

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
HCCS. NO. 987 OF 2018

MPAKA JULIUS MAZI MPAKA

PLAINTIFF

V

- 1. MOSES GAVA**
- 2. KEMIREMBE JOY**
- 3. KYOBWIRE FRIDA**
- 4. KANAMUGIRA RICHARD**
- 5. MUKUNZI GRACE**
- 6. MWESIGWA ABEL**
- 7. TANDEKA FRANK**

DEFENDANTS

BEFORE: HON. LADY JUSTICE P. BASAZA – WASSWA

J U D G M E N T

Representation:

Mr. Rwalinda Jambo Godfrey and Mr. Kigenyi Emmanuel for the Plaintiff.

Mr. Moogi Brian and Mr. Kayambi Dennis for the Defendants.

Introduction:

[1] The Plaintiff; Mr. Mpaka brought the present suit against the Defendants;

Mr. Gava and six (6) others, for alleged trespass on land comprised in **Buruli**

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Block 4 Plot 6 at Kikabukabu, in Nakasongola District, measuring 173.75 Hectares (0. 429. 336 acres). (Hereinafter referred to as '**the suit land**').

- [2] The Plaintiff and all the Defendants are members of the same family. The 1st Defendant; Mr. Gava is a Paternal uncle to the Plaintiff, while the 4th – 7th Defendants are said to be Mr. Gava's biological children. The 2nd Defendant; Ms. Kemirembe Joy is Mr. Gava's wife, and the 3rd Defendant; Ms. Kyobwire Frida is the 2nd Defendant's mother, a mother in – law to Mr. Gava.

Background:

- [3] It is not disputed that;
- i) The suit land originally belonged to the late Semu Byekwaso Lubwama who passed away in 1966. See the certificate of title marked **EXH. DE. 1.**
 - ii) The late Semu Byekwaso Lubwama was the father of Mr. Kaweesa Yona Kyakulubaala (DW4), and (DW4) is the father of Mr. Alupa Ntege Kimeze (PW2).
 - iii) Mr. Mpaka is the current registered proprietor of the suit land, with effect from April 28, 2006. See the certificate of title (**EXH. PE. 1**).
 - iv) The suit land is currently being used as grazing land for cattle by both the Plaintiff and the Defendants. The Defendants reside thereon,

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while the Plaintiff does not reside there, although he has structures thereon. The Plaintiff resides at Ngoma Trading Centre in Nakaseke District.

[4] It was brought to the attention of this court, at the closure of the Plaintiff's case, that there are two other cases in the High court that are in respect of the same suit land; one of which was filed in this Division, while the other was filed in the Family Division. To wit;

- i) **HCCS No. 0794 -2020: Kaweesa Yona Kyakulubaala and Moses Gava v Alupa Ntege Kimeezi, Mpaka Julius and Anor.**
- ii) **HCCS No. 0222 -2019: Alupa Ntege Kimeezi v Kaweesa Yona Kyakulubaala.**

[5] On the basis that each of the above suits was filed later in time than the present suit, and that both the said suits are at the stage of pleadings, with no proceedings taken, I applied the provisions of **sec. 6 of the Civil Procedure Act**¹ to the effect that the trial in a later suit must be stayed until the disposal of the earlier suit. The present suit filed earlier thus proceeded.

The Plaintiff's case:

[6] Mr. Mpaka contends that he is the lawful registered owner of the suit land. He complains that in or about the year 2010, without his consent nor permission, Mr. Gava and his family; the 2nd – 7th Defendants, unlawfully

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¹ Cap. 71

entered onto the suit land, and constructed make shift shelters and graze
(d) their animals thereon.

[7] He (Mr. Mpaka) further complains that the Defendants have refused to vacate the suit land, and that their actions have caused him a lot of suffering, mental anguish, and non - use of the suit land, thus denying him his proprietary rights.

[8] In his plaint, he seeks for Judgment against the Defendants for;

- i) An Eviction order from the suit land,
- ii) A permanent injunction restraining them,
- iii) Mesne profits,
- iv) General damages,
- v) Interest and Costs of the suit.

The Defendant's case:

[9] In their written statement of defence, Mr. Gava and the other 2nd - 7th Defendants contend that;

- i) Mr. Gava bought the suit land at a sum of **UGX. 45,000/=** from a one Frederick Ssaabwe on January 18, 1979 when the suit land was then referred to as; FC No. 4877. That a sum of **UGX. 15,000/=** was deposited, but due to the political situation, the transaction was not completed on April 17, 1979 as had been agreed.

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That the transaction was later completed by payment of the remaining balance of **UGX. 30,000,000/=** (*sic*).

- ii) That upon buying the suit land in 1979, Mr. Gava took possession thereof, and allowed the 2nd – 7th Defendants, as his children, to also take possession. That Mr. Gava has been in possession of the suit land since 1979, before the birth of the Plaintiff.

Issues for determination:

[10] The following issues were agreed upon;

1. **Whether the Defendants are trespassers on the suit land?**
2. **What remedies, if any, are available to the parties?**

Determination of issues:

Issue No. 1: Whether the Defendants are trespassers on the suit land?

[11] On the one hand, the Plaintiff had two (2) witnesses. The Plaintiff, Mr. Mpaka testified as PW1, and called a one Alupa Ntege Kimeze as PW2.

On the other hand, the Defendants had four (4) witnesses, to wit; Mr. Gava (DW1), Mr. Rwetagira Nicholas (DW2), Mr. Mugyimbaho Fred (DW3) and Mr. Kaweesa Yona Kyakulubala (DW4).

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Their full testimonies are on the court record. It was not necessary to reproduce them here. Only the relevant portions of their testimonies have been referred to in this Judgment.

Submissions of Counsel:

[12] Learned Counsel for each party filed written submissions. For brevity, these have also not been reproduced here. Only reference to the relevant portions of their arguments have been captured.

Analysis by this Court:

[13] I will begin by defining the concept of trespass.

The concept of 'Trespass' is defined in Black's Law Dictionary² as;

'An unlawful act committed against the person or property of another; esp. wrongful entry on another's real property'

[14] The concept of trespass was also well enunciated by Mulenga, J.S.C., (as he then was) (R.I.P), in the celebrated case of Justine E.M.N Lutaya v Stirling Civil Engineering Company Ltd³, that;

'Trespass to land occurs when a person makes an unauthorized entry upon land and thereby interferes or portends to interfere with another person's lawful possession of that land. The tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land'.

(Underlining added for emphasis).

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² 9th ed. at page 1642

³ SCCA No. 11 of 2002 UGSC 39

[15] Possession and Constructive Possession are also defined respectively, in

Black's Law Dictionary⁴ as:

'The fact of having or holding property in one's power; the exercise of dominion over property'...'Something that a person owns or controls; property'

'Control or dominion over property without actual possession or custody of it'

[16] Trespass can also be continuing trespass. In **Winfield and Jolowicz on**

TORT⁵, the learned authors state that;

'Trespass, whether by way of personal entry or by placing things on the claimant's land, may be "continuing" and give rise to actions from day to day so long as it lasts. In *Holmes v Wilson*⁶, highway authorities supported a road by wrongfully building buttresses on the claimant's land, and they paid full compensation in an action for trespass. They were nevertheless held liable in a further action for trespass, because they had not removed the buttresses. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass⁷.

[17] Guided by the above definitions and the contentions of each warring side, the question to be determined is; **'whether the entry by, and presence of Mr. Gava and the other Defendants on the suit land was / is lawful and or authorized'**?

[18] **PW1; Mr. Mpaka (47)** told court that he is the lawful owner of the suit land, and that he claims ownership thereof, as a purchaser. That in 1976, his late father; the late Kikoona Wilton together with his father's brothers, owned

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⁴ " " at pages 1281 & 1282

⁵ 19th ed., Sweet & Maxwell London, 2014, para. 14-015 at pg. 433

⁶ (1839) 10A. & E. 50

⁷ *Hudson v Nicholson* (1839) 5 M. & W. 437 followed in *Konskier v Goodman Ltd* [1928] 1 KB 421

land comprised in Buruli Block 4 Plot 247 at Kikabukabu, in Nakasongola District, that surrounds the suit land. That the suit land [Plot 6] is located in the middle of Plot 247.

[19] That since the suit land was unoccupied in 1976, his late father utilized it as a squatter and that they lived thereon, and grazed animals, as they established a farm there. That when his father died in 1985, he (Mpaka) continued to live on the suit land with his mother; Merab Kabeshekyere, where they grew crops and grazed animals.

[20] That he (Mr. Mpaka) purchased the suit land on November 19, 2005 vide a sales agreement (**EXH. PE. 2**) and was registered on the title to the suit land in 2006 (**EXH. PE.1**).

That he bought the suit land from the same people who also owned the surrounding land; Plot 247. That after purchasing the suit land, he constructed buildings thereon, although he grazed his cows there before 2006.

[21] That currently on the suit land, he has about 600 heads of cattle, a paddock, a dam, a fence (barbed wire) round the suit land, a gate at the farm, a house (points to the house next to CM 9 on the survey report [**EXH. CX. 1'**], and water pumps that he uses to pump water; from about 2.5km, to the suit land from the lake.

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[22] That in or about 2010, after he (PW1) bought the suit land, Mr. Gava and the other Defendants, who previously lived at Ngoma, unlawfully entered onto the suit land without his (PW1's) consent nor permission. That they brought their animals and constructed makeshift shelters, where they are staying, and have been using the local council Authorities, specifically the LC 1 Chair of the area; a one Mr. Mugyimbaho Fred (DW3), to frustrate his efforts to remove them from the suit land. That the Defendants started chasing and assaulting his (PW1's) workers, destroying his kraals and threatening to take his life.

[23] **PW2; Mr. Alupa Ntege Kimeze (47)** testified that his grand and great grandparents were the original owners of the suit land. That his father is Yona Kaweesa Kyakulubala (DW4), his grandfather was Semu Byekwaso Lubwama and his great grandfather was Yona Wasswa.

That the late Yona Wasswa, was succeeded by the late Semu Byekwaso Lubwama, who in turn was succeeded by his (Lubwama's) son; a one Gaseri Kibuuka. That PW2 succeeded Kibuuka who did not bear any children, and who, in his Will, bequeathed all his property, including the suit land, to PW2.

That he (PW2) holds letters of administration to the estates of the late Semu Byekwaso Lubwama and the late Yona Wasswa. [See EXHs. PE. 3 & PE. 4].

Handwritten signature: Alupa Ntege Kimeze 3/8

[24] **PW2** further told court that together with a one Stanley Musoke and Senoga Alex, he (PW2) sold the suit land measuring 429 acres, to Mr. Mpaka (PW1), who had been occupying the suit land with his family, as squatters.

That they sold the suit land to PW1 at **UGX. 17.6M/=**, and that after receiving full payment from PW1, he (PW2) transferred the suit land into PW1's (Mr. Mpaka's) names.

[25] **For the Defence, DW1; Mr. Gava (74)** testified that he is resident on the suit land, and that he entered the suit land in 1976, and has permanent houses thereon, two (2) Valley Dams, and other developments. That in 1976 the suit land was vacant and he occupied it peacefully until 2006 when Mr. Mpaka unlawfully entered thereon with his cattle, without his (Mr. Gava's) permission. That he (Gava) chased Mr. Mpaka away.

[26] That in 1979, the registered proprietors of 210 acres and 219 acres of the suit land were Semu Lubwama Byekwaso and Yona Wasswa Mukwenda, respectively.

That by an agreement dated 18/1/79 (**EXH. DE. 2**), he (Mr. Gava) bought all the 429 acres of the suit land at a cost of UGX. 45,000/=, from a one Frederick Ssaabwe. That EXH. DE. 2 was witnessed by a one Kaweesa Yona Kyakulubaala. That Frederick Ssaabwe is a son of, and the administrator of the estate of the late Yona Wasswa Mukwenda, while Kaweesa Yona

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Kyakulubaala is a son of, and administrator of the estate of the late Semu Lubwama Byekwaso. Frederick Ssaabwe sold the suit land to Gava, having inherited the same from Yona Wasswa Mukwenda.

[27] That at the execution of the sale agreement; (EXH DE.2), he (Mr. Gava) paid **UGX. 15,000/=** to Frederick Ssaabwe, and later in 2017, he paid the balance to Kaweesa Yona Kyakulubaala, as Frederick Ssaabwe had since passed on.

[28] DW1 further stated that Mr. Kaweesa Yona Kyakulubaala, in the capacity as the administrator of the estate of the late Semu Lubwama Byekwaso (EXH. PE 14), and as the administrator of the estate of the late Yona Wasswa Mukwenda; executed with him (DW1) the sale agreement dated 16/11/2017 (EXH. DE. 3), for the suit land. That the sale agreement (EXH. DE. 3) was executed to complete the earlier purchase of the suit land, vide the sale agreement (EXH. DE. 2), that he (Gava) made with the late Frederick Ssaabwe in 1979. That Kaweesa Yona Kyakulubaala had not yet got letters of Administration to the estate of the late Frederick Ssaabwe.

[29] DW1 further stated that Mr. Alupa Ntege Kimeze (PW2), who is a son of Kaweesa Yona Kyakulubaala (DW4), fraudulently sold the suit land to Mr. Mpaka without the authority of his father; Mr. Kaweesa Yona Kyakulubaala, and with the knowledge that the suit land belonged to him (Mr. Gava).

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[30] He (DW1) asserted that Mr. Mpaka has no color of right over the suit property, and does not carry out any activity on the suit land. That he (Mr. Mpaka) has no home on the suit land, save for cows and workers in temporary make-shift structures.

[31] **DW3; Mr. Mugyimbaho Fred (51)**, stated that since 2001 he has been the Area Chairman of Kigarambi Village, Nakasongola District, the place where the suit property is situated. He told court that;

He has always known the suit land to belong to his (DW3's) Uncle; Mr Gava. That Mr. Gava has been in possession of the suit land at all material times, and has constructed permanent houses, water dams and an animal farm. That Mr. Mpaka has land neighboring the suit land. That in 2006, it is Mr. Mpaka who started claiming to be the owner of the suit land and claiming to have purchased it from Mr. Alupa Ntege Kimeze (PW2). That the suit land belonged to Yona Kaweesa Kyakulabaala, the only surviving son of Byekwaso Semu Lubwama.

[32] That in 2006 Mr. Mpaka brought his cows to the suit land, whereupon Mr. Gava petitioned the area leadership, who summoned Mr. Mpaka, but he declined to come. Mr. Gava was then advised to report the matter to the Police, which he did.

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[33] **DW4; Kaweesa Yona Kyakulubaala (75)** stated that Frederick Ssaabwe, his uncle, sold about 400 acres of land to Mr. Gava in 1979 vide an agreement dated 18/01/79 (EXH. DE. 2), and that Mr. Gava paid for the land. That in 2017, he sold to Mr. Gava the same 400 acres vide the agreement marked EXH. DE. 3. That they terminated the agreement marked EXH. DE. 2 and made the new agreement (EXH. DE. 3) in 2017.

DW4 also stated that Mr. Senoga, a son to DW4's brother, who got a share of about 150 acres in the Buruli land through his late father, sold his share to Mr. Mpaka. That DW4 was a witness to the agreement of sale of land between Mr. Senoga and Mr. Mpaka, but the 150 acres sold were not on the disputed land.

[34] From the evidence as a whole, it has emerged that both sides each base their claims to the ownership of the suit land on sale agreements with **'different members'** of **'the same family'**. Both sides also each cite **'separate grants'** of letters of Administration to **'the same estate'**; to wit; **'the estate of the late Byekwaso Semu Lubwama'**.

[35] In Mr. Mpaka's evidence, he claims that he purchased the suit land vide a sale agreement with Mr. Alupa Ntege Kimeze (PW2), dated 19/11/2005 (EXH. PE. 2) pursuant to letters of administration granted to the latter vide Admin. Cause No. 0057 of 2000 dated 26/05/2000 (EXH. PE.3). On the other hand,

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in Mr. Gava's evidence, he claims to have also purchased the suit land vide two (2) sale agreements dated 18/01/1979 (EXH. DE. 2) and 16/11/2017 (EXH. DE.3) with the late Frederick Ssaabwe, and with Mr. Yona Kaweesa Kyakulabaala (DW4), respectively.

That the sale agreement with Mr. Yona Kaweesa Kyakulabaala was executed pursuant to letters of administration vide Admin Cause No. 456 / 2011 dated 3/08/2011 (EXH PE. 14) granted by Mwendha, J., (as she then was).

[36] As it is, it is not legally plausible for two different grants of letters of administration, to be issued to two (2) different people, by two different Courts, in respect of the same estate. Mr. Alupa Ntege Kimeze (PW2) and Mr. Yona Kaweesa Kyakulabaala (DW4) cannot both legally hold letters of administration to the same estate; the estate of the late Byekwaso Semu Lubwama, yet issued by different courts, at different times.

[37] It is also not legally plausible for the suit land to have been validly sold three (3) times, by different people, vide three (3) different, unconnected sale agreements.

[38] Learned Counsel Mr. Rwalinda and Mr. Kigenyi argued for Mr. Mpaka that before selling the suit land vide the sale agreement of November 16, 2017 (EXH. DE 3), Mr. Kaweesa Yona Kyakulabaala never had letters of

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Administration to the estate of the late Yona Wasswa Mukwenda nor to the estate of the late Semu Lubwama Byekwaso.

They cited *inter alia*; **sec. 191 of the Succession Act**⁸, and the case; **Joseph M. Nviri v Palma Joan Olwoc & 2 Ors**⁹ and argued that the law prohibits a person who does not hold letters of administration from dealing with an estate of the deceased person, that any such acts are illegal, null and void.

They submitted that neither the late Frederick Ssaabwe, nor Mr. Kaweesa Yona Kyakulubaala possessed letters of Administration in respect of the suit land, and prayed that Court finds these as illegalities.

[39] In reply, Mr. Moogi and Mr. Kayambi argued for Mr. Gava and the other Defendants, that the said letters of Administration obtained by Mr. Kaweesa Yona Kyakulubaala vide Admin Cause No. 456 / 2011 dated 3/08/2011 (EXH. PE. 14), were granted by a court of competent jurisdiction, and were legally obtained. That those letters of administration (EXH. PE. 14) are valid, unlike the letters of administration granted to Mr. Alupa Ntege Kimeze (PW2) vide Admin. Cause No. 0057 of 2000 dated 26/05/2000 (EXH. PE.3), that were fraudulently obtained.

[40] They argued further that the **173.75 hectares (429 acres)** of the suit land could not have been considered as a small estate, as the same falls under

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⁸ Cap 162


⁹ HCCS No. 926 of 1998 [Land Div.]

big estates. That as such, the said letters of administration were issued by a Magistrates' court that lacked Jurisdiction. They cited **Sec. 2 (1) of the Administration of Estates (Small Estates) (Special Provisions) Act¹⁰**, and **sec. 191 of the Succession Act.**

[41] Mr. Moogi and Mr. Kayambi further argued that Mr. Alupa Ntege Kimeze (PW2) is a son of Mr. Kaweesa Yona Kyakulubaala (DW4) and not a son of the late Semu Lubwama Byekwaso as stated in the letters of administration granted to him vide EXH. PE.3). That the same are a manifest of the fraudulent and illegal nature in which the letters of administration were obtained by Mr. Alupa Ntege Kimeze, and cannot pass the legal test.

[42] Learned counsel concluded that the sale agreement between Mr. Mpaka and Mr. Alupa Ntege Kimeze dated 19/11/2005 (EXH. PE. 2) pursuant to the said letters of administration vide Admin. Cause No. 0057 of 2000 dated 26/05/2000 (EXH. PE.3), and the attendant transfer of the title to the suit land into Mr. Mpaka's name, were invalid and void *abinitio*.

[43] After very careful assessment of the evidence adduced by each side to this dispute, and after very careful examination of the documents that they each produced at the trial, and also after due consideration of the submissions of their respective Counsel, I make the following findings;



¹⁰ Cap 156

[44] **First, I find that the letters of Administration granted to Mr. Kaweesa Yona Kyakulabaala (DW4) by Mwondha, J., (as she then was), vide Admin Cause No. 456 / 2011 dated 3/08/2011 (EXH PE. 14) were granted in respect of an estate to which letters of Administration were already granted, and are in existence.** To wit; the letters of administration granted to Mr. Alupa Ntege Kimeze by HW Deo Nizeyimana, vide Admin Cause No. 0057 of 2000 dated 26/05/2000 (EXH. PE.3), were already in existence, and as such, the subsequent letters of administration granted to **Mr. Kaweesa Yona Kyakulabaala (DW4)** are null and void.

[45] I disagree with the argument by learned Counsel Mr. Moogi and Mr. Kayambi that the letters of administration granted to Mr. Alupa Ntege Kimeze (PW2) vide Admin. Cause No. 0057 of 2000 dated 26/05/2000 (EXH. PE.3), were illegal on account that they were issued by a court that lacked Jurisdiction.

[46] **Sec. 2 (5) of the Administration of Estates (Small Estates) (Special Provisions) Act** specifically provides that;

'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 declared in an application for the grant unless the court is satisfied that the interests of the beneficiaries are thereby prejudiced'.

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[47] On the basis of the above legal provision, I find the said argument by counsel to be without merit. In order to sustain their said argument, learned Counsel would have had to satisfy court;

- (i) that the total value of the estate declared in the application made by Mr. Alupa Ntege Kimeze for the grant of letters of administration in the year 2000, was at that time, above the threshold of the pecuniary jurisdiction of a Chief Magistrate.
- (ii) that the interests of the beneficiaries, existing at the time, if at all, were prejudiced by the declaration made by Mr. Alupa Ntege Kimeze in his application for that grant.

[48] All the above was not shown. That notwithstanding, the propriety of how Mr. Alupa Ntege Kimeze obtained the said letters of administration was not among the issues before this court, and neither was Mr. Alupa Ntege Kimeze (PW2) made a party to this suit. As it is, the grant of letters of administration (EXH. PE 3) to Mr. Alupa Ntege Kimeze have never been revoked and are in existence.

[49] In addition, although I agree with the submission by learned Counsel Mr. Moogi and Mr. Kayambi that Mr. Alupa Ntege Kimeze (PW2) was a son of Mr. Kaweesa Yona Kyakulubaala (DW4) and not a son of the late Semu Lubwama Byekwaso, but a grandson, I find no merit in their argument that;

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'as a result of that flaw, the sale agreement dated 19/11/2005 (EXH. PE. 2) between Mr. Alupa Ntege Kimeze and Mr. Mpaka, and the transfer of the title to the suit land into Mr. Mpaka's name, were invalid and void *abinitio*'.

[50] In my view, the said error or flaw in the said letters of administration, is an error / flaw that does not, in law, affect the validity of the sale agreement (EXH. PE.2) and the Registration of the name of Mr. Mpaka on the certificate of title to the suit land.

[51] **It is trite law that except for fraud brought home to the transferee, or done with his knowledge, for which he / she takes advantage, the certificate of title of a registered proprietor who purchases property in good faith, bona fide, cannot be impeached on account of the fraud of the previous registered proprietor. A *bona fide* purchaser obtains good title.**

(See sections 136, 176 and 181 of the RTA and sec. 5 of the Administration of Estates (Small Estates) (Special provisions) Act).

Also See the celebrated case; David Seijaaka Nalima v. Rebecca Musoke¹¹ and the case; Robert Lusweswe v G.W Kasule & Anor¹² and Ipolito Semwanga v Kwizera Buchana Paul & Ors¹³.

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¹¹ SCCA No. 12 of 1995 – reported in [1992] KALR 132 at page 149

¹² C/S No. 1010 of 1983 [1987] HCB page 65

¹³ HCCS No. 61 of 2005

[52] I find that neither fraud nor illegality were ever pleaded, nor proved against Mr. Mpaka in respect of the said sale vide the agreement dated 19/11/2005 (EXH. PE. 2), nor in respect of his registration as proprietor of the suit land. He is validly registered as the owner of the suit land.

[53] In arriving at the above conclusion, I also took it into account that Mr. Kaweesa Yona Kyakulubaala (DW4) admitted during cross –examination that he consented to, and witnessed the said sale vide EXH. PE. 2, when Mr. Alex Senoga, who was a party to that sale, sold his portion to Mr. Mpaka. I make Reference to clause 4 (b) of EXH. PE. 2 and to the testimonies of PW1, PW2 & DW4.

[54] In the David Sejjaaka case (supra), the Respondent; Ms. Rebecca Musoke brought an action against Mr. Sejjaaka for a declaration that his registration as proprietor of the suit land comprised in **LRV 625, Folio 2 Plot 156-158 Mutesa II Road, Nakawa**, was null and void. She contended that Sejjaaka's registration was void on account of having been obtained from persons who did not have lawful authority to effect the transfer. A one Mr. Dick Sengomwami Semanda, who was neither named in the will, nor known to Ms. Rebecca Musoke, applied as a son of the deceased; late Prof. Musoke, and upon obtaining letters of administration to the said estate, was registered as proprietor of the suit property, which he transferred to a one

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Lameck L. Sendaula, and Sendaula in turn transferred the suit property to Mr. Sejjaaka.

[55] The issue at the trial in that David Sejjaaka case (supra) was; whether the letters of administration granted to Mr. Sengomwami Semanda were capable in law to confer title to the suit property to Mr. Sejjaaka, notwithstanding the infirmity of his author's title?

[56] The learned trial Judge held that the grant was incompetent and of no legal effect. That Mr. Sejjaaka who derived his title from Mr. Lameck L. Sendaula who had himself obtained registration through fraud, could not be protected.

[57] On appeal, Odoki, J.A., (as he then was), did not agree with the learned trial Judge, although he dismissed the appeal after finding against Mr. Sejjaaka to the effect that there was sufficient circumstantial evidence to saddle him (Sejjaaka) with fraud. Odoki, J.A., observed that;

'The effect of sec. 189 (now 181) of the RTA is that once a registered proprietor has purchased the property in good faith, his title cannot be impeached on account of the fraud of the previous registered proprietor. A bona fide purchaser therefore obtains a good title even if he purchases from a proprietor who previously obtained title by fraud'

'...fraud by persons from whom the registered proprietor claims does not affect him, unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out the fraud had he been more vigilant and made further inquiries, which he omitted to make, does not itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him'

[61] **Second, I also find that the agreement dated 16/11/2017 (EXH. DE. 3) between Mr. Kaweesa Yona Kyakulubaala (DW4) and Mr. Gava (DW1) is invalid.**

At the time of the alleged sale in November 2017, the suit property was registered in the names of Mr. Mpaka, with effect from 28/04/2006. Mr. Kaweesa Yona Kyakulubaala (DW4) who was neither the registered proprietor, nor had possession of the suit land, therefore had no authority to sell what he did not own. He purportedly sold the suit property to Mr. Gava by virtue of letters of administration to the estate of the late Semu Byekwaso Lubwama vide Admin Cause No. 456 / 2011 dated 3/08/2011 (EXH PE. 14), yet by that date in 2011, the suit property did not form part of the said estate.

[62] **Third, I further find that the alleged sale agreement between Mr. Gava and the late Frederick Ssaabwe dated 18/01/1979 (EXH. DE.2), is highly suspect.**

[63] I carefully looked at the three certificates of title to the suit land (EXHs. DE. 1 (a) & (b) and EXH. PE. 1), together with the contents of the sale agreement dated 19/11/2005 (EXH. PE. 2). These, with the testimonies of Mr. Alupa Ntege Kimeze (PW2) and of his father Mr. Kaweesa Yona Kyakulubaala

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(DW4), show that the first two titles EXHs. DE 1 (a) & (b)¹⁴; were in the names of Semu Byekwaso Lubwama, with effect from 20/09/1935, measuring 85.05 Hectares (210.158 acres), and in the names of Yona Wasswa, with effect from 09/1935, measuring 88.70 Hectares (219.177 acres). The total acreage of both titles being 173.75 Hectares (429.3 acres)

[64] The sale agreement dated 19/11/2005 (EXH. PE.2) shows that three (3) people sold the suit land to Mr. Mpaka; to wit; a one Stanley Musoke sold 150 acres, one Alex Senoga sold 150 acres, and Alupa Ntege Kimeze (PW2) sold 129 acres, all totaling to the said 429 acres¹⁵.

Alupa Ntege Kimeze (PW2) told court that together with Stanley Musoke and Alex Senoga, they sold the suit land to Mr. Mpaka, who had already taken possession of the suit land. Also refer to clause 3 (f) of EXH. PE. 2).

PW2 further told court that the agreement was consented to and witnessed by his father Mr. Kaweesa Yona Kyakulubaala (DW4), a fact that DW4 did not refute, but only feigned ignorance, and claimed that the sale of 150 acres that he witnessed between Senoga and Mr. Mpaka was in respect of another piece of land and not the suit land.

[65] The above admission by Mr. Kaweesa Yona Kyakulubaala (DW4) that he witnessed the said sale, *inter alia*, contradicts the defence evidence that the

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¹⁴ At pages 35 & 36 of the Joint Trial Bundle

¹⁵ Refer to clause 4 (a – c) of the sale agreement (EXH. PE. 2)

suit land was earlier sold to Mr. Gava vide the sale agreement dated **18/01/1979 (EXH. DE.2).**

[66] **Fourth**, and in addition to my **third** finding, I find that **there was no evidence adduced before this court, nor any observation made by court at the locus in quo, that supported the proposition by Mr. Gava and his family members (the 2nd – 7th Defendants) that they had settled on the suit land from as far back as 1976 / 1979 as they allege.**

[67] At the locus, Court observed that the houses in the homestead of Mr. Gava (DW1) and his family members (2nd – 7th Defendants), were not permanent houses as he had alleged. Mr. Gava's houses were temporary, made of 'not old' mud and wattle, and were roofed with relatively new iron sheets (mabati). His cattle kraal and goat shed were freshly built, only days or weeks old. The likely age of the houses in that 'newish' homestead, with the said roofing, cannot be more than 10 - 15 years old. That fact, is coupled with the fact that the said Gava homestead only occupied one (1) acre out of the entire suit land that measures 429 acres. That is in sharp contrast with Mr. Mpaka who occupies and utilizes the rest of the suit land for crazing his large herd of cattle (over 400 - 600 heads of cattle), save for 38 acres that are occupied by a one Kasalina.

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[68] The 'newish' Gava homestead is a fact that manifests that Mr. Gava has not been on the suit land for 43-45 years, since 1976 -79 as he alleges. Rather it corroborates Mr. Mpaka's assertion that the Defendants entered upon the suit land about the year 2010. See the joint survey report (EXH. CX1) that shows that the Gava homestead only covered one (1) acre out of the 429 acres. Also refer to the court observations made in the locus notes.

[69] **Fifth**, I found the testimonies of the Plaintiff's witnesses to be coherent, firm and credible, unlike the testimonies of the defendants' witnesses, that were incoherent and riddled with contradiction.

Decision of this Court:

[70] **For the reasons given, (1 - 5 above), I hold as follows;**

1. **That Mr. Mpaka is the lawful registered proprietor of the suit land.**
2. **That by the time of the sale of the suit land to Mr. Mpaka on 19/11/2005, Mr. Mpaka had taken possession of the suit land.**
3. **That the 1st Defendant; Mr. Gava and his family members (2nd – 7th Defendants) came onto the suit land after Mr. Mpaka had taken both physical and constructive possession of the suit land. All the Defendants thus entered on the suit land without Mr. Mpaka's consent or permission.**

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4. **The 1st Defendant; Mr. Gava and his family members (2nd – 7th Defendants) are illegally on the suit land and are mere trespassers thereon.**

[71] **Issue No. 1** is accordingly answered in the affirmative. All the Defendants (1 - 7) are trespassers on the suit land.

Issue No. 2: What remedies, if any, are available to the parties?

[72] Having found and held as I have under issue No. 1, it follows that Mr. Mpaka is entitled to Judgment and relief. Judgment is accordingly entered for Mr. Mpaka against all the Defendants, in the following terms;

1. A Declaration is hereby made that all the Defendants; Mr. Moses Gava and his family members (2nd – 7th Defendants) are trespassers on the suit land comprised in **Buruli Block 4 plot 6 at Kikabukabu, in Nakasongola District.**
2. All the defendants are ordered to vacate the suit land within six (6) months from the date of this Judgment, in any case, not later than 1st March 2023.
3. All the defendants are ordered to remove their illegal structures from the suit land within six (6) months from the date of this Judgment, in any case, not later than 1st March 2023.

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4. In the event of default by the Defendants to remove their illegal structures from the suit land within the time hereby given under clause 3 above, demolition and removal of the said illegal structures shall automatically ensue at their (the Defendants) cost.
5. No damages are awarded, this being a matter involving members of the same family. I have considered that such an awarded shall only negate the possibility of family reconciliation and efforts to restore harmony.
6. The costs of this suit are awarded to the Plaintiff, Mr. Mpaka, against all the Defendants.

I so Order,

P. Basaza Wasswa 31/8

**P. BASAZA - WASSWA
JUDGE**

August 31, 2022

Judgment is delivered via email to the parties, and uploaded on the Judiciary ECCMIS system.