

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

CIVIL SUIT NO. 438 OF 2012

5 **JOSEPHINE KYAKUWA NAMBUSI**
 (Suing through
 the next friend, Sarah Mukasa Kalumba)......**PLAINTIFF**

VERSUS

10

1. **BALABA LUKE**
2. **MUKASA KALUMBA JOSEPH**.....**DEFENDANTS**

JUDGMENT:

Before: Lady Justice Alexandra Nkonge Rugadya

15 **Introduction:**

The plaintiff, Ms Josephine Kyakuwa Nambusi, is the registered proprietor of private mailo land situate at **Mengo Kyadondo plot 501 Block 195**, measuring approximately 0.139 hectares. As minor in 2012, she filed this suit through her next friend and biological mother, Ms Sarah Mukasa Kalumba.

20 It is the plaintiff's claim that in 2010 the 1st defendant, Luke Balaba trespassed on the suit land and constructed thereon a semi-permanent structure claiming beneficial interest on the suit land from *kibanja* of Serapio Mukasa who was his grandfather. That Balaba is a biological child of the late Sserwanga Luke, one of the children of the late Serapio Mukasa.

25 On his part however, Balaba claimed however that his grandfather was by the time of his death in 1969, the owner of the *kibanja* situate at Kyanja **plots 501 and 502**, both of **Block 195, formerly plot 39, Block 195** Kyadondo, which also had burial grounds for the entire family; and that some of the relatives had been buried there. That his grandfather died intestate leaving his widow and the family of Luke Serwanga in the home of the late Serapio Mukasa, where Balaba has lived to date.



In his counterclaim he further contended that Kalumba had in 2001 connived with the land lord Sarah Buteba and Joshua Lwere to convert the said *kibanja* into registered mailo interest in favour of the plaintiff who happens to be Kalumba's daughter.

He further claimed that he and other beneficiaries were entitled to their share in the said *kibanja* that now lies on **plots 501 and 502**. That the transfer of the mailo interest to Kyakuwa therefore was intended to defeat his and other beneficiaries' interest therein; and was therefore fraudulent.

The 2nd defendant/3rd counter defendant, Mukasa Kalumba Joseph however denied those claims maintaining that the suit land was originally the property of the late Sarah Buteba who had offered it for sale to various individuals.

That at all material times Balaba had been asked to leave the suit land to no avail and instead had gone ahead to bring policemen to arrest him when he was trying to carry out some developments on the said land, on behalf of Kyakuwa.

In her rejoinder, Kyakuwa contended that her father had purchased the suit land from the land lord Sarah Buteba through her administrator, Joshua Lwere. Her father had granted her his interest in the suit land. She therefore refuted the claim that she had connived with him to have the suit land registered into her names.

That Balaba never in any case objected to the issuance of the certificate of title for **plot 501** which was legally bought and transferred into her names with full knowledge of all the stakeholders involved. That given that the suit property had been registered without any fraud or connivance she was entitled to quiet enjoyment of the property.

Representation:

The plaintiff/1st counter defendant, Ms Josephine Kyakuwa Nambuusi was represented by **M/s Mayende & Associates**. The 1st defendant/counterclaimant, Mr. Luke Balaba was represented by **M/s Semwanga, Muwazi & Co. Advocates**. A notice of joint instructions was filed by **M/s MOM Advocates** to represent the defendant/counter claimant on 17th August, 2022.

On 12th December, 2013, by consent, Kyakuwa withdrew the suit against her father whom she originally sued for giving Balaba access to her land over which he claimed no interest. Upon such withdrawal, Balaba remained the sole defendant and a counter claimant in this suit.

Issues:

- 1. Whether the suit land forms part of the estate of Serapio Mukasa**
- 2. Whether the defendant has a beneficial interest in the suit land.**

 2

3. Whether the plaintiff was fraudulent in the acquisition of the suit land

4. Remedies available.

Issue No. 1 : Whether the suit land forms part of the estate of Serapio Mukasa

And:

5 **Issue No. 2: Whether the defendant has a beneficial interest in the suit land.**

The plaintiff's side did not file any written submissions as court had directed. The defendant's side however did, and this court has taken the same into consideration in dealing with the issues raised for determination.

I will handle the first two issues since they are intertwined.

10 **Analysis of the law and evidence:**

By virtue of **section 101 (1) of Evidence Act, Cap. 6**, whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist. **(George William Kakoma v Attorney General [2010] HCB 1 at page 78).**

15 The burden of proof lies therefore 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.**

20 The defendant, Luke Balaba as counter claimant also had to satisfy this court that the land in dispute constituted part of the estate of his late grandfather, Serapio Mukasa and that he had a lawful claim through his late father, Sserwanga Luke.

He also had to substantiate his allegations that Josephine Kyakuwa and her father had fraudulently acquired and transferred the suit land into the names of Kyakuwa; and that the fraud had been committed directly or indirectly by either or both of them.

25 **The law on trespass:**

In the case of: **Justin Lutaya v Stirling Civil Engineering Company, Supreme Court Civil Appeal No. 11 of 2002, the Supreme Court**, trespass was defined as an unauthorized entry upon land that interferes with another person's lawful possession.

30 It 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. Trespass to land was

also held to be committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another.

Needless to say, a tort of trespass to land is committed, not against the land, but against the person who may be in physical or constructive possession thereof. (See: **Justine E. M Lutaaya**

5 **vs Stirling Civil Engineering Company Ltd. Civil Appeal No. 11 of 2002).**

In the amended plaint in the present case, Ms. Josephine Kyakuwa Nambusi, who is registered owner of **plot 501, Block 195**, land measuring 0.139 hectares (0.343 acre) claimed that around 2010 Luke Balaba, without consent from her had settled on her land and constructed several semi-permanent structures thereon.

10 It is Kyakuwa's claim that this land was bought by her parents Joseph and Sarah Mukasa Kalumba, between 1998-1999. They had verbally donated it to her, after obtaining consent and transfer from the registered proprietor Joshua Lwere in 2001.

Balaba, who claimed to have beneficial interest in the suit land which his grandfather, Serapio Mukasa had left behind however refused to vacate the land and hence this suit.

15 Joseph Kalumba in his counter defence and in support of Kyakuwa's claims told court that Kyakuwa was born in 1995 implying that she was at the material time still a minor. That Balaba had always been under his care since the age of 4 to 15 years and has always stayed in Jinja, while Luke Sserwanga, his brother and father to Balaba resided in Makindye prior to his death in 1992.

20 In *paragraph 4* of his counter defence, he argued that the land in dispute belonged to Sara Buteba and added in *paragraph 5* thereof that the land was under her administrator, Joshua Lwere. That upon the death of Serapio Mukasa, the owner had threatened to sell the *kibanja* land.

That he was appointed heir to his father and that his siblings had left him on the suit land which he and his wife had duly paid for in installments between 1994-1999 at a consideration of **Ugx**
25 **1,000,000/=**. Others who were willing buyers and occupants in the neighboring plots had also been given opportunity to purchase their respective plots.

Kalumba maintained however that prior to the purchase he had informed the family members who did not offer any help to pay up for the *kibanja*, currently occupied by his nephew, Luke Balaba who refused to vacate it. According to him this was not ancestral burial land and therefore
30 no law was barring him from registering it into his daughter's names.

In *paragraph 7* of his written statement he further added that he had allocated his aunt to stay on **plot 501** where she was to date (as at 8th September, 2010), and that he promised not to evict her. It struck this court as odd that the prayers sought against Balaba the defendant were for

4


his eviction from that plot, which was jointly owned by Kyakuwa and Pius Mukasa Kalumba. The two were minors at the time of registration but at the time of filing the suit Pius Mukasa Kalumba had already attained the age of majority.

Although he was not party to the main suit, he had been joined as a party in the counter claim in respect to **plot 502**. It is however not clear therefore whether Kyakuwa had filed the suit on her own behalf or for both of them. No authority to that effect was availed to court.

As proof of payment for consideration of the *kibanja*, Kyakuwa relied on **PExh 1**, a payment receipt dated 19th February 1998; **PExh 2** was acknowledgment of money received on 30th March, 1999 totalling **Ugx 250,000/=**.

PExh 3 is another acknowledgment by one Fred Kisakye of receipt of **Ugx 250,000/=** dated 1st April, 1999, which sums according to Kalumba were received on behalf of Joshua Lwere, the administrator of Sarah Buteba, the recognized mailo owner.

This court noted that the registration of the two plots was made on same date of 14th November, 2001 as per the certificates of title attached to the amended plaint. The size of **plot 501** was indicated as 0.139 hectares (0.343 acres).

For **plot 502** however the total area is 0.397 hectares (0.981 acres). The originals/certified copies of each of these titles were not availed to court, nor were the two titles or area schedule for each tendered in as evidence.

PExh 4 was the acknowledgment of receipt of a sum of **Ugx 1,250,000/=**, dated 22nd April, 1995.

This amount was the consideration for the purchased land for one acre of land, purported to have been received by Sara Buteba, the land lady, who thumb printed the acknowledgment of receipt of the said sums. The remaining 0.87 acres for the second plot was to be paid later at a sum of **Ugx 1,150,000/=**.

It was Joseph Kalumba's evidence in chief that an agreement was made in that respect for the one acre of land comprised in **plot 502**. Court noted however that despite the fact that a survey was to be made by the purchasers, no survey report was filed meaning therefore that the exercise was never conducted to help in determining the actual size and boundaries of each of these plots.

At the *locus* visit, Balaba told court that he was in occupation of **plot 502**, measuring around an acre in size, which facts could not be readily verified since there no such evidence was provided to prove that a prior the survey had been conducted to determine the boundaries of **plot 501 and plot 502**.



Furthermore, no sale agreements were availed to court to prove that the sale transactions took place for both plots. What was availed however was the said document, **PExh 4**, titled: 'Acknowledgment of receipt, dated 22nd April, 1995.

The said document which was thumb printed by Sarah Buteba as the vendor on the one hand and Joseph and Sarah Kalumba as purchasers on the other hand, was witnessed by Joshua Lwere, and read as follows:

I Sarah Buteba of Mutundwe Kampala Do Hereby Acknowledge receipt of Shs 1,250,000/=... from Mr. Joseph & Mrs Sarah Mukasa Kalumba of ETATS Ltd P.O Box 1304 Jinja as payment of one acre of land located at Kyanja Kyadondo where we are resident.

The remaining 0.87 acres are to be paid later at a sum of Ug shllings 1,150,000/=...

We have agreed that when Mr. and Mrs Mukasa Kalumba have paid for the second plot, that is the 0.87 acres a full agreement and transfer will be signed for both plots.

However Mr & Mrs Kalumba are free to survey this one acre they have paid for if they so wish; and for that purpose I have signed provisional transfer forms.

On the same date 22nd April, 1995, a transfer was purported to have been made by the land lady who again thumb printed the transfer instrument. (**PExh 5**). As noted by this court, the plot numbers were neither indicated on any of the various acknowledgements (**PExh 1-PExh 4**), relied on by the plaintiff.

The transfer form which had no specific plot number: (**PExh 5**) had been thumb printed by the said Sarah Buteba as vendor, signed by Joseph Mukasa as purchasers, with Joshua Lwere as a witness.

PExh 6 is a letter by Joshua Lwere as 'administrator', dated 15th August, 1994 and addressed to Joseph Kalumba who was acknowledged as one of the squatters on the land originally **plot 39, block 195**, out of which both **plots No. 501 and 502** (suit land) had been curved.

Joshua Lwere, from the wording of that letter, had been tasked to probe into the status of tenureship of all the occupants on the land belonging to the estate of Sarah Buteba, who presumably, was still alive at the time. It was a form of authority that the administrator wrote for himself. It was not written by the principal.

The name of the person who was issued with letters of administration upon the principal's death was however not revealed to court. What is clear from Kalumba's evidence is that Lwere was never granted the authority to manage Buteba's estate.


6

Kalumba's response to the letter, **PExh 6** is dated 11th September, 1994, **PExh 7**. From the contents thereof, the communication to regularize their occupancy had been directed to him and Filista Namala his paternal aunt. Several visits had been made by the two to Lwere's office between 5th August and 10th September, 1994.

- 5 His brother and wife had also joined them on some of the visits to the land lady. However from the contents of that correspondence they had not succeeded in reaching an agreement on the rate at which to buy the *kibanja*.

In that same response in the last *paragraph* thereof, he had this to say:

10 *I also request you to provide grantee (sic!) that after my 'kwegula' pay for the kibanja I will comfortably transfer that piece of land in my names without any obstacle from my land lady or her heirs and successors. (emphasis added).*

15 Since Lwere never wrote back to address the concerns as expressed by Kalumba, it is presumed that Lwere had no requisite authority from Bateba to allow him to handle matters beyond the scope of his purported powers as an agent/administrator and make the transfers to Kyakuwa and her sibling, as he had done.

Not only was Joseph Kalumba aware of the other interests he represented but was also aware that the person he was dealing with was only tasked *to probe into the status of tenureship of all the occupants on the land belonging to the estate of Sarah Buteba. (PExh 6).*

20 He could not therefore also deny that what he was buying at the time was his father's *kibanja* which involved other interests.

Equally surprising was that whereas Kalumba thought it proper to reduce into writing such concerns as expressed in that communication, he never deemed it necessary to obtain written assurances from the beneficiaries of his father's estate and secure their approval/consent for the purchase of the *kibanja* in his names.

25 Kalumba thus allegedly bought mailo interest from Sara Buteba, **plots 502 and 501, block 195**, when the titles he secured indicate that the registered owner at the time was in actual fact Joshua Lwere.

30 On the same date and year 11th November, 2001, the land had been transferred respectively, into the names of his children relying on a 'provisional' transfer, which had no named plot numbers. This was a transfer relied on by Kyakuwa, the plaintiff, not from her parents as a gift as she wanted court to believe but from Lwere who had been dealing with the land merely as an agent without express authority to do so from Buteba or from this court.



In a handwritten letter dated 15th October, 1998 (**PExh 9**) by Kalumba to Lwere, Kalumba had requested from him a signed transfer, mutation forms for the plots, and copies of the blue prints. None of these however were to be found on the court record. The failure to present those vital documents never prevented Kalumba some three years later, from transferring the land into his children's names.

The above exchanges were demonstration that Kalumba was dealing with Lwere, paying him money at times through third parties, for the purchase of the two plots purportedly on behalf of Buteba, fully aware that he had no authority to do so.

Evident from the plaintiff's evidence, Lwere though registered on both titles as early as 2001, was not the lawful owner of the mailo interest which alone ought to have put Kalumba on sufficient notice of the nature of the transaction.

Even more baffling is the question as to how, when and at what point Lwere had taken over proprietorship of that land. As such therefore, the circumstances under which the agent became actual owner and how all this could have happened were not revealed to court.

Besides also was the fact that no signed transfer instrument by Sarah Buteba had been made to Lwere. In consequence therefore Kalumba presented documents which were missing vital information. He bought registered interest from a person who was not recognized or known to have been the rightful owner of the land.

The capacity under which Lwere appeared to have acted and the issue of how in the first place he had acquired Buteba's property whether as a gift *intervivos*, purchase or as an agent was not known to court.

Regardless of whether or not the land was a donation, the transferors still had to fulfill the requirement to sign transfer forms. But other than **PExh 5** a 'provisional' transfer (which was not in the names of the transferees) none of the documents relied on by the plaintiff's side could show with certainty how the land had moved from its original ownership to Lwere and later to Kyakuwa and her brother.

I could not agree more therefore with the proposition as stated in the authority of **Ndigejjerawa Versus Kizito and Sabane Kubulamwana [1953] 7 ULR 31** which was cited by counsel. Any land that is subject to the **Registration of Titles Act** can be transferred only by execution and registration of that instrument.

No document or instrument however perfect is effectual to transfer any interest in land until it is duly and properly registered. It is only then that a legal interest is said to have been created.


8

As per **PEXH 4**, (acknowledgment of receipt), the purported vendor had committed herself to write a full agreement and transfer of the land for the two plots *after all payments had been made by Mr. and Mrs Kalumba*.

The fact also therefore that there was no full agreement signed between Sarah Buteba or her legal representatives was clear manifestation that by 2001 when the transfers were made for the land comprised in **plots 501 and 502** in the names of Kalumba's children, the total amount of consideration had not been fully paid to the estate.

Under those circumstances, this court could not also rule out the possibility that the amounts that were invariably paid out by Kalumba and his wife as consideration to Lwere and his agents for the disputed land were not agreed upon or even received by the principal as the rightful mailo owner. It created doubt in the mind of this court on the validity of the contract.

Balaba in his defence presented proof that several meetings had been held, (**Ref: DEXH 3-DEXH 6**), in a bid to resolve the dispute between the parties. Several recommendations were made which however failed to resolve the dispute.

Having determined that the *kibanja* constituted part of the estate of the late Serapio Mukasa, the question becomes whether or not any of the parties to this suit is entitled to a share under his estate.

Section 29 (2) (a) of the Land Act, Cap.227 provides that an occupant of land seeking to benefit from the provision of a *bona fide occupant* has to prove that he had been in such possession for a minimum of 12 years, without any challenge to such occupation before the coming into force of 1995 Constitution.

Furthermore, **section 29(5) of the Land Act Cap 227** provides that any person who has purchased or otherwise acquired the interest of the person qualified to be a *bonafide* occupant under the section shall be taken to be a *bonafide* occupant for the purpose of the Act.

The intention of the makers of the **Constitution of Uganda 1995 and the Land Act, Cap. 227** was to protect such occupancy for as long as court is able to satisfy itself that the occupants did not have the status of licencees, but *bona fide* occupants of the suit land. (**Civil Suit No. 857 of 2000: Jonathan Masembe and 3 others vs. Makerere University & 2 others**).

Serapio Mukasa had bought the said piece of *kibanja* in the 1950s from one Sendege Alinaya, constructed his home on the *kibanja*, and resided in that home with several of his children, who included the late Sserwanga Luke, Balaba's late father, and Joseph Mukasa Kalumba.



Balaba Luke himself was a minor, and under the care of Joseph Kalumba's family and one or two things may not have been known to him at the time. But much of what he stated in court was either corroborated or not in dispute.

5 Neither the plaintiff nor her father could for that matter refute the claim that Serapio Mukasa had other children including Balaba's father, who had beneficial interest in the estate. Needless to add, upon the demise of Serapio's children their own children became beneficiaries thereof, claiming under their parents.

10 Kalumba, **Pw1** in his own evidence in chief also confirmed that Serapio Mukasa had settled on **plot 39, Block 195** measuring about 4 acres in total, which not only included **plot 501 and 502** but other plots as well. However since no survey report was filed in court, the actual size of the *kibanja* which he had acquired could not be readily established.

15 Following Serapio Mukasa's death in 1969, the said *kibanja* had been entrusted to one Namala Felista their paternal aunt. Balaba's contention that his father had at the time of his death in 1992 started constructing a house on the same suit *kibanja* was also supported by **Dw2** Nabayaza Juliana, a sister to Serapio Mukasa.

In further corroboration of Balaba's evidence, **Dw3**, Nakyazze Joyce elder sister to Kalumba stated that while she herself was born in Naluvule, her siblings, Namata Florence and Muyinda Anthony were born in Kyanja at the suit *kibanja* which she confirmed belonged to her late father Serapio Mukasa.

20 That when her parents separated she had remained on that land with her father, who eventually got himself another wife, Regina Nakalema. Her brother and sister subsequently left the home with their mother.

25 Her aunt Felista Namala, the care taker of the *kibanja*, built a house on the upper side of the *kibanja* which is now **plot 501**. According to Sarah Kalumba Mukasa, **Pw3** however, it was Kalumba himself who put up a small house for the aunt on that plot.

But it was also Kalumba's evidence that he never had any intentions of evicting his aunt from the land, and within the spirit of **section 29 of the Land Act**, the land on which her late brother had stayed and utilized, unchallenged for decades by the rightful owner of the mailo interest.

30 Further corroboration was by **Dw2** Nabayaza Juliana, a sister to Serapio Mukasa who confirmed that the *kibanja* initially belonged to Serapio Mukasa and that it had been occupied by his widow after his death. It is on the said *kibanja* where Serapio Mukasa and other relatives had been buried. The graves had however been removed by Kalumba and relocated to Kiboga.


10

The above is clear demonstration that the late Serapio Mukasa had for long held utilized a *kibanja* on the suit land on the two plots, enjoying uninterrupted occupation and possession.

Joseph Kalumba Mukasa as the heir and successor to his deceased father and having stayed on the said land with the family of his deceased father was just as entitled to a share out of the estate, like the rest of the family/beneficiaries.

Pursuant to **section 29(2) and 29(5) of the Land Act** and as correctly pointed out by counsel for the defendant, Balaba who claimed under his father's estate, together with all the other beneficiaries under the estate of the late Sarapio Mukasa qualified to be a *bonafide* occupants on the suit *kibanja* and were not trespassers to the land. He and other beneficiaries accordingly derived protection under the above provisions of the law, as *bonafide* occupants holding equitable interests therein.

It is the law under **section 35 (8) of that same Act** that a change of ownership of title effected by the owner by sale, grant and succession or otherwise shall not in any way affect the existing lawful interests of *bonafide* occupants, and the new owner is obliged to respect the existing interests.

Upon the death of intestate the codified rules of succession under the **Succession Act, Cap. 162** must apply. The administration of the estate of an intestate is governed by **Section 180** which provides that it is the person appointed as administrator of the estate of a deceased person who is his or her legal representative for all purposes.

It is also clearly stated in **section 25 of the said Act**, that all property in an intestate devolves and vests in the personal representative of the deceased, as trustee for all the persons entitled to the property.

The representative duly appointed is under an obligation to hold the property for the benefit of others, known as *cestuis que trust* or beneficiaries. He/she cannot act without consultation, consent or approval from the beneficiaries. (Ref: **Equity & Trusts, David Bakibinga 2011, Law Africa, page 66**).

A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert fully ownership of the property.

A person who receives property in the circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will however also be a constructive trustee of that property. (**Stanbic U Ltd vs Joseph Aine & Others Civil Suit No. 314 of 2005; see also: 48 Halsbury's Laws Of England, 4th Edition, para 587.**)



It therefore also goes without saying that administration of the deceased's estate without prior authority of court amounts to intermeddling with the estate, in violation of **section 268 of the Succession Act**.

5 As heir, beneficiary, or as party who claimed to have inherited the property, Kalumba could not argue as he did that his father had no property under his estate to be distributed among beneficiaries.

His father from the above findings had a *kibanja* which he had occupied uninterrupted for decades. Kalumba's claim therefore that it had not been necessary to obtain letters of administration did not hold any merit.

10 He could only purchase, dispose or otherwise deal with his father's *kibanja* as an administrator and upon securing the written consent of the family to do so. With due respect, the estate had to be distributed as the law offers no exceptions for property inherited by an heir. Save of course where there is clear proof that it had been received as a gift *intervivos*. No such proof was presented to court.

15 It is immaterial therefore that Kalumba with his wife had struggled to get money, investing a lot in salvaging the suit land, or the fact that the rest of the Serapio family did not make any financial contribution to the purchase; or that Kalumba and his wife had taken care of Balaba's education as a child.

20 They could not simply rely on those assertions to claim ownership, without taking into account what they owed to the rest of the beneficiaries in trusteeship. Having acknowledged that this was a *kibanja* that originally owned by his father, he could not claim exclusive ownership over it under the pretext that he was the heir to his father, and then transfer it into his children's names without prior authority.

Issues No. 1 and 2 are therefore answered accordingly.

25 **Issue No. 3: Whether the plaintiff was fraudulent in the acquisition of the suit land:**

This issue has been addressed in part.

In general terms, a certificate of title is conclusive evidence of title and takes priority over any adverse claims and 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**).

30 A registered proprietor of land is therefore protected under **section 176 RTA** to the extent that no action of ejectment or other action for recovery of any land shall lie or be sustained against the person registered as proprietor under the Act, save in the cases as spelt out under that law,



including, where a person deprived of any land by fraud as against a person deriving otherwise than as a transferee *bonafide* for value from or through a person so registered through fraud.

Fraud was defined in the case of **Fredrick Zaabwe vs Orient Bank and Others SCCA No. 4 of 2006** as an intentional prevention of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

Fraud is such 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 is trite law that that fraud that vitiates a land title of a registered proprietor must be attributable to the transferee and that fraud of a transferor not known to the transferee cannot vitiate the title. **See: Wambuzi C.J, Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 20120**. It can manifest itself in several acts and aspects of a transaction.

It is also well established law that a cause of action in fraud must be specifically pleaded, particulars thereof provided and the claim proved at a higher balance of probabilities. **See Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC)**.

Balaba in his defence told court that Joseph Kalumba had connived with the land lady Sarah Buteba and Joseph Lwere to convert the *kibanja* into registered mailo interest in favour of Kyakuwa, claims which Kalumba however refuted.

In the counterclaim against the plaintiff; Pius Mukasa Kalumba; Sarah Mukasa Kalumba; and Joshua Lwere as administrator of the estate/agent of Sarah Buteba, the following were the particulars of the fraud, as gathered from the counter claim:

1) ***That the 3rd counter defendant swore an affidavit on the 8th day of September, 2010 and on 2nd day of December, 2003 to prove his ownership of the suit land yet he knew that 1st and 2nd counter defendants were already the registered owners then;***

2) ***That the 3rd and 4th counter defendants (parents of the 1st counter defendant) hijacking the suit land and donating it to the 1st and 2nd counter defendant without approval of other beneficiaries;***



13

3) *That the 3rd counter defendant by shifting all the 8 graves without the consent or approval of other beneficiaries/relatives with intention of taking over the land to the detriment of other beneficiaries;*

5 4) *That the 3rd and 4th counter defendants hurriedly transferring the suit land into names of the 1st and 2nd counter defendants who were minors then in order to defeat the interests of the other beneficiaries;*

10 5) *That the 3rd and 4th counter defendants dealing with the suit kibanja and transferring the mailo interest therein without the consent and approval of the kibanja owners or beneficiaries who were lawfully in occupation of it.*

Citing the case of **Kampala District Land Board and Another Versus Venansio Babweyaka and 4 Others Civil Appeal No. 2 of 2007**), among others, counsel in his submission contended rightly so, that these two plots of land were fraudulently created over his grandfather's kibanja without the knowledge of the beneficiaries to defeat the unregistered interest of the defendant.

This court earlier found that no prior written approval/consent had been sought in relation to any of the transactions entered or actions taken by Kalumba (including the shifting of the graves), prior to the transfers.

It is also therefore reasonable to conclude in light of the earlier findings above that Kalumba and his wife, respectively the 3rd and 4th counter defendants, hurriedly transferred the suit land into names of the 1st and 2nd counter defendants who were minors then, in order to defeat the interests of the other beneficiaries.

There is hardly any doubt that Kalumba had beneficial interest in his father's estate. But so did the rest of his siblings and those who claimed under them. He therefore betrayed the trust bestowed upon him as the heir.

A trust is a relationship recognized by equity and arises where property is vested in a person who is under a duty to hold for the benefit of others known as *cestuis que trust* or beneficiaries. Such person must do as the settlor directs. (**Equity & Trusts, David Bakibinga 2011, Law Africa, page 66**).

Kalumba in connivance with his wife and Lwere dealt with the family property, in contravention of the provisions of **section 39(1) of the Land Act, Cap 227 (as amended by the Land amendment Act, 2004)**-



Within the spirit of that law, a person is barred from selling, exchanging or otherwise dealing with family land; enter into any contract for the sale, exchange, transfer *or give away family land intervivos*.

5 The argument that the land was given out to the plaintiff by her parents, with all due respect does not therefore hold for in any case the law does not recognize a verbal gift of land. Such donation is characterized by a deed.

The known principle is that in equity a gift is only complete as soon as the donor has done everything that he/she is required to do, that is to say, as soon as the donor has within his/her control done all those things necessary for him as donee to complete his title.

10 In determining whether the deceased created a gift *intervivos* in respect of the disputed land court has to ascertain the intention of the donor and then whether formal requirements of the method of disposition which he attempted make have been satisfied. (**Nassozi and anor vs Kalule HCCA 2012/5**).

15 This was in respect to land as defined by law, on which was situated the ordinary residence of a family; and which qualified to be treated as family land according to the norms, culture, customs, traditions or religion of the family; where the family resided with some degree of continuity apart from accidental or temporary absences. As such one does not have to live on that land year in, year out.

20 In so dealing with the family suit *kibanja*, transferring the mailo interest therein without the consent and approval of the *bona fide* occupants of the *kibanja* or beneficiaries who were lawfully in occupation of it, and without a valid deed of transfer, fraud had been committed against the estate.

25 As if that was not enough, the documentary proof that the land belonged to Sarah Buteba was actually missing as no certificate of title was seen in her names. there was no area schedule to that effect availed, leaving court wondering whether Buteba was indeed the rightful owner of the mailo interest.

Even if one was to assume that Buteba had legal interest, the parties herein did not address court on the validity of the transfer forms and any of those documents which Sarah Buteba had thumbprinted, demonstrating that she was illiterate.

30 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.


15

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.

Section 3 requires that the document written at the request, on behalf 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 v. The Electoral Commission & 2 Others, H.C Election Petition No.1 of 2012** it was held that;

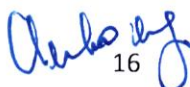
"There is a clear intention in the above enactments that a person who writes the document of the illiterate must append at the end of such a document a kind of 'certificate' consisting of that person's full names and full address and certifying that person was the writer of the document; that he wrote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

Further, that the Act was intended to protect illiterate persons and the 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.**


16

In **Kasala Growers Cooperative Society vs Kakooza and Anor, SCCA No. 19 of 2010**, it was held that the illiterate person cannot own the contents of a document when it is not shown that it was explained to her and that she understand it.

Under the circumstances as highlighted, **section 3** of the **Illiterates Protection Act, Cap. No. 78** was applicable to the transfer deed and acknowledgments purported to have been made by the mailo owner.

By virtue of that section, there ought to have been proof that the contents of the documents that she purportedly endorsed with her thumb print had been properly explained to her and that she had understood the nature of the commitments she made, the obligations therein and the consequences of that decision.

This borders on her competence and/or capacity to enter into such commitment for by virtue of **section 10(1) of the Contracts Acts 2010** a contract is an *agreement made with a free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound*. Since no certificate of translation was provided, an illegality was committed in these transactions.

An illegality cannot be ignored by court once brought to its attention. It overrides all manner of pleadings, including admissions. (**Makula International Ltd vs His Eminence Cardinal Nsubuga & Another Civil Appeal No. 4 of 1981**)

In absence of anything else to make court think differently, Buteba's endorsement which had no certificate of translation, considered together with Joshua Lwere's lack of written authority and capacity to deal with the estate of the late Sarah Buteba amounted to fraudulent dealings in respect of these two estates. Kalumba's failure to secure the letters of administration over Serapio Mukasa before dealing with the estate compounded the problem. In all this, Kalumba could not therefore have been a *bona fide* purchaser for value without notice of the fraud.

Whether or not there was fraud and whether or not a party was a *bonafide* purchaser for value without notice the question that a court would poise is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. (**David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985**). It is the conclusion arrived at by this court that Kalumba in dealing with Lwere the way he did, did not do so in good faith.

Lwere, the first 'registered' proprietor for each of the properties in issue relating to the suit land according to **Pw3's** was busy and could not therefore attend court. This implies that he was fully aware of the counterclaim against him.



It was him who made or witnessed the majority of the transactions which resulted in the fraudulent transfers. His absence therefore was implied admission of his direct and indirect participation of the fraudulent acts committed in the process of the transfers.

All in all therefore, as stated in ***Bishopgates Motor Finance vs. Transport Brakes Ltd [1949] 1 KB 332, at page 336-7*** in the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give better title than what he himself possesses. That legal principle was emphasized by the Supreme Court in ***Halling Manzoor vs. Serwan Singh Baram, SCCA No.9 of 2001.***

The children of Kalumba could not therefore have obtained a good title through fraud since the predecessors in title had no title to pass on to them. In any case as duly noted by court, the transactions contravened the provisions of ***sections 38 and 39 the Land Act***, as cited earlier and were therefore null and void.

Issue No. 3 is therefore determined accordingly.

Issue No. 4: Remedies:

General damages.

The defendant prayed for an order against eviction in his counter claim as he was likely to suffer loss and damage as a beneficiary to the estate of the late Sarapio Mukasa. He also sought for damages for the wrongful acts attributed to the counter defendants.

It is trite law that damages are granted at the discretion of the court. Its trite law that, that damages which are granted at the discretion of court are the direct and probable consequence of the acts complained of.

Such may be loss of profit, physical inconvenience, mental distress, pain and suffering, (***See also Assit (U) Vs Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999 at page 5***). It is also a settled position of the law that the award of general damages is in the discretion of court and is always as the law will presume to be the natural consequence of the defendant's act or omission.

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

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


18

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had he or she not suffered the wrong. He or she ought to lead evidence or give an indication what damages should be awarded on inquiry as the quantum.

(Ongom Vs. AG (1979) HCB 267, cited by court in Kamugira Vs National Housing & Construction Co. CS.No. 127 of 2009)

In this instance, a denial by the 3rd counter defendant of quiet enjoyment of the beneficial interests to which the beneficiaries under the estate of Serapio Mukasa were invariably entitled, the mental anguish and inconvenience to Balaba as the counterclaimant, arising out the fear of eminent eviction occasioned by the acts of Kalumba, the 3rd counter defendant would attract an award of general damages.

An award of **Ugx 200,000,000/=** prayed for by counsel for the counterclaimant in his submissions was not provided for in the pleadings, and therefore court had no basis upon which to grant the said amount, which in any case appeared to be on the higher side.

In the final result, the main suit is dismissed with costs. The counterclaim succeeds with damages payable by the 3rd, 4th and 5th defendants.

The following orders and declarations are accordingly issued:

- 1. The kibanja portion comprised in plots 501 and 502, Block 195, Kyadondo Mengo, formerly part of plot 39 constitutes part of the estate of the late Sepirio Mukasa.**
- 2. The commissioner, Land Registration is directed to cancel the names appearing on the titles for plots 501 and 502, Block 195, Kyadondo Mengo created over the kibanja formerly owned by Serapio Mukasa, and under which the beneficiaries of his estate have an equitable interest, and replace them with the names of the person(s) to be appointed by court as administrators of the estate.**
- 3. The money paid by Joseph and Sarah Kalumba to purchase and/or salvage the kibanja shall constitute a debt against the estate of the late Serapio Mukasa.**
- 4. Mr. Balaba Luke, the counterclaimant derives his interest in the kibanja from the estate of his father Sserwanga Luke who just like Joseph Mukasa Kalumba, was a beneficiary of the estate of the late Serapio Mukasa.**
- 5. A permanent injunction issues against the counter defendants and their agents from evicting any member of the family/beneficiaries deriving interest under the estate of Serapio Mukasa.**



19

6. General damages of Ugx 25,000,000/= awarded to the counterclaimant to be paid jointly by the 4th and 5th counter defendants in respect of the illegalities committed against the estate.

7. An amount of 25,000,000/= shall be paid directly to the estate of the late Serapio Mukasa by the 3rd counter defendant as general damages.

8. Interest of 12% p.a shall be payable in respect to orders 6 and 7 above, from the time of delivery of this judgment till payment in full.

9. Costs awarded to the counter claimant, Luke Balaba.

I so order.

Alexandra Nkonge Rugadya

Judge

5th October, 2022.

Delivered by email
Chibwe
5/10/2022