

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 445 OF 2011

GETRUDE KALEMA : PLAINTIFF

VERSUS

1. PRINCESS NAKIBUULE ANNET
2. THE REGISTRAR OF TITLES : DEFENDANTS

JUDGMENT

Before: Lady Justice Alexandra Nkonge Rugadya

Introduction.

The plaintiff filed this action seeking for orders for the surrender and cancellation from the register book, and certificates of titles of land comprised in **Block 206, Plot 3719 – 3724 (formerly plot 2610)**; a declaration that the defendants dealt fraudulently with the matrimonial land; permanent injunction restraining the defendants from dealing with the suit land; general damages; interest on general damages ; and costs of this suit.

The suit was filed in 2011. An *ex parte* judgment was entered in favour of the plaintiff against the 1st and 2nd defendants. Upon application by the 1st defendant, the said judgment was set aside and the suit was heard on its merits.

Representation:

The plaintiff was represented by **M/s Lunar Advocates**, while the 1st defendant was represented by the firm of **M/s Sebbnja & Co. Advocates**. The 2nd defendant did not enter appearance.

Facts of the case:

The plaintiff Mrs Gertrude Kalema is the widow and administrator of the estate of her late husband Kalema Fredrick Muwonge, and is currently in possession of the suit land. The late Kalema was the registered proprietor of **Kyadondo, Block 206, Plot 2610** where he lived with the plaintiff as a married couple. She claimed that upon realizing that her husband had become mentally incapacitated lodged a caveat on the 31st July, 2008.

A search that was conducted later revealed that the land was subdivided into several plots. The suit property comprised in **Kyadondo Block 206 Plot 3719** was mutated off **Block 206 Plot 2610** and the 1st defendant, Princess Nakibuule Annet became the registered proprietor thereof.

The 1st defendant on her part contended that the suit property had previously been owned by the late Fredrick Kalema who gifted her the suit land as his daughter which portion had ceased to be part of his estate. She therefore refuted the plaintiff's claim that the land was part of her matrimonial home.

Agreed facts:

5 At the scheduling conference the agreed facts were therefore identified as follows:

- a) *The plaintiff is the widow and administrator of the estate of the late Fredrick Kalema.*
- b) *The late Fredrick Kalema was the registered proprietor of the **Kyadondo Block 206 plot 2610** where he lived with the plaintiff as a married couple.*
- c) *The suit property comprised in **Kyadondo Block 206 plot 3719** was mutated off **Kyadondo Block 206 plot 2610** and the defendant is registered proprietor thereof.*
- d) *The plaintiff lodged a caveat and was registered by the Registrar of Titles on the 31st day of July, 2008.*

Issues:

The four issues below were also agreed upon between the plaintiff and the 1st defendant:

1. ***Whether the suit land was matrimonial property;***
2. ***Whether there was any fraud or illegality committed by the defendants in transferring the suit land into the 1st defendant;***
3. ***Whether there is a just cause for revocation or annulment of the letters of administration granted to the plaintiff.***
4. ***What are the remedies to the parties?***

Issue No.3: Whether there is just cause for revocation or annulment of the letters of administration granted to the plaintiff.

In her counter claim, the 1st defendant sought the following orders/ declarations:

- a). *A declaration that the land comprised on **Kyadondo Block No. 206, Plot No. 3719 at Mpererwe Kampala District** belongs to the counter claimant.*
- b). *A declaration that the attempt by counter defendant to lodge a caveat on the suit land and/or property without informing the counter claimant was illegal, null and void ab initio.*



c). An order for revocation of letters of administration granted to the counter defendant vide High Court of Uganda **Administration cause No. 260 of 2010** and the same be granted to the counterclaimant.

5 d). An order to surrender to court the grant of letters of administration granted to counter defendant.

e). An order to file a comprehensive true and counter statement of account of the counter defendant's dealings with the estate of the late Kalema Fredrick Muwanga using the said grant.

f). An order to pay reparation for the loss and damage negligently and willfully occasioned to the estate of the late Kalema Fredrick Muwanga by the counter defendant.

10 g). Mesne profits for loss of income, denying the counter claimant access to the suit land and/or property and to account for money delivered from the same by the counter defendant.

h). A declaration that the encroachment on the said land comprised on **Kyadondo Block No. 206, Plot No. 3719 at Mpererwe Kampala District** by the counter defendant amounts to trespass.

15 i). An order for a temporary injunction restraining the counter defendant, her agents, servants and/or workmen and any other person claiming under her from further interfering with the suit land and/or property until the counter claim/suit is heard and determined.

20 j). An order for a permanent injunction restraining the counter defendant, her agents, servants and/or workmen and any other person claiming under her from further transfer or interfering with the suit land/or property.

k) General damages for trespass inconveniences and embarrassment.

l). Interest at a rate of 30% on item (k) from the date of filling the suit till payment in full.

25 The 1st defendant in the due course of the trial abandoned her prayer for an order for revocation under paragraph (c), and together with it also therefore went paragraph (d) of the counter claim wherein she had sought an order for the counter defendant to surrender the grant of letters of administration.

In agreement with counsel for the 1st defendant, this court finds that the other prayers made in the counter claim would still have to be considered.

Issue No. 1: Whether or not therefore the suit land was matrimonial/family property:

The law:

30 **Section 38 of the Land Act, Cap 227** defines family land to mean, land:



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

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

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

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

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

"land from which a family derives sustenance" means—

(a) land which the family farms; or

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

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

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

Section 39 (1) of the Land Act gives restrictions on transfers to be made on any part of family land.

The said section stipulates that no person may enter into any transaction in respect to land, on which the person ordinarily resides with his or her spouse and from which they derive sustenance, except with the prior consent of the other spouse. A matrimonial home/property is by all means part of what would ordinarily constitute family land/property.

Particular reference is made to **section 39 (1) (c)** of the same section which I find relevant to the present case. It states clearly that a person shall not give away any family land *intervivos*, or enter into any other transaction in respect of family land, except with prior consent of the spouse.

In the instant case, the plaintiff claimed that the 1st defendant had illegally caused herself to be registered on the suit land/property which was matrimonial property, without her consent and/or permission as the widow and administrator of the estate of the late Kalema Muwanga Fred.

That she fraudulently transferred the suit land from the registered proprietor using forged signatures and instruments. Furthermore she failed to get spousal consent from the plaintiff when dealing with the land; and connived with the 2nd defendant to deny the plaintiff her legal interest in the suit land.

- 5 The 1st defendant however refuted the claim that this was matrimonial property. According to her, the said land was originally occupied by one Mukasa his uncle who later relocated to Mukono District.

Her late father had prior to his death informed her that he had inherited the land from his late father, Muwanga Francis Kisekka and upon inheritance, he had engaged a surveyor and obtained a certificate of title into his names. He thereafter gifted to her and to her sister, Nakalema Angel, but who for some
10 unknown reason did not testify.

The plaintiff in her evidence while admitting that her husband had been registered owner of land at Mpererwe comprised in **Block 206, Plot 2610**, (measuring 0.853 hectares) which was obtained originally as a *kibanja* from the late Francis Kisekka in 1966, it became the matrimonial property which they jointly owned and developed as husband and wife.

- 15 The legal interest was purchased from Namasole, as per sale agreement, **PEXh 3 (a) and 3(b)**. The late Kalema signed the agreement as the purchaser of the legal interest. His wife, the plaintiff and **Pw3**, Steven Semwanga had been witnesses to the agreement dated 12th July, 2002; and the said agreement was not contested.

The plaintiff relied on her own evidence, as **Pw1**, that of Ms. Joyce Galabuzi, **Pw2** and Mr. Steven
20 Serwadda **Pw3** her son, to prove that the property was her matrimonial home and therefore property which could not have been transferred without spousal consent.

It was also not in dispute that she had solemnized her marriage with the late Fredrick Kalema Muwanga in 1985. This implies that the two got married after the deceased had acquired the disputed land from Kisekka.

- 25 For over forty years, they resided on the suit land comprised in **Block 206 Plot 2610**, together with their six children, and later in 2006 jointly acquired the legal interest from Namasole Manjeri Lunkuse, the unchallenged holder of the legal interest, and surveyed off their portion. The plaintiff continued residing on that land, even after her husband's demise.

With her husband's knowledge and consent she also tilled the land and derived sustenance from it,
30 carrying out different farming activities. This was also the same land where one of their children had been buried. All that came out clearly from the plaintiff's unchallenged evidence.

The plaintiff's evidence on that score was also strengthened by that of **Pw2**, one of her neighbors who had resided on the neighboring plot, as confirmed from the visit at *locus*. Her truthfulness as a witness was not questioned.



Other witnesses maintained that the late Kalema Muwanga first lived on this land with his brother Mukasa and their maternal aunt. However later Mukasa had shifted from the suit land and left it in occupation of the plaintiff, her husband and their children.

According to **Pw3**, both parents had been gainfully employed and were therefore able to pool their resources together to buy the legal interest.

Resolution of the issue:

The concept of matrimonial land which is an aspect of family land, is a fusion between law and equity. It creates special tenure relations between the householder and the other spouse. With reference to registered land, the proprietary rights to the parcel of land are vested in the householder (the registered spouse) with rights of occupancy guaranteed and protected by the law, for the unregistered spouse, for their joint occupancy, use and enjoyment. It therefore creates an undivided and inalienable right in the land for the other spouse, enjoyed in common with the registered spouse.

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

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

The concept in effect creates and elevates to the status of a legal right, what would otherwise have been an equitable interest of an unregistered spouse. The hitherto equitable interest is now enforceable as a right once the existence of the right is established.

It is also the settled principle is that matrimonial property to which each spouse should be entitled is that property which the parties choose to call home. (***Muwanga Vs Muwanga H.C.C.S 135 of 1997 (unreported)***).

As also held in the case of ***Herbert Kolya Vs Ekiriya Mawemuko Kolya CS No. 150 of 2016 Article 31(1) of the Constitution*** confers on men and women equal rights during marriage and its dissolution.

Courts have therefore over a period of time recognized each spouse's contribution to acquisition of property and this attribution may be direct, where the contribution is monetary or indirect, where a spouse offers domestic or other services. (***Rwabinumi Vs. Bahimbisowe Civil Appeal No.1 10 of***

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2009 citing with approval the authority of Kagga Vs Kagga (High Court Divorce Cause No 11/05).

At the *locus* visit, it was also confirmed that the first house that the couple lived in as their home was situated on the suit land. The visit also confirmed that there was a house that had been built by the plaintiff herself in 1987 which she used as a shop and later she rented it out to a church owned by one Takererwa.

Court was also able to confirm that the land on which the homestead was situated had an ordinary residence, where the deceased and the plaintiff resided, with a degree of continuity. It had always been treated as their family land.

In line with the above principles and findings of court, prior consent of the spouse was not only mandatory under the law as cited, but also an integral part of any transfer of any such property, and an act of due diligence demanded of any prospective buyer or transferee.

Was there a valid gift *intervivos* therefore enforceable against the plaintiff?

A gift *intervivos* is characterized by a deed of transfer. The known principle is that in equity a gift is only complete as soon as the donor has done everything that he/she ought to accomplish, necessary to complete the title.

Thus in **section 92 of the RTA** the transfer of registered land can only be effected by the transferor signing transfer forms in favour of the transferee. The gift is completed upon the signing of the transfer forms and only becomes effective upon execution or delivery of the transfer. It cannot be recalled after that, even though the donee has not been registered as proprietor.

The donor must therefore do all in his/her power to vest the legal interest in the property to the donee and once the transfer is made the gift would not fail even if something remained to be done by some third person. (**Norah Nassozi and anor vs George William Kalule HCCA NO. 05 OF 2012**).

In determining whether the deceased created a gift *intervivos* in respect of the disputed land, court has to ascertain, not only the intention of the donor but also whether formal requirements of the method of disposition which he/she attempted make have been satisfied.

In the present case, the deed **PEXh 8: 'Agreement to donate land'**, dated 16th November, 2008 and witnessed by nine people, read as follows:

I Fred Kalema have donated to my daughters Nakibuule Annet and Nakalema Angel my land which I bought from Namasole located on Block 206 plot 2610. This donated land is on the upper side of the fence continuing up to the road to Mr. Mubiru's land. I have donated to them the upper part of the eastern side of Mr. Nsereko's land.



The land I have donated is part of the land I inherited from my father MUWANGA FRANCIS KISEKKA. I have authorized them to measure off the above described land and whatever decimals it covers is theirs.....

.....

5 ***I have made this donation in life, with a sound mind in front of the village elders...and local council members. No one should ever take away this donation from them. I have also signed the transfer forms authorizing them to mutate off their portion of land.***

The donor:

Fred Kalema

10 ***The Donees:***

- 1. Nakibuule Annet***
- 2. Pri Nakalema Angel***

The gift document was duly signed by the late Kalema Fredrick Muwanga as the donor; and both the 1st defendant and her sister Nakalema Angel as the donees. It had been witnessed by some of the LC Executives Mpererwe Namere Zone Kawempe Division, for the upper part of the land comprised in what was originally **block 206, plot 2610**. These were originally two *bibanja* portions which however became part of a single title under the names of the deceased.

According to the 1st defendant, the upper part belonged to Mukasa, while their father Kalema, owned the lower part. That their late father had wished to give his daughters the portion which belonged to Mukasa. Other siblings were to get the lower part, without affecting the matrimonial home.

She relied on the evidence of **Dw1**, Nakungu Oliva Muwanga, one of the witnesses to the gift deed. **Dw1** had grown up in Namere, and became Vice Chairperson of the area in 2002 and in 2004, became LC Chairman, following the death of the LC Chairperson at the time. She was a witness to the deed transfer. Without any doubt therefore, she knew all about the area and the disputed transaction affecting that land.

She claimed that sometime in 2008, the deceased had called them as elders to give out his property to his children and grandchildren. The Executive had however advised him against the decision of subdividing his matrimonial home before securing the consent of his wife.

The meeting which was originally convened in the deceased's home in the presence of the plaintiff had ended in disarray since the plaintiff had failed to agree with her husband's plan to give away part of the land.

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Another meeting had however been convened at the home of the Secretary General of the area, one Antonio Nalubega; in the presence of the treasurer Kiyimba, and that is where the donation was made after the deceased had refused to heed the advice of the Executive.

Thus whereas the plaintiff's signature had been duly obtained at the time when the legal interest was acquired, **(PExh 3)**, there was no similar endorsement by from her when the transfer was made thereafter by her late husband in relation to that same property, which the 1st defendant and her sister now claim.

The donor in a sketch marked the specific area **(PExh 8)** which he had gifted to the daughters. The sketch shows the neighbours on all sides, without however giving the specific size or measurements of the portion given to each or what was left as part of the matrimonial home leaving court with the impression that it was intended by the deceased to remain undivided.

It would also appear from the reading of that document that it doubled as a gift deed and the *transfer* instrument, and in that form failed to satisfy the requirements of **section 92 of the RTA**, which under the *Seventh Schedule* thereof, gives the prescribed form for the transfer. Without the mutation and/or transfer instruments, the transaction between the late father and his two daughters had not therefore been completed.

As a matter of fact, the two portions of the *kibanja* as it were, had been merged into a single title registered in the names of the deceased, **(PExh 4)**, after his brother Mukasa had left the area. , Before or even after Kalema had taken over that land as the registered owner, no member of Mukasa's family or the administrator of his estate ever raised any issue so as to make it distinct from the lower portion; and indeed none of them came to court to testify or claim any interest therein.

The widow claimed the entire portion rightly so, as property jointly owned between her and her late husband. This had been part of her home, from which the family derived sustenance. She may not have been the financial muscle behind the acquisition of the suit land and indeed, her contribution need not have been financial, or equal to that of her husband to entitle her to any share.

In my view therefore even if the property had been an inheritance for her father and uncle as the 1st defendant wishes this court to believe, the plaintiff and his wife had lived together on that land for 40 years, with the knowledge and consent of the Mukasa's family, and Namasole as the former registered owner.

The two had enjoyed quiet and uninterrupted occupation. That alone would have made her an equitable owner of an interest in that land to make her qualify for protection as a *bonafide* occupant by virtue of **section 29 of the Land Act, Cap.227**.

It is also the view held by this court that the 1st defendant's claim that the upper part of the land initially belonged to her uncle's Mukasa was in itself self-defeating as it implied that her father never



sought consent from his brother when he bought the legal interest; and/or never sought the consent of his brother's family before transferring it under the deed. It implied in short that the deceased had gifted his two daughters with land that never belonged to him.

As per **PExh 11**, a referral letter dated 16th March, 2006, it is also clear to court that at that material time the deceased was disoriented, *with a flight of ideas and diminished attention span*. The said unchallenged evidence of the plaintiff was also supported by that of **Pw3** who confirmed his father's state of mind around the time when the deed was signed.

All in all, the purported gift *intervivos* could not have been valid. It was null and void as it was made against matrimonial/family property, and, contrary to **sections 38 and 39(1)(c) of the Land Act**, without consent of the plaintiff as the spouse.

Issue No. 2: Whether there was any fraud or illegality committed by the defendants in transferring the suit land into the 1st defendant:

The law:

The allegations against the 2nd defendant were that the said suit property which had been caveated had been illegally subdivided; and one of the plots irregularly registered in the names of the 1st defendant and entered into the register book, without notice to the plaintiff as widow and caveator.

The plaintiff claimed that there had been failure to follow the right procedure when registering the matrimonial property and failure on the part of the 2nd defendant to recall the certificates for the illegally subdivided plots.

On her part, the 1st defendant counter claimed that the plaintiff dealt with the suit land well aware that it belonged to her; lodged a caveat thereon and obtained letters of administration through misrepresentation and fraud; and intermeddled with the estate of the late Kalema, thus depriving the 1st defendant of her interest in the suit land.

"Fraud" as defined in **FJK 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.

5 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.

10 The burden of proof therefore 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**).

15 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.

20 The 1st defendant in this suit claimed that she discovered that sometime between 2008 and 2010 the plaintiff had lodged a caveat on the suit land comprised in **Kyadondo Block No. 2006, plot No. 3719** at Mpererwe Kampala District, without her knowledge and consent. That the said caveat upon occupation had lapsed and had been removed from the suit land.

The plaintiff's explanation on that point was that she had lodged the caveat, **PExh5** on 31st July, 2008 (under **KLA 384933**), around the time when the late Kalema had become very sick as she harbored the fear that the titles would be lost and property stolen.

25 Indeed after his demise in 2010, she failed to trace the titles. When she carried out a search on 1st day of June, 2010 the caveat was still lodged on the register (**See PExh. 6**). A subsequent search made on the 29th June, 2011 revealed that the caveat had been dislodged; and that the 1st defendant had become the registered owner of **plot No. 3719, Block 206 at Mpererwe**, after the subdivision of the land into several plots.

30 **Section 139 of the RTA** allows a beneficiary or other person claiming an interest in the land to lodge a caveat with the commissioner, forbidding the registration of any person as transferee or proprietor of land until after notice is issued of the intended registrations given to the caveator.

Section 140 (1) of the RTA provides that:-

(1) **Upon receipt of such caveat the Commissioner shall notify receipt to the ... proprietor against whose title... or interest the caveat has been lodged, and the**

proprietor...may summon the caveator to attend to show cause why the caveat should not be removed.....

From the unchallenged testimonies of the plaintiff's witnesses, such notice was never issued to her by the 2nd defendant.

- 5 The 1st defendant had knowledge of the existence of the caveat at the time she got registered on the title and caused its removal. She also had full and prior knowledge of the plaintiff's unalienated interest in the suit land, as a spouse.

PExh 4 was the certificate for **plot 2610, block 206** the matrimonial property, which originally had an area of **0.853 hectares**. It is not disputed that it was through the 1st defendant's efforts and actions that the subdivisions were made and titles created, including **plot No. 3719** in respect of which she had obtained registration.

This had been done fraudulently, and with the knowledge and connivance of the 2nd defendant, all achieved without the plaintiff's knowledge and consent as a beneficiary and administrator of the estate.

- 15 The 1st defendant was also fully aware that the plaintiff had secured letters of administration, **PExh 2**, on 7th September, 2010: vide **High Court Admin. No. 260 of 2010**, which the 1st defendant never challenged, at least not until the suit was filed against her.

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.

According to the 1st defendant, the plaintiff had irregularly and fraudulently obtained letters of administration, since she had them secured without the knowledge, consent and participation of the beneficiaries; and had turned the estate into personal property, preventing other beneficiaries, from accessing their late father's home. As noted earlier, she however later abandoned the prayer for revocation of the said grant.

In contravention of the above provisions as cited, the 2nd defendant allowed the subdivision of the land, removed the caveat without notifying the plaintiff; and caused the registration of the illegally created titles into names of other people, without the participation and consent of the plaintiff as the administrator of the estate.

Section 26(3) of the Succession Act, Cap. 162 is to be read together with **section 38 of the Land Act**. It refers to residential holdings normally occupied by a person dying intestate, prior to his/her

death. It is recognized as his/her principal residential holding and upon death is held by the personal representative, upon trust for the legal heir, subject of course to the rights of occupation.

Section 26 (3) thereof stipulates that any dispute as to the exact area of any portion of land to be occupied by any beneficiary is to be settled by the personal representative, who in this case is the plaintiff; and any person aggrieved by the decision of the personal representative can appeal from that decision.

The above provisions reinforce the legal requirements for consultations with an administrator of the estate who also happens to be the spouse when dealing with a residential holding or any part of it, and in line with **sections 38 and 39 of the Land Act**.

The 1st defendant in overlooking those critical legal requirements acted with impunity and reckless abandon to deprive the plaintiff of her interest in the estate. It was the 1st defendant, and not the plaintiff who having had no authority to deal with any part of the estate intermeddled with the estate of the deceased, in contravention of **section 268 of the Succession Act**.

Section 27 of the Succession Act, exempts the matrimonial property/principal residential holding from distribution. The section therefore takes into account the occupation rights of the spouse.

As per the decision in **Herbert Kolya Vs Ekiriya Mawemuko Kolya CS No. 150 of 2016**, it would be unlawful for a spouse to give away or bequeath such property to any other person without his/her partner's concession.

Given all the above, and as noted earlier the 2nd defendant looked on while all the transactions were taking place in its office; failed to take any action in execution of its mandate under the **RTA and Land Act**, so as to correct the illegalities in relation to this case.

As per **PExh 10** dated 8th July, 2008 the lawyers for the plaintiff had requested for the recall of the certificates of title for **plots 3719-3724** fraudulently subdivided out of **block 2610, plot 2610**.

A reminder was sent to that office on 26th August, 2011: **(PExh 10 b)**. As per their subsequent response, **PExh 10(c)**, dated 28th September, 2011, 11 years later, the office is still carrying out investigations on this matter.

The 2nd defendant did not file a defence and by implication therefore admitted the irregular acts in subdividing, creating titles and effecting transfers of the various titles, in perpetration of the fraud.

Issues 1,2,3 are each therefore declared in favour of the plaintiff.

Issue No.4: What are the remedies to the parties?

The plaintiff sought for orders for the surrender of the certificate of title of land comprised in **Block 206, Plot 3719**; an order registering the plaintiff as the rightful proprietor thereon a permanent injunction; general damages, interest and costs of this suit.

5 **General damages:**

Its trite law that, that damages are direct and probable consequence of the act complained of, also noted in the case of **Kampala District Land Board and George Mitala Vs Venansio Bamweyana CA No. 2 of 2007**. Such may be loss of profit, physical inconvenience, mental distress, pain and suffering, (*See also Assit (U) Vs Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999 at*
10 *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
15 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.

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position
20 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*)

The determination of damages was left to court.

25 From the evidence, the plaintiff was denied by the 1st defendant of her right to quiet enjoyment of the land for over a period of ten years, attributable to both defendants. She incurred expenses to recover the land.

She has been twice in this court. The first round was when the defendants failed to turn up. Judgment had been made in her favour but later set aside to give the 1st defendant a hearing in defence of her
30 claim. The award of damages of **Ugx 150,000,000/=** is in the circumstances of this case therefore justified as against both defendants.



Section 177 of the RTA gives this court power to direct the Commissioner to cancel any certificate of title, instrument or entry in the register relating to the land and substitute the certificate or entry as circumstances of the case would require.

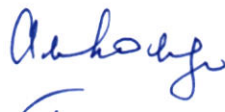
Accordingly, the counterclaim is accordingly dismissed with costs and the following orders are hereby granted:

- 1) *All titles fraudulently created out of Kyadondo Block 206, plot 2610 (land at Mpererwe, are hereby cancelled.*
- 2) *The said land shall revert back to its original Block 206, plot 2610 (land at Mpererwe, and into the names of Gertrude Kalema, as the administrator of the estate of the late Kalema Muwanga Fred.*
- 3) *A permanent injunction issues against both defendants and their agents preventing them from interfering with the quiet enjoyment and possession of the land by the plaintiff.*
- 4) *General damages of Ugx 150,000,000/= shall be paid jointly by the defendants, with interest at 15% payable per annum, from the date of delivering this judgment, till payment is made in full.*
- 5) *The plaintiff is to file an inventory and an account showing the distribution of the estate, within a period of six months from the date of this judgment.*
- 6) *Costs of this suit by the 1st defendant.*


Alexandra Nkonge Rugadya

Judge
25th
21st March, 2022.



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25/03/2022