint filed on 18/1/2000 by the advocates for the plaintiff m/s Kiyimba Kisaka Advocates. The gist of the accusation of fraud was that the defendant intentionally registered the whole piece of land in his names while aware that the plaintiff had a portion on this land and occupied it.
7. Though not pleaded the defendant alluded to the fact that the plaintiff and Nakayi Joyce are relatives the plaintiff being the son of Nakayi's cousin brother that they were therefore conniving to defeat his interest after Nakayi had lawfully sold the land to him, and vide instrument No. KA204620 of 27/05/1999 he was entered as the registered the owner.
8. During a locus visit conduct on 7th /04/2000 by my senior retired brother Judge JPM Tabaro he stated the following as facts he found;
 - WXYZ marks represented KB 28 plot 724 as the land sold
 - structures marked C,D,F were inside WXYZ and claimed by the plaintiff
 - the plaintiff planted poles separating the land after the dispute started
 - that the disputed portion was identifiable
 - the area marked C adjacent to the disputed land belonged to the defendant
9. At the trial the following issues were framed but modified by court under O. 15 of the Civil Procedure Rules to read as follows;
 - i. Whether the defendant is a bona fide purchaser for value without notice
 - ii. Whether the defendant committed fraud in the process of registration.
 - iii. Whether the plaintiff has any interest in the land (meaning KB 28 Plot 724)
 - iv. Whether the plaintiff is entitled to the remedies sought.

10. By court direction the submission by both parties was done through written arguments filed in court. In the submission of M/s Ojambo Olara Advocates & Solicitors for the plaintiff they elected to raise what they termed important point of law relating to an illegality in the proceedings. They cited the already famous decision of **Makula International V. His Eminence Cardinal & Another [1982] HCB 11** where it was held that; “ a court of law cannot sanction what is illegal once brought to the attention of court, it overrides all questions of pleadings including admissions made thereon.”
11. The above argument was intended to seek leave from this court that the matter be raised belatedly and perhaps without notice to the other side since they ought to reply. This to me seemed to be the argument of learned counsel Samuel Ojambo on 4th/05/2021 when this matter came up for oral clarification on the parties written submission and on 24/05/2021 when learned counsel Paul Muhimbura for the defence replied.
12. The above issue is sufficiently covered in the written submission of both sides. The facts it relates to as well as the law are clearly stated and argued by both counsel. This court would still be bound by the decision in the **Makula International (Supra)** that such issues have to be raised the moment they are identified or noticed
13. The point of contention as a preliminary point of law to be resolved is that the agreement under which Joyce Nakayi sold the land comprised in KB 28 Plot 724 measuring 33 decimals equivalent to 0.13 Hectares which court received as Exh, D2 is an illegal agreement for offending **Sections 2 and 3 of the ILLETRATES PROTECTION ACT CAP 78 Laws of Uganda**
14. Learned counsel Ojambo is quoted in his submission to have stated that; “PW2 having stated that she’s illiterate, it was upon the defence to prove that PW2 understood what she was signing. Having stated that she is illiterate with no evidence to the contrary, the agreement becomes void by operation of law and renders the agreement illegal.”
15. The decision of the Supreme Court in **Kasaala Growers Co-Operative Society V. Kakooza & Anor Sc Civil App. No. 19/2010** was cited for this court. In that application the Supreme Court cited with approval the case of

Ngoma Ngime V. Electoral, Commission & Winnie Byanyima Election Petition Appeal No. 11 of 2002, where the court held that “S.3 of the illiterate protection Act enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his or her true and full address.....”

16. Counsel submitted further that the Supreme Court added that *the illiterate person cannot know the contents of the document when it is not shown that they were explained to him or her and that he or she understood them. That the Act is intended to protect the illiterate persons and the provision is couched in mandatory terms and failure to comply with the requirement renders the document inadmissible*. Counsel argued so because Exh. D2 had in details no jurats. He concluded by asking this court to reject Exh. D2.
17. Counsel for the defendants in whose favor Exh. D2 was signed disputed the above to be the applicable situation. He in paragraph 13 of his written submission invited court to consider the evidence of PW2 in cross-examination by learned counsel Alex Ruzida (which this court will reproduce later) where PW2 admitted that she understood the contents of Exh.D2 and were correct.
18. The respondent side then referred this court to my Brother Mubiru Stephen’s decision in **Opia Moses V. Clukia Lumago Roselyn & Ors Hccs No. 22/2013**. Here the defendants claimed they did not know the English language but admitted to have understood the contents of the document before signing it and the judge held that they could not be protected by the Act. He concluded by asking the court to find that PW2 knew and understood what she was signing and received the money she cannot be protected by the Act.
19. In rejoinder counsel for plaintiff argued that the court in *Opia Moses V. Chukia Lumego (Supra)* took into account the defendant’s level of education which was senior four to hold that the defendants could not seek the protection of the Act. That the case was distinguishable counsel concluded.
20. The arguments above have forced this court to revisit the evidence on this point when PW2 appeared. In her evidence in- chief PW2 stated;

“After selling my portion I went and told my brother that I had sold my part and I wanted us to go and measure off the plaintiff’s part.”

21. There are other areas in the evidence of PW2 which show her understanding of the land sold. It runs from the start of her evidence as below;

“I know the plaintiff the plaintiff is my nephew who was the heir of my father Eriya Sonko. My sister Nakiwala Victor and I succeeded my father’s property. The plaintiff inherited the part occupied by the boys quarter in Makerere Mukwenda Zone, the whole plot is 724 Block 28. It is very big but less than an acre.

22. In these parts of evidence of PW2, the understanding of the witness is that the land comprised in KB 28 Plot 724 was to be divided among the two beneficiaries that is PW2 and PW1. I have had to compare this evidence to Exh. D2 and the evidence of PW2 under cross-examination by Alex Ruzida learned counsel for the defence during the hearing of 25th August 2015.

23. Firstly, Exh. D2 the agreement of sale of KB 28 Plot 724 stated in its descriptive and introductory part as below; *“whereby it is agreed that the seller sells to the buyer and the buyer buys land at Makerere **comprised in Kbuga Block 28 Plot, 724.**”*

24. Exh. D2 refers and covers the whole piece of land under KB 28 Plot 724 which was approximate to 0.13 Hectares. It does not mention any part as parts being interest of any other person. This is contrary to the evidence of PW2’s understanding of how land at Makerere would be shared.

25. Secondly, the evidence vide cross-examination below referring to Exh. D2 is to the effect; *“I do not know how to read. So I cannot tell its contents”*

The court allowed counsel Ruzida to read the document to PW2 I believe the same was interpreted in Luganda (not indicated on the) record, PW2 answered as below;

“all that is correct”

That means that PW2 agreed that the contents of Exh. D2 is true. That means the whole plot under KB 28 Plot 724 was sold

26. I will refer to other areas which show mixed understanding of what happened. When the transfer under which the land in Block 28 Plot 724 was transferred was shown to her and she denied ever signing any transfer for the defendant. This resulted into Alex Ruzida applying that an expert of hand writing be called to confirm that she signed specimen signatures which had to be collected from PW2 before the trial judge, to be examined by an expert.
27. Then in re- examination the same PW2 said; *"I signed documents for the defendants. I did not know what I was signing... He told me to sign for money he deposited with me....."* These last two examples are not part of exh. D2 but I am using them to show how PW2 seemed to have failed to understand what was happening.
The handwriting expert report was produced but never tendered in evidence but it showed the writer was confused
28. The above instances showed to me that PW2 was such a person who needed protection under the Act. She fitted in the concluding remarks of the Supreme Court made in **Kasaala Co-operative Society V. Kakooza (Supra)** on S. 3 of Cap 78 L.P.A that an illiterate person cannot own the contents of the document when it is not shown they were explained to him or her and that he understood them.
29. This is the situation here. All the instances I cited from the document and PW2's evidence showed that she needed to have had the agreement and other documents explained to her in order to understand them. I have found the facts and reasons for the decision of court in **Opia Moses V. Chukia Lumago (Supra)** distinguishable.
30. In that case Mubiru Stephen Judge referred to paragraph 6 of the written statement of defence as a plea that the defendants did not understand the consents of the agreement at the time they signed it. He added; *"In his testimony DW1 stated that the meeting at which the agreement was signed was conducted in Lugbora yet the agreement was written in English Mutua Romero was transacting the proceedings to Mr. Ben Ikilai the plaintiff's Lawyer."*

31. In the case before me I believe while learned counsel Razide was cross-examining PW2 on the document – Exh. D2 he would not have stopped at the admission that the contents are true. He would have gone deeper to ask the circumstances under which Exh. D2 was created, to show that the Advocate Edward Bamwite who witnessed the agreement for both the vendor and the Purchaser explained to her its contents in her language and that she understood the same. That is when the decision in **Kasaala Growers Co-operatives Society V. Kakooza (supra)** by the Supreme Court would allow an illiterate person to own the contents of Exh. D2. Such evidence is not on file.

32. Instead what court has seen are two complete understanding by PW2. One that she sold her part to the plaintiff and caused her brothers part to be severed off and two that she sold the whole land under KB 28 Plot 724 at Makerere. In those circumstances it would not be just for this court to deprive PW2 of the protection S.3 of the illiterates Protection Act provides to her. Exh. D2 therefore cannot be admitted in evidence.

33. I will however proceed and answer all other issues. This is because Exh. D2 was not the only evidence to this transaction. In her evidence on oath orally PW2 gave evidence that she sold land relating to KB 28 Plot 724 at Makerere. The defendant as DW1 in his testimony on oath refers to the purchase of land under KB 28 Plot 724. Additionally the pleadings allowed each party to add any other evidence. For reasons of clarity, I will reproduce the relevant paragraphs.

34. In paragraph 4(c) of the plaint it is pleaded that; *“it was agreed between the said Joyce Nakayi and the plaintiff that the plaintiff would register his transfer when the said Joyce Nakayi had obtained a purchaser for the residual of the land forming Kibuga Block 28 Plot 724.”*

35. Part of paragraph 4 (g) reads as below;

“..... the defendant was told about the claim of the plaintiff at the very onset and indeed the defendant who was present at the council meeting acknowledged to and undertook to settle amicably with the plaintiff,”

36. The written statement of defence has its own contentions. Refer to Para. 5, 6 and 7. The gist of which is that the defendant is a bona fide purchaser for value without notice of any third party claims whose title is indefeasible except for fraud. Lastly paragraph 4 of the plaint under the sub- heading on particulars of fraud lists three items as particulars of fraud.

37. Consequently in consideration of all the above, that is the other evidence and pleadings supported by the fact that sale agreements for land are questions of individual contract and not a legal requirements, the exclusion of Exh. D2 from admission **does not end this case. I so find**

38. Issues and Resolution

This court will answer the issues framed as follows, issue one will be answered first. Issues 2 and 3 will be answered together while issue four will naturally be answered last.

39. ***Whether the plaintiff has any interest in the land- Kibuga Block 28 plot 724***

40. In the plaint the plaintiff claimed that he is the owner of the part of the land comprised under KB 28 Plot 724 at Makerere which he acquired as his share in the estate of his grandfather the late Eriya Sonko as his heir and has been living thereon since 1989. He testified as PW1 and called two others witnesses who included Joyce Nakayi.

41. In his sworn evidence before this court given on the 5th. 02. 2004 the plaintiff as PW1 stated relevant to the issue that;

“I acquired the disputed land as the heir to late Eriyasafu Sonko who died in 1987. When he died the land was shared between me (his grandson) and (his) daughter Nakayi Joyce this was done at the last funeral rite in 1989 at the late’s home. My father Denis Kitendwe was present. I was then still at school but I attended the ceremony.

On the land there was the late’s house and a boys quarter which was very old 40-50 years. My father took care of my share for 5 years by collecting rent from the tenants.

When I finished school I took possession and married on this land, on 6th June 1993, I lived in the “Muzigo” but after three years I built my own a house there. I continued letting out the “Muzigo” I had vacated.

.....
Proof that the land is mine are: a document that I am the heir given to me by the late’s daughter Nakayi and Nakiwala, documents of payment of KCC dues and the transfer forms signed by Joyce Nakayi (None of these was tendered) and as I lived on the land from 1993-1996.”

- 42.The cross examination of PW1 by learned counsel Alex Ruzide did not attack the above evidence of acquisition of the land by way of inheritance, occupation and constructions. Briefly that evidence runs as below;

“I live in Bbira-Nakuwadde since 1996 when I left Makerere. I became aware the land has a certificate of title in 1989. It was in the names of Eriyasafu Sonko my grandfather. Today the title is in the defendant’s names. The transfer into the defendants name was done in 1999.

I am not aware of letters of Administration of the estate of Eriyasafu Sonko (Document shown) I have never seen this document. I am aware of the titles in the names of Joyce Nakayi having been transferred to her by the administrator of the Estate. I knew this before I filed the case. I know Nakayi sold and transferred to the defendant the land in question yet she should have sold her portion instead (see annexure EXH.1) I receive rent of shs. 500,000/- per annum from the building.”

- 43.The effect of PW1 having given evidence of acquisition and occupation of part of KB 28 Plot 724 and Counsel Ruzida asking him no question in challenge of the same, is that his evidence remained the unchallenged truth.

- 44.Justice A.E.N Mpagi Bahigeine JA in the case of **Sonde Martin V. Uganda Court of Appeal Criminal Appeal No. 278 of 2003** cited the case of **James Sawoabiri and Anor V, Uganda Supreme Court Criminal Appeal No.5 of 1990** where the Supreme Court stated that; “an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination, would lead to an inference that the evidence is accepted

45. It will be difficult to suggest that the evidence be rejected. Refer to **Brown V. Dunns (1894) 6 R67 House of Lords HL**. I have found it difficult to reject PW1's unchallenged evidence on inheritance, occupation and construction. I find as above.

46. I notice that all the documents that were attached to the plaint as annexures and referred to by PW1 in his evidence were not tendered in the court as exhibits when learned counsel Kisaka was leading PW1 yet he had referred to them. That way by reason of the requirement in **S. 66 of the Evidence Act** cannot be considered to be part of his evidence. I am however of the view that that breach does affect his oral evidence on how he acquired the land. This situation is different from instances where S. 91 and 92 of the Evidence Act apply

47. The second piece of evidence for evaluation on this issue is that of PW2 Joyce Nakayi. In material particulars it renders credence to PW1's story. The relevant part is quoted below;

"I know the plaintiff. He is my nephew.... heir of my father Eriya Sonko. I, my sister Nakiwala Victor and the plaintiff succeeded my father's property. The plaintiff inherited the part occupied by the boy's quarters in Makerere, mukwedda Zone. The whole plot is 724 block 28. The distribution was in 1988 in a clan meeting. Present was Yusuf Wamala our old paternal uncle, Dan kitandwe my brother, Nelson Mayombo my brother, Kanni Buwambo my grandson, and Nakiwala my sister. The meeting was at Sempa Bulemezi..... I took the piece occupied by the main house on the same plot 274 block 28. Before we took over respective portions, they were being occupied by tenants. I have never occupied the house. I eventually sold my house and the portion to Kasitro who was my tenant for three years from 1996- 1999. I did not sell to him the boys quarters which was the plaintiff's portion. By the time Kasitro started renting, the plaintiff was in occupation of his portion."

48. In the cross-examination evidence of PW2 by learned counsel Ruzida there is a very small area in which acquisition of the land by the plaintiff is attached. I will reproduce it for reasons of relevance. It is on the court record of

25th.08.2005 at page 24 of the record of proceedings where the trial judge then noted. Mr Ruzida (continues)

“suggestion that after selling and getting the money, I and the plaintiff failed to agree and that was the start of the problem is not true. I sold my portion but not the plaintiff’s. I do not agree that the plaintiff did not have land at Makerere. He had it and the LCs know it. I do not agree that before I sold to Kasitro I produced a letter from LC confirming that the land is mine alone.”
(Sic PW1)

49. The position of PW2’s testimony quoted above show that PW2 did not change any of her position on acquisition of a portion of land by PW1 given in her evidence in-chief. She denied the claim that she sold the whole interest in KB 28 Plot 274 for her own behalf and on the behalf of PW1 and they failed to share the money, She instead confirmed that PW1 had a part of land on that land.

50. Additionally I am aware that the evidence of PW3 Kabeeka David “a surveyor” could not be received for technical reasons but the fact that PW2 hired him to survey off the portion that belong to her nephew remains a fact that was not challenged as PW2 testified.

51. In his pleadings (WSD) and evidence as DW1 the defendant puts emphasis on the facts that he purchased land under KB 28 Plot 724 Makerere and got registered. He denies knowledge of existence of the plaintiff. He also admits he did not inform LCs about it. I will go into the details of that in the next issues but that denial or absence of knowledge does not mean that the evidence of acquisition and occupation given by PW1 and PW2 to Plot 724 KB 28 Makerere by the plaintiff is not correct.

52. Earlier in this judgment (see para 8) I reproduced the findings of my learnt senior brother JPM. Tabaro-Judge, who visited the locus on 7.04.2000. Of interest is that the findings that structures C, D and F were inside plot 724 Kibuga Block 28. He also established that the marks were poles planted after the dispute. On the 7th.04.2000 when my lord Tabaro visited the land it was exactly one year since the purchase of that land. In his observation the judge did not make any conclusion that structures C, D, and F were newly constructed by the plaintiff.

53. 19 years after Tabaro J's locus visit as submitted by learned counsel for the plaintiff both counsel were authorized by the court to visit the locus. The visit occurred on 19.03.2019. Their findings do not differ from those of the judge. They only found that the concrete boundary wall replaced the poles planted by the plaintiff. This appears in the submission of learned counsel Ojambo at page 11.

54. From the unchallenged evidence of PW1 he took possession of this land himself in 1993 and earlier in 1989 through his father care-taking for him and collected rent from tenants. He physically stayed on the land from 1993 to 1996. All that happened before the defendant bought the land in 1999

55. Evaluation of evidence in all civil cases is done based on the standard of proof imposed on the party with the burden to prove a fact. That standard is the balance of probabilities. Refer to **C.A No. 20 of 2013 Gulu High Court Ojera Joseph V. Labeja Pirimino** by Mubiru J and **SCCA No. 4 of 2016 Godfrey Sebanakita V. Fuelex (U) Ltd.** Applying the two authorities here, in my view the following relevant facts were proved to that standard by the plaintiff, It is probable;

- That he is a blood relative of Eriya Sonko now deceased and he is his heir
- As the heir of Eriya Sonko the daughters of Eriya Sonko gave him some property belonging to the deceased.
- That part of that property was the portion of land on KB28 Plot 724 Makerere where the boy's quarters were.
- That he took possession of the part given to him and he used it
- That all the above occurred before 1999 March when the defendant bought the land
- That although the plaintiff's inheritance of the land was not direct, it was true the deceased's daughters gifted the land to him as the heir to their late father. Learned counsel for the plaintiff correctly cited **Ovayo poli V. Wakunga Charles Civil Appeal No. 13 of 2014**, holding that a gift of land may be established by evidence of exclusive occupation and use thereof by the donee during the life time of the donor.

56. In the case before this court Nakiwala and Nakayi were the donors. In 1993 or even earlier when the plaintiff occupied the land through his tenants both the donors were living. Based on the above evidence, this court finds that the plaintiff had an interest in KB 28 Plot 724

57. Despite the finding of this court above, it remains crucial that the following two issues are resolved for the reason that the defendant raised the defence of being a bona fide purchaser for value without notice of the third party claims. His title cannot be impeached except only on grounds of fraud meaning that the plaintiff's interest may not necessarily invalidate the defendant's title to the disputed land. I have already stated that issues No. two and three will be answered together.

58. They are:

- i. Whether the defendant is a bona fide purchaser for value without notice
AND
- ii. Whether he committed fraud in the process of registration

59. The claim in the amended plaint against the defendant of the alleged fraud appears in para.4. The three particulars pleaded mean the same thing. The last item is the best drafted of all of them. It is stated therein that it was fraud for the defendant, by “*intentionally registering the land belonging to the plaintiff in the defendants names when the defendant was aware of the plaintiff's claims in the land*”

60. In reply to the above accusation the defendant denied the same in paragraph 5 and 6 of the WSD and pleaded the defence of bona fide purchaser for value without notice of earlier claims. The defendant testified as DW1. The relevant part as DW1 is reproduced in the following paragraph.

61. DW1's relevant testimony on the two issues runs as here below;

“I acquired the land when Nakayi was looking for the buyer and I bought it. At that time Nakayi was the owner of the land. I have a copy of the sale agreement I made with Nakayi..... the agreement was made on 14. 03. 1999..... I was buying land at

Makerere under Block 28 plot 724 I paid shs 14.500.000/=. I partially paid 12.500.000/=. I paid less Shs 1.5000.000/=. When I came to pay (it) Nakayi refused and said that I pay it to Kimbowa. I told her I do not know Kimbowa. Kimbowa is the plaintiff. Nakayi gave me the Duplicate certificate of title and transfer forms. I transferred the land into my names. She agreed I could do the transfer before paying the balance. I have a copy of the Duplicate certificate of title it was issued on 25.05.1999..... Before I bought the land I did due diligence. I searched at land office. I found Nakayi is the registered owner and there was no caveat. That is how I bought. I was a neighbor next to Nakayi. I know the land and knew the land belonged to Nakayi. I had another property in the same area..... It bordered the one of Nakayi in the southern part. I did not ask LCs but in the process Nakayi involved LC at a meeting. The LC said the land belonged to Nakayi and she could sell it. I have the LC.1 letter showing Nakayi was the owner. It is from Mukwenda LC.1 Makerere dated 16.04.1999..... The allegation that I got the duplicate certificate of title through fraud is not correct (true). I did not know the plaintiff and I had never seen him I deny being fraudulent. It is not true I included his plot. I only bought plot 724 Block 28..... Nakayi and Kimbowa are relatives. Nakayi is a sister to Kimbowa's father."

62.DW1 was cross-examined by learned counsel Ojambo, in his evidence relevant to two issues quoted above, he stated; *"I found the duplicate certificate of title in the names of Nakayi..... When I made the agreement Nakayi had not transferred the land. I do not have any copy of the search certificate. My lawyer did not explain to me the meaning of "beneficiary" I did not find out who Sonko was. I never found it necessary..... I did not complete the purchase price for that reason (that is to say Nakayi refused the money and said it be paid to Kimbowa)..... It was not illegal to transfer in violation of the agreement. I had paid. There were no people occupying the land. It is not Nakayi who occupied the place, she lived in Wobulenzi. Today I occupy the whole land Kimbowa is not on the land.*

Court showed DW1 receipts for payment of property rates by Erick Kimbowa and he answered; "they do not mean anything to me. I have not paid property

rates. There is a wall for the area claimed by Kimbowa from the area I occupy.”

63. In re-examination DW1 admitted there were tenants who occupied the old house. He told them that he was the land lord and they left. He repeated that at the time of purchase Kimbowa was not there and he did not know him. He added that it was a mistake for Kimbowa to pay for property rates.

64. In his submission for the defendant learned counsel Paul Muhimbura referred this court to the definition of a bona fide purchaser as stated in Black’ law dictionary 9th Edition page 1355. He submitted that one who makes the plea of bona fide purchaser for value must prove the four (4) elements stated in the case of **Hannington Njuki V. George William Musisi [1999] KALR 794**. Namely:

- i. That the defendant holds a duplicate certificate of title
- ii. That the purchaser purchased the property for valuable consideration
- iii. That he or she bought in good faith without any such defect in title
- iv. That the vendor was the former registered owner of the property

65. The same case held that once the defendant proves the above on the balance of probabilities then the onus shifts to the plaintiff to strictly prove beyond a mere balance of probabilities that the defendant is guilty of some fraudulent act. Then counsel proceeded to show how the defendant fulfilled the above in his submission at page 7 and 8 and 9. He concluded that the defendant’s title is protected under S. 136 and 181 of the RTA

66. On the issue of whether the defendant committed fraud in the process of registration learned counsel referred court to the definition of what amounts to fraud as stated in the case of **Kampala Bottlers Ltd V. Damanico (U) Ltd SCCA NO 22 OF 1992** and the holding in the same authority that a party alleging fraud must prove that the fraud is attributed to the transferee. He cited S.59 RTA providing for the Duplicate certificate of title being conclusive evidence of proprietorship.

67. He emphasized that by the time of purchase the defendant searched the register and found no caveat, thereby making the plaintiff’s claim on

unregistered interest. He cited **John Katarikawe V. Katwiremu and Anor [1997] HCB 187**, S. 59 and S. 61 of the RTA

68. Counsel cited S. 176 of the Registration of Titles Act requiring the plaintiff to prove the illegal acquisition of land and **Kampala Bottlers Ltd V. Damanico (supra)** which held that fraud must be strictly proved and the burden is heavier than the one of balance of probabilities generally applied in civil matters.

69. Under paragraph 41 of the written submission of the defence at page 12 learned counsel made comments which I need to and must reproduce here and will resolve them later in this judgment. It runs as follows “..... PW2 Nakayi has never complained of fraudulent transfer of her land to the defendant neither had she filed any suit against the defendant. The vendor testified as a witness not as a complainant/ plaintiff. It is not right for the plaintiff to purport to rely on the witness testimony as though it is his own testimony. PW2 acknowledged having sold their land to the defendant and acknowledges the defendant is the lawful registered proprietor of the suit property.....
..... the vendor of PW2 was aggrieved in any way by the sale or any events arising therefrom. She would have sued the defendant personally or jointly with the plaintiff for appropriate remedies.”

70. On the part of the plaintiff it was argued that the defendant intentionally registered the plaintiff's land into his names well aware that the plaintiff claimed the land. The plaintiff's counsel attacked the defendant to have made on oath as DW1 on the 2nd Sept 2020 the statements below

- i. That before the purchase of the land he found by check at land office that the land belonged to Nakayi Joyce
- ii. That he did not know who Erick Kimbowa was
- iii. That in a letter dated 16.04.1999 the local council confirmed to him before purchase that the land belonged to Joyce Nakayi

71. S. 64 of the RTA and the decision of the Supreme Court **F.K Zaabwe V. Orient Bank Ltd & Others SCCA No 4 of 2006**, were cited to court. Then counsel reviewed the three items in paragraph 70 above and concluded that in all of them the defendant was not truthful. See page 15 and 16 and 17 of the

submission. He relied on **Kampala Bottlers Ltd V. Demenico (U) Ltd (supra)**. In cases of this nature “the defendant must be guilty of some dishonest act or must have known of such acts by somebody else and taken advantage of such act.”

72. The plaintiff’s conclusion was that the defendant was aware of the plaintiff’s claim or ought to have been aware and such awareness if looked at the plaintiff’s counsel suggested, has its legal consequences as held in **Uganda Posts & Telecommunication V. Abraham Katumba [1997] iv KALR 103** 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 vendors without carrying out the due inquiries from the person in occupation and use commits fraud.
73. The plaintiff contested any claim that the defendant was a bona fide purchaser. The definition in Black’s Law Dictionary was relied on 9th Edition page 1355 under which a bona fide purchaser is *one who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects..... or enquiries against the sellers title*”
74. For reasons earlier given and that the plaintiff was in possession from 1990 to 1996 the plaintiff concluded that the defendant was not a bona fide purchaser. The decision in **Uganda Posts and Telecommunication V. AKPM Lutaya SC Civil Appeal No. 36 of 1995** was relied on to state that: : a person who conducts a perfunctory search of title to land before purchase, takes it subject to existing equitable interest. In that case the respondent had limited his due diligence before purchase to a mere search of the register but did not carry out physical inspection of the land and court found he took the land subject to the respondent’s possessory rights. Counsel made the above argument in relation to the search the defendant stated to have made at the land office.
75. In paragraph 69 of this judgment I quoted paragraph 41 of the submission of the defendant that the quotation thereunder contains two procedural errors that must be corrected. The first one is the claim that PW2 Joyce Nakayi admitted to have sold the suit land to the defendant in her evidence. I have compared that claim to the evidence of PW2 I verbatim reproduced in paragraph 47

hereof and the comments of this court in paragraph 49 and found with respect that the claim by counsel is false.

76. **S. 19 of the Evidence Act** states:

“Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.”

PW1 as the plaintiff referred to PW2 in relation to the acquisition of part of KB 28 Plot 724. Consequently if it were to be true that PW2 made the claimed admission, no further proof of that fact would be required and the plaintiff's case would fail. Some cases of that nature require that judgment be entered on admission **see O. XIII R.6 CPRs**. There was no such admission in this case. To the contrary Nakayi denied ever having sold the part the heir to her father occupied.

77. The second error of procedure identified in paragraph 69 is the submission by counsel that PW1 the plaintiff cannot use the evidence of PW2 as if it was his own evidence and that if PW2 had any grievance with the sale of the disputed land, she ought to have sued the defendant or be joined as a party to the present suit. There is no such requirement in the law.

78. **S. 133 of the Evidence Act** provides that: *“subject to the provision of any other law in force no particulars number of witnesses shall in any case be required for the proof of any fact.”* That means that any witness can be used to prove a fact. In any event evidence of a particular witness cannot be considered in isolation of the testimony on the record as a whole.

79. On the issues whether the plaintiff here was bona fide and did commit or did not commit the alleged acts of fraud I have had to analyze the evidence hereunder.

While on oath DW1 testified that before purchase of the land he searched the land registry and found that Nakayi was the owner. The register shows that: on 24th.05.1978 vide instrument No. 7965 Eriya Safu Sonko was the registered

proprietor. This did not change until the 18.05.1999 when vide instrument No. KLA 104355 one Victor Nakiwala and Joyce Nakayi got registered as the administrators of their fathers Estate under Misc. Cause 607 of 1999.

The defendant bought the contested land on 13. March.1999 which means if he searched the register then, he could not have found Nakayi as the registered owner but Eriyasafu Soko.

80.What is important here is not that DW1 could have told court an untrue statement, but what the defendant ought to have discovered if he had actually searched the register. He would have found that the vendor is not the registered owner and that would prompt him to make other discoveries including Kimbowa's interest. Contrary to the requirement in **Hanning Njuki V. GW Musisi (supra)** that by the time of purchase the vendor must be the registered proprietor, here Nakayi was not.

81.I am in agreement with learned counsel Ojambo when he cited to this court the decision in **Haji Abdu Nasser Katende V. Vithaalidas Haridas & Co. Ltd CACA No. 84 of 2003** citing the case of **Sir John Mageire V. Ausi Matovu CACA No.07 of 1996** where Kikonyogo DCJ quoted my lord Okello JA (as he was) emphatically states that: "Lands are not vegetables that are bought from unknown sellers. Land is valuable property and buyers are expected to make thorough investigations not only of the land **but also the sellers before purchase** (emphasis added)

82.In this judgment I have emphasized the investigation of the seller. Here, if the defendant investigated Joyce Nakayi he would find she was not the registered owner. That way he would have known any other interest in the land. He would have known that the owner is dead and there could be beneficiaries who are more than Nakayi as it actually was.

83.Secondly, the defendant claimed that vide a letter dated 16.04.1999 the LC.1 of Mukwenda Zone, Makerere 1 Kawempe Division confirmed that the land he bought belonged to Nakayi. He admitted in his evidence that he never consulted the LC before purchase. That makes the retrospective confirmation by L.Cs that the land belongs to Nakayi not only untrue but also useless in my view. Nakayi with her sister Nakiwala became registered owners only on 18.05.1999 and not before.

84. The record has no proof from the defendant that he consulted LCs before purchase actually he did not. He did not talk to any neighbor before buying this land. Although himself owned an adjacent piece of land in the southern part to Nakayi. The question would be why he didn't ask. The fear to know the truth has been discouraged on the part of purchases of land. See **Uganda Posts & Telecommunication V. Abraham Katumba (supra) citing Taylor V. Stilbert [1803-13] ALLER 432** court held that failure to make reasonable inquiries of persons in possession and use of the land or the purchaser's ignorance or negligence to do so formed particulars of fraud and the purchaser acquires and takes such purchased land subject to its equities let alone a finding that he or she committed fraud. I am bound by that finding.
85. Thirdly, I did not agree that the defendant did not know Erick Kimbowa. It may be true that he bought in 1999 and Kimbowa left in 1996, but the fact that he was a tenant of Nakayi before the sale and the fact that he owns land adjacent to the contested land, made it on the balance of probabilities to be true that he knew Kimbowa or that if he did not know him, as person he knew of his interest in the land. Before occupation of the land Kimbowa had tenants on this land first under his father's care, then himself. It is this very tenants he sought to evict and take possession.
86. My lord Katurebe CJ (as he then was) gave fraud its wide enough befitting definition as he stated in **F.K Zaabwe V. Orient Bank Ltd & Others SCCA No. 4 of 2006**. That fraud: *"an intentional perversion of truth for purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by words or conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury."* I am bound to apply it here.
87. By making an agreement with Joyce Nakayi over the whole of the land comprised in Kibuga Block 28 plot 724 which measured approx. 0.13 hectares when aware that the plaintiff was on this land, he had houses there, he had tenants occupying them, the defendant concealed the truth and the same action caused the plaintiff a legal injury.

88.It is the finding of this court in conformity with the authorities cited that the defendant's registration of the land with the equities of the plaintiff means that the defendant's interest in the land is subject to the same equities.

89.Consequently the defendant cannot be a bona fide purchaser as he claimed. He had notice of Eric Kimbowa's interest but chose to ignore it. Such conduct as per the decision in **F.K Zaabwe V. Orient Bank Ltd** constitutes fraud. Also see **UP & TC V. Abraham Katumba** (supra). I therefore answer the two issues by declaring the defendant not being a bona fide purchaser and that he was fraudulent.

90.In the result, I make the following orders;

- i. At the cost of the plaintiff that the area he occupied be surveyed off by a surveyor appointed by the Deputy Registrar of this court.
- ii. By order of this court the Commissioner Land Registration shall cancel the registration of the defendant as the proprietor of the whole land in KB 28 Plot 724 at Makerere measuring approx. 0.13 Hectares and instead issue two separate titles as follows;
 - (a) Using the prints produced by the surveyor maintain the old title for the defendant
 - (b) The print for the area occupied by the plaintiff be used to make a separate title for the plaintiff Eric Kimbowa
- iii. That 14 days after the surveyor has produced the new prints, the defendant shall surrender his Duplicate Certificate of Title to the Commissioner Land Registration (CLR) for subsequent procedures, failure of which the CLR shall proceed and issue new titles as above with or without such title being surrendered in accordance with s. 73 of RTA
- iv. Since the plaintiff has always been in occupation of his portion of the land, no general damages are awarded to him.
- v. The defendant shall pay the costs of this suit to the plaintiff.

Given under my hand and seal of this honorable court this **14th** day of **September**, 2021


.....
NYANZI YASIN
JUDGE