

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 3051 OF 2016

(Formerly Nakawa Circuit Civil Suit No. 233 of 2014)

NABAYINDA RUTH :::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

- 1. MUTYABA EDWARD**
- 2. THE REGISTRAR OF TITLES :::::::::::::::::::::::::::::::::::::: DEFENDANTS**

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

Introduction:

The plaintiff, Ms Nabayinda Ruth filed a land case against Mutyaba Edward and the Commissioner, Registrar of Titles for:

a). A court declaration that the plaintiff being the surviving spouse widow and Administrator of the estate of the late George William Semakula is entitled to possession of family property comprised in **Kyadondo Block 215 Plot 300** left by the late George William Semakula of Kulambiro, Kyanja Nakawa Division, Kampala.

b). A court order cancelling the 1st defendant's names to wit **MUTYABA EDWARD** from the certificate of title for property comprised in **Kyadondo Block 215 Plot 300** at Kulambiro, Kyanja Nakawa Division, Kampala.



c). A declaration that in place thereof the names of the plaintiff be registered on the suit property as an Administrator of the estate of the late GEORGE WILLIAM SEMAKULA.

d). A permanent injunction be issued restraining the 1st defendant, his agents, servants or anybody claiming after him from interfering with the suit property and from evicting the plaintiff and the family members from the suit property.

e). General damages.

f) Costs of the suit

g). any other relief as this court may deem fit.

Background to the case.

10 The plaintiff's case is that her husband George William Semakula died on 24th February, 2007 leaving the matrimonial home where the plaintiff was staying at Kulambiro **Block 215, Plot 300**, Kampala.

The plaintiff obtained from this court letters of administration and embarked on distributing the estate property. She was surprised however when she discovered after getting letters of
15 administration that the deceased's property was now registered in the names of the 1st defendant claiming that her matrimonial home was his property. She contended that the registration of the 1st defendant on the suit property was unlawful, illegal and fraudulent.

From the record, the suit was initially filed in Nakawa Central Circuit as **Civil Suit No. 233 of 2014**. This court presided over by J. Nahamya on 7th November, 2014 ordered the matter to
20 proceed *ex parte* upon which plaintiff presented evidence by way of witness statements. The case was however transferred to this court and filed as **Civil Suit No. 3051 of 2014**.

Copies of summons to file written statements of defence were received by each defendant on 9th July, 2014 and served by the plaintiff's process server on that day. Unlike the 2nd defendant however who acknowledged receipt of service, the 1st defendant declined to acknowledge service.
25 Despite the service, the defendants did not file any defence. The record also indicates that several other services had been effected between 2014 and 2019 but no response was received from the defendants.

Representation:

The plaintiff was represented by **M/s Bamwite & Kakuba Advocates**. The defendants were duly
30 served but did not file any defence.

Analysis of the evidence:

The plaintiff relied on the evidence of three witnesses. **Pw1** Grace Sebugwawo, the LC11 Chairperson of Kyanja Nakawa, **Pw2** Nabayinda Ruth, the Plaintiff and **Pw3** Nakitende Barbra one of the children of late George William Semakula testified in support of the plaintiff's case.

Issues for determination by court:

The following issues were identified:

1. ***Whether as the surviving widow and Administrator of the estate of the late George William Semakula the plaintiff is entitled to the property comprised in Kyadondo Block 215 Plot 300 at Kulambiro Kyanja Nakawa Division Kampala.***

2. ***Remedies.***

Issue No. 1: Whether as the surviving widow and Administrator of the estate of the late George William Semakula, the plaintiff is entitled to the property comprised in Kyadondo Block 215, Plot 300 at Kulambiro, Kyanja, Nakawa Division, Kampala.

Fraud was defined in "**F.K. Zaabwe Vs Orient Bank SCCA 4 of 2006** to mean among other things a false representation of a matter of fact whether by words or conduct by false or misleading allegations by that which deceives and intended to deceive so that it is acted on. It is an intentional perversion of truth for purposes of inducing another to part with some valuable thing belonging to him/her, or to surrender a legal right.

Thus anything calculated to deceive, whether by a single act of combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture amounts to fraud.

It is such a grotesque monster that courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all transactions. (**Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994]KARL 307**).

For an allegation of fraud to hold, the standard becomes heavier than on a mere balance of probabilities as generally applied in civil matters. (**Kampala Bottlers Ltd. Vs Damaniaco (U) Ltd (supra)**). The burden to prove fraud lies on that party who wishes to rely on it, not only to specifically plead but also strictly prove that fraud had been committed.

The particulars of fraud as pleaded in this present case were: *the registration by the 2nd defendant of the 1st defendant as proprietor when no transfer was executed for him; ignoring the plaintiff's interest in the property; and backdating registration of the 1st defendant.*

5 The plaintiff testifying as **Pw2** informed court that she is the widow of the late George William Semakula in whose names the matrimonial home at Kulambiro **Kyadondo Block 215 Plot 300** (*suit land*) was registered.

10 That her husband had passed away in 2007 and it was in 2013 that she discovered that the title to the suit land had been transferred into the names of the defendant, Mr. Mutyaba Edward her only biological son and who had refused to return the title into her names as the administrator of her husband's estate.

In *paragraph 10* of her witness statement filed in court on 1st April 2015, she alleged further that the 1st defendant had intentions of selling off her matrimonial home to render her and other beneficiaries homeless.

15 As proof of the above assertions, she presented two other witnesses, **Pw1 and Pw3**. She also relied on **PExh 1**, the letters of administration granted to her by this court on 16th March, 2009; **PExh 2**, a certificate of the title which was originally in the names of her late husband and now registered in the names of the 1st defendant.

20 The evidence of **Pw1**, Grace Sebugwawo the area LC 11 Chairperson, Kyanja Nakawa was that the plaintiff was known to her as she had lived in the area for 25 years. **Pw1** found the family on that land. Accordingly the facts surrounding the land were within her knowledge. She corroborated the plaintiff's evidence to the effect that her marriage to the deceased had been in 1980 and that between them they had four children.

25 It was also within her knowledge that it was the plaintiff's husband who had bought the land, and not the 1st defendant. **Pw3**, Nakitende Babra aged 32 years, a sister to the 1st defendant corroborated the plaintiff's evidence that this was matrimonial property. She claimed to have lived in the home since 1998 which had been put up by her parents.

That the defendant fraudulently acquired the title in his names and now threatens to evict the plaintiff. the witnesses were consistent in their evidence that following the death of Semakula, the plaintiff was left in possession and occupation of the suit land.

30 It was also the plaintiff's claim that when she checked in Land Office, no transfer form had been executed by her husband to the 1st defendant. In *paragraph 6 and 7* that her husband did not

give out the matrimonial home to the plaintiff or to any other person, a claim which **Pw3** confirmed and which the defendants did not challenge.

It was also established through the plaintiff's evidence that in 1993 when the transfer was made into the 1st defendant's names he was still a minor. That to court would imply that he could not have had the capacity to cause the transfer or commit any fraud as alluded to by the plaintiff.

However her contention that the entries on the title had been backdated were not denied and therefore found to be credible, having noted that from the documents availed to court from the 2nd defendant, no transfer instrument was availed as having been signed by the deceased. Besides there was no suggestion offered or indication by the 1st defendant that he had received the suit land from his father as a gift prior to his demise.

As such, the circumstances under which the 1st defendant acquired the land from his father were not known as there was no proof as to how the transaction which had resulted in the change of ownership of property from father to son had been executed.

The plaintiff's contention was that this was her matrimonial home, illegally disposed of since she never consented to the transfer. A matrimonial home is one which spouses choose to call home. It is considered as jointly owned property which together with the property either of the spouses contributes to is what is referred to as matrimonial property. (**Ref: Muwanga vs Kintu HC Divorce Appeal No. 135 of 1997- unreported: also cited in Katuramu vs Katuramu MA No. 0019 of 2014**).

Furthermore, **section 38 of the Land Act, Cap 227 (amended by the Land Amendment Act, 2004)** defines the scope of what constitutes family/matrimonial property as **land—**

(a) on which is situated the ordinary residence of a family;

(b) on which is situated the ordinary residence of the family and from which the family derives sustenance;

(c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or

(d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family;

"ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period;

"land from which a family derives sustenance" means—



(a) land which the family farms; or

(b) land which the family treats as the principal place which provides the livelihood of the family; or

(c) land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food.

(5) For the avoidance of doubt, this section shall not apply to spouses who are legally separated.

Section 39 of the Land Act (Supra) precludes the disposal of land that constitutes family or matrimonial property, without the consent of the spouse. The principles as stipulated in the above provisions were applicable as equitable principles in 1993 equally as they were in 1998, upon their codification in the **Land Act, Cap.227**.

The **Constitution of Uganda, 1995** provides for equality in marriage, encapsulated in **article 31 (1)**. As such, men and women are entitled to equal rights in marriage and at its dissolution. That includes the right of a spouse to participate in any decision affecting the spousal interests over the jointly owned property. The same Constitution also recognizes and protects an individual's right to acquire and own property by him/herself or jointly with others. **(article 26 thereof: protection from deprivation of property)**.

In this instance the plaintiff made the assertion that at the time the suit property was passed onto the 1st defendant, she had at all material times been in possession thereof, but was neither consulted nor involved in the 1993 transaction which saw the signing away of her equitable interest in the property. There was no indication that she and her late husband were separated at the time of his demise.

The case of **Draza Moses v Abdul Salam & Anor High Court Civil Suit No. 16 of 2013** discusses at length the concept of family land, as jointly owned property which according to that authority is a fusion between law and equity. It creates special tenure relations between the householder and the other spouse.

In respect of registered land, the proprietary rights to the parcel of land are vested in the householder (the registered spouse) with rights of occupancy guaranteed and protected by the law, for the unregistered spouse, for their joint occupancy, use and enjoyment.

It applies to land that is owned (or leased) by one spouse and occupied by the spouses as their family home; or occupied by the spouses as their family home while at the same time serving as their source of sustenance; or agreed to be used in either of the two prior modes; or according to the norms, culture, customs, traditions or religion of the family, is was treated as family land.

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The concept effectively creates two divisions in ownership of land to which it applies; the registered owner has legal ownership. His/her spouse has a beneficiary or equitable interest of occupancy and user in the same property, such that one piece of land forms the subject of two proprietary rights separately vested in both spouses, guaranteeing a mutual occupation and enjoyment of the land.

In effect it creates and elevates to the status of a legal right, what would otherwise have been an equitable interest of an unregistered spouse. The hitherto equitable interest is now enforceable as a right, and once the existence of the right is established it is not open to the court to consider the merits of the situation before giving a remedy.

10 It therefore follows that upon the death of one of the spouses, the surviving spouse has the first priority and right over the matrimonial home and it is only the surviving spouse (in this case also the administrator of the estate), who would have authority to deal with the estate, a portion of which was owned by her.

15 In the Supreme court decision earlier cited (***Lutalo Moses (Administrator of the estate of the late Lutalo Phoebe vs Ojede Abdalla Bin Cona (Administrator of the estate of the late Cona Bin of Gulu: SCCA 15 of 2019)***), the concept of adverse possession which I find also applicable to this case gives preconditions that must be satisfied before court can consider one to be an adverse possessor in Uganda.

20 These include factual possession of the land. There must be physical control of the land in issue. The person in occupation must be dealing with the land as owner might be expected to and possession must be a continuous period of at least 12 years, uninterrupted.

The concept of *animus possidendi*, an intention to possess the land to the exclusion of all others, including the legal owner must also exist. Such possession must be peaceful, exclusive, open and notorious so as to put the owner of the land on notice of the possessor's intention.

25 The title of adverse possessor rests on the infirmity/failure of the right of others to eject him. The owner is therefore under duty to protect his interest in the land; not just look on when his rights are either infringed or threatened by third parties such as squatters and trespassers occupying his or her land. Failure to do so would mean that the owner of the land has abandoned the property to the adverse possessor or has acquiesced to the hostile acts and claims of the person
30 in possession.

Even if therefore one were to argue that the 1st defendant had rightfully acquired the land, the above principles would apply to him, having failed to challenge the plaintiff's continued occupation of the land on which he is registered as owner.

During the *locus in quo* visit conducted on 1st March, 2022 this court confirmed that the plaintiff was the main occupant of the main house situated on the suit property. She and her family were carrying on subsistence farming and other developments were identified as ongoing. The property constitutes the matrimonial home, one she and some of her children have lived in peacefully for more than forty years.

As per the inventory dated **PEXh 3** dated 26th February, 2013, the plaintiff as the administrator of the estate had created five subdivisions for herself and her four children including the 1st defendant. **PEXh 3** witnessed by the area LC authorities, has a sketch showing how much each was entitled to under the distribution.

PEXh 4 was an inventory dated 6th June, 2013: *A Report on the final accounts and distribution of the estate*, filed in court on 4th July, 2013, her proof that she had executed her duty as administrator of the estate of her late husband. There is no evidence to show that the distribution was ever challenged.

During the *locus* visit, court also noted that in the area allocated to the 1st defendant as shown in the sketch, he had put up a structure though yet to be completed. The assumption is that he had even accepted what was given out to him under the 2013 distribution.

The 1st defendant never showed up in court to challenge his mother's occupation on that land; defend his purported rights over it; or offer any explanation regarding how he had secured the title into his names.

In light of the above, it is reasonable to assume that the acts complained of which resulted in the registration of the 1st defendant onto the title were for his sole and exclusive benefit, acts that were intended to deprive the widow of her equitable interest in the property that she and her children called home.

The transaction was therefore fraudulently effected since no spousal consent was secured from the plaintiff, an act which was also in violation of the provisions of **article 26 of the Constitution**.

Without any signed transfer form from the late George William Semakula as the original owner, such transfer could not have been possible. The 2nd defendant whose duty it was to ensure that all procedures were duly followed and all transfer instruments in place before any transfer could be effected, had both the knowledge and therefore participated in the fraud.



In response to the first issue therefore, the suit property comprised in **Kyadondo Block 215, Plot 300 at Kulambiro** constituted part of the estate of the late George William Semakula to be administered by the plaintiff as part of the matrimonial property.

Accordingly, the plaintiff's action against the defendants succeeds.

5 **Issue No. 2 Remedies:**

1. General Damages:

10 Its trite law that, that damages are direct and probable consequence of the act complained of, also noted in the case of **Kampala District Land Board and George Mitala Vs Venansio Bamweyana CA No. 2 of 2007**. Such may be loss of profit, physical inconvenience, mental distress, pain and suffering, (**See also Assit (U) Vs Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999 at page 5**).

It is also a settled position of the law that the award of general damages is in the discretion of court and is always as the law will presume to be the natural consequence of the defendant's act or omission.

15 The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. (**See: Fredrick Nsubuga Vs Attorney General S.C.C.A. No. 8 of 1999**).

Therefore, in the circumstances of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and event of the breach.

20 A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had he or she not suffered the wrong. He or she ought to lead evidence or give an indication what damages should be awarded on inquiry as the quantum. (**Ongom Vs. AG (1979) HCB 267, cited by court in Kamugira Vs National Housing & Construction Co. CS.No. 127 of 2009**)

25 The plaintiff's claim is for general damages of **Ugx. 40,000,000/-** for causing her psychological torture mental, anguish and inconvenience to her.

I consider this to be a fair amount, payable by both defendants.

2. Cancellation of the certificate of title:

30 **Section 177 of the Registration of Titles Act, Cap. 230** gives power to this court to direct the Commissioner, Land registration to cancel any registration on a certificate of title or any entry invalidly/irregularly made on the register, and substitute such certificate of title or entry.

In light of the findings above, the plaintiff's evidence as presented to court merits the orders sought.

Accordingly:

- 5 **1. The registration of Edward Mutyaba, the 1st defendant is to be cancelled from the certificate of title for the land comprised in Kyadondo Block 215, plot 300 at Kulambiro, Kyanja Parish.**
- 2. The names of Nabayinda Ruth (as the administrator of the estate of the late George William Ssemakula) are to be substituted, to enable her complete the distribution.**
- 10 **3. General damages of Ugx 40,000,000/= (Ugx forty million) shall be paid by the defendants, with interest at 15% per annum, from the date of delivering this judgment, till payment is made in full.**
- 4. Costs of the suit to be paid to the plaintiff.**

15 
Alexandra Nkonge Rugadya

Judge

2nd August, 2022

*Delivered on
2/8/2022*