

Brief facts:

The plaintiffs are the children and direct beneficiaries under the estate of the late Noah Gitta who died intestate on 18th February, 1982 leaving behind several children, some of whom are alive and out of which only 10 were still alive.

It is not disputed that at the time of his death Mr. Noah Gitta owned several properties including the land comprised in **Bulemezi Block 338 Plot 1 at Kifunfugu village**, Kasangombe sub-county in Nakaseke District, measuring approximately 6.05 hectares (15 acres). The plaintiffs claimed that they and other family members of the late Noah Gitta were using the said land for cultivation as a home and as burial grounds.

On 8th November, 2011 however, the 1st defendant Kavuma Paul caused the transfer of the suit land into his name purportedly as an administrator of the estate of the late Noah Gitta, without the knowledge and consent of other beneficiaries.

He subdivided and/or caused subdivision of the suit land into two **plots 78 and 79** and purported to transfer **plot 78** into the 2nd defendant's name and **plot 79** into his name.

Defendants' case:

The defendants however denied the contents of the plaint, refuting the plaintiffs' contention that they had valid interest in the suit property. They filed a joint counterclaim contending that the plaintiffs were allocated other areas comprising the estate of the late Noah Gitta.

In October, 2011, the 1st defendant, Mr. Kavuma Paul applied for letters of administration of the estate of Noah Gitta after obtaining a certificate of no objection on 13th September, 2011 and he denied therefore having obtaining the letters of administration through fraud as alleged.

The 2nd defendant, Mr. Kimbugwe Jessy claimed to have lawfully purchased the suit land comprised in **Bulemezi Block 338, plot 78** at Kifunfugu from the 1st defendant and contended that he is as a *bonafide* purchaser for value without notice of any fraud.

He refuted the claim that his registration as proprietor of the suit land was not procured through fraud or any illegality. The defendant therefore prayed that the plaintiffs' suit be dismissed with costs.



Representation:

The plaintiffs were represented by **M/s Wameli & Co. Advocates**. The defendants by **M/s Abubaker M. Kaweesa**.

Issues.

5 At the scheduling the following were the issues for court to determine:

1. ***Whether the plaintiffs have lawful interest in the suit land?***
2. ***Whether the suit property forms part of the estate of the late Noah Gitta?***
- 10 3. ***Whether the defendants were fraudulently registered as proprietors in the suit land?***
4. ***Which of the parties is a trespasser on the suit land?***
- 15 5. ***Whether the plaintiffs have a caveatable interest on the suit land?***
6. ***What remedies are available to the parties?***

I will deal with **issues No. 1, 2 and 4** jointly.

The law:

20 Trespass to land was defined in the case of **Dima Dominic Poro vs Inyan Godfrey & Apipik Martin Civil Appeal No. 0017 2016** where it was held that an action for tort of trespass to land is for possessory rights rather than proprietary right. It is the unlawful interference with possession of property; invasion of the interest in the exclusive possession of land and occurs when a person makes an unauthorized entry upon land and thereby interferes or portends to
25 interfere, with another person's lawful possession of that land.

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

30 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*).

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*).

In this instance, the plaintiffs averred that the 2nd defendant's coming upon the suit land and threatening to carry out activities thereon and threatening to evict the plaintiffs and/or beneficiaries amounted to trespass.

They had the burden to provide evidence that not only trespass had been committed but also that the transactions between the defendants were tainted with fraud, committed with the knowledge and consent, directly or indirectly by either or both of the defendants.

In their counterclaim the defendants denied the allegations levelled against them, arguing that from 2013 to date the 2nd defendant has been the registered owner of the land on **Bulemezi Block 338 plot 78 at Kifunfugu**.

That sometime in January, 2014 the plaintiffs had unlawfully entered upon the said land and cultivated on part thereof without his authority and that their continued activities on that land amounts to trespass.

They also referred to a caveat lodged by the 1st and 3rd plaintiffs together with Peter Wasswa without any justification or lawful claim and sought general damages for such trespass and unlawful lodgment of the caveat; eviction order; a permanent injunction restraining the plaintiffs and their agents or servants from further trespassing on the suit land; removal of caveat; interest; and costs of the counterclaim.

Analysis of the evidence:

The plaintiffs claimed that at the time of his death the late Noah Gitta owned several properties, including the suit land which was at the time comprised in **Bulemezi in Bulemezi Block 338, plot 1 at Kifunfugu village, Kasangombe sub county in Nakaseke**, measuring approximately 6.05 hectares (15 acres), which the plaintiffs and other beneficiaries have been using for cultivation, residential and also as a burial ground.

They relied on the evidence of three (3) witnesses. Nalunga Annet (**Pw1**) a daughter to the late Noah Gitta, who told court that she and other beneficiaries of the estate were entitled to have a

share in the suit land, which has the family burial ground and also used by her family for cultivation.

Kavuma Anslem (**Pw2**), son of Emmanuel Kasirivu, one of the children of the late Gitta, and therefore a grandson to the late Noah Gitta. His father had died in 1981. **Pw2** claimed to have been on the land since 1990 and a care taker, appointed by his paternal aunties and uncles some of whom however were not resident on that land. He confirmed however that some of his relatives were utilizing the land for cultivation.

The 2nd defendant according to him came to inspect the land and presented a title in his names, without explaining how he had acquired it. **Pw2** further claimed to have reported the matter to various authorities: the Gombolola Land Committee, the Lcs, the Land Protection Unit and the RDC. However that the 1st defendant who was his paternal uncle and, Teddy Nagitta **Dw1**, his paternal auntie who testified in support of the 1st defendant's case, did not reside on that land.

According to the witness, fraud was committed when the suit land was sold to the 2nd defendant without knowledge of the entire family, and yet part of it constituted burial grounds. His evidence was corroborated by that of his elder brother, Mr. Peter Wasswa Gitta who gave evidence as **Pw3**. He too denied the claim that the properties of the deceased had been distributed.

The defendants on the other hand relied on the evidence of two witnesses: **Dw1**, Tereza Nagitta aged 70 years, a sister to the 1st defendant, two of the children of the deceased and the 2nd defendant as **Dw2**.

Dw1 informed court that the 15 acres which formed part of the estate belonged to her mother Ann Maria Nakandi and her biological children, having received the same from the late Gitta. 2 acres were left as burial ground.

It was not in dispute that Gitta died on 18th January, 1982 as per the death certificate. It was also her evidence that her mother, Nakandi was the legal wife but that she had separated from Gitta about 5 to 8 years prior to his death; and that after his demise, she only came to the suit land to attend his burial. At the last funeral rites at which one Lugolobi Constatine became the heir, each of the four or so widows with her children had been given property in their respective areas of residence; and none of them had complained.

Nakandi passed on in 1992, but as the court record clearly indicates, no letters of administration were granted for her estate or that of Nuwa Gitta her late husband.

Dw1 also stated that the land in Kifunfugu was for the children of Anna Maria Nakandi who was also mother to Kasirivu, the father of **Pw1 and Pw2**. Out of the two acres reserved for the burial



grounds Kasirivu himself had obtained an acre, while the other acre remained for the burial ground.

According to her the rest of the family had also obtained their respective shares. Furthermore the part of the money from the proceeds of the sale of the 13 acres in 2011 was used to treat the heir to the estate, Lugolobi who passed on in 2016.

The 1st defendant, Mr. Paulo Kavuma who was of advanced age did not attend any of the proceedings; and it was his sister's evidence that he had been blind for the last 20 years.

The second witness for the defence was Mr. Kimbugwe Jessy, the 2nd defendant, (**Dw2**) who told court that he had bought 13 acres of the suit land on 24th August, 2011, after making a search and due inquiries from the LC1 chairman.

However that although when he bought the land he had not seen the title, he together with the LC chairman had inspected the land which, (as confirmed during the *locus in quo* visit conducted by this court), was separated by a road.

That during the inspection they found a bush with some eucalyptus trees and a home. The LC chairman of the area with whom they had carried out the inspection was not however called in as a witness.

The 2nd defendant further claimed that when he carried out the inspection however he never saw the burial grounds. He confirmed as did this court during the locus visit that that **Pw2** was resident in the upper part across of the road, where the burial grounds were found.

Regarding the sale transaction, it was his claim that the 1st defendant was not totally blind as he could at least use one eye, and had signed the agreement. In *paragraph 1 and 2* of his statement, he told court that he was assured that the land belonged to the 1st defendant and his siblings. This however contradicted the statement by **Dw1** that the 1st defendant, her brother had been blind for close to 20 years.

That the sellers had assured him that their late father had donated the land to them together with their mother Anna Maria Nakandi. That nobody else had any claim or interest in the land and that it did not form part of the estate of the late Noah Gitta. That the sellers had delivered to him the duplicate certificate of title for **Bulemeezi Block 338 plot 78** duly signed in his name.

DExh 1, the sale agreement dated 24th August, 2011 indicates that the parties in that agreement had acknowledged the fact that Noah Gitta was the registered owner of 15 acres of land comprised in the certificate of title for land originally comprised in **MRV 1153 Folio 7 plot 1, Kifunfugu, Nakasweke**.



From the contents of *clause 3* of the said purchase agreement, it was agreed between the 1st defendant, his siblings and the 2nd defendant that the sellers would cause the administrators of the estate of the late Noah Gitta to sign mutation and transfer forms for the buyer.

The sale was for 13 acres. It excluded the residential house and burial grounds. The 2nd defendant, as the buyer was required to survey the property at his own expense.

While denying the assertion that he was a trespasser on the land, he had nothing to show that he had surveyed the land prior to the purchase, as per his undertaking under the agreement.

Dw2 testified in *paragraph 5* of his statement that after buying 13 acres of land, the vendors delivered to him the duplicate certificate of title duly registered in his name. He got his title even before the survey was made.

Consideration by court:

Section 191 of the Succession Act provides that no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.

By virtue of **section 192** thereof, letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his/her death.

The parties in this case do not deny that the fact the late Noah Gitta died intestate. It is also not in dispute that a certificate of no objection was granted to the 1st defendant; that he went ahead to apply for the grant but there is nothing on record to prove that he secured the grant.

The plaintiffs relied on a correspondence dated 18th February, 2013 addressed to **M/s MMAKS Advocates**. It refers to **AC No. 854 of 2011: Estate of the late Noah Gitta**. In that letter, the Assistant Registrar of Family Division, His Worship Deo Nzeyimana, had this to say:

A petition of letters of administration to the above estate was filed on 27th October, 2011 by one Paul Kavuma (son). A notice of application was signed on 3rd November, 2011. To date we have not received any advert in respect of the matter and as such the matter is still pending in court.

No grant was ever issued and therefore if any exists it is not in respect of the mentioned application. (emphasis added).


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As per *clause 2(iii)* of the Sale agreement, the 2nd defendant as the buyer was to pay **Ugx 27,500,000/=** on 25th November, 2011 on condition the sellers shall have registered the land in the names of the administrator of the estate.

In *clause 3* thereof, the sellers were to cause the administrators of the estate to sign the transfer and mutation form. The title shows that by 8th November, 2011 the 1st defendant was already registered on the title as administrator but when he signed the agreement neither him nor his siblings signed the agreement as administrators of the estate.

No such letters of administration were ever issued to the 1st defendant or to anyone else for that matter over the estate of the late Nuwa Gitta. The 2nd defendant did not provide any transfer form or mutation form signed by the administrator as per the agreement or any copy of the letters of administration as his shield before committing the funds.

From **Dw1's** evidence the 1st defendant who had been the key signatory to the purchase agreement had been blind for the last 20 years. One wonders how he could have signed the agreement or even appreciate its contents as a blind man.

Also worth noting is the fact that the widow, Nakandi, had since passed on at the time the agreement was signed. No letters of administration for her estate were however availed to court and indeed among the signatories to the agreement, none of them had signed as her legal representative/administrator of her estate.

Nakandi from **Dw1's** evidence had in any case long separated from her husband at the time of his demise. **Section 30 of the Succession Act, Cap. 162** makes it clear that no spouse is to take interest in an estate of an intestate if at the time of the death of the intestate he/she was already separated from the intestate. That section therefore rules out possibility that the widow still has interest in the estate of Noah Gitta.

The certificate of title **Annexure B** annexed to the plaint shows that the deceased, Noah Gitta became the first registered owner on 26th June 1952. On 8th November, 2011, the 1st defendant purportedly became the next registered owner, as the administrator of Gitta's estate, under *Instrument No. BUK 97385*. It is not known as to how the Land office could have registered him as administrator before a valid grant was issued to him. All that was in his possession was a certificate of no objection (CONO), which by itself could not entitle or authorize him to deal with the estate. Court's conclusion therefore is that the registration of the 1st defendant on the title was based on misrepresentation.

The defence could not sustain the claim that the suit property was not part of the estate after the 1st defendant had got himself registered on the title as administrator of the estate and even



gone ahead to make commitments to the 2nd defendant, that the family would provide mutation and transfer forms signed by the administrator, as per *clause 3* of the agreement.

Under those circumstances the defence's argument that since the plaintiffs did not adduce in court any letters of administration they had failed to prove that the suit property forms part of the estate of the late Noah Gitta was not only a shot in the wrong direction but also self-defeating.

Furthermore, in the petition for the letter of administration attached onto the plaint which was filed on 27th October, 2011 in *paragraph 3 and 4* thereof, the 1st defendant had indicated clearly that at the time of death, the deceased had left land on **Bulemeezi Block Vol. 1153, Folio 7**, measuring approximately 15 acres.

This contradicted the defendants' claim therefore that the land did not constitute part of the estate or the claim made that it was land gifted to only the widow, Ann Maria Nakandi and her children.

In ***Harrison vs Wells (1966) 3 All E.R 524*** the court of Appeal observed that the rule of estoppels is founded on the well-known principle that one cannot approbate and reprobate. The principle is applicable in this case.

It is also to be noted that the total number of children begot by the deceased was not in contention. However in his petition, the 1st defendant had listed only 5 family members as children of the deceased, out of the total of 22 children, 10 of whom were still alive.

The defendants' evidence also failed to show when, how much land, and how the land had been gifted to the siblings who were listed under the sale agreement, that is, whether it was documented by way of a deed or in the form of verbal instructions. The known principle is that in equity a gift is only complete as soon as the donor has done everything that a donor has to do within his control and necessary for him to complete the title.

The law as such does not recognize a verbal gift of land. Such donation is characterized by a deed. 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***).

The evidence of such donation to the children of Nakandi was in this case conspicuously missing. It left court wondering as to how many children left by Nakandi and entitled as alleged, to the donation; how many of them were deceased; whether or not they all had knowledge and

consented; or whether or not each of them had been represented when the estate was being disposed of to the 2nd defendant.

In absence of any proof to think differently, the plaintiffs' claim was believable therefore, that they were not aware of the 1st defendant's bid to obtain letters; and that the 2nd defendant and
5 Regina Nalunga, Nalunga Agnes, Constantino Lugolobi and Teddu Naggita who disposed of the suit land to the 2nd defendant as per the sale agreement **DExh1**, did so without knowledge and consent of plaintiffs and the rest of the beneficiaries.

The defence whose duty it was to prove the assertion presented nothing to court to sustain their claim that indeed Noah Gitta had gifted the land to Nakandi and her children.

10 It was the argument by counsel for the defendants that since the **Dw1** was older, than her nieces and nephews she was more conversant with the details of ownership of the suit land and therefore more credible. **Dw1's** evidence on the donations however lacked the relevant backing since the 1st defendant himself was not able to testify.

15 With all due respect therefore, the assertion made that the plaintiffs had been given their share out of the estate (even if it were the truth); or that the proceeds were used to provide medical treatment for the heir, could not justify or redeem any acts of fraud committed by the 1st defendant.

20 During *locus* court established that Anselm Kavuma, the care taker was on part of the land and rearing some goats. Across the road was an old house, belonging to the deceased. Behind were the home were the 13 acres which the 2nd defendant claims to have bought. The 2nd defendant was not in physical possession.

In response to **issues No. 1, 2 and 4** therefore, the plaintiffs have a lawful interest in the suit land which constitutes part of the estate of the late Noah Gitta; and were not, could not have been trespassers on the land which was yet to be distributed.

25 In response to **issue No. 5**, since they had interest in the estate of the late Gitta, it goes without saying that they also have a caveatable interest in that estate.

Issue 3: Whether the defendants were fraudulently registered as proprietors of the suit land.

Analysis of the law:

30 It is a well-established law that a cause of action in fraud as in this instance must be specifically pleaded, particulars thereof provided and the claim proved at a level higher than on the balance

of probabilities. (*See Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC).*)

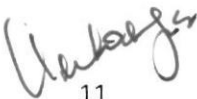
A party faced with pleadings founded in fraud would then know the specific elements of fraud that it needs to rebut or disprove in its defence. *See: Fam International Ltd & Another vs. Mohamed Hamird El-Fatih Civil Appeal No. 16 of 1993 (SC).*

Particulars of fraud as pleaded in this case are:

- 1) *The 1st defendant purporting to transfer the suit and into his names as administrator of the estate whereas he was not;*
- 2) *The 1st defendant purporting and attempting to obtain letter of administration through misrepresentation and decet in order to procure registration on the suit land;*
- 3) *The 1st defendant purporting to transfer the suit land into his names with the intention of defeating the interests of the plaintiffs and other beneficiaries in the estate of the late Noah Gitta;*
- 4) *The 1st defendant purporting to sell and/or transfer part of the suit land to the 2nd defendant without the knowledge and condsent of the plaintiffs and other beneficiaries and with the intention of defeating their interests.*

The acts of fraud raised against the 2nd defendant were:

- 1) *The 2nd defendant purporting to purchase and/or obtain registration on part of the suit land well knowing that the same formed part of the estate of the late Noah Gitta and that the beneficiaries had not consented to the transfer;*
- 2) *The 2nd defendant purporting to purchase and transfer into his names part of the suit land well knowing or having cause to know that the 1st defendant had fraudulently and illegally caused the same to be transferred into his name;*
- 3) *The 2nd defendant deliberately refusing and/or neglecting or failing to conduct due diligence search and inquiry about the title of the 1st defendant before purporting to purchase and transfer part of the suit land into his name, whereby he would have established that the same had been acquired fraudulently and illegally;*



4) *The 2nd defendant purporting to purchase and transfer into his name part of the suit land in total disregard of the plaintiffs' and other beneficiaries' interests therein;*

5) *The 2nd defendant purporting to purchase and/or transfer part of the suit land into his name with the intention of defeating the interests of the plaintiffs and other beneficiaries of the estate of the late Noah Gitta.*

Issue No. 3 is answered in part, this court having found that the registration of the 1st defendant had been fraudulent. The registration was made with the sole objective of defeating the interests of the rest of the beneficiaries under the estate.

Regarding the 2nd defendant, and in relation to *clause 8* of the purchase agreement, the 2nd defendant, **Dw2's** argument was that the sellers had assured him that the property was free of any encumbrances or third party claims whatsoever, be it possessory or otherwise.

However that to date he is unable to utilize the land. He had dealt with the 1st defendant who assured him that this was their land; and that they were in the process of obtaining letters of administration.

It was also submitted by his counsel that **Dw2** had complied with the conditions set out in the purchase agreement namely, the land sold and bought excluded the burial grounds and the residential house. That if any fraud was committed (which was denied), no fraud can be attributed to him since he is a *bonafide* purchaser for value without notice of any adverse claim.

When asked about the search at the land office his reply was that it was his lawyer who went to the office. It is also clear from the facts as presented that the 2nd defendant never carried out the survey.

He also admitted that he did not participate in the process leading to registration of the duplicate certificate of title in his name, also claiming that the plaintiffs did not exhibit in court either photocopies of the said certificate of title or certified copies from the Land Office.

Secondly, they did not call the Registrar of Titles as a witness to discredit the process of registration of the defendants on the suit land as being illegal, null and void. In the absence of such proof, it was not therefore necessary to rectify the register in **Bulemezi Block 338 Plot No.s 79 and 78.**

The term *fraud* has been defined to imply an act of dishonesty. (**Kampala Bottlers Ltd. vs. Damaniaco (U) Ltd SCCA No. 2 of 1992.**); an intentional perversion of truth 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.

In **F.I. K Zaabwe vs Orient Bank and 5 others SCCA No. 4 of 2002**) it was 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/she shall act upon it to his legal injury.

Under **section 59 of the Registration of Titles Act, Cap. 230 (RTA)**, the general principle is that a certificate of title is conclusive evidence of ownership. Save where fraud is proved, it is also an absolute bar and estoppel to an action of ejectment or recovery of any land. (**Refer to: section 176 of the Registration of Titles Act, Cap 230 (RTA) and section 64 (1) RTA**).

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 he himself possesses (**Bishopgates Motor Finance vs. Transport Brakes Ltd [1949] 1 KB 332, at page 336-7**). That principle was emphasized by the Supreme Court in **Halling Manzoor vs. Serwan Singh Baram, SCCA No.9 of 2001** that a person cannot pass title that he does not have.

In order for a party to claim interest in the land, his title ought to be derived from someone who had a recognized right and title on land. (**Godfrey Ojwang Vs. Wilson Bagonza CA No. 25 of 2002**).

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 2012**).

The 2nd defendant in this case claimed to have been a *bona fide* purchaser for valuable consideration of land. Such party would derive protection under **section 181 of the RTA**. It is also trite law that a person who purchases an estate which he/she knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

The term is defined in **Black's Law Dictionary 8th Edition at page 1271** to mean:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."

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The said transactions are guided by the basic rule is *nemo dat quod habet*, that the transferor cannot pass a better title than what he himself possesses, save of course where there is clear demonstration of good faith.

- 5 As earlier observed, the 1st defendant fraudulently obtained his title when he registered himself thereon as administrator of the estate of the late Noah Gitta, whereas not. The 2nd defendant could not therefore claim to have purchased 13 acres of land from a person who had no valid authority, and without a valid title.

10 The act of due diligence requires a prospective buyer to carry out physical inspection on the land in a bid to obtain first-hand information from the occupants, neighbors and LCs about the land he intends to buy.

Land transactions today are based on four key elements: caution, precision, patience and prudence. The opening of boundaries becomes inevitable so as to ascertain that what is on the ground is reflected on the title, as an act of due diligence. It is not therefore enough for the
15 intending buyer to stop at inspecting the land with the chairman; or visiting the land office and signing an agreement, as the 2nd defendant did in this case.

The certificate of title, sale agreement and letters of administration/probate, will or gift deed (if any), and others which parties may need to rely on must be verified, to ascertain their authenticity, failing which the plea of a *bonafide* purchaser for value becomes inapplicable. A
20 party who so fails is deemed to have had constructive knowledge of such fraud.

In ***Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995***), such failure to make reasonable inquiries or ignorance or negligence fails to meet the necessary criteria for good faith; and constitutes fraud.

As declared in the case of ***Omar Salim Mukasa Vs Haji Muhammed & another CACA NO 114 of 2003***, in equity constructive knowledge is deemed to constitute fraud. Whether or not there
25 was fraud therefore and whether or not a party was a *bonafide* purchaser for value without notice, the question that a court would pose 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***).

30 In alignment with the above principles, if the 2nd defendant in the present case had taken the trouble to carry out prior thorough investigations and consultations, he would have noted in the first place, that the estate of the late Gitta was never distributed; and that had varied interests


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and hence unresolved disputes. The 1st defendant who purported to administer it was therefore intermeddling with the estate, in violation of **section 268 of the Succession Act**.

While at the *locus*, **Dw2** stated that prior to the purchase, he inspected the land in the company of **Pw2**, the caretaker of the land and a grandson of Noah Gitta and the LC1 Chairman. **Pw2** however denied the claims by the 2nd defendant. The LC 1 did not endorse the agreement; and none of those he mentioned were called in as his witnesses in court.

Section 35 (8) of the Land Act, Cap. 227 is clear. It implies that even where a change of ownership of title is acknowledged, whether by sale, grant and succession or otherwise this would not in any way affect the existing lawful interests or *bona fide* occupant. The new owner is obliged to respect the existing interests.

In **Vivo Energy Uganda Ltd vs Lydia Kisitu CACA NO. 193 of 2013**, court while laying emphasis on the need for thorough investigation declared that there was sufficient circumstantial evidence to establish fraud against a defendant.

Court also rejected the argument (as I also now hereby do), that a certificate of title was not enough to establish ownership where there was circumstantial evidence that should have put the defendant on notice, requiring him to go beyond the certificate of title.

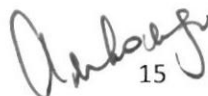
Fraud is such grotesque monster that courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all transactions. (**Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994]KARL 307**).

In conclusion therefore, the evidence above demonstrates that the 2nd defendant fraudulently acquired the title for the suit land. It is also important for court to point out that the issue that each widow having earlier obtained their respective and fair share out of the estate and taken possession therefore would have been ironed out if the 1st defendant or other member of the family had duly taken out the letters of administration and distributed the estate, taking into account what each beneficiary has already acquired.

What remedies are available?

General damages:

The law is that the claim for general damages must be proved. General damages are those that the law presumes to arise from direct, natural or probable consequences of the act complained of by the victim.


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These follow the ordinary course or relate to all other terms of damages whether pecuniary or none pecuniary, future loss as well as damages for paid loss and suffering. **See; Uganda Commercial Bank Vs Deo Kigozi [2002] EA 293.**

Black's Law Dictionary 9th Edn at page 445 defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the direct probable consequence off the act complained of. Ref: *Storms versus Hutchison (1905) AC 515.*

In the case of **Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35** it was held that *the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering*.

It is the defendants' claim in this case that the plaintiffs did not prove that they have suffered any loss; and indeed while at the locus, part of the suit land was found to be bushy, and not properly in use.

Be that as it may, the inconvenience, betrayal of trust and expenses of an expensive trial (since 2014) suffered by the beneficiaries were partly attributable to the 1st defendant and partly to the 2nd defendant 2014. This justifies an award of general damages of **Ugx 20,000,000/=** against the two defendants.

Cancellation of the title:

The plaintiffs prayed for cancellation of registration of the defendants on the suit land comprised in certificate of title for **Bulemezi Block 338 Plot Nos. 79 and 78.**

Under **section 177 of the RTA** where there is recovery of land court may direct the office of the Registrar of titles as I now hereby do, to cancel the title fraudulently issued and this relates to both **plots 78 and 79 land situated at Kifunfugu, LC1 Mpedde Parish, Kasangombe Sub County at Nakaseke District**, the ownership of which shall revert into the names of the late Noah Gitta.

Accordingly, the plaintiffs' action succeeds and orders below granted:

a). *the suit land comprised in Bulemezi Block 3,38 Plots 78 and 79 (formerly) Plot 1 land situated at Kifunfugu, LC1 Mpedde Parish, Kasangombe Sub County at Nakaseke District (suit land)forms part of the estate of the late Noah Gitta;*

b) *the transfer and or registration of the defendants on the suit land was fraudulently procured and as therefore illegal, null and void.*


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c) the names of the names of Noah Gitta or his duly appointed administrator shall be reinstated on the title of the suit land, comprised in **Bulemezi Block 338 Plot Nos 79 and 78;**

d). the 2nd defendant is a trespasser on the suit land;

5 e) a permanent injunction issues against the defendants and their agents to restrain them from dealing with the suit land;

f) the 2nd defendant is entitled to a full recovery of the purchase money irregularly paid by him and received and refundable by the 1st defendant and others who endorsed the invalid sale agreement;

10 f) general damages of **Ugx 20,000,000/=** awarded to the plaintiffs, payable by the defendants jointly, with interest of 15%, accruing from the date of delivering this judgment till payment is made in full;

g) the counterclaim is dismissed.

Costs to the plaintiffs.

15 I so order.


Alexandra Nkonge Rugadya

Judge

25th January, 2023

Delivered by email

25/1/2023

