THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 156 OF 2014

1. **HUSSEIN KISIKI NYAMAYAALWO**
2. **MINSA NABAGABO**
3. **NDUGA ABDUL.....PLAINTIFFS**

VERSUS

EDWARD KASINZI *Alias* GATSINZI.....DEFENDANT

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

Introduction:

The plaintiffs brought this suit against the defendant praying for a declaration that land comprised in ***Buruli Block 219 plots 13 & 16, LRV 1840 Kidudula Estate land at Kamunina*** belongs to the estate of the late Mitina Nakanwagi; a declaration that the acts of the defendant to deprive the estate of the late Mitina Nakanwagi of their share in the suit property was fraudulent; a further declaration that the sale agreement between the defendant and the plaintiffs dated 30th June, 2008, is fraudulent, illegal, and void *ab initio*.

They sought a protective order for the suit property and a permanent injunction to restrain the defendant, his servants, agents, employees or those claiming under him from disposing of the suit property, renting, transferring, or otherwise dealing with the suit land in a manner detrimental to the interests of the beneficiaries of the late Mitina Nakanwagi's estate.

The plaintiffs also sought an order for cancellation of the special certificate of title made by the defendant, an order of recovery of the land by the estate of the late Mitina Nakanwagi;, general, aggravated and punitive damages as well as costs of the suit.

Brief Background.

The plaintiffs' case is that they are not only the biological children but also beneficiaries of the late Mitina Nakanwagi who bought the suit land comprised in ***Buruli Block 219 plots 13 & 16 measuring approximately 3 (three) square miles*** from A. Sajjabi, I Kasajja, M. Ssebusolo, K Nabunya and a Budallawafu Walusimbi, who were the proprietors thereof.

That the defendant's father who later came onto the land utilized half a square mile of the suit property for grazing cattle until sometime in 2002 when the children of the registered proprietors of the suit land sued both the defendant and the late Mitina Nakanwagi vide ***Civil Suit No.98 of 2002.***

The plaintiffs claimed that because the late Nakanwagi did not have enough funding to defend the suit, she was approached by the defendant, a family friend to the family of the late Mbwana with whom it was agreed that their cows be sold in order to fund the case after which the defendant solicited the services of ***M/s Kiyemba Matovu & co. Advocates*** to defend the suit.

That instead they connived with the defendant and that without the consent of the late Mitina Nakanwagi entered into a consent by which the late Nakanwagi was deprived of her land.

Furthermore, that upon the demise of the late Mitina Nakanwagi, the defendant approached the children of the deceased with another document requiring them to recognize his legal interest which they had done, in respect of the half a square mile (320 acres) on which his family previously had a *kibanja* interest.

In connivance with his lawyers ***M/s Semakula Kiyemba & Matovu Advocates,*** the defendant had committed fraud when they removed the first pages of the sale agreement for the suit land which the late Nakanwagi had signed and which some of the children had witnessed.

The pages had were replaced with the unsigned pages, indicating that the remaining square mile had also been sold to him by the deceased.

That the defendant was now threatening to transfer the entire suit property measuring approximately one and a half square miles into his names, thereby depriving the beneficiaries of the late Nakanwagi's estate of the property.

In addition, that the Registrar of titles has since refused to register the caveat lodged by some of the beneficiaries of the estate of the deceased who have since withdrawn the certificate of title from the land registry for safe keeping, and have without success tried to restrain the defendant from his fraudulent schemes.

Other acts of fraud were claimed to have been committed including that the defendant, well aware that the family of the late Mitina Nakanwagi was in possession of the original duplicate certificate of title of the suit land had created a special certificate of title, changed the description of the suit in a bid to hide the same from being traced by the beneficiaries and attempted to get registered as the proprietor thereof in order to defeat the inheritable interest of the plaintiffs.

The defendant's case.

In his written statement of defence, the defendant objected to the filing of this suit on grounds that the plaintiffs have no cause of action against him as they claim a right through a consent judgement reached by this court, which they

seek to overturn and that the suit is not only premature and misconceived, it is also brought in bad faith.

That the original purchase of 3 square miles of land by Nakanwagi was contested by the registered proprietors of the land, vide ***High Court Civil Suit No.98 of 2002.***

However that before the said suit was filed, the late Nakanwagi had sold one square mile of land to the defendant's father, Mr. Augustine Lwamulangwa who occupied the said property and that the late Nakanwagi never disputed the said sale, ownership or occupation of the suit land.

In addition, the defendant claimed that Nakanwagi was never coerced to enter the said consent of the sale agreement which was witnessed by her son Hussein Nyamayaalwo and Hajji Katongole and that even after her death, the plaintiffs did acknowledge the defendant's ownership of the land in a memorandum of understanding entered on 8th June, 2011.

The two brothers had also witnessed the sale of 100 acres to Lt. Karuhanga James which has never been challenged.

Furthermore, that the defendant's family has been on the land measuring one square mile since his birth and that the remaining 0.5 square miles was purchased from Nakanwagi, who gave them duly signed transfer forms.

The defendant also contended that the purported original duplicate certificate of title held by the plaintiffs was cancelled by the Commissioner of Registration who was fully aware of the facts subsequently issued a Special Certificate of Tile to the defendant and also declined to lodge the fraudulent caveat because the plaintiffs had no registrable interest on the land.

Rejoinder by the plaintiffs:

The plaintiffs in their reply to the defendant's written statement in defence prayed that the same be struck off the record for being evasive as it does not

provide a specific answer to the claim to his averment that the late Augustine Lwamulanga purchased one square mile of land from the late Nakanwagi.

That while the late Lwamulangwa was a mere servant of the late Mitina Nakanwagi, the defendant's averments of loss of the sale agreement in the war is not only false but also unsubstantiated.

Representation:

The plaintiffs were represented by ***M/s Kaganzi & Co. Advocates.*** The defendant was represented by ***M/s Ahamya Associates & Advocates***, jointly with ***M/s Magelani & Co. Advocates; and KOB Advocates and Solicitors.***

Issues for determination:

At the scheduling, the following were identified as the issues for determination of court:

1. ***Whether the defendant has any lawful interest in the suit land.***
2. ***Whether the suit is res judicata.***
3. ***Whether the plaintiffs have any cause of action.***
4. ***Whether the defendant validly purchased any part of the suit land from the late Mitina Nakanwagi on 30th June, 2008.***
5. ***Whether the consent judgment entered on 28th May, 2008 can be varied.***
6. ***Whether the parties are entitled to any remedies sought.***

Issue No. 2: Whether or not the issue is res judicata:

This being a preliminary point of law that is capable of disposing off the entire suit, I will deal with it first.

The learned counsel for the defendant argued in his submission that the matters in this instant suit had been determined under the terms of the consent judgment and decree entered in an earlier suit: ***Civil Suit No. 98 of 2002***.

That the land in dispute was surveyed; a special certificate of title created in the names of the defendant and the late Nakanwagi; and one Karuhanga James a third party to the suit, had obtained his portion as court had ordered in that settlement.

According to the learned counsel for the plaintiffs however the crux of that settlement had been captured in *paragraph 4* of that consent where it is stated that:

> ***..the 1.5 square miles of the suit land is the property of the defendants, to be surveyed off inclusive the land currently occupied by the 2nd defendant.***

The plaintiffs' cause of action was therefore based on the plaintiffs' contention that the entire 1.5 acres rightfully belongs to the defendant who was the 2nd defendant under that suit.

Consideration by court:

Section 101 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and the burden of proof lies on that person.

Section 103 further stipulates that:

> ***"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence."***

The common law doctrine of *res judicata* bars re-litigation of cases between the same parties over the same issues already determined by a competent court.

As observed in ***Halsbury's Laws of England, Volume 12 (2009) 5th Edition,*** the law discourages re-litigation of the same issues, except by means of an appeal.

It is not in the interest of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions.

The danger lies not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute.

Essentially the test to be applied by court to determine the question of *res judicata* is outlined in the case of ***Boutique Shazim Ltd Vs Norattan Bhatia & another CA No. 36 of 2007,*** where the question to be asked was:

> ***"is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belongs to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the same time"***

Did the above concept apply therefore to the present suit?

Analysis by court:

Civil Suit No. 98 of 2002: Kasifa Nabynya & Others vs Nakanwagi and Edward Kasinzi

In this particular case, the suit was filed against Nakanwagi the plaintiffs' mother and Edward Kasinzi, the defendant herein.

It was filed on 25th April, 2002 vide: ***Civil Suit No. 98 of 2002 (PExh 2)*** by Kasifa Nabunya; Issa Kasajja; Ali Sajjabi and Peter Kisinzigo who the original registered proprietors of the land measuring 3 square miles, which Nakanwagi claimed to have bought from them.

They sought to challenge the Special Certificate of title which they claimed was fraudulently obtained by Nakanwagi relying on false declaration that the duplicate had been lost.

The plaintiffs claimed in that suit that Nakanwagi had obtained the said title based on her claim that she had bought the land comprised in ***LRV 1840 Folio 7,*** the duplicate having been originally issued to them as ***LRV 1839, Folio 22*** and which at that point was still in possession of the plaintiffs in that suit.

They also challenged the undated sale agreement which indicated that she had bought the land in 1981 and which they denied having signed.

Upon his father's death the defendant Mr. Kasinzi together with his sister on 22nd July, 2004 were issued with letters of administrators of their father's estate. ***(DExh 1***). But it was him alone who was joined as a party to the suit.

The prayers sought in that suit were a declaration that the plaintiffs were the lawful owners of the land comprised in ***LRV 1840, Folio 7;*** an order that the 1st defendant (the late Nakanwagi) surrenders the special certificate of title to the Registrar of titles; an order of eviction against Kasinzi; and costs.

Civil Suit No. 133 of 2002:

Another suit had earlier been filed on 5th March, 2002 by both Nakanwagi and the defendant, vide ***HCCS No. 133 of 2002 (DExh 2)*** against Serudonyoli Stephen and 2 others, who according to Nakanwagi and Kasinzi had no claims

on the suit land but continued to occupy and utilize the suit land, despite several requests to vacate that land.

This was the land comprised in ***Buruli Block 219 plots 13 and 16*** which following the orders of court later became ***plot 13 and 18.***

The two suits were consolidated and a consent judgment and decree entered, ***PExh 3/DExh 3,*** dated 28th May, 2008.

The terms of that consent were as follows:

1. ***That the suit land at leasehold register 1840 plot 13 and 16 Buruli block 219 Katikamu Kkidudula estate be divided into equal parts.***

2. ***That the special certificate of title procured by the defendants in respect of LRV 1840 Folio 7 Plots 13 and 16 Buruli block 219 at Katikamu Kidudula estate be surrendered to the registrar Of titles for cancellation and the duplicate tendered in court be released to the appointed surveyors to effect the subdivision.***

3. ***That one and a half square miles of the suit land is the property of the plaintiffs.***

4. ***That one and half square miles of the suit land the property of the defendants is to be surveyed off inclusive of the land currently occupied by the 2nd defendant.***

5. ***That M/s Jolanam Survey Services are hereby appointed to subdivide the suit land pursuant to the consent judgment and thereafter handover the duplicate certificate of title to David Matovu Advocate.***

6. ***That the plaintiffs' interest in the suit land be transferred in favour of James Karuhanga who is to have 640 acres and Ernest Mugume***

to have 320 acres who have paid 50,000,000/=.....as consideration for the land .....

7. ***That the said Karuhanga James and Ernest Mugume should have physical possession of the 1½ square miles immediately the consent judgment is filed and endorsed by this...court.***

8. ***That the defendants' interest in the suit land be transferred into their joint names.***

9. ***That the above suit be withdrawn.***

10. ***That the duplicate certificate of title duly registered in the names of James Karuhanga and Ernest Mugume is to be kept by Sewankambo Augustus an advocate with M/s Sewankambo & Co. Advocates. The same shall be handed over upon maturity of the cheques.***

In the present suit: Civil Suit No. 156 of 2014:

While the suits earlier filed concerned approximately 777 hectares (3 square miles) originally jointly owned by Walusimbi Abdulawafu and his family, the present suit filed by the beneficiaries of Nakanwagi's estate however rotates around the execution of the consent orders; and the validity of the subsequent transactions invariably entered between the defendant and Nakanwagi and the beneficiaries under her estate.

The plaintiffs' claim in this instant suit is therefore for the separate causes of action alleged to have occurred in respect of 1.5 square miles of what now constitutes ***plots 13 and 18,*** as per special certificate of title ***DExh 6.***

The plaintiffs in the present suit accordingly have no interest in the 1.5 square miles which as decreed belonged to the estate of the late Walusimbi's family, the subject of the dispute in the earlier suits.

Trespass to land as pleaded, will occur 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.

It is a continuous tort that keeps recurring as long as the alleged act of interference with the actual owner's rights persists.

Needless to say, a tort of trespass to land is committed, not against the land, but against the person who is in actual possession of the land. (See: ***Justine E. M Lutaaya vs Stirling Civil Engineering Company Ltd. Civil Appeal No. 11 of 2002).*** It is also important to note that such possession may be physical or constructive.

As highlighted in the Court of Appeal decision cited by counsel for the plaintiffs in ***Maniraguha Gashumba vs Sam Nkundiye (Civil Appeal No. 23 of 2005) [2014] UGCA 1,*** in cases of continuing trespass ordinarily the principles of *res judicata* and limitation would not bar any such action against continued trespass.

Court's observations in ***Sheikh Muhammed Lubowa vs Kitara Enterprises Ltd C.A No. 4 of 1987,*** the authority cited by counsel for the defendant make it incumbent for the party who alleges trespass to present proof that the disputed land belongs to him/her and that the entry was made without permission or that the trespasser had no claim of right or interest in the land.

Accordingly in the present suit, the trespass occurring on the land as claimed in the earlier suits had hardly any bearing with that alleged to have been committed against the land which is the subject of this suit.

In reply to the issue therefore as to whether or not this case was *res judicata,* the response is in the negative.

Issues 1, 3, 4 and 5:

I will deal with these four issues jointly on account of the fact that the circumstances under which they arose are basically the same.

A cause of action means the fact or combination of facts which give right to a right of action. It is every fact which if denied the plaintiff must prove in order to obtain judgment. (***Aluminum Ltd vs Restituta Twinimugisha Court of Appeal No. 22 of 2000).***

The criteria as laid out in the commonly cited authority of ***Auto Garage vs Motokov (1971) EA 514*** lies in the question as to whether the evidence discloses that a plaintiff enjoyed a right; that the right was violated and that the defendant is liable.

The plaintiffs' right to file this suit is rooted in the authority of ***Israel Kabwa vs Martin Banoba Mugisha SCCA No. 52 of 1952,*** where the superior court acknowledged the right of a beneficiary of an estate of an intestate to institute proceedings in his/her own name and protect the estate for his/her own benefit, without to first obtain the letters of administration.

It is not in dispute that the plaintiffs are some of the biological children and beneficiaries of the late Hajati Mitina Nakanwagi who died intestate. Upon her death, the plaintiffs were selected to apply for the letters of administration for her estate.

On 20th September, 2013 a certificate of no objection (CONO) (***PExh 1),*** was granted to the plaintiffs and one Mohamood Maalo (since also deceased), all of these as children of the deceased.

Based on the above authority, even though by the time the hearing of this suit no grant had been issued over the estate, it would be erroneous to think that the plaintiffs had no *locus standii* to file this suit.

With all due respect therefore to counsel for the defendant's submission, the delay to secure the grant though unreasonable would not affect their right as beneficiaries to file this suit.

The genesis of the dispute as highlighted in the pleadings is that the plaintiffs' mother, the late Mitina Nakanwagi initially acquired land described as ***LRV 1840 Folio 7 Buruli Block 219 plot 13 and 16 land at Katikamu , Kidudula estate*** measuring 3 square mile (suit land) in 2002.

This land had been mortgaged to Uganda Development Bank (UDB) as security for a loan. One of the original owners Mr. Abdulawufu Walusimbi approached Nakanwagi to lend him and his family money that he had borrowed from the bank, to help him clear the loan and save the land from foreclosure.

The two sides agreed that Mitina Nakanwagi would pay off the outstanding sum of ***Ugx 270,000/***= to UDB and the balance to the co-owners of the land. In turn Nakanwagi would take over the land which upon inspection was alleged to have been vacant.

The entire outstanding amount of ***Ugx 270,000/***= plus the accrued interest was settled through Mr. Hussein Kisiki Nyamayaalwo, the 1st plaintiff, following which the mortgage was released.

The balance of ***Ugx 230,000/***= of the purchase price was paid to Walusimbi in instalments. Nakanwagi thereupon entered into a purchase agreement which they however challenged, and thereafter took possession and ownership of the land.

The defendant's father, Augustine Lwamulangwa who at the material time had been employed as a cashier at the restaurant owned by Nakanwagi at Kakooge used to stay with his family at Katalama where they used to graze their cattle.

However, during the period of drought Lwamulangwa would miss work at Nakanwagi's restaurant and because this affected the business she invited him to graze his cattle on part of her newly acquired land which was nearer the restaurant where he worked. All the above facts were not in dispute.

It is the plaintiffs' claim however that the grazing area he was shown by Bruce Muhammed Nyamayaalwo (a child of Nakanwagi) was, with the permission of Nakanwagi also used by Mbwana, a friend and relative of Lwamulangwa.

It is further alleged that Lwamulangwa died in 1991 and was buried on this portion of land. His family, including the defendant, left the area in 1994 when the war in Rwanda ended.

The defendant returned in 1998 and lived with the Mbwana family as he had no income at the time, and according to the plaintiffs he would often get financial assistance from their family.

In his WSD, the defendant however claimed that his father had in1981, prior to the institution of the 2002 suit, bought one square mile from Nakanwagi of the land in question (a claim that is refuted) which his family took possession of and resided for years.

That the documents proving the said transaction of sale had been lost during the civil war in Luwero. However that Nakanwagi had never disputed the said transaction or their family's ownership and occupation.

Subsequently, the defendant presumably as a follow up on the 2002 consent judgment, also purportedly entered into a sale agreement on 30th June, 2008 with Nakanwagi,. ***(PExh 4),*** the authenticity of which the plaintiffs seek to challenge in this action.

Was fraud committed in any of the transactions in this suit:

"Fraud" as defined in ***FJ K Zaabwe vs. Orient Bank & 5 O'rs SCCA No. 4 of 2006 (at page 28)*** 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.

It is also defined as a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

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).*** It must therefore be specifically pleaded and proved.

In any other ordinary civil matter, other than fraud the the standard of proof is on a balance of probabilities. It lies with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. ***(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.***

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)).***

It places a burden on that party who wishes to rely on it to specifically plead and strictly prove that fraud had been committed.

It was the plaintiffs' contention that the defendant committed fraud and illegalities when he:

a) *solely and in consonance with his lawyers, Semakula, Kiyemba and Matovu Advocates fraudulently replacing the first two pages of the memorandum recognizing him on a half a square mile with pages showing a sale of the entire land belonging to the estate of the late Mitina Nakanwagi whereas no sale ever took place.*

b) *stealthily tried to have himself registered on the suit land in exclusion of the late Mitina Nakanwagi to deprive her of estate of their legal entitlement amounting to one square mile at no consideration.*

c) *stealthily created a special certificate of title when well aware of the fact that the family of the late Mitina Nakanwagi is in possession of the original certificate of title.*

d) *stealthily changed the description of the suit land to hide it from being search and reclaimed by the beneficiaries and producing a special certificate of title without going through the due process;*

e) *sought to defeat the inheritable interest of the plaintiffs through sharp practice of paying good will deceiving the plaintiffs that it was in appreciation of the legal interest on the half square mile, whereas not.*

The defendant testifying as ***Dw1*** however denied any allegation of fraud claiming that he never coerced Nakanwagi into entering the said consent under the sale agreement.

That the same had been witnessed by her children, Hussein Nyamayaalwo and Haji Katongole and that the sale agreement has since been registered.

I will deal with each of these aspects as herebelow.

1. The validity of the sale agreement between Nakanwagi and the defendant: (30th June, 2008)

In their pleadings the plaintiffs averred that solely and in consonance with his lawyers: Semakula, Kiyemba and Matovu Advocates fraudulently removed the first two pages of the agreement memorandum which recognized the defendant's interest on a half a square.

That all three pages had been thumb printed by Nakanwagi who was illiterate. They had also been signed by some of the family members witnesses but the two pages had been replaced with those which were not signed, which showed a sale of the entire land belonging to the estate of the late Mitina Nakanwagi, whereas no such sale ever took place.

The question to court therefore was not only about the actual size of the land claimed by the defendant but also the validity of the sale agreement.

The plaintiffs' evidence was led by the 1st plaintiff, Mr. Hussein Kisiki Nyamayaalwo who testified as ***Pw1.*** It was corroborated by that of ***Pw2,*** Mr. Bruce Muhamed Nyamayaalwo.

They alleged that the original agreement containing clauses which were consistent with the consent judgment were falsified and that the purported sale agreement, ***PExh 4*** had glaring falsehoods intended to support defendant's claim over the the disputed land.

They further claimed through their counsel's submission that the said document contravened the requirements of the ***Illiterates Protection Act.***

In *paragraph 4* of the WSD the defendant who was a sole witness only offered a general denial to those allegations, and to specifically *paragraph 3* of the plaint where several serious allegations had been raised against him.

Order 6 rule 8 of the Civil Procedure Rules states:

It shall not be sufficient for a defendant in his/her WSD to deny generally the grounds alleged by the statement of claim...each party must deal specifically with each allegation of fact of which he did not admit the truth.

There is no doubt that the omission to deny the above grave allegations was fatal to the defence as it were.

The burden howeverl remained with the plaintiffs to discharge by availing to court with the authentic copy of the sale agreement within their custody or any other proof, sufficient to prove that such alterations had occurred, so as to remove the suggection that the late Nakanwagi had sold the land in dispute to the defendant.

The plaintiffs did not however present the signed copies. The explanation was that the defendant had taken away all the copies on the pretext that he was handing them to the lawyer for endorsement. They were never brought back and therefore no copies had been availed to the plaintiffs.

The defendant however neither rebutted this allegation against them nor did he call his counsel or any other witness for that matter to refute or dispel it.

Pw1 furthermore told this court that the consent order under ***Civil Suit No. 98 of 2002*** which he admitted was never set aside recognized the defendant's interest in the land but never defined its size and could not therefore support the claim that the defendant had acquired the one sq. mile.

In the submissions by his counsel, the validity of the same document remained questionable for according to him, the agreement did not meet the requirements of the ***Illiterates Protection Act, Cap. 78.*** Counsel for the defendant did not put any rebuttal to this point of law.

In the course of his defence however, the defendant referring to another document which was a sale agreement of 1981, ***DExh 7A,*** told court that Nakanwagi had appended her actual signature.

He admitted that she was not only illiterate but was also old and could not see well. It comes as little surprise then that 30 years later, Nakanwagi had become even more vulnerable and that each of the documents made by her thereafter had to be read out and interpreted to her and also bear a certificate of translation to confirm that this had been done.

The sale agreement had no such certificate though according to the defendant her lawyer had drawn up that agreement. Besides also was the fact that the transaction had been made in the presence of her children.

What he did not add however was that Mr. David Matovu who drew up the agreement had also been his lawyer in several of the transactions.

The term *"illiterate"* is defined under ***section 1(b) of the Illiterates Protection Act*** to mean, in relation to any document, a person who is unable to read and understand the script or language in which the document is written and printed.

Section 2 thereof provides for verification of the illiterate's mark on any document, and that prior to the illiterate appending his or her mark on the document it must be read over and explained to him or her.

By virtue of ***section 3,*** the document written at the request, on behalf of or in the name of any illiterate must bear certification that it fully and correctly represents his or her instructions and was read over and explained to him or her.

In ***Tikens Francis & Another vs. The Electoral Commission & 2 Others, H.C Election Petition No.1 of 2012*** it was held that:

> ***"There is a clear intention in the above enactments that a person who writes the document of the illiterate must append at the end of such a document a kind of 'certificate' consisting of that person's full names and full address and certifying that person was the writer of the document; that he wrote the document on the instructions of the illiterate and in fact, that he read the document***

over to the illiterate or that he explained to the illiterate the contents of the document and that, in fact, the illiterate as a result of the explanation understood the contents of the document...the import of S.3 of the Act is to ensure that documents which are purportedly written for and on instructions of illiterate persons are understood by such persons if they are to be bound by their content...these stringent requirements were intended to protect illiterate persons from manipulation or any oppressive acts of literate persons."

The Supreme Court in of ***Kasaala Growers Co-operative Society v. Kakooza &Another S.C.C.A No. 19 of 2010*** citing with approval the case of ***Ngoma Ngime v. Electoral Commission & Hon. Winnie Byanyima Election Petition No. 11 of 2002*** held that;

Section 3 of the Illiterate Protection Act (supra), enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his/her true and full address. That this shall imply that he/she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it."

The Supreme Court went on to hold that the illiterate person cannot own the contents of the documents when it is not shown that they were explained to him or her and that he understood them. Furthermore, that the Act was intended to protect illiterate persons.

The said provision is couched in mandatory terms, and failure to comply with the requirement renders the document inadmissible. ***(See also: Lotay v. Starlip Insurance Brokers Ltd. [2003] EA 551;Dawo & Others v. Nairobi City Council [2001] 1EA 69***.

The argument advanced by the defence was that the transaction which the family members had duly witnessed was never queried or disputed by the deceased or the plaintiffs during her lifetime and to counsel, this was a settled matter.

That *prima facie* any such order/consent made before counsel is binding on all parties and those claiming under them.

Counsel referring to the case of ***Mohammed Allibhai vs W.E Bukenya and DAPCB SCCA No. 56 of 1996*** argued that such consent cannot be varied or discharged unless obtained by (among others) fraud or collusion or in general for a reason which would enable the court to set aside an agreement. He fortified his point by citing other leading authorities on consent decree.

The question of setting aside or variation of a court order in this particular instance however, in the view of this court did not arise.

For indeed if the plaintiffs had been aggrieved by the consent order made in 2008 they would have challenged it by way of a review. A distinction had to be made in these arguments between the consent order arising out of ***Civil Suit No. 98 of 2022*** and the purported consent ***(PExh 4)***, between Nakanwagi and the defendant entered.

The consent order could have been varied by court upon application of the plaintiffs/beneficiaries and in exercise of the rights open to aggrieved parties, as enshrined in ***section 82 of the Civil Procedure Act, Cap. 71*** and ***order 46 of the Civil Procedure Rules.***

As rightly noted by the counsel for the defendant, Nakanwagi who was a party in the two previous suits under which the consent arose never deemed it necessary to challenge it.

She even went ahead to act on it, in execution of the decree by agreeing to release the title and retain only that part of the land as decreed by court.

Not least was also the fact that the plaintiffs themselves had been witnesses to some of these questioned deals. That could only mean that the arguments as raised in submission by the defence were only applicable to the impugned sale agreement but not the consent order.

The next question for court to address therefore was generally on the weight to be attached or the validity of an agreement made by a party in the presence of his/her counsel and family but which allegedly fails to meet the requirements of the ***Illiterates Protection Act*** (as cited earlier).

According to the plaintiffs there had been collusion between the defendant and Nakanwagi's lawyers at the time in so far as the 2008 sale transaction was concerned.

When such grave questions arise bordering on collusion, betrayal of trust and fraud by counsel, the rules of natural justice would apply just as in any other case which calls for a fair hearing.

It becomes therefore imperative for the party to add the person against whom such allegations are made in order to avail them chance to defend their integrity. This was never done.

But that notwithstanding, as declared by the Supreme Court the requirements alluded to under the ***Illiterates Protection Act*** are crafted in mandatory terms and that decision is binding to this court.

Indeed those provisions do not provide exceptions.

Regardless therefore of whether or not there are witnesses to the disputed document or of the fact that the document was made in the presence of a spouse, a trusted member of the family or any lawyer with integrity, the requirement to present a certificate of translation where a maker of a document or any of the parties is illiterate would apply, without any distinction.

Such omission is fatal as it goes to capacity to contract and to the root of a valid contract. The principles as enshrined in ***section 10 of the Contracts Act, No. 7 of 2010*** are quite clear. An agreement must be made with the free consent of parties, with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

Furthermore, under ***section 11(1) (supra)*** a person has capacity to contract where that person is of eighteen years or above; of sound mind; and not disqualified from contracting by any law to which he or she is subject.

A person cannot have the legal capacity or be said to have an intention to be bound and/or enter into binding relations unless he/she is able to form an intention which would require him or her to understand and appreciate the nature of the transaction and its contents, before entering any such commitment. That is the spirit within which both aspects of the law were made.

For those reasons therefore, the sale agreement dated 30th June, 2008 was inadmissible as it did not meet the criteria of the ***Illiterates Protection Act*** and the Contract law.

2. The validity of the MOU: (8th June, 2011:

Similar principles governing a contract apply to a Memorandum of understanding which, by the definition given in ***Black's law Dictionary, Sixth Edition***, is an informal record, note or instrument embodying something that the parties desire to fix in memory by the aid of written evidence, or that is to serve as the basis of a future or formal contract or deed.

For a contract to come into existence on basis of a memorandum of understanding, there must be an intention to do so. (***see: vol.1 Chitty on Contracts, at 198 (H.G. Beale ed., 29th Ed. 2004; and Balfour v. Balfour [1919] 2 K.B. 571at 579)***.

The test is an objective one, for if a reasonable person would consider that there was an intention so to contract, then the promisor will be bound ***(see Ermogenous v. Greek Orthodox Community of SA Inc [2002] HCA 8, 209 CLR 95 at [25]***.

In cases where the memorandum of understanding is in the nature of a contract and fulfils its essentials, it is held to be enforceable ***(see Weddington Productions,Inc.vs.Flick(1998) 60 Cal.App.4th793).***

Thus also just like in any other contract, where one or both parties fail to fulfill the obligation imposed by the terms of the contract this would amount to breach of contract. (Ref: ***Black's law dictionary 5th Edn at page 171*** and ***Sempa vs Kambagabire HCCS No. 408 of 2014.***

Under the MOU in the present suit which was purportedly made after the death of Nakanwagi, the following were the terms (in part):

WHEREAS:

1. The landlord owns land at Buruli Block 219 plots 13 and 18. (emphasis added).

2. The landlord enjoys a special relationship with the family of the late Mitina Nakanwagi dating back from the time when the late Augustine Lwamulangwa.(sic!)

3. The land lord wishes to pay the beneficiaries some money in furtherance of their relationship.

.....

The presumption was that the defendant was already the owner of the entire suit land. It was based on the false belief of the validity of the sale agreement endorsed by Nakanwagi ***(PExh 4)***.

The plaintiffs however interpreted the above MOU as a move that was intended to defeat the inheritable interest of the plaintiffs through the sharp practice of

paying good will, deceiving the plaintiffs that it was in appreciation of the legal interest on the half square mile, whereas not.

In *paragraph 14* of the WSD, the defendant in this suit argued that even after the death of Nakanwagi, the children being the plaintiffs did acknowledge the defendant's ownership of the said land in a Memorandum of Understanding (MOU) that was entered on the 8th June 2011. ***(DExh 4).***

Counsel for the defendant argued that the doctrine of approbation and reprobation was applicable to the plaintiffs' conduct in the transaction.

The doctrine is based on the principle that no person can be allowed to take up two positions inconsistent with one another or as is commonly expressed to blow hot and cold. ***(Ref. Newahu Obo V.N vs. Tumana vs Commission for Conciliation, Mediation and Arbitration & Others Case No. P1 15/08).***

The plaintiffs' however pointed out that although each of the 8 beneficiaries had signed each page, Bruce Nyamayaalwo who had not subscribed to the scheme had not signed it.

As duly noted by court indeed each of the beneficiaries did acknowledge receipt of ***Ugx 1,687,500/=*** as per the MOU. They even authorized one of their brothers Mr. Kakooza Hussein Nyamayaalwo to receive an additional ***Ugx 10,000,000/=*** on their behalf on or before 1st August, 2011. This amount was to be distributed to each of the beneficiaries.

More than ten years later however, there was nothing to show that the final sum of ***Ugx 10,000,000/=*** was ever paid before that date or at all, in fulfilment of the defendant's commitment to settle the plaintiffs' claims.

Clause 3 of the MOU (page 2) also specifically reads:

> ***The land lord and beneficiaries expressly agree that upon execution of this memorandum of understanding there shall be no further claims on this land. (emphasis added).***

After the sale agreement ***(PExh 4)*** was purportedly signed, the defendant went on to acknowledge (as per that MOU) the plaintiffs' claims in the suit land and made an attempted to settle which however failed.

These claims could have possibly been settled fully had he completed his part of the bargain under the M.O. U.

I found nothing however from the pleadings, evidence on record and submissions to show anywhere that the balance of the ***Ugx 10,000,000/*** was ever paid out and distributed, as per the commitment.

It can therefore be rightly concluded that the defendant obtained the said signatures on the MOU by way of deceit and false pretenses. Since therefore he had failed to pay the additional sum of money by a specified date, the execution of the said contract had failed.

It could not remain binding only to the plaintiffs where their counterpart had failed to meet a key part of the bargain. In those circumstances, the doctrine of probation and approbation was not therefore applicable.

3.Did the defendant therefore validly purchase the disputed land:

In ***paragraph 5 of Civil Suit No. 133 of 2002*** filed by Mitina Nakanwagi and the defendant the pleadings were:

> *The plaintiffs (in that suit) have got an interest in the suit land, the 1st plaintiff as purchaser from the registered proprietors and the 2nd plaintiff (Gasinzi) as kibanja holder who has been on the suit land since 1979 and having bought part of the land from the 1st plaintiff.*

By those pleadings, the defendant confirms to court that this was a *kibanja* and also acknowledged as such by the plaintiffs. Nowhere in that provision was the size of the land bought by his father mentioned.

The defendant therefore shouldered the burden to prove when and under what circumstances he had purchased the legal interest for the area of one square mile.

In the JSM to the present suit, among the facts as highlighted for the defendant's side, was the claim that his father had bought the land (which was a *kibanja)* from Nakanwagi in 1981.

He had no witnesses however, not even from his own family, elders or LCs from that area, though he had the plaintiffs' acknowledgement of the interest of his family in the 320 acres, merely as a *kibanja*.

Without the necessary documents, witnesses or survey report to back up his claim on the exact measurements of the *kibanja*, the defendant could not satisfy this court that the size of the land bought or acquired by his father from Nakanwagi was the registered interest of one square mile.

The defendant's role as an administrator:

As a collateral to all the above, ***section 180 of the Succession Act***, provides that an administrator of the estate of a deceased person is his or her legal representative for all purposes, and as such all the property of the deceased person vests in him or her.

Thus in ***section 25*** all property in an intestate devolves upon the personal representative of the deceased, as trustee for all the persons entitled to the property.

Parties are bound by their pleadings. From the contents of *paragraph 9* of the WSD it is pleaded thus:

9. That in 2002 when the registered proprietor filed HCCS No. 98/2002 the defendant being the administrator of the estate of Augustine Lwamulangwa was joined to the suit.

Following the death of Lwamulangwa, the defendant jointly with his sister Riza Mukansanga had on 22nd July, 2004 been granted letters of administration ***(DExh 1)*** *vide* ***AC No. 703 OF 2004.***

By his own statement above he was added to the 2002 suit as an administrator implying therefore that the consent order in effect recognized the *kibanja* interest not as his exclusively, but only as one of the trustees for the rest of the beneficiaries under the estate.

Since the defendants was not the only appointed trustee of his father's estate he owed to this court an explanation as to why therefore for each of the transactions concerning his father's estate it was him alone who signed the documents, including the MOU which declared him the exclusive owner of the entire suit land.

In his testimony he told court that he had siblings. Some of these were married. One of them called was even a student who needed support from the estate. There was no inventory as mandated by law to show that distribution had been done and that his suibling's interests in the estate accounted for.

Whereas therefore the defendant had every right and even the opportunity to buy the 0.5 square mile from Nakanwagi as his personal property which he could deal with freely, there is nothing from the record to show that he had prior authority from the co-administrator of his father's estate to deal with rest of the estate that his father had purchased, and possessed.

Accordingly, all subsequent transactions in so far as they related to the land bought and occupied by the family of Lwamulangwa directly concerned and affected the estate and had to be sanctioned by the co-administrator.

The beneficiaries had to be involved as well. If the defendant genuinely believed that the endorsement by the beneficiaries of Nakanwagi to the MOU in relation to their mother's property was so relevant in supporting his claim, he failed to explain on the other hand why he did not find it necessary to secure the support of his family in those commitments he made relatingto his own father estate.

Indeed as correctly submitted by counsel, there was nothing to show from the reading of the consent order under ***Civil Suit No. 98 of 2002,*** had granted him the automatic and exclusive ownership and legal interest in the one square mile.

Pw1's evidence that he had been present when his mother bought the land and at the execution of the 1981 agreement and the fact that around that time the defendant was still a young man was not discredited.

The defendant from his own testimony was 47 years at the time of giving evidence in court, implying he was born in 1973. His father bought the land in 1981 when he was only nine years.

He claimed that Nakanwagi had given him the papers proving that his father had bought the land totaling one square mile. When pressed hard during cross examination, he was quick to add that he received the papers when he was an adult.

That evidence however did not tally with the contention he made in *paragraph 8* of the WSD that the documents were lost during the civil war in Luwero.

This court takes judicial notice of the fact that the said war took place around the beginning of the 1980, at the time obviously when he was still a minor.

It meant therefore that the defendant's knowledge of the background to the acquisition of the land by his father and its size was based on mere hearsay. But even more troubling was court's realization that he was not consistent or entirely truthful in his evidence.

The defendant statement made during cross examination was that in all this he was protecting the interests of his father. He admitted therefore that he was acting in the capacity of an administrator.

Keeton, Law of Trusts 10th Edn p.5 observes that the power to administer an estate of a deceased does not necessarily confer a right to own it and/or dispose it off. That equally applied to the defendant in this case.

He however evidently confused his interests as a beneficiary with those of an administrator. Based on the authority of ***Israel Kabwa*** *(supra)*, he no doubt had the rights as a beneficiary to salvage the estate of his father.

As an administrator, he failed to protect the estate interests on account of his failure to separate the two interests and even distribute the estate, 18 years after the grant was issued to him and his co-administrator.

He could not rely on the invalid sale agreement as he attempted to do, to obtain the exclusive possession of what he in the same breath he claimed had been acquired by his father.

Indeed there is nothing to show that the defendant had inherited his father's estate or that it was allocated to him by way of distribution of the estate.

The defendant's fraudulent acts therefore not only affected the plaintiffs but also affected the interests of the beneficiaries under his father's estate.

For the plaintiffs, this court faults them for dealing with their mother's estate in violation of the provisions of ***section 268 of the Succession Act, Cap. 162.***

By virtue of that section, a person who intermeddles with the estate of the deceased or does any other act which belongs to the office of the administrator is an executor of his or her own wrong.

It is also important to note that though the said consent orders were never challenged by either parties or their predecessors in title, the one specifically calling for survey was not properly executed.

The failure to carry out a survey is attributable to the defendant and the plaintiffs' mother who had been parties to the consent order. For as duly noted by this court and during the time of *locus* visit conducted by this court, no survey report had been presented from ***M/s Jolanam Survey Services*** as court had directed in 2002, or other survey report for that matter.

During cross examination, the defendant when asked about the survey told court that he was young at the time and that he did not know who surveyed the land. One wonders therefore if any survey was ever done at all regarding this property.

His interest as it were, was to protect the estate but never did he think about ascertaining the areas and boundaries which he needed to preserve.

Indeed during the *locus* visit there was uncertainty about the boundaries, which left much to speculation, thus also making it hard for this court to appreciate the distinction between the suit land claimed by the defendant and his father on the one part and Nakanwagi's registered interest on the other part.

The plaintiffs were not in occupation of the land. The defendant on the other hand occupied some parts. He showed court areas where there were small valley dams and areas where he had planted pineapples, maize and a few scattered banana trees on ***plot 13*** measuring approximately 200 acres, according to the defendant.

Plot 16 on the other hand was approximately 400 acres. Neither the size of the land nor the claim that the plots were subdivided could be readily verified. Also noted was the fact that no access roads were visible for such an expanse of land.

Failure to conduct a survey also presented difficulties in knowing which portion of the suit land each of the third parties who were in possession/occupation were actually entitled to.

It had been for that very reason that this court had on the 7th day of January, 2022 directed the parties under this suit to secure an independent surveyor to

conduct a boundary opening exercise to establish the actual size, location, status and developments on the suit land, which the parties however failed to do.

It is the firm view of this court that had the survey been carried out as court had directed, the dispute would not have ended up in a suit.

All in all, given the fact that the sale agreement ***(PExh 4)*** relied on by the defendant was found to be inadmissible and that, it was him who had frustrated the final settlement of the plaintiffs' claims by failing to pay the balance as spelt out in the 2011 M.O.U, he had only himself to blame for the failure to enforce the MOU.

Breach of a contract refers to a situation where one party to a contract fails to carry out a term of the said contract. It occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. (***See: Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690***).

It follows therefore that when one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy.

In response therefore to the issue as to whether the defendant therefore validly purchased the disputed land, the response is in the negative. He could only validly lay his claim on 0.5 sq. mile (320acres) out of the disputed land as duly acknowledged by the plaintiffs.

He therefore acted fraudulently when he attempted to deprive the beneficiaries of Nakanwagi's estate of what rightly belonged to that estate.

Whether or not the Special certificate of title were validly issued:

Another area of dispute raised by the plaintiffs is that fraud had been committed by the defendant when he caused the creation of a special certificate of title.

A certificate of title is conclusive evidence of title and takes priority over any adverse claims. By virtue of ***section 176 of the Registration of Titles Act, Cap 230 (RTA),*** save for fraud, it is also an absolute bar and estoppel to an action of ejectment or recovery of any land. (***Refer also S. 64 (1) RTA).***

The defendant claimed that he had applied as a sole registered proprietor of the suit land, having fully bought interests of the plaintiffs' late mother but that the duplicate disappeared from the lands only to surface in the possession of the plaintiffs.

It is the plaintiffs' claim on the other hand that the defendant did not follow the proper procedure in securing the title.

Section 70 of the RTA provides that where the duplicate is lost the persons having knowledge of the circumstances may make a statutory declaration stating the facts and particulars of all encumbrances affecting the title or the land to the best of the deponent's knowledge information and belief.

Section 71 of the RTA governs the procedure where a party seeks to obtain a special certificate of title in respect to land.

It provides:

> ***Where under any provisions of the CPA any court calls upon the commissioner to issue a special certificate of title, the commissioner shall issue the certificate as prescribed by section 70; but ...before issuing the special certificate give notice in the Gazette of his/her intention to do so, whereupon any person who wishes to oppose the issue of the certificate may within one month of the date of the notice make an application to the court in that behalf.***

It is not clear if in the present case any of these steps which are mandatory, had been followed.

A careful scrutiny of ***DExh 6,*** reveals that the certificate of title had a lease term of 44 years *w.e.f* 1st July, 1979 and was therefore due to expire in 2023.

The first lessees registered on the title were Budalawafu Walusimbi, Kasifa Nabunya, Issa Kasajja, Ali Ssajjabi, Mustapha Sebisolo and Peter Kisinzigo as tenants in common in equal shares.

Pw1 in his evidence denied having witnessed the sale of land between the defendant and James Karuhanga and Davis Rwangoga under which 100 acres had been sold to the two. ***(DExh 5***) although his brother no doubt had been a witness to that transaction.

It comes out clearly in *clause 1* of *the sale agreement* ***DExh 5*** that at the time the defendant sold the 100 acres to the third parties he had taken over the entire estate of 960 acres from Nakanwagi under questionable circumstances since as noted by this court, the sale agreement was found inadmissible and the MOU not fully satisfied.

The special certificate of title ***DExh 6***, had not been issued in 2011 when he sold part of the suit land. When it was eventually issued in 2013 it was in the names of both Nakanwagi and the defendant.

That means that the defendant had gone ahead to sell part of the suit land well aware that the legal interest was owned by Nakanwagi's estate, and did so without the authority as mandated by law. In the view of this court, it is immaterial that the transaction was witnessed by a child of the late Nakanwagi. It had to be sanctioned.

It is also clear that the Land office never gave the plaintiffs the opportunity as allowed under the law as cited above, to raise any objection to the issuing of the title. This is deduced from the evidence adduced by the plaintiffs.

PExh 6 indicates that the plaintiffs wrote to the Lands office opposing the application by the defendant for a special certificate of title for ***plots 13 and 18.***

The objection was raised on 2nd October, 2013 through their counsel then, Mr. Harimwomugasho Francis. The letter is dated 2nd October 2013 and was received by that office on 10th October, 2013.

However on the following day, 11th October, 2013 the title was issued under the joint names of the deceased and defendant. There is nothing to show that the office ever paid any attention or responded to the objection raised by the plaintiffs before issuing the title.

From the above findings, the various transactions and entries on that title indicate that several subdivisions were made and a number of caveats placed on this land, which ought to have put the office of the commissioner of lands on sufficient notice of the controversies surrounding this land before issuing the title as it did on 11th October, 2013, in both Nakanwagi and the defendant's names. The office was however not made party to this suit.

It would also under those circumstances have been more sensible, in the opinion of this court, if the MOU had been entered and executed by the parties after, and not before 2013.

As it were, the 2008 sale agreement and the MOU of 2011 are rendered as of no legal consequence given the fact that the title that was issued later in 2013 recognizing Nakanwagi's interest in the land, within the spirit of ***section 59 of the RTA*** ought to have been regarded as overriding the two previous transactions.

In conclusion:

Section 92 of the RTA stipulates that the transfer of registered land can only be effected by the transferor signing transfer forms in favour of the transferee.

The defendant pleaded and alleged, but could not prove that any transfer instrument was made to him by Nakanwagi before her death as pleaded in his defence.

He committed acts of fraud by taking advantage of the late Nakanwagi's vulnerability and well-intentioned actions towards his father; and upon her demise well aware of the fact that the beneficiaries of her estate were yet to secure letters of administration attempted to deprive the estate of Nakanwagi of what rightfully belonged to that estate.

The defendant also acted illegally when without prior authority from his co-administrator entered into any of the transactions, all for his own exclusive benefit.

On a balance of probabilities the plaintiffs proved that the defendant lacked basis to claim more than 0.5 sq. miles of the disputed land which the plaintiffs acknowledged as a *kibanja*, which constituted part of his father's estate.

It is important to note that although the plaintiffs were not in physical occupation they remained with the legal ownership, rightfully claimed under the estate of their late mother.

In short therefore, the land which the defendant claimed was not readily available for him to lease.

In ***Suleiman Adrisi v Rashida Abul Karim Halani & Anor Civil Suit No. 008 of 2017*** court observed that land is only available for leasing when it is:

i) ***vacant and there are no conflicting claims to it;***

ii) ***occupied by the applicant and there are no adverse claims to that occupation;***

iii) ***where the applicant is not in occupation but has a superior equitable claim to that of the occupant;***

iv) ***where the applicant is not in occupation but the occupant has no objection to the application.***

Under those circumstances, and in response to the issue whether or not the special certificate of title had been validly issued, the answer is in the negative.

In light of the above, the plaintiffs have a cause of action against the defendant who through subterfuge sought to deprive the estate of properly which rightful belonged to it.

Issues 1,3,4,5 are responded to accordingly.

Issue No. 6: Remedies:

The plaintiffs did not ask court for any damages. Court also takes into consideration the fact that the plaintiffs as beneficiaries gained benefit from the invalid transactions which took place between them and the defendant which they must refund to him. ***(PExh 4*** and ***DExh 4).***

Under ***Section 177 RTA*** it is provided that upon recovery of any land estate of the interest by any proceedings from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the register book relating to that land, estate or interest and to substitute such certificate of title or entry as the circumstances of the case required and the registrar shall give effect to that order.

In the premises, the plaintiffs' action largely succeeds. Judgement is accordingly entered in favour of the plaintiffs, and in the following terms:

1. ***The suit land measuring one square mile comprised in Buruli Block 219 plots 13 & 18, LRV 1840 Kidudula Estate land at Kamunina belongs to the estate of the late Mitina Nakanwagi;***

2. ***The sale agreement between the defendant and the plaintiffs dated 30th June, 2008, is illegal, and void ab initio.***

3. ***The MOU and such other transactions by the defendant intended to deprive the estate of the late Mitina Nakanwagi of their share in the suit property were fraudulent;***

4. ***The estate of Lwabulangwa Augustine is entitled to only 320 acres (0.5 sq. mile) in the part of the land that was formerly occupied by, and belonged to his father Augustine Lwabulangwa;***

5. ***The office of the Commissioner of Lands, is directed to cancel the special certificate of title for the land comprised in Buruli, Block 219 plots 13 & 18, LRV 1840 Kidudula Estate land at Kamunina which was irregularly obtained by the defendant.***

6. ***The Commissioner of Lands is also directed to cause a survey of the land comprised in Buruli, Block 219 plots 13 & 18, LRV 1840 Kidudula Estate land at Kamunina; subdivide and create two separate titles, one in the names of Mitina Nakanwagi and another title under the names of the administrators of the estate of Augustus Lwabulangwa.***

7. ***The subdivisions shall be made taking into consideration the developments made by the defendant.***

8. ***A permanent injunction issues restraining the defendant, his servants, agents, employees or those claiming under him from disposing of the land belonging to the estate of Nakanwagi, renting, transferring, or otherwise dealing with it in a manner detrimental to the interests of that estate.***

9. ***The plaintiffs whose names appear on the certificate of no objection shall secure the letters of administration for the management of the estate of the late Mitina Nakanwagi and distribute the estate within 6 months after the grant is issued; and thereafter file in court within that same period an inventory/account of such distribution.***

10. ***The amount of money initially paid to the late Mitina Nakanwagi as the consideration for the 320 acres shall be a debt to the estate of the deceased, to be paid back to the defendant within a period of 6 months from the grant of letters of administration over Nakanwagi's estate.***

Costs of the suit awarded to the plaintiffs.

I so order.

Alexandra Nkonge Rugadya

Judge

2nd September, 2022

Delivered by email

2/9/2022