

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CIVIL SUIT NO. 022 OF 2011

1.MUGISHA PATRICK

5 **2.MUSEKURA NZENIA**

3.BABIGAMBA SILVER-----
PLAINTIFFS

V

1.MUSINGUZI EDSON

10 **2.BESIGYE HERBERT**

3.TURINAWE IVAN

4.ANTHONY MUPERE (T/A ARMSTRONG

BAILIFFS & AUCTIONEERS)

5.DFCU BANK LTD

15 **6.REGISTRAR OF TITLES-----**

DEFENDANTS

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

20 The Plaintiffs suit against the Defendants is for breach of contract and trust, conversion
and for orders of return of the certificate of title to the suit property comprised in LRV
525 Folio 25, Plot No.7, Bushwekwiire road, Kabale Municipality, an order for
cancellation of the 1st Defendant's name from the title and reinstatement of the

Plaintiffs' late father Matyansi Kabasharira, a permanent injunction, recovery of mesne profits, special and general damages, interest and costs of the suit.

Plaintiffs' Facts

5 The late Matyansi Kabasharira was the registered proprietor of the land comprised in LRV 525 Folio 25, Plot No.7, Bushwekwiire road, Kabale Municipality, the suit property. He died testate and bequeathed all his property to all his children including the Plaintiffs who were entitled to possess and benefit from it as beneficiaries.

10 In or around 2003, the Kabale Municipal Council shut the toilets on the suit property on grounds that they were not meeting the required sanitation standards. A deadline was given within which the Plaintiffs and other family members were to replace and renovate the facilities. Since they could not afford the works, the Plaintiffs agreed to borrow UGX 1,000,000/= at an interest of UGX. 250,000/= from the 1st Defendant for the purpose of purchasing construction materials for the required renovation works. As
15 security for the payment they handed over the certificate of title for the suit property to the 1st Defendant and undertook to repay the sum on or before 26th October 2003. The Plaintiffs were unable to meet the repayment deadline and tried to negotiate an extension with the 1st Defendant. These efforts were unsuccessful. Out of suspicion, the Plaintiffs conducted a search at the Lands Registry. It revealed that the 1st Defendant
20 had registered himself on as registered proprietor on the suit title on the 18th December 2003, only three months after the title had been deposited to him as security.

The Plaintiffs later received information that the 1st Defendant connived with one Kabatereine George to obtain letters of administration to the late Matyansi Kabasharira. These letters were challenged and recalled by court on the 2nd April 2004. Another
25 search on the suit property indicated that it had been transferred again from the 1st

Defendant to the Kabatereine George and then back to the 1st Defendant on the same day, the 18th June 2004.

High Court Civil Suit No. 40 of 2010 was filed at Kabale against the 1st Defendant seeking cancellation of the transfer of title from Kabatereine George to the 1st Defendant on grounds of fraudulent transfer. Court summons in the suit were never served on the 1st Defendant and the suit was dismissed under Order 5 rule 3 of the Civil Procedure Rules. The instant suit was filed by the Plaintiffs.

On the 6th September 2012, while this suit was pending, the 2nd Defendant and the 4th Defendant extracted a court order in HCCS No. 40 of 2010 and illegally evicted the Plaintiffs and their tenants from the suit property causing them loss of property, monthly rent and financial hardship. The court order in HCCS No. 040 of 2010 neither provided for eviction of the Plaintiffs or vacant possession of the suit property and was procured illegally.

The eviction was violently and inhumanely done and as a result, the Plaintiffs lost property valued at UGX 10,000,000/=. After the eviction, the 2nd Defendant was granted a new lease over the suit property jointly with the 3rd Defendant in spite of this pending suit challenging the propriety of the 1st Defendant's title to the suit property.

It was the Plaintiffs' contention that the transactions leading to the removal of their late father Matyansi Kabasharira from the certificate of title were illegal and fraudulently orchestrated by the 1st, 2nd, 3rd, 4th and 5th Defendants acting jointly with the 6th Defendant for which they sought the following remedies;

- a. **A declaration that the registration and transfer of the suit property into the 1st Defendant's names and subsequent transfers were illegal, null and void.**
- b. **An order of cancellation of the 1st Defendant's name from the certificate of title of the suit property comprised in LRV 525 Folio 23 Plot 7 Bushekwire Road.**

- c. An order that the names of the late Matyansi Kabasharira be reinstated on the certificate of title for the suit property of the Administrators of the estate.
- d. An order for the cancellation and removal of the mortgage and further charge registered on the suit property in favour of the 5th Defendant vide instrument numbers 352762 of 1st April 2005 and no. 358852 of 30th September 2005 respectively.
- e. An order for cancellation of the lease granted to the 2nd and 3rd Defendants.
- f. An order that the lease to the suit property granted to the 2nd and 3rd defendants be transferred to the estate of the late Matyansi Kabasharira or in the alternative, that the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and/or severally pay the fair market value of the suit property to the plaintiffs as compensation.
- g. An order for payment of special damages of UGX. 10,000,000/= and the sum of UGX. 300,000/= per month per plaintiff from 6th September 2012 till payment in full and mesne profits at a rate of UGX. 7,000,000/= per month from the date of eviction till the property is restored to the Plaintiffs.
- h. An order for aggravated damages.
- i. An order for general damages with interest.
- j. Costs of the suit.

Defendants' Facts

In his defence filed on the 22nd November 2012, the 1st Defendant denied the allegations in the Plaint and claimed that he purchased the suit property from Kabatereine George on the 20th January 2004. It was witnessed by several witnesses and family members of the late Matyansi Kabasharira. He denied knowledge of fraud as imputed on Kabatereine George, the seller. The 1st Defendant, took possession of the suit property and eventually mortgaged it to expand his business. His business suffered losses, he

failed to service the bank loan and the mortgaged property was sold off to the 2nd Defendant. It was the 1st Defendant's contention that he lawfully acquired the suit property with the full knowledge of the Plaintiffs and they did not challenge the transaction.

5 The 2nd Defendant and 3rd Defendant, in their joint defence denied the allegations in the
Plaint. They contended that they were bona fide purchasers for value without notice of
the Plaintiffs' interests in the suit property. The 2nd Defendant specifically averred that
he lawfully bought the suit property from the 5th Defendant bank through its agent, the
4th Defendant. This was after the formal process of auctioning, where the 2nd Defendant
10 emerged as the best bidder.

Prior to the purchase, the 2nd Defendant inquired from the 5th Defendant bank as to
whether it had a valid mortgage to the suit property. He was shown the certificate of
title and assured by the manager of the 5th Defendant bank that the mortgage had been
duly registered. Thereafter, the 2nd Defendant proceeded to the land Registry in
15 Kampala, at the Commission of Lands, to ascertain whether there were any other
encumbrances. His inquiries revealed that it was only the 5th defendant bank's mortgage
on the suit title.

After the 2nd Defendant paid the 1st instalment, the 5th Defendant together with its agent
the 4th Defendant, evicted the tenants who were occupying the suit property and
20 immediately handed over vacant possession of the same to the 2nd Defendant. The 2nd
Defendant did not participate in extracting an order of court evicting the Plaintiffs from
the suit property.

Upon handing over vacant possession, the 5th Defendant recommended the 2nd
Defendant to the Kabale District Land Board for an extension of the lease. 3rd
25 Defendants applied for and were granted an extension of lease over the suit land. The
lease was extended and subsequently they were registered as proprietors. At the time of

taking possession of the land, the 2nd and 3rd Defendants had no knowledge of the Plaintiffs' occupation of the property. And although there was a pending suit, there was no court order stopping any transaction or dealing on the suit property and prayed that the suit be dismissed with costs.

- 5 The 2nd and 3rd Defendants did not participate in the eviction and were not liable for the damages and accompanying remedies sought in the Plaint.

The 4th Defendant claimed that he sold the suit property to the 2nd Defendant under the instructions of the 5th Defendant. He added that he carried out a peaceful eviction based on lawful orders of court. Denying fraud, the 4th Defendant contended that he lawfully
10 executed his duties as court bailiff and sold the suit property to the 2nd Defendant without any notice of fraud or irregularity. He therefore prayed that this court be pleased to dismiss the suit with costs.

The 5th Defendant bank contended that the suit does not disclose a cause of action and that it is time barred and prayed for its dismissal with costs. It was their defence that in
15 June 2004, the 1st defendant applied for and obtained a loan facility of UGX. 65,000,000/= from it. Repayment of the said facility was secured by inter alia a mortgage over the suit property comprised in LRV 525 Folio 25 Plot 7 at Bushekweire Road, Kabale belonging to the 1st Defendant.

A formal mortgage deed in respect to the said property was duly registered onto the
20 certificate of title on 29th September 2004 vide Instrument Number 347150. Before executing the said mortgage, the 5th Defendant bank exercised due diligence and established that the 1st defendant was the registered proprietor of the suit property and the same was free from encumbrances from any third party.

The 1st Defendant defaulted on his loan repayment obligations upon which the 5th
25 Defendant bank recalled the facility and the outstanding amount became due and

payable. It was at this stage that the 5th Defendant engaged the 4th Defendant to realise the security which he did and sold the same to the 2nd Defendant.

At no time did the 5th Defendant bank commit fraud as alleged. Its mortgage was and still is bonafide and indefeasible and they therefore prayed that the suit be dismissed with costs.

The 6th Defendant did not file a defence and the suit proceeded in its absence. However, owing to the nature of the suit, this court summoned the Registrar of Titles and the Secretary, Kabale District Land Board as witnesses to provide information that would aid the judicious determination of the matter. The evidence of these two witnesses is on court record.

Issues

1. Whether the Plaintiffs have the locus standi to file this suit?

2. Whether Plaintiff discloses a cause of action?

3. Whether the 1st Defendant's registration as proprietor of the suit land was lawful/ legal in the circumstances?

4. Whether the suit land was available to be mortgaged to the 5th Defendant on the account of the 1st Defendant.

5. Whether the sale of the suit property by the 4th Defendant to the 2nd Defendant was valid/ lawful?

6. Whether the eviction of the Plaintiffs from the suit property was lawful/undertaken legally?

7. Whether the suit property was available for leasing to the 2nd and 3rd Defendants?

8. Whether the 6th Defendant acted lawfully when registering the 1st Defendant as proprietor of the suit property?

9. What are the remedies available?

Issue 1

Whether the Plaintiffs have the locus standi to file this suit?

According to Black's Law Dictionary, locus standi is *the right or capacity to bring an action or to appear in a court.*

Arguments

It was Counsel for the Plaintiffs' submission that the Plaintiffs' clearly demonstrated that they are children and grandchildren to the late Matyansi Kabasharira, who was the registered proprietor of the suit property. By Will, he had distributed his estate, which primarily consisted of the suit property, to the Plaintiffs directly or through their parents.

The Plaintiffs' claim is that the Defendants fraudulently and illegally deprived them of the right to derive benefit from the suit property to which they were entitled as beneficiaries. Counsel cited the case **Israel Kabwa Vs Martin Banoba Mugisa SCCA No. 52 of 1995** where the court held that a beneficiary has a right to sue to obtain and protect an estate where he has a beneficial interest or to prevent wastage of

the estate. He concluded his submissions by contending that the Plaintiffs are seized with the requisite locus standing to file this claim and further, that the suit discloses a cause of action.

In reply, Counsel for the Defendants argued that the Plaintiffs lacked the locus standi to institute Civil Suit No. 022 of 2011 and that the suit does not disclose a cause of action against any of them.

Counsel for the 1st Defendant submitted that under paragraph 4(a) of the amended Complaint, the Plaintiffs brought the suit as children and beneficiaries of the estate of the late Kabasharira, formerly the registered proprietor of the suit land comprised in LRV 525 Folio 25, Plot No. 7 Bushekwire Road, Kabale Municipality. However, no evidence was adduced to demonstrate any connection between the Plaintiffs and the late Matyansi Kabasharira, either by way of letters of introduction from the local council authorities conversant with matters regarding the deceased's estate or from any lawful authority. It was further Counsel for the 5th defendant's submission that beneficiaries under section 27 of the Succession Act do not include grandchildren like the 1st Plaintiff and he is not a beneficiary of the deceased's estate.

The 5th defendant's Counsel argued that the Plaintiffs are not appointed administrators for the estate of the late Matyansi Kabasharira and therefore under section 191 of the Succession Act, they have no right to claim the suit property. The Defendants' Counsel all argued that the case of **Israel Kabwa** (supra) is distinguishable from the instant case. It was their submission that in that case the appellant was resident on the suit land. He had applied for letters of administration and was entitled as beneficiary to more than three quarters of the estate of his late father. This was not the case for the Plaintiffs in this suit where the estate of the late Matyansi Kabasharira was administered by the late Kabatereine.

Counsel for the Defendants argued that according to the testimony of PW2, the Plaintiffs knew that their brother Kabatereine sold the suit land to the 1st Defendant and never filed any suit against him nor did they have his letters of administration revoked. The filing for a citation does not prove that the letters were revoked. Counsel further submitted that the title held by the late Matyansi Kabasharira was a lease-hold, whose lease was for a period of 49 years running from 1st March, 1962 and expiring on 1st March, 2011. The Plaintiffs never applied for extension of the lease before its expiry or renewal after its expiry.

Counsel further argued that the Plaintiffs cannot sustain this suit against the 5th Defendant because by the time they instituted this suit against the 5th Defendant in November, 2017, they had no interest in the suit land. He added that the interest which they claim in the suit land had since long been sold and transferred to the 1st Defendant, Edson Musinguzi in 2004 by the Administrator George Kabatereine and the same interest was extinguished by expiry of the lease in March, 2011.

At no point was the suit property was registered in the name of the Plaintiffs as proprietors or donees of powers of attorney. They could not therefore claim to have pledged the land as security for their loan. Counsel argued that those actions amounted to an illegality which cannot be condoned by this Court. He relied on the case of **Makula International vs. His Eminence Cardinal Nsubuga & Another CACA No.4 of 1981 at page 20.**

RESOLUTION

Amendment of the Plaint

To establish locus standi, an examination of the plaint and its annexures is necessary. This suit was filed on the 8th July 2011 by five Plaintiffs; Kataryeba Dominic, Mugisha Patrick, Museruka Nzenia, Nyongozi Bereta and Babigamba Silver through their advocates, M/S Murumba & Matsiko Advocates. At that time, the Plaintiffs sued jointly

and severally as beneficiaries of the estate of the late Matyansi Kabasharira. Their claim was against two Defendants; Musinguzi Edson and Besigye Herbert. The cause of action under Paragraph 3 was;

5 ***‘cancellation of the instrument of transfer in respect of the 1st Defendant on property comprised in Plot No.7 Bushekwire Road, Kabale Municipality and for further orders re-stating the original owner as the registered proprietor, general damages and costs of the suit’***

On the 17th August 2016, Mr. Muhangi, Counsel for the Plaintiffs, informed the court that the 1st and 4th Plaintiffs; Kataryeba Dominic and Nyongozi Bereta were dead. Mr.
10 Muhangi is on record as stating;

‘I am taking up the matter from Counsel Jude Byamukama since the death of the two Plaintiffs. We pray to amend the plaint and continue with mediation.’

Mr. Mutungi for both Defendants replied;

15 ***‘We have a challenge in determining the status of this case. We are also in touch with the 1st Defendant.’***

To which court ruled;

‘Case adjourned to the 18th October 2016. Counsel for the Plaintiffs to amend the plaint as prayed.’

A year later, on the 2nd November 2017, M/S Arinaitwe Law Advocates filed an
20 amended Plaint. It went beyond the removal of the two deceased Plaintiffs, added breach of contract and trust and conversion as additional causes of action and introduced the 3rd, 4th ,5th, and 6th Defendants as parties to the suit.

The 5th Defendant bank, under Paragraph 4 of their Written Statement of Defence, filed on the 20th November 2017, protested their addition to the suit, 6 years after it was

instituted, without being given an opportunity to be heard and elected to move court to have it struck out.

Certainly, it is within court's discretion to allow the amendment of pleadings in situations where there is discovery of new information or realization of some errors in the already filed pleadings or for other justifiable reasons. Court's discretion to grant amendments is governed by well- established principles as set out in **Gasu Transport Services (Bus) Ltd v Martin Adala Obene SCCA No. 4/1994(Unreported)**

- a. **The amendment should not work injustice to the other side. Any injury which can be compensated by the award of costs is not treated as an injustice.**
- b. **Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.**
- c. **An application which is made malafide should not be granted.**
- d. **No amendments should be allowed where it is expressly or impliedly prohibited by any law.**

It was further held in **Edward Kabugo Sentongo v Bank of Baroda HCMA No. 203 of 2007 (Unreported)** that amendment will not be allowed where it will substantially change the cause of action into a different one.

In my view, Counsel for the Plaintiffs misled the court into believing that the only purpose for the amendment sought was to remove the two deceased Plaintiffs. The full extent of Counsel for the Plaintiffs' intended actions only became clear after the amended Complaint was filed in court. I find that the liberties taken by Counsel for the Plaintiff, in widening the scope of the anticipated amendment, were irregular and deprived the court of its duty to exercise its discretion to grant or disallow the additional amendments made at Counsel for the Plaintiffs' own behest. Court had no opportunity to apply the principles governing amendments to the intended amendments and they

were unceremoniously smuggled in. The only conclusion I can draw from these actions is that Counsel for the Plaintiffs was aware that the additional amendments would most likely have been rejected by this court had they been subjected to court's examination.

Be that as it may, the amendment is on court record and it is the duty of this court to determine whether the Plaintiffs have a locus standi to bring this suit against the Defendants. The Plaintiffs claim against the Defendants has always been about the recovery of the suit land which they claim as beneficiaries. Since no injunctions to maintain the status quo were ever applied for the Plaintiffs, this court called the Registrar of Titles as a witness to establish the status of the suit land.

The Registrar of Titles, Mr. Nyonzima Vincent, appeared as a court witness with the registry file pertaining to the suit land comprised LRV 525 Folio 25 Plot 7 at Bushekweire Road, Kabale. He testified that the first registered proprietor on the suit title was Matyansi Kabasharira, who was registered on the 2nd November 1962 under instrument number 153438. The 49 years on the lease commenced on the 1st March 1962 and expired at the end of February 2011. The Plaintiffs' never applied for renewal of the lease and it is the contention of Counsel for the Defendants that their interest in the suit property, as beneficiaries of the late Matyansi Kabasharira terminated at the end of February 2011. The Plaintiffs therefore had no locus standi to institute this suit against the Defendants on the 8th July 2011.

Leasehold tenure is a form of tenure provided for under section 3(5) of the Land Act Cap.227. It is created either by contract or operation of law. In particular section 3(5)(c) provides as follows;

‘(c) under which one person, namely the landlord or lessor, grants or is deemed to have granted another person, namely the tenant or leasee, exclusive possession of land usually but not necessarily for a period defined, directly or indirectly, by reference to a specific date of commencement and a specific date of ending.’

The specific date of ending in this case was the end of February 2011. I agree with Counsel for the Defendants that the Plaintiffs by this time had no locus standi to bring this suit in any capacity related to the former lessee the late Matyansi Kabasharira.

Locus standi precedes cause of action, one cannot have one and presume to argue that they are possessed of the other. The Plaintiffs had no right to stand before this court and demand an interrogation into the transactions on the suit property comprised LRV 525 Folio 25 Plot 7 at Bushekweire Road, Kabale. They lost that right at the end of February 2011. I must state that the lease remained in force between 20th January 2004, when the sale between the 1st Defendant and the late George Kabatereine took place, and February 2011, when the lease expired. The Plaintiffs, challenged George Kabatereine's letters of administration to the late Matyansi Kabasharira's estate and a citation for their revocation was issued by the court on the 2nd April 2004. Those proceedings have never been concluded by the Plaintiffs. There is no record of return of the letters of administration nor is there evidence to indicate that the letters of administration were revoked. It appears that for seven years, the Plaintiffs, well aware of the transactions on the suit land, chose not to take any effective action to protect the interests of the late Matyansi Kabasharira. As to why they later brought this suit, after the lease had expired, is a mystery. I find issue 1 in the affirmative. And for that reason, this suit is dismissed for want of locus standi by the Plaintiffs.

Before I take leave of this matter I find it important to make some observations on the overall prosecution of this suit by Counsel for the Plaintiffs. During the last ten years, since the filing of this suit, the Plaintiffs have had the benefit of legal representation by three law firms at different times. The information obtained by this court, through Mr. Nyonzima, the Registrar of Titles, on the status of the suit land, has always been available for access to any diligent advocate. If the advocates had done their duty and taken the necessary pre-suit action to carry out investigations, they would have easily discovered that the Plaintiffs had no basis for this suit.

I also observed that there was an unsuccessful attempt by the Plaintiffs to challenge a court order to give vacant possession to the 1st Defendant issued under HCCS 40 of 2010 on grounds that it was made irregularly. The court in dismissing the application for review of that court order, advised the Plaintiffs on the necessary steps to take to seek redress before the right court and against the proper respondent. This ruling was delivered on the 16th April 2013. Since then, the Plaintiffs have taken no step to follow court's advice. I have already expressed my dissatisfaction at the way Counsel for the Plaintiffs took advantage of this court's order allowing an amendment remove the deceased Plaintiffs', to make unanticipated amendments, to the Plaint without seeking leave of court.

All in all, I find that the Plaintiffs were let down by their advocates who fell short of giving them a professional legal service with the requisite diligence. It is possible that litigants sometimes insist on pursuing, 'a lost cause', but it is the role of the advocate to give the appropriate legal advice supported by the law. In Prof. Dr. G.W. Kanyeihamba's Case Book on Lawyers Ethics, Professional Fees and Charges, 2017, at page 280, he states under the 'Advocates' Duties to the Client' that;

'An advocate is obligated to provide competent representation to a client and to exercise diligence in the pursuit of his client's interest'

It is my opinion, that in light of the foregoing observations, it is just and equitable to spare the Plaintiffs the full burden of the costs in this case. I therefore exercise my discretion to award 40% of the costs to the Defendants.

I hereby order as follows;

1. Suit is dismissed for want of locus standi by the Plaintiffs.
2. The Defendants are awarded 40% of the costs of the suit.

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Olive Kazaarwe Mukwaya

JUDGE

31st March 2021

- 5 Delivered by email to Counsel to the Parties.