

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**LAND DIVISION**

**CONSOLIDATED CIVIL SUIT NO 2333 OF 2015**

**ARISING FROM CIVIL SUITS NO. 33 & 333 OF 2015**

**KABALI TWAHA**

**( Administrator of the estate of the late**

**Wandyaka yusuf musembi and mukasa kajubi.....PLAINTIFF**

**VERSUS**

**1. KIMERA TWAHA**

**2. NSAMBA BUKENYA FRED**

**3. SSENDAGALA CHARLSE**

**4. MWEBAZE EZRA**

**5. BARYARUHA LAWERENCE.....DEFENDANTS**

**BEFORE: HON.JUSTICE TADEO ASIIMWE**

**JUDGMENT**

**Background.**

The Plaintiff filed this suit against the defendants seeking for a declaration that he is the rightful owner of the suit property, order for cancellation of the defendant's names from the tittle comprised in block 197 plot 23, 541 and 583, a Permanent injunction, general damages, mesne profits and costs.

The Plaintiff's case is that he is an administrator and a beneficiary in the estate of the late Musa Kajubi who was the owner of the suit land formerly comprised in FC 14346 VOLUME 118, FOLIO 23. That the suit land originally belonged to the late wandyaka yusufu Musembi who bequeathed it to his father as per kabaka's inventory. That the 1<sup>st</sup> fraudulently surveyed off part of the suit land using a forged succession certificate.

On the other hand the 1<sup>st</sup> defendant never filed a defence but the 2<sup>nd</sup> defendant in his written statement of defence stated that he acquired the suit land from the 1<sup>st</sup> defendant who was the registered proprietor in 2008 without any encumbrances or third party claims and took physical possession to date. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants in their WSD contended that the suit land initially was owned by the late Yokana Kibirige the grandfather of the 1<sup>st</sup> defendant who obtained a tittle in way back 1933.

## **Representation**

The plaintiff was represented by Counsel Pande Norman holding brief for Counsel Peter Kimaje Nsibambi while smith kayanja appeared for the defendants holding brief for Musa Kabega.

## **Issues**

The following issues arise from the pleadings of both parties and the plaintiffs scheduling memorandum.

1. Whether or not the plaintiff is a lawful owner of the suit land.





2. Whether the defendants fraudulently acquired the suit land.

3. What remedies are available to the parties.

On the 4<sup>th</sup> October 2022 when the matter came for hearing, both counsel were in court and the matter was adjourned interparty to 12<sup>th</sup> October for commencement of hearing. However on 12<sup>th</sup> the defendants counsel was absent the matter proceeded exparte where the plaintiff called one witness who exhibited 7 documents and closed his case.

### **SUBMISSIONS.**

The plaintiff's counsel filled written submissions which I shall consider in this Judgement. He submitted that the suit land measuring 30 acres originally belonged to the late wandyaka yusufu Musembi which he bequeathed to his son Musa Kajubi as evidenced by the kabaka inventory PE3 which was never challenged. That in 2007 the 1<sup>st</sup> defendant disguised himself as Charles Bukenya and surveyed off part of the suit land using forged succession certificate without the plaintiffs knowledge and consent a fact which was denied by the said Charles Bukenya. That the 1<sup>st</sup> defendant wrongfully transferred the suit land to the names of the 2<sup>nd</sup> defendant. He relied on the case of Fredrick Zaabwe Vs Orient Bank & Others SCCA No, 4 of 2006 arguing that the 3<sup>rd</sup> defendant disguising himself as the owner of the land illegally and fraudulently caused a subdivisions and registration of the suit land in the names of 4<sup>th</sup> and 5<sup>th</sup> defendants without the plaintiff's knowledge and consent. Further the 3<sup>rd</sup>,

A large, stylized handwritten signature in black ink, consisting of many overlapping loops and strokes, positioned at the bottom right of the page.

4th and 5<sup>th</sup> defendants produced no proof of purchase of the suit land as alleged in their pleadings so as to qualify to be bonafide purchasers since they failed to conduct a search on the suit land to establish the true owner. He invited court to find that the plaintiff is the lawful owner of the suit land being the administrator of the estate of the late Musa Kajubi, who inherited it from the original owner. He finally invited court to grant all the remedies sought in the plaint.

### **RESSOLUSSION OF ISSUES.**

1. Whether or not the plaintiff is a lawful owner of the suit land.
2. Whether the defendants fraudulently acquired the suit land.

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

**In Miller V Minister of Pensions [1947]2 ALL E R 372 Lord Denning stated:**

“That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not.”



It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

In this case the plaintiff led evidence of KABALI TWAHA, the plaintiff who testified as pw1 and closed his case. In his evidence contained in the witness statement which was admitted on record, pw1 testified that he an administrator of his father (Musa kajubi) and his grandfather's (Wandyaka Yusuf Musembi) estates vide administration case no AC 263 OF 2009 & AC 052 OF 2012. That the suit land was bequeathed to his father Musa Kajubi through a will as evidenced by an inventory to the Kabaka of bugand adated 4<sup>th</sup> September 1936 as per PE3. He further stated that the 1<sup>st</sup> defendant fraudulently transferred the suit land in to his names from a one Charles Bukenya who he had fraudulently fronted and registered on the said land as the first owner who later distanced himself from the said transaction as a fraudulent as he has never owned the suit property. That on 2009 the 1<sup>st</sup> defendant transferred the suit property to the 2<sup>nd</sup> defendant. That the 2<sup>nd</sup> defendant in 2010 also transferred the suit property to the 3<sup>rd</sup> defendant who immediately sub divided it in two plots and transferred it to the 4<sup>th</sup> and 5<sup>th</sup> defendants. That in 2018 he reported a criminal cases of trespass and forgery in respect to the suit property.

From the evidence on record the gist of the plaintiff's claim is that the suit land was bequeathed to his father a one Musa Kajubi by his grandfather, the late wandyaka Yusuf Musembi.

Before I cross over to the lane of succession, wish to note that both parties claim from different persons as original owners of the suit property. The plaintiff claims that the suit land originally belonged to his grandfather wandyaka Yusuf Musembi. He however did not lead evidence on how his grandfather acquired the suit property. However by effect of PE3 the plaintiffs claim is that his grandfather was given the suit land by the Kabaka. However the said PE3 is a letter to the kabaka introducing successors of the subject of that letter and not a letter by the kabaka gifting or giving or confirming that the suit property was given to the said wandyaka Yusuf Musembi by the kabaka. Besides even the author of PE3/ or any one from the Buganda land Board did not testify in court to at least highlight how and when if at all the suit land belonged to the kabaka and how it was given to the said wandyaka Yusuf Musembi. Reliance on kabaka's alleged inventory does not prove that the plaintiff's grandfather owned the suit land. Worse still the persons introduced to the kabaka in PE3 a one YUSUF SEWANYANA OMUSEMBI is different from the plaintiffs grandfather a one WANDYAKA YUSUF MUSEMBI. There is no evidence on record to show that the two persons are one and the same person. Unfortunately the only witness on record (PW1) never gave any explanation or clarification in regard to the difference in the names.

That notwithstanding, the law governing succession is very clear under the succession act. Administration where a will exists applicants will be issued with a probate. Whereas the plaintiffs claim stems from an alleged



will as per PE3, the record shows that the plaintiff was granted letters of administration as per PE1 and PE2. It also defeats logic as to why the head of the Nsenene clan had to write to the kabaka over property which had already been dealt with under a will.

This evidence is a clear indicator that there was no will at all and it no surprise that none was produced in court. All that the plaintiff relied on was pe3 which I have already stated that it was a letter by the Nsenene clan introducing the successors of the late YUSUF SEWANYANA OMUSEMBI to the kabaka. Although it made mention of will and the plaintiff's father, no other credible evidence was led to back the assertion on the existence of a will. The document PE3 in itself thus lacks validity as a Will evidencing the bequeathing of the suit land to the Plaintiff's father. I therefore find no nexus between the plaintiff and the original owner of the land.

On the issue of fraud, the plaintiff's evidence is that the first defendant through a one Charles Bukenya fraudulently registered the suit land in his name using a forged certificate of succession. He further pleaded that the said Charles Bukenya through a statutory declaration disowned the ownership and dealing in the suit land.

**Fraud** was defined to mean *the intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right.*

*It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury. see Fredrick Zaabwe Vs Orient Bank & Others SCCA No, 4 of 2006,*

● In **Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992,** it was held that;

*“ fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters, it was further held that;*

● *‘The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.’”*

In this case the allegedly forged certificate of succession was not tendered in evidence for court’s inspection and no expert evidence led to prove the said forgery.

In addition, the said Bukenya Charles did not testify to own up the statutory declaration wherein he allegedly disowned dealings and ownership of property and the same was not tendered in evidence.

I therefore find that the plaintiff fell far short of the burden placed on him to prove the alleged fraud and forgery by the defendants.



In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> issues are answered in the negative.

**Remedies available to the parties.**

Having answered issues one and two in the negative, the plaintiff is not entitled to the remedies sought.

**COSTS**

Ordinarily costs follow the event as per section 27 of the civil procedure Act. The defendant's having failed to lead evidence in this case are not entitled to costs.

In conclusion this suit lacks merit and the same is hereby dismissed without costs.



TADEO ASIIMWE

JUDGE

12/12/2022