

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

CIVIL SUIT NO. 0094 OF 2008

1. NASSANGA MARGRET
2. MUDIIMA EMMANUEL
3. NALUNGA CATHERINE } PLAINTIFFS

VERSUS

1. LEO KIBAHIGANIRA
2. ALIKA TIMBER ENTERPRISES LTD
3. NAKAYIMA NURU BIRABWA
4. MULANGIRA KIMERA NAMUGALA
5. WINFRED KALUNGI } DEFENDANTS

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

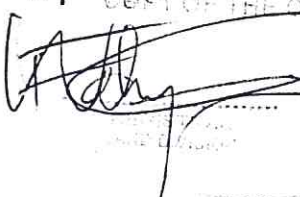
[1] The Plaintiffs; Nassanga Margret (1st Plaintiff), Mudiima Emmanuel (2nd Plaintiff) and Nalunga Catherine (3rd Plaintiff) filed this suit against 5 Defendants; Leo Kibahiganira (1st Defendant), Alik Timber Enterprises Ltd (2nd Defendant), Nakayima Nuru Birabwa (3rd Defendant), Mulangira Kimera Namugala (4th Defendant) and Winfred Kalungi (5th Defendant) for recovery of land, Kyadondo Block 262 previously plot 179 or monetary market thereof, general damages and costs of the suit.

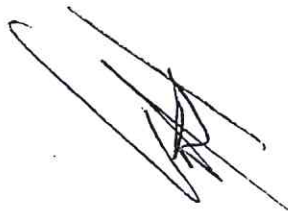
[2] The facts constituting the cause of action briefly, are as follows:-

- i. The Plaintiffs are legal Administrators of the estate and beneficiaries of the late Alfred Kiwanuka Byuma vide High Court Administration Cause No. 849 of 2007 at Kampala and the estate includes the suit land.
- ii. The deceased Alfred Kiwanuka Byuma died intestate on 14th September, 2000 and thereafter the Plaintiffs made a search in Lands Registration Department and discovered that an unknown person calling himself Charles Kigozi Byuma had obtained Letters

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of administration for the estate of the deceased from Mengo Chief Magistrate's Court on 16th August, 1999 (when he was still alive).

- iii. The said **Charles Kigozi Byuma** used the said Letters of administration and subdivided the suit plot 179 into **plots 826 and 827** after which he caused his registration on the Certificate of title and transferred **plot 826** to the **3rd Defendant** and **plot 827** to the **1st Defendant**.
- iv. The **3rd Defendant** transferred **plot 826** to the **4th Defendant** who in turn transferred it to the **5th Defendant** while the **1st Defendant** transferred **plot 827** to the **2nd Defendant company** of which himself and his wife **Annet Kibahiganira** are shareholders.
- v. The Plaintiffs claim to had known no person in the names of **Charles Kigozi Byuma** in the deceased's family and the Letters of administration obtained by him was of a small estate yet the deceased's estate was a big one, they applied for its invalidation in the same Chief Magistrate's Court which nullified the Grant on 27th June, 2006 upon which thereafter, the Plaintiffs applied for and got the Grant from High Court Kampala.

- [3] The Plaintiffs contend that all the transactions on **plot 179** including the subdivisions thereof into **plots 826 and 827** and transfer thereof to the Defendants were illegal.
- [4] The Plaintiffs particularized the illegalities of the transactions on both **plots 826 and 827** subdivided from **plot 179, Block 262** and also particularized fraud by each of the Defendants.
- [5] In their Written statement of defence, the **1st and 2nd Defendants** averred that the Plaintiffs have no cause of action against them, that the Plaintiffs ought to have sued **Charles Kigozi Byuma**, the original vendor and alleged fraudster. That they acquired the suit property from a person holding valid Letters of administration and therefore contended as follows:-

- i. That the **1st Defendant** by an agreement dated 24th April, 2001, purchased 1.335 hectares out of land comprised in **Kyadondo Block 262 plot 179 (plot 827 upon subdivision)** at Luwafu from **Charles Kigozi Byuma** free from any encumbrances, squatters,

occupants or third party claims whatsoever and took immediate possession thereof.

- ii. That **Charles Kigozi Byuma** in his capacity as the Administrator of the estate of the late **Alfred K. Byuma** vide **Mengo Administration Cause No. 138/1999** transferred the purchased **plot 827** to the **1st Defendant** who subsequently transferred the same to the **2nd Defendant**, the current registered proprietor.
- iii. That the transfer of the suit land by the **1st Defendant** to the **2nd Defendant** was to enable the **2nd Defendant**, Inter alia, easily access loan facilities to finance its massive investments which include a school now in place, for which was his right to do so.
- iv. That having acquired the suit property from the Administrator of the estate of **Alfred K. Byuma**, the **1st and 2nd Defendants** acquired a clean title and are immuned against the Plaintiffs' claims in so far they neither had knowledge of nor participated in the alleged fraud or illegality and are therefore bonafide purchasers for value without notice.
- v. That **Charles Kigozi Byuma** in his capacity as the Administrator of the estate of the late **Alfred K. Byuma** enjoyed all the powers of a legal representative including powers to sell the land to the **1st Defendant** and the issue of want of authority was never known to the **1st and 2nd Defendants**.

[6] For the **3rd Defendant**, in her Written statement of defence contended as follows:-

- i. That her father **Elias Basajjasubi** bought land comprised in **Kyadondo Block 262 plot 826** situate at Luwafu from the **1st Plaintiff** which forms part of the suit land.
- ii. That the **1st Plaintiff** on the instructions of her father, one **Alfred Kiwanuka Byuma** surrendered the duplicate Certificate of title to the **3rd Defendant's** father **Elias Basajjasubi** to effect the subdivision but he died before causing the subdivision.
- iii. That the duplicate Certificate of title was handed over to **M/s Lubega, Matovu & Co. Advocates** for custody until when the subdivision was caused by the Administrator of the estate of the late **Alfred K. Byuma** and duly transferred the suit **plot 826** into

her names and she also transferred to the 4th **Defendant** who in turn also transferred to the 5th **Defendant**.

- iv. That she was therefore neither aware of nor party to the fraud or illegality as being alleged in the plaint.
- v. That the Plaintiffs are taking advantage of the death of the 3rd **Defendant's** father **Bassajasubi** to lay a second claim over land that the 1st **Plaintiff** had already sold to **Basajjasubi** thus they have no claim over the same and the entitlement claimed in the plaint is baseless.

[7] As for the 4th & 5th **Defendants** in their Written statements of defence, they denied the Plaintiffs' alleged fraud and the 5th **Defendant** in particular contended;

- i. That she is the current registered proprietor of the suit land comprised in **Kyadondo Block 262, plot 826** situate at Luwafu, which forms part of the suit property having acquired the same from the 4th **Defendant**, the then registered proprietor.
- ii. That she is a bonafide purchaser for value without notice of any fraud and therefore protected under the law who took possession of the suit land and has developed the same without any claim or objection whatsoever from the Plaintiffs.

[8] The following are agreed facts; the suit land is comprised in **Kyadondo Block 262, plots 826 and 827** at Luwafu having been subdivided from **plot 179**. Whereas the 5th **Defendant** is the current registered proprietor and in occupation of the suit **plot 826**, the 2nd **Defendant** is the registered proprietor and in occupation of the suit **plot 827**.

[9] The following are agreed issues for resolution of this suit:

- a. Whether the Defendants were unlawfully and fraudulently registered on the suit land Certificates of titles.
- b. Whether the Plaintiffs are entitled to the reliefs claimed.

[10] **THE BURDEN OF PROOF:**

Generally, in all civil suits, the burden of proof lies with the Plaintiff who has to prove his or her case on the balance of probabilities; **SEBULIBA VS. COOPERATIVE BANK LTD [1982] HCB 130. Section 103 of the Evidence Act**, 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 the proof of that fact shall lie on any particular person. He who asserts must affirm (see also *JOVELYN BARUGAHARE VS. A. G S. C. C. A. NO. 28/1993*). In this suit, the Plaintiffs raised allegations of fraud against the Defendants. It follows therefore that the burden to prove the alleged fraud falls on the Plaintiffs who allege it.

- [11] It is trite law that fraud must be specifically pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in civil matters; *KAMPALA BOTTLERS LTD VS. DAMANICO (U) LTD CIVIL APPEAL NO. 22/1992 (S.C)*.

1ST ISSUE: Whether the defendants were unlawfully and fraudulently registered on the suit land Certificate of titles.

- [12] The following facts appear to be uncontested by the Defendants:-

- a. The Plaintiffs are children of the late **Alfred Kiwanuka** who died intestate on the **14th day of September, 2000** and are beneficiaries and Administrators of his estate vide Letters of administration granted by the High Court at Kampala (**A. C. No. 849 of 2007 - P. Exh. 1**) dated **27th August, 2007**.
- b. Prior to the said Grant, there were Letters of administration issued by the **Chief Magistrate's Court at Mengo** under **Administration Cause No. 138 of 1999** in respect of the estate of the late **Alfred Kiwanuka Byuma (P. Exh. 5)** issued before the death of the deceased.
- c. The Plaintiffs caused the above Chief Magistrate's Court issued Grant revoked by the issuing court on **27th June, 2006** on the ground that it was fraudulently obtained.
- d. The deceased **Alfred Kiwanuka Byuma** left land comprised in **Kyadondo Block 262 plot 179** at **Luwafu, Makindye Division, Kampala**, the suit land.
- e. The revoked Letters of administration were in favour of a one **Charles Kigozi Byuma** who obtained a Special certificate of title for the suit land and got himself registered thereon as an Administrator of the estate of the deceased and subdivided it into 2 plots; **826 and 827**.
- f. **Plot 826** was transferred to the **3rd Defendant** who also transferred it to the **4th Defendant** who in turn, transferred it to the **5th Defendant**.

- g. **Plot 827** was transferred to the **1st Defendant** who also transferred it to the **2nd Defendant**, a company in which he holds the majority shares.

Alleged particulars of fraud against the 1st and 2nd Defendants:-

- [13] That the Letters of administration held by **Charles K. Byuma** upon which he sold **plot 827** subdivided from **plot 179** to the **1st Defendant** were illegal having been obtained from **Mengo Chief Magistrate's Court** which had no jurisdiction to issue such for a big estate. That besides, the Grant was obtained during the life time of the deceased. **Secondly**, that in the Lands Registry, the **white page for plot 179** while still in the names of the deceased had a caveat thereon of 1989.
- [14] Counsel for the Plaintiffs Mr. Muhwezi submitted as follows:-
- a. That **Charles Kigozi Byuma**, the vendor of the suit property to the **1st Defendant** registered himself on the suit Special certificate of title as an Administrator using Letters of administration that were issued by a court without jurisdiction and that the **2nd Defendant** is faulted for fraud in obtaining the title deed from the **1st Defendant** who had obtained it from **Charles K. Byuma** on the basis of the illegal Grant.
 - b. That the claim by the **1st Defendant** that a search in Lands office proved that there was no encumbrance on the original title of which he was given a certified copy is a lie because there was a 1989 registered caveat of the late **Alfred Kiwanuka Byuma** on the **white page (P. Exh. 4)** for **plot 179**. That the **1st Defendant** therefore chose to transact on a newly created white page, where **Alfred Kiwanuka's** caveat was not reflected.
 - c. That the **1st Defendant** colluded with the Lands officials to make another white page, made on 08th February, 2001 to defeat the caveat registered on the deceased's white page title.
 - d. That the **1st Defendant** ought to have carried out an inquiry from the vendor **Charles K. Byuma** about the deceased's estate beneficiaries, the estate Account and Inventory and that the lawyers who drafted for him the purchase agreement ought to or must have told him that the Letters of administration held by the vendor were illegal having been issued for a small estate yet he was dealing in a big estate.

- e. That the 1st Defendant's failure to produce the seller **Charles K. Byuma** and the lawyer **M.s Lubega Matovu & Co. Advocates** who drafted for him the purchase agreement as his witness is fatal to the sale.
- f. That the 1st Defendant participated in the subdivision and creation of plots 826 and 827 from plot 179 and that this is proved by the fact that the 1st Defendant executed the purchase agreement when the entire plot 179 had not been subdivided to create the 2 plots 826 and 827. That therefore, the 1st Defendant's attributing the subdivision to **Charles K. Byuma** allegedly known to the deceased's family is incorrect. That the letter purportedly addressed to him (D. Exh. 9) by the Plaintiffs' family lawyers **M/s Murungi, Kairu & Co. Advocates** is a forgery as shown by D. Exh. 10, proof that **M/s Murungi, Kairu & Co. Advocates** had never been their lawyers.

[15] On the other hand, it is the contention of the 1st and 2nd Defendants that:-

- a. By a sale agreement dated 24th April, 2001, the 1st Defendant purchased the suit land (plot 827) from **Charles Kigozi Byuma**, who was registered as proprietor thereof in the capacity of Administrator of the estate of the late **Alfred Kiwanuka Byuma**.
- b. The 1st Defendant before the purchase carried out a search both in Land office and physically on the ground and confirmed that the land belonged to the vendor, **Charles Kigozi Byuma**.
- c. When he wanted to obtain a loan, the 1st Defendant upon advise of the Bank, transferred the land into the 2nd Defendant's name, a company in which he holds majority shares together with his wife and son.
- d. The 1st Defendant has since developed the suit land (plot 827) into a Primary School and is in effective occupation thereof.
- e. The Defendants were duly registered on the suit plot as bonafide purchasers for valuable consideration without notice of the alleged fraud.

[16] **Fraud**; it is well settled that fraud means actual fraud or some act of dishonesty; *DAVID SEJJAKA NALIMA VS. REBECCA MUSOKE CIVIL APPEAL NO. 12 OF 1985 (C. A)*. See also *WAINAHA SAW MILLING CO. LTD VS. WAINONE TIMBER CO. LTD (1926) A. C 101* as per Lord

Buckmaster. In *KAMPALA BOTTLERS LTD VS. DAMANICO (U) LTD S. C. A. NO. 22 OF 1992* reported in [1994 - 95] HCB court restated the circumstances under which fraud can defeat the claim of bonafide purchase of registered land; *fraud must be attributable to the transferee. It must be attributable 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.*

- [17] In the instant case, it is not disputed that **Charles Kigozi Byuma**, the vendor of the suit property to the **1st Defendant** had registered himself on the suit Special certificate of title as an Administrator basing on **Letters of administration** he had obtained from Mengo Chief Magistrate's Court vide **Administration Cause No. 138 of 1999**. This Grant (**D. Exh. 2**) was later revoked/annulled on the grounds, Inter alia, that it had been obtained fraudulently and issued by a court without jurisdiction (**P. Exh. 5**). It is however the contention of the **1st Defendant** that he purchased the suit property (**plot 827**) on the 24th of April, 2001 (**D. Exh. 3**) and at the time, he was not aware and had no knowledge that the vendor held a fraudulently obtained and or an illegal Grant. Indeed, it is a fact that the impugned Grant was annulled on the 27th of June, 2006 (**P. Exh.5**) and therefore, the **1st Defendant's** justification that he was not aware and or had no knowledge of its defect unless it is shown by the Plaintiffs that its defect was brought to his notice or attention. In this case, there is no evidence that the defect in the Grant was brought to the **1st Defendant's** notice or attention because it is apparent that even the Plaintiffs themselves had had no knowledge of its existence until in 2005, when they filed **Misc. Application No. 269/2005** for its revocation. However, it is Mr. Muhwezi's submission that since lawyers were involved in the sale and transfer exercise of the suit property, they ought to have investigated the validity of the Grant.
- [18] I think, this is putting too much of a burden or task on a purchaser, even if knowledgeable in law to investigate the validity of a Grant upon which the vendor got registered on the property to be sold. To fault the purchaser on this aspect would equally mean faulting the Registrar of Titles who effected the registration of the vendor on the title but who in this case was not sued. The above notwithstanding, **Section 136 Registration of Titles Act** provides thus:-

"136; purchase from registered proprietor not be affected by notice except in the case of fraud, no person contradicting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land, lease or mortgage, shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which the proprietor or any previous proprietor thereof was registered, ..."

- [19] I am not therefore, in the circumstances of this case persuaded by Counsel for the Plaintiffs that the 1st **Defendant** as a purchaser had the duty to go beyond or behind the register book after establishing the prospective vendor, to study the Grant upon which the vendor had been registered and then determine its validity. To require the purchaser to go into that would surely defeat the essence of indefeasibility of title conferred by **Section 59 Registration of Titles Act**. It follows from the foregoing therefore, that the annulment of Letters of administration obtained fraudulently, alone cannot automatically affect the title of a subsequent bonafide purchaser who was not a party to the fraud. Annulled Letters of administration for just cause under **Section 233 of the Succession Act and Section 2(4) of the Administration of Estates (Small Estates)(Special Provisions) Act** can become a good source or root of a good title to bonafide purchaser without notice. This is the ratio decidendi in **DAVID SEJJAKA NALIMA VS. REBECCA MUSOKE CIVIL APPEAL NO. 12/1985 (C. A)**. I agree with the principle laid down in **SANYU LWANGA VS. GALIWANGO S. C. C. A. NO. 48 /1995** that Letters of administration issued without jurisdiction are incompetent and of no legal effect or consequences and no title could be derived under them but this is when the default in the Grant is brought to the notice or attention of the purchaser at the time of the sale transaction. In the instant case, the Grant in question was valid and remained effectively so until on the 27th of June, 2006 when it was annulled/revoked. This is especially so in view of **Section 2(5) of the Administration of Estates (Small Estates)(special Provisions) Act Cap 156** which provides thus;

"A Grant of Probate or Letters of administration shall not be revoked or annulled for want of jurisdiction if during the administration of the estate it is subsequently discovered that the total value of the estate is greater than the total value of the estate in an application for the grant unless the court is satisfied that the interests of the beneficiaries are thereby prejudiced."

- [20] In this case, at the time of sale by the said **Charles K. Byuma**, the Grant was valid until when court was satisfied that the interests of the beneficiaries had been thereby prejudiced by fraud. The advocates who dealt in the sale therefore, had no obligation to advise the parties about the then unknown fraud and illegality in the Grant at the time.
- [21] The Plaintiffs however complained further that the Grant was obtained during the life time of the deceased. Again, the Plaintiffs have not shown that this was within the knowledge of the **1st Defendant** and that it was brought to his notice, and then he proceeded to transact in the suit property. The Plaintiffs themselves could not even produce the original copy of the deceased's death certificate.
- [22] The other claim of fraud is that the white page for **plot 179** (from which the suit **plot 827** was subdivided) while still in the names of the deceased had a caveat thereon of 1989 (P. Exh. 4).
- [23] In proof of the above, the Plaintiffs exhibited a copy of the white page that had caveats lodged by the deceased **Alfred K. Byuma** and her daughter **Margret Nassanga** (**1st Plaintiff**) while the **1st Defendant** on the other hand, exhibited a copy of the white page that bore no encumbrances at all (**D. Exh. 1**).
- [24] I note that the Plaintiffs and the Administrator of the estate of **Charles K. Byuma** had no owner's copy of the suit Certificate of title. This explains why the Administrator dealt on a Special certificate of title and the Plaintiffs presented the white pages as their exhibits. Upon search, the **1st Defendant** was availed **D. Exh. 1** copy that had no encumbrances. It follows therefore, that the burden is on the Plaintiff to show that the white page which bore the caveat encumbrances was available for whoever did the search in the Lands office registry. The Plaintiffs would do so by producing an official from the Lands office to testify in court and explain the source of the 2 white pages. This is especially so in the circumstances where court had granted Mr. Eric Muhwezi for the Plaintiffs leave to have the Commissioner Land Registration as a witness. The Plaintiffs opted not to call or have him as a witness. This court is entitled to impute that the failure to have him as a witness after obtaining leave to do so meant that his evidence would be adverse to the Plaintiffs and favour the **1st Defendant**.

- [25] Besides, the 1st Defendant purchased the suit property from **Charles K. Byuma**, the Administrator of the estate of the deceased caveator **Alfred Kiwanuka Byuma** and therefore, the caveat lodged by the deceased was no longer effective. The caveat was not transferred to the suit Certificate of title upon which the vendor was registered as the proprietor.
- [26] In any case as observed in *HAJJI NUMAN MUBI AKULAMUSA VS. FRIENDS ESTATE LTD CIVIL APPEAL NO. 104/2018 (C. A)*, in law, a mortgage, like a caveat, is not the type of encumbrance that bars any transfer of proprietorship of, or any other dealing in the mortgaged or caveated property. Acquisition of legal or equitable interest in such property is in fact and law, permissible only that it is so done subject to the mortgage or caveat entered in the register as an encumbrance.
- [27] It follows therefore, from the foregoing, that purchase of property bearing a caveat per se is not evidence of dishonesty and or fraud.
- [28] The other complaint of the Plaintiffs is that, the fact that the 1st Defendant paid shs. 26,250,000/- as a consideration of the suit property is proof that he knew this was a big estate and that was knowledge that the vendor held a fraudulently obtained Grant from the Chief Magistrate's Court whose jurisdiction in granting Letters of administration was limited to shs. 100,000/- as per *Section 2(1)(b) of the Administration of Estates (Small Estates)(Special Provisions) Act*.
- [29] I am not persuaded by the argument that because the 1st Defendant paid shs. 26,250,000/- as consideration for the suit property, then that it is proof that he knew that the vendor held a fraudulently obtained Grant from the Chief Magistrate's Court by virtue of the value of the property. This is so because issues of whether or not to grant Letters of administration of an estate are issues of law and fact determined by court and not a purchaser of property. To uphold Counsel Muhwezi's argument would mean that the law would be imposing a very unrealistic burden or task to purchasers of real property some of whom may be even illiterate but are willing and have resources to purchase and own property. Courts must avoid situations that have a likelihood of leading to gross injustice and absurdity.
- [30] The failure by the lawyer who transacted the sale on behalf of the parties to advise the 1st Defendant on the validity of the Grant obtained by the vendor similarly cannot be a ground to defeat his purchase as already

explained in this judgment. Besides, there is no evidence that M/s **Lubega, Matovu & Co. Advocates** who were involved in this transaction were advocates for the 1st Defendant. The purchase agreement (**P. Exh. 2**) instead clearly show that **A. Lubega Matovu** of M/s Lubega, Matovu & Co. Advocates who witnessed the agreement did for both parties. It is the 1st Defendant's contention that the firm of advocates were for the vendor and it has not been disputed by the Plaintiffs that actually it is this firm that had custody of the suit Certificate of title. The implication is that the firm of the advocates was for the vendor and not the purchaser.

- [31] The failure by the 1st Defendant to have both the seller of the suit property and the advocate who drew the sale agreement as witnesses is not fatal to the Defendant's case or evidence of fraud as Counsel for the Plaintiffs demands court to believe. The advocate who drew the purchase agreement would be necessary as a witness if the 1st Defendant had failed to establish the purchase of the suit property. That is the holding in **JOHN BAGEINE VS. AUSI MATOVU CIVIL APPEAL NO. 7 OF 1996 (C. A)** being relied on by the Plaintiffs. At p. 8 court found:

*"I agree with the trial Judge's findings that the evidence of the Appellant fell short of establishing the plea of **bonafide purchaser for value** without notice. His failure to **produce the evidence of the person from whom he allegedly purchased the land, and of the advocate who drew the purported sale agreement between the Appellant and the alleged seller** was a serious flaw in the Appellant's case. These were witnesses whose evidence could have **established purchase ...**"*

- [32] In this case, the purchase of the suit property between **Charles K. Byuma**, the vendor and the 1st Defendant is not in dispute. What is at stake is that the said **Charles K. Byuma** obtained a fraudulent Grant upon which he got registered on the suit property that he sold to the 1st Defendant. On his part, the 1st Defendant has shown in this case that he first established the prospective vendor, **Charles K. Byuma**, the Administrator of the estate of the former registered proprietor of the suit property.
- [33] As to whether the vendor **Charles K. Byuma** was fictitious or not, the 1st Defendant referred this court to a letter dated 27th September, 2007 (**D. Exh. 9**). The letter was authored by the firm of **Murungi, Kairu & Co. Advocates** on behalf of the Plaintiffs addressed to the 1st Defendant

wherein **Charles Kigozi**, the vendor was referred to as a **close confidant** of the late **Alfred Kiwanuka Byuma** who claiming to be a son of the deceased, illegally obtained the impugned Letters of administration which were later revoked. It is his contention therefore, that the said **Charles Kigozi** is not fictitious and though he is not aware of his whereabouts, the Plaintiffs knew him and know his whereabouts.

- [34] On the other hand, it is the submission of Counsel for the Plaintiffs that this letter is a forgery and that the said firm has never represented the Plaintiffs. He referred court to a letter dated 05th February, 2008 authored by the firm of **Muhanguzi, Muhwezi & Co. Advocates** wherein they addressed the **Notice of change of Advocates** to **M/s Murungi & Co. Advocates** as the former lawyer of the Plaintiffs (**D. Exh. 10**) as proof to the contention "M/s Murungi, Kairu & Co. Advocates" have never been lawyers for the Plaintiffs.
- [35] My view is that the burden is on the Plaintiffs to produce the author or any member of the firm of **M/s Murungi & Co. Advocates** to show and prove that the firm never acted for the Plaintiffs during September 2007 and therefore did not author or dispute the letter dated 27th September, 2007 (**D. Exh. 9**). This is so because, the 1st Defendant by exhibiting **D. Exh. 9** established that the said **Charles K. Byuma** was a close confidant of the deceased **Alfred K. Byuma** and therefore, he is known to the Plaintiffs since the letter was written on the instructions of the Plaintiffs.
- [36] The fact that **Charles K. Byuma** was served by substituted service vide **Mengo Chief Magistrate's Court M. A. No. 269/2005** when revoking his Letters of administration in respect of the estate of the deceased **Alfred K. Byuma** and he failed to appear is not sufficient evidence that he is fictitious. It is therefore my finding that the Plaintiffs have not shown and proved that the said **Charles K. Byuma** the vendor of the suit property is fictitious. The fact that the sale of the suit property is not in dispute did not necessitate the 1st Defendant to have him as a witness. To the contrary, it would be the Plaintiffs to produce him as a witness for purposes of defeating the 1st Defendant's purchase.
- [37] This is however not to leave the Plaintiffs who may have been aggrieved or deprived of land by virtue of the Grant fraudulently obtained by **Charles K. Byuma** or by omission or by mistakes made by the Land officials. The Plaintiffs in this case have and had the option to sue **Charles K. Byuma**, the holder of such a Grant and or **Commissioner**

Land Registration under Section 183 Registration of Titles Act for damages and or compensation.

- [38] The Plaintiffs' claim that the **1st Defendant** purchased the suit property ie **plot 827** before the subdivision of **plot 179** (from which plot 827 is derived) again is not helpful to the Plaintiffs' case because the claim is not backed by any evidence. No credible Area schedule of the plots in question was presented to show court how and when **plot 179** was subdivided to create **plots 827 and 826**. What is on record are mere photocopies with no evidential value.
- [39] It is the evidence of the **1st Defendant** that by agreement dated 24th April, 2001, he purchased 3.5 acres of land out of the then **plot 179 Block 262** from a one **Charles Kigozi Byuma**, the then registered proprietor in his capacity as the Administrator of the estate of **Alfred K. Byuma** (the father of the Plaintiffs) at a consideration of shs. 26,250,000/-.
- [40] That he was introduced to the land by land brokers who took him to the site with no occupation where he met the owner and vendor **Charles K. Byuma** who showed him the boundaries of the said land upon which they negotiated the purchase price.
- [41] That he then went to the Land office and conducted a physical search on the file and obtained a certified copy of the title (**D. Exh. 1**) in the names of the vendor **Charles K. Byuma** with no caveat at all. That upon signing of the agreement, he was informed that 1 acre out of the said **plot 179** had already been sold to **Basajjasubi** and that he was therefore to get his title to the purchased 3.5 acres after subdivision and surveying off of **Basajjasubi's** 1 acre.
- [42] That after the subdivision, his title of the 3.5 acres became **plot 827** and that of **Basajjasubi** became **plot 826**. Later in 2003, for purposes of business expediency, he transferred the **suit plot 827** to the **2nd Defendant company** where he is a Director and shareholder with his wife and son as shareholders. Since 2001, he has developed the suit land by putting up a school thereon; **Uganda Martyrs' Junior School, Lukuli** which is licenced by the Ministry of Education.
- [43] It is the contention of the Plaintiffs that the **1st Defendant's** transfer of the suit plot to the **2nd Defendant** was for purposes of hiding the fraud. I don't agree. There is surely no prohibition by law that would hinder him to do so. The **1st and 2nd Defendants'** predecessor in title **Charles K.**

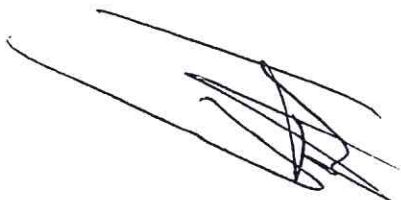
Byuma in his capacity as an Administrator of the estate of the late Alfred K. Byuma lawfully sold and made the necessary transfer to the 1st Defendant for the suit property since the Letters of administration he held at the time were valid and unchallenged. As the 1st Defendant established a lawful purchase of the suit property and got registered thereon, he is protected under *Sections 181, 176 and 59 of the Registration of Titles Act* save for fraud. The burden therefore was on the Plaintiffs to adduce evidence of fraud in the acquisition of the suit property. It has been my finding that the Plaintiffs have failed to establish any fraud on the part of the 1st Defendant's acquisition of the suit property, I therefore in the circumstances uphold the 1st Defendant's claim of being a bonafide purchaser for value without notice of any alleged acts of fraud. His title for **plot 827 Block 262** at Luwafu is indefeasible and cannot be impeached or cancelled because it was acquired for value and without notice of fraud of the previous registered proprietor; *LUSWERE VS. KASULE & ANOR. H. C. C. S. NO. 1010/1983.*

Allegations of fraud against the 3rd, 4th and 5th Defendants:-

[44] In his extensive submission, Counsel for the Plaintiffs contended as follows:-

- a. That all the Defendants defrauded the estate of the late Alfred K. Byuma who was the 1st registered proprietor on the Certificate of title for **plot 179 Block 262**, followed by Charles K. Byuma registered on the basis of Letters of administration issued by a court without jurisdiction which were nullified.
- b. That the subdivision of **plot 179** was done on substituted white page when there was and still is an intact original one with Alfred K. Byuma as proprietor with his subsisting registered.
- c. That the 3rd Defendant claims that the late Alfred K. Byuma with her daughter sold her father, the late Basajjasubi land for any specified acreage or at all on **plot 179** is incorrect.

[45] On her part, the 3rd Defendant Nakayima Nuru Birabwa testified that she is a biological daughter of the late Erias Basajjasubi who purchased 2 acres of land comprised in Kyadondo Block 262 **plot 178** and a portion on **plot 179** from the 1st Plaintiff Nassanga Margret (D. Exh. A(1) and D. Exh. B(1)). The portion from **plot 179** on mutation became **plot 826** where her father constructed a house.



- [46] She testified that the duplicate Certificate of title for **plot 179** had been surrendered to **M/s Lubega, Matovu & Co. Advocates** for custody where it was later retrieved with the help of the **4th Defendant** whereupon it was registered in her names. She later transferred the suit plot (**plot 826**) to the **4th Defendant** who in turn transferred it to the **5th Defendant**.
- [47] That throughout the process none of the Plaintiffs ever came up to challenge the transactions simply because they knew that their father had sold that portion of **plot 179**.
- [48] It is the submission of Counsel for the Plaintiffs that though the Plaintiffs were never in possession of the suit land **plot 826**, it is no ground for denial of their late father's land who was the legal owner registered on **plot 179** before the illegal subdivision into **plots 826 and 827**. That there is no proof that the **1st Plaintiff**, daughter to the deceased owner, ever owned **plot 179** in her names as registered proprietor to sell part of it to **Basajjasubi**. That there is no agreement between the **1st Plaintiff** and **Basajjasubi** transacting on the land as vendor and buyer respectively. Further, that *Section 95 Registration of Titles Act* provides transfer to be signed by the registered proprietor while *Section 146 (1) & (2) Registration of Titles Act* provides for the registered proprietor to appoint any person on his or her attorney to act for him or her in transferring land.
- [49] In the instant case, it is true that the deceased **Alfred K. Byuma**, the original proprietor of the suit property neither signed a transfer instrument in favour of **Basajjasubi** nor did he give Power of attorney to the **1st Plaintiff**. However, there is documentary evidence, **D. Exh. A(1)** which is an agreement by the **1st Plaintiff** selling her land comprised in **Kyadondo Block 262 Mengo plot 178** to **Erias Basajjasubi**, the father to the **3rd Defendant**. This documentary evidence is admitted by the Plaintiffs. It is the contention of the Plaintiffs that **plot 178** is not part of the suit land. However, in the same document (**D. Exh. 1A**), it is indicated that the **1st Plaintiff**, in addition to **plot 178**, with the authority from her father **Alfred K. Byuma**, she was selling a part or portion of **plot 179 Block 262** to make a total of 2 acres which she sold to **Basajjasubi** at a total consideration of shs. 50,000/- and she handed over the 2 Certificates of title (ie for **plot 178** and for **plot 179** to enable the subdivision in favour of **Basajjasubi**).

- [50] Proof of authority to the 1st Plaintiff by her father **Alfred K. Byuma** to additionally sell a portion of **plot 179 to Basajjasubi** is documentary evidence **D. Exh. B(1)** for enabling the 1st Plaintiff add up to 2 acres for sale. It is noted that the portion of plot 179 the Plaintiff's father permitted her to sell was "adjoining" or adjacent to hers.
- [51] The Plaintiffs dispute the alleged acquisition of a portion of **plot 179** by the 1st Plaintiff from her father **Alfred K. Byuma**. That the deceased **Alfred K. Byuma** disputed the sale of 1 acre out of plot 179 by his daughter the 1st Plaintiff by writing a letter dated 26th October, 1978 to the **District Staff Surveyor**. This alleged letter by the 1st Plaintiff's father **Alfred K. Byuma** to the **District Staff Surveyor** was however not exhibited in evidence. It is merely on record for identification. **Mudiima Emmanuel** (2nd Plaintiff) who testified as PW₁ however explained that the 1st Plaintiff rightfully sold 1 acre of land of **plot 178 and that the other 1 acre was out of plot 179**. I find his explanation consistent with **D. Exhs. A(1) & B(1)** (with their English translations **A(2) and B(2)**).
- [52] It therefore follows from the above that as correctly submitted by Counsel for the 3rd Defendant, the 3rd Defendant's father **Erias Basajjasubi** purchased **plot 826** measuring about 1 acre (which was subdivided from **plot 179**) from the 1st Plaintiff who had been duly permitted and authorized to sell it by her father, the late **Alfred K. Byuma**. The late **Basajjasubi** died before having the suit plot transferred into his names and the formal transfer had to be effected by **Charles K. Byuma**, the Administrator of the estate of **Alfred K. Byuma** since he, **Basajjasubi** had also demised. The 3rd Defendant as a daughter to the late **Basajjasubi** was entitled to a legal right as proprietor, her father having purchased the land from the 1st Plaintiff. This was confirmed by **Mulangira Namugala** (DW₃) as eventually executed by **Charles K. Byuma**, the Administrator of the estate of the registered proprietor upon recognizing the interest of **Basajjasubi's** family. The father of the Plaintiffs therefore, extinguished his right in the suit property (**plot 826**) when he sold it to **Erias Basajjasubi** and the Plaintiffs therefore, do not have any interest in the suit property since it does not form part of the estate they are administering.
- [53] It is the law that where there are a series of subsequent transfers, for the title of the incumbent registered proprietor to be impeachable, the fraud of the previous proprietors must be brought home to him; **DAVID SEJJAACA NALIMA VS. REBECCA MUSOKE** (supra).

[54] In the instant case, the 1st Plaintiff Margaret Nassanga who was personally involved in the transaction of sale of the suit land to Erias Basajjasubi never appeared as a witness and therefore, there is no evidence to controvert the 3rd Defendant's evidence regarding the purchase of the land by Basajjasubi. By the time the 3rd Defendant got registered on the suit land on 02nd January, 2007, she was already in possession of the land. She got the title from the Administrator of the estate of Alfred K. Byuma who had sold the land to their father, Basajjasubi. By the time the said Administrator executed transfer of the land in favour of the 3rd Defendant, there is no evidence that the revocation order of the Administrator's Grant had either been served upon the Land Registry or brought to the attention of the 3rd Defendant to bar her from being registered as the proprietor. In any case, the family of Basajjasubi had already acquired an equitable interest in the suit land and the Plaintiffs having had no interest whatsoever in the suit land could not be said to be persons being deprived of land by fraud under *Section 176 Registration of Titles Act*.

[55] Lastly, the dealings in the suit land subsequent to the 3rd Defendant have nothing to do with the Plaintiffs as they had lost interest therein and therefore the securing of registration on the Certificate of title by the 3rd and 4th Defendants within 2 minutes was not detrimental or prejudicial to the Plaintiffs. In any case, it is not uncommon for parties in agreement to visit the Land Registry and effect simultaneous transfers in favour of each other. There is nothing illegal about that approach. The subsequent transfer of the land to the 5th Defendant was therefore also equally without fraud and lawful.

2ND ISSUE: Remedies available to the parties:

[56] In conclusion, I find that the Plaintiffs have failed to adduce sufficient evidence in support of their allegations of fraud against all the Defendants. The 1st and 2nd Defendants acquired the suit land **plot 827 Block 262** Luwafu lawfully as they are bonafide purchasers without any notice of fraud and therefore protected from ejectment under *Sections 176 and 181 Registration of Titles Act*.

[57] As regards **plot 826 Block 262** Luwafu, the Plaintiffs have no interest whatsoever therein, their father Alfred K. Byuma having permitted his daughter, the 1st Plaintiff to sell the same to Erias Basajjasubi from

whom her daughter the 3rd Defendant derived interest that she passed to the 4th Defendant who in turn transferred the same to the 5th Defendant. The plaintiffs are therefore not entitled to the reliefs sought and the plaintiffs' case is therefore in the circumstances dismissed with costs to the 3rd, 4th and 5th defendants.

- [58] As regards the 1st and 2nd defendants, in the circumstances of the case where the 1st and 2nd defendants happen to derive their interest from a vendor who held an impugned grant that was later revoked/annulled for fraud, no order is made as to costs.

Dated at Kampala this 20th day of January, 2021.



.....

Byaruhanga Jesse Ruggyema

JUDGE.

