THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL SUIT NO. 102 OF 2013

NANTEZA SARAH, BABIRYE KETI WAMALA & MUBANDA RONALD
(Administrators of the estate of the late James Wamala) ::::: PLAINTIFFS

VERSUS

SUGAR CORPORATION OF UGANDA LTD :::::::::::::: DEFENDANT

BEFORE HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

JUDGMENT

Background

The Plaintiffs brought this suit against the Defendant as administrators and beneficiaries of the estate of the late James Wamala seeking for vacant possession of the suit land, compensation for the Plaintiffs using alternative land for their livelihood, general damages, exemplary damages for the wanton use and occupation of the suit land, mesne profits for the illegal use of the Plaintiffs land, interest and costs of the suit.

Summary of the Plaintiffs' claim

Prior to his demise in July 2000, the late James Wamala was the registered proprietor of land comprised in Kyagwe Block 303 Plot 204 land at Nyenga measuring approximately 49 hectares (here in after referred to as the suit property). Upon his death, the Plaintiffs who are a widow, daughter and son of the late James Wamala obtained Letters of Administration for his estate vide High Court Administration Cause No. 39 of 2002 which estate has nine beneficiaries to wit a widow and 8 children.

Upon obtaining Letters of Administration, the Plaintiffs got registered on the certificate of title for the suit property as administrators of the estate. The suit property had been a subject of a lease to a one Alexander McPherson, a British Citizen, for a period of 99 years from 18th February 1923.

While tracing the late James Wamala's assets including the suit property and following a search at the land registry at Mukono, the Administrators of the estate discovered that a re-entry of the afore mentioned lease was entered on the 7th day of May 1985 vide instrument No. mko43853 thereby freeing the land from any incumbrances. The Plaintiffs as the Administrators of the estate of the late James

08.09.2023

Wamala engaged surveyors to locate and where possible open boundaries of the suit land whereof, they discovered sugarcane planted on the suit property which the neighbours confirmed to belong to the Defendant who had been in possession of the suit property for over 10 years.

The Plaintiffs requested the Defendant to quit the suit property and pay general damages, compensation and mesne profits who in turn requested for time to enable them establish whether the said sugarcane belonged to them. However, the Defendants have never communicated to the Plaintiffs regarding their willingness to vacate the suit property nor compensate the Plaintiffs for the illegal use and occupation of the land for all the period they have been in occupation.

That the Defendant has never bought the suit land and her claim is fraudulent.

Summary of the Defendant's claim

That the late James Wamala entered into a lease agreement with a one Alexander McPherson, a British Citizen for a period of 99 years from 18th February, 1923. That due to non- payment of ground rent, the late James Wamala who was the registered proprietor of the mailo interest re-entered on the land and caused re-entry to be noted/entered on the certificate of title.

That the said James Wamala after successfully effecting the re-entry entered into a memorandum of sale and transfer of the suit land on the 24th day of July 1991 with the Defendant and the Defendant took possession of the suit land and have at all material times been using the suit land.

Representation

The Plaintiff was represented by M/S Kamugisha & Co. Advocates while the Defendant was represented by M/S H & G Advocates formerly Kateera & Kagumire Advocates.

In the Joint Scheduling Memorandum, the parties agreed to the fact that James Wamala died in July 2000 and the Plaintiffs are administrators and beneficiaries of his estate and that the suit land is occupied by the Defendant who is using it for sugarcane growing.

The parties agreed on the following issues for determination.

1. Whether the suit and plaint is barred by the law of limitation.
2. Whether there was a sale of the suit land to the Defendant by the late James Wamala.
3. Whether the suit land belongs to the Defendant.
4. Remedies available to the parties.

08.09.23

Both parties amended their respective pleadings to wit the Plaint for the Plaintiffs and the Written Statement of Defence for the Defendant.

The Plaintiffs called three witnesses to prove their case to wit Muwanda Ronald (PW1), Mulindwa Andrew Ssekyete (PW2) and Chelengat Sylvia (PW3). The Defendant on the other hand adduced evidence of one witness Ronald Kyazze.

The parties filed written submissions which have been considered in determining this suit.

Court's Consideration

Issue 1. Whether the suit and the plaint are barred by the law of limitation.

In submission to this issue, Counsel for the Plaintiffs referred to paragraph 4 (e) of the amended Plaint where in it was stated that the Plaintiffs learnt of the existence of the suit land after obtaining letters of administration in 2002 and after a search at the land office. That the actual location of the suit property was ascertained later in 2003 with the assistance of surveyors. This position was re-echoed by PW1 in his uncontroverted testimony during cross examination.

Counsel further stated that PW2 informed Court that James Wamala at one time had to flee for his dear life to Lake Victoria islands to escape the wrath of Ali Fadhul and that explained why the Plaintiffs did not know of the suit land's existence or its location and neither did PWI or PW2 know how Brig Ali Fadhul left the suit land or the circumstances under which the Defendant entered occupation thereof. That amidst those circumstances, the Plaintiffs could not have with reasonable diligence known about the existence of the suit land before 2003 when the surveyors located it for them.

Counsel for the Plaintiffs further submitted that the Defendant's claim of purchase from James Wamala in PEX.6 (the memorandum of sale) is fraudulent since the late Wamala did not of the Defendant's occupation of the suit property during his lifetime and could not have sold it to the Defendant. That the Handwriting Expert's report PExh 10 confirmed that the signature on the sale was not authored by the late James Wamala as alleged.

Counsel for the Plaintiff relied on **Murome Vs Kuko HCB 68**, where it was held that the Plaintiff must plead facts from which a reasonable inference can be made that the suit is not statute barred. Where a case is based on fraud, the limitation period shall not begin to run until the Plaintiff has discovered the fraud or could have with reasonable diligence discovered it. Counsel referred to **Section 25 (a) (b) & (c) of the Limitation Act** in support of this legal position.

0809-23

In reply, counsel for the Defendant submitted that the Plaintiffs instituted this suit on 19th August 2013 for recovery of land. Counsel referred to paragraph 3 of the Amended Plaint in which the Plaintiffs state that they bring this suit against the Defendant for vacant possession and in the alternative, compensation. Counsel cited **Section 5 of the Limitation Act** which provides that no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or if it first accrued to some person through whom he or she claim to that person.

It was Counsel's submission that **O. 7 R 6 of the Civil Procedure Rules** requires that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the Plaint should show the grounds upon which exemption from the law is claimed and where no exemptions are pleaded, then **O. 7 Rule 11(d) of the Civil Procedure Rules** dictates that such a Plaint shall be rejected.

To reinforce the above position, Counsel cited the case of **Iga Vs Makerere University (1972) EA 65** wherein the above issue of limitation arose and the Court observed that;

"A Plaint which is barred by limitation is a Plaint barred by law. Reading these provisions together, it seems clear to me that unless the appellant in this case put himself within the limitation period showing the grounds upon which he could claim exemption, the Court shall reject his claim".

Counsel for the Defendant further submitted that the Plaintiffs' father, the late James Wamala, acting through his authorised agents /lawyers M/S Mutyabule Kisadha & Co. Advocates initiated the sale and finally sold the suit property to the Defendant for a sum of Ug. Shs. 19,372,800/= on 24th day of July 1991. That by the time of his death in July 2000, the said James Wamala had never challenged, disputed or even rejected the Defendant's use, occupation and ownership of the suit property.

The Defendant stated that although the Plaintiffs have made an effort to argue that their action could only be possible and time only started to run after obtaining Letters of Administration for the estate of their late father, this argument is legally untenable and wrong. For this argument, Counsel relied on **Section 15 of the Limitation Act** which provides that;

"For the purposes of the provisions of this Act relating to actions for recovery of land, an administrator of the estate of deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the Letters of Administration"

08.09.23

To buttress the same, Counsel cited the case of **Prince Kalemera H. Kimera & Anor Vs. The Kabaka of Buganda & 3 Ors HCCS NO. 535 of 2017.**

Counsel elaborated on the import of the aforesaid section where he rightly put it that for any claims derived from the interest of a deceased person, the time for actions start to run from the occurrence of the alleged cause of action and the death of the owner does not interrupt the said time.

Counsel submitted that the cause of action if any for the recovery of suit land began to run on 24th July 1991 when the land was sold under a memorandum of sale executed by the parties and by the time the instant suit was filed on 19th August 2013, it was already 22 years after the alleged cause of action arose and that therefore the suit is time barred.

In rejoinder, the Plaintiffs reiterated their contention that the suit is within time and thus properly before court. It was Counsel for the Plaintiff's submissions in rejoinder, that the Plaintiffs at the time of filing the suit believed the Defendant was only in illegal possession, the issue of ownership came later when the Defendant introduced D.Exh.6(a memorandum of sale and transfer). Accordingly, time begun to run upon the Plaintiff's discovery of the Defendant's occupation of the suit land without any valid claim and that was in 2003 when the Plaintiffs, with the help of surveyors, discovered that the suit land was being occupied by the Defendant.

In light of **Section 15 of the Limitation Act**, Counsel submitted that it does not over ride **Section 25 of the same act**. Time begins to run when fraud is discovered whether you are the registered proprietor, an administrator or a beneficiary of an estate. **(See Katuramu & Ors Vs Kyanyaamu & 11 Ors HCCS No. 205 of 2014, Sunday Edwrad Mukooli Vs Nabbale Teopista & Ors CS No. 282 of 2013).**

Counsel for the Plaintiff submitted that in **Prince Kalemera H. Kimera & Anor Vs The Kabaka of Buganda (Supra)** cited by the Defendant, the Certificate of title for the suit land was issued as far back as 1924 and subsequently various leases were issued thereon. That the actions by the beneficiaries came 93 years later and in fact some of the leases had been issued with their knowledge. It was Counsel's contention that in the instant case, there has not been any transfer of the certificate of title and even though the Defendant claims interest, there is nothing registered on the certificate title in respect of the Defendant's interest at the very least, a caveat. That administrators and beneficiaries of the estate of the late Wamala acted promptly upon discovery of the fraud. Plaintiffs' Counsel submitted that the Defendant is not a bonafide purchaser for value as found in the

08.09.23

case of Prince Kalemera case and that therefore, the Kalemera decision is inapplicable in this situation.

Having read the submissions of both Counsel, I resolve this issue as follows:

Section 5 of the Limitation Act prohibits bringing an action by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.

On reading the Amended Plaint, there is no clears the doubt that this is an action for recovery of land. In **Gawubira Mankupias Vs Kakwiita Stephen HCCA No. 130 of 2008**, where Court referred to the case of **Odyeki & Anor vs Yokonani & 4 Ors ca no. 0009 of 2017** it was held that;

"With regard to actions for recovery of land, there is a fixed limitation period stipulated by Section 5 of the Limitation Act. This limitation is applicable to all suits in which the claim is for possession of land, based on title or ownership i.e. proprietary title, as distinct from possessory rights"

The issue then becomes when did the right of action accrue.

It is now a settled proposition of law as held in **Eridad Otabong Vs Attorney General SCCA NO. 6/1990, (1991) ULSLR 150** that;

"Where a period of limitation is imposed, it begins to run from the date on which the cause of action accrues"

It is a settled principle of law that in determining matters of time and rights to sue, the Court is bound to consider the pleadings of the Plaintiff alone. **(See Ababiri Muhamood & 4 ORS Vs Mukomba Anastasia and Anor. HCCS NO. 22 OF 2015).**

I have carefully perused paragraph 4 (e) of the Plaint as pointed out by the Counsel for the Plaintiffs and the amended Plaint generally. It can be adduced therefrom that the Plaintiffs are the Administrators of the estate of the late James Wamala having obtained the grant thereto vide High Court Administration Cause No. 39 of 2002.

Upon obtaining the Letters of Administration, they embarked on tracing the deceased's assets including the suit property and following a search at the land registry at Mukono, they discovered that the suit land was free of any encumbrances. They engaged surveyors to locate the suit property and open boundaries and in the process, they discovered that the Defendant was in

08-09-23

possession of the suit property. That the Plaintiffs approached the Defendant and requested her to vacate the suit land to which the Defendant requested for time to verify whether the sugarcane belonged to her. To date, the Plaintiffs have not received a response from the Defendant in this respect.

I have observed that the Plaintiffs obtained the Letters of Administration to the estate of the late James Wamala on 29th July 2003. (See **Annexture A** to the initial Plaint)

Counsel for the Defendant
observed that although the Plaintiffs that their action started running could only be possible and time only started to run after obtaining Letters of Administration for the estate of their late father, **Section 15 of the Limitation Act** which provides that;

"For *the purposes of the provisions of this Act relating to actions for recovery of land, an administrator of the estate of deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the Letters of Administration"*

Counsel for the Defendants observed that the above section of the law is very specific to actions for recovery of land, is clear and unambiguous. He argued that it means that for any claims derived from the interest of a deceased person, the time for actions starts to run from the occurrence of the alleged cause of action and the death of the owner does not interrupt the said time.

He cited the case of **Prince Kalemera H. Kimera & Another vs. The Kabaka of Buganda & 3 Ors HCCS No. 535 of 2017** where the Hon. Principal Judge was considering a matter for recovery of land brought by the grandchildren as Administrators of the Estate of the Late H.R.H Sir Daudi Chwa and had this to say at page 16 of his judgment;

"The question that is left to be determined here is at what point did time start running for the Plaintiffs to bring the suit? Was it after the death of Sir, Daudi Chwa 11 in 1939 or immediately after the 1st Defendant was registered in the title in 1993?..... I find this argument convincing. The Certificate of Title for the suit land dated to 1924 and various leases were issued on the titles after 1924. The leases were actually not issued by Daudi Chwa II. Daudi Chwa II did not challenge the said leases. The beneficiaries of Daudi Chwa cannot come now almost a century later (93) years) to challenge the proprietorship which their father did not challenge. S.15 of the Limitation Act leads credence to this argument. It should be noted that Daudi Chwa died in 1939 but he had not

08.09.23

attempted to challenge the 1st Defendant's proprietorship. His lineal descendants therefore cannot claim to have a superior claim of right than him".

I find the case of **Prince Kalemera H. Kimera & Anor Vs The Kabaka of Buganda & 3 Ors (Supra)** distinguishable from the instant case and with that, I associate myself with Counsel for the Plaintiffs' observation in his submission in rejoinder that in the Prince Kalemera H. Kimera Case, the Certificate of title for the suit land had been issued as far back as 1924 and subsequently various leases were issued thereon. Daudi Chwa II never challenged the said leases. The actions by the beneficiaries came 93 years later and infact, some of the leases were issued with their knowledge.

In the instant case, there has not been any transfer of the Certificate of Title to the Defendant. For the avoidance of doubt, the photocopy of the certificate of title attached to the impugned Plaint shows that the Administrators of the estate of the late James Wamala got registered on the certificate of title for the suit land on24/10/2007. Although the Defendant claims an interest through purchase of the suit property from the late James Wamala, there is nothing registered on the certificate of title as evidence of the Defendant's interest, not even a caveat.

It can be discerned from the Amended Plaint (Paragraph 4 (c)) that the suit property belonged to James Wamala which upon his demise, vested in his estate. In 2002, the Plaintiffs as administrators of his estate embarked on tracing the estate properties and found the suit property in the deceased's name hence forming part of the estate. It was during the opening of the boundaries for the suit property that the Plaintiffs discovered sugarcane on the property and inquiries from the neighbours led to the finding that the sugarcane belonged to the Defendant who when allegedly contacted had to find out whether the sugarcane belonged to her.

Bearing in mind that possession of a Certificate of Title is conclusive proof of ownership **(Section 59 of the Registration of Titles Act Cap 230)** and having in mind that the Plaintiffs are the registered proprietors of the suit land coupled with the fact that the certificate of title had never been tampered with in any way, I am of the considered view that the cause of action arose in 2003 after the Plaintiffs had obtained the Letters of Administration and with the help of surveyors traced the suit property with sugarcane being grown thereon.

I find **Section 15 of the Limitation Act** cited by counsel for the Defendant misplaced since even at the death of James Wamala in July 2000, the suit property was still in his names therefore he was the owner of the suit property. Therefore, the Plaintiff's cause of action could not have accrued in 2000 as argued by the Defendant's since suit property was still owned by the late Wamala and to

08.09.23

Wamala, the suit property by the time of his death was occupied by Ali Fadhul, a notorious soldier and not the Defendant. To buttress this, it was PW2's evidence that the late Wamala did not take possession of the suit land which was occupied by Ali Fadhul, who blocked Wamala from getting any where near the land and that Wamala filed a suit against Fadhul and died before conclusion of the suit. (Refer to paragraph 6 and 7 of the evidence in chief and in the re-examination of PW2). From this evidence, it is clear that Wamala knew that his land was in occupation of Ali Fadhul. He was not aware of the Defendant's occupation if at all it was at the time of his death thus there was no way the cause of action could have arisen then.

Having found that the cause of action rose in 2003 and this suit was instituted in 2013, it is clearly indicated that the Plaintiffs filed this suit after 10 years from the date when the cause of action arose. For that reason, I find that the suit is not time barred.

More to that, the Plaintiffs under paragraph 5A of the amended Plaint pleaded fraud on the part of the Defendant. In light of this, Counsel for the Plaintiff submitted that in **Murome Vs Kuko HCB 68**, it was held that where a case is based on fraud, the limitation period shall not begin to run until the Plaintiff has discovered the fraud or could have with reasonable diligence discovered it. Counsel referred to **Section 25 (a) (b) & (c) of the Limitation Act.**

Whereas fraud was pleaded in the Plaintiffs' pleadings, the Plaintiffs ought to have disclosed when they discovered the said fraud.

In **Fredrick James Junju & Anor Vs Madhivan Group Limited & Anor,** it was stated that **Section 25 of the Limitation Act** provides for postponement of the limitation period for actions founded on fraud or mistake as one of exceptions in respect to claims for the recovery of land. It is to the effect that the period shall not begin to run until the Plaintiff has discovered the fraud of the mistake, or could with reasonable diligence have discovered it. For the Plaintiffs to benefit from the postponement of the limitation period, they had to show by their pleadings when they became aware of the alleged fraud or could have with reasonable diligence become aware of the alleged fraud of the Defendants.

Furthermore, in **Hammann Ltd Vs Ssali & Anor HCMA No. 449 of 2013,** it was held that in absence of the averments showing grounds of exemption from limitation, the presumption is that the Plaintiffs were aware of the alleged fraud at all times, which renders their suit and claims therein statute barred.

From the afore going authorities and the fact that in determining limitation period we look at the Plaintiff's pleadings only, the Plaintiffs cannot seek solace in

08.09.23

Section 25 of the Limitation when they did not specify when they discovered the fraud. Failure to plead the time leads to an inference that they have always been aware of the fraud.

However, since I have earlier found that the Plaint is not time barred, with or without the fraud, it stands. Issue one is thus answered in the negative.

The parties preferred to resolve issue 2 and 3 together which I will also adopt.

Issue 2.

Whether there was a sale of the suit land to the Defendant by the late James Wamala.

Issue 3.

Whether the suit land belongs to the Defendant.

It should be noted that the Plaintiffs filed their Plaint on 19/8/2013 on assertions that the Defendants were in illegal use and occupation of the suit property. The Defendant filed her Defence on 5/9/2013 where in she contended that she bought the suit land from the then registered proprietor the late Wamala James on the 24th day of July 1991 and took possession of the suit land and has at all material times been using the suit property.

In November 2015, the Plaintiffs received a memorandum of sale agreement from the Defendant's lawyers for the suit land whereof they thought it right to amend their Plaint on which note Misc. Application No. 007 of 2016 was filed and by consent, the parties agreed to the amendment which resulted in the filing of the Plaintiffs' Amended Plaint and consequently introduced a new cause of action based on fraud. The Plaintiff contended that the memorandum of sale agreement was forged. The Defendant filed an amended Written Statement of Defence.

It is a general rule in Civil matters that he who alleges must prove his or her allegation to the satisfaction of Court. **Section 101 of the Evidence Act** provides that; "Whoever desired any Court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."

The above-mentioned provision of the law places the legal burden of proof on the Plaintiff since he is the one who desires judgement in his favour.

To prove their case, the Plaintiffs' witness **Ronald Mubanda (PW1)** in his evidence in chief testified that his late father James Wamala, was the registered proprietor of the suit land since 1979 following the death of his father. That in

08.09.23

1923, the suit land was leased to a one Alexander Mcpherson, an Englishman for a period of 99 years. It was his testimony that after knowledge of McPherson's departure, his father embarked on tracing the exact location of the suit land and with the help of surveyors tried to open boundaries and have physical possession of the suit land but was blocked by Ali Fadhul who was in possession of the land. He filed a suit against Ali Fadhul vide HCCS No. 956/1986 for vacant possession of the suit land which matter had not yet been determined at the time of his death.

Mulindwa Andrew Ssekyete (PW2) corroborated PW1's evidence when he stated that the suit property was being occupied by Ali Fadhul who blocked the late Wamala from getting anywhere near the suit land. He further testified that the late Wamala filed a suit against Fadhul who died before conclusion of the suit. It was also his evidence that the late James Wamala never sold the suit land to the Defendant.

Chelangat Sylvia (PW3) a Superintendent of Police and a Forensic Document Examiner of the Uganda Police Force testified that after examining the sample signatures in exhibits A1-A4 and Exhibit B, she found strong evidence that the author of sample signatures in Exibits A1-A4(her naming of the documents) but herein referred to as PEX. 4, PEX. 5 (a), PEX. 5(b) did not write/sign the questioned handwriting/signature in exhibit B.

The Defendant on the other hand called **Ronald Kyazze (DW1)** an employee of the Defendant as the General Manager Legal and the custodian of all the documents, information and paper work in respect of all the pieces of land owned, acquired and under the occupation, use and control of the Defendant including the suit land, testified that the Defendant bought the suit land from the Plaintiffs' father, Mr. James Wamala (this is the Defendant's position as per the witness statement paragraphs 7, 8, 9, 10) at Ug. Shs. 19,372,800/= which was paid vide a Bank of Baroda Cheque No. 460525 dated 24 June, 1991 for a total sum of Ug. Shs. 43,016,910 being a total consideration for the lands bought by the Defendant including the suit property. It was his testimony that the cheque was forwarded to the late Wamala's lawyers, M/S Mutyabule Kisadha & Co. Advocates. That as the payments were being processed and made, the late Wamala's lawyers drew and prepared a sale agreement that was endorsed by their client James Wamala and also by the Defendant. That Mr. Wamala gave the Defendant the original certificate of title for the suit land to enable the Defendant have the same transferred into its name and the Defendant forwarded the same to its lawyers M/S Mugerwa & Matovu Advocates to transfer the title into the Defendant's name. That the Defendant tried to take possession of the suit land in early 1992 but was met with resistance from a one Ali Fadhul who was claiming that he had acquired it from the Departed Asians Custodian Board. That the Defendant took

08·09·23

possession of the suit property in mid-1994 and the deceased never challenged the Defendant's purchase, use, acquisition, possession and control of the suit land.

From the evidence on record, the Defendant asserts that it bought land from the late James Wamala. In support of this, the Defendant produced a memorandum of sale and transfer documents which was admitted on record as EXB. 6.

On this, counsel for the Plaintiff submitted that the defendant's basis of possession and ownership of the suit land is tainted with fraud. That EXB. 6 tendered in as proof of the purchase of the suit land and the conduct of the defendant during the process of acquiring the suit land is tainted with fraud.

I have with greatest care analysed the record and observed that the genesis of these two issues is the authenticity of the memorandum of sale and transfer which was admitted on record as PEX. 6 of the Plaintiff's documents and EXB. 6 of the Defendant's documents. This document is crucial to this matter as it confers equitable ownership of the suit property to the Defendant.

PW1 in his evidence in chief testified under paragraph 11 that; "The Defendant later during scheduling in Court claimed that it had bought the suit land and produced a sale agreement purported to have been signed by my late father and witnessed by his lawyer Kisadha Mutyabule which we realised were forgeries because both signatures were well known to us."

Under PEX. 10, a laboratory report authored by PW3, who introduced herself as a handwriting expert relied on documents PEX. 4, PEX. 5 (a), PEX. 5(b), and an application for letters of Administration in the matter of the estate of the late Erieza Goobi Mukiibi to compare, and establish whether the author of the sample handwriting/signatures in the above documents/exhibits wrote/signed the questioned handwriting/signature in PEX. 6 she observed fundamental differences between the questioned signature/handwriting in PEX. 6 and the sample handwriting/signatures provided in PEX. 4, 5(a), 5(b) and the application for letters of administration in the matter of the estate of the late Erieza Goobi Mukiibi. She stated that she had not observed any similarities between the questioned signature and the sample signatures. She opined that there is strong evidence to show that the author of the sample handwriting/signatures did not write/sign the questioned signature in PEX. 6.

In regard to the above, Counsel for the Defendant submitted that the seller of the suit property, James Wamala did not append his known signature on the memorandum of sale and transfer (PEX. 6) but chose to instead write his name as "James Wamala" That during cross examination, PW3 testified that there is no written law nor Act nor Statute that regulates how one is to endorse or sign on

08.09.23

documents or agreements such as the memorandum of sale in question and that it is not an offence for one to endorse an agreement by simply printing or writing their thereon name instead of scribbling a signature.

Defendant's Counsel observed that the name James Wamala was written on the said Memorandum of sale and this was not a signature. That if any analysis was ever needed over that handwriting, the only relevant material or specimen would have been the late James Wamala's handwriting and not his known signature for purposes of comparison. Counsel prayed that PEX. 10 be disregarded in respect of Mr. James Wamala's handwriting as against his signature.

I entirely disagree with Counsel for the Defendant on his submission that the name James Wamala was written on the memorandum of sale and that it was not a signature therefore the only relevant material or specimen would have been the late James Wamala's handwriting and not his signature for purposes of comparison.

I base my disagreement on the fact that a mere looking at the specimen signatures reveals that James Wamala's signature is a reciprocal of his handwritten name only that James is abbreviated to "J" followed by his full name Wamala. Similarly in the memorandum of sale and transfer where the questioned signature is, James Wamala still wrote his name but this time round, even the name James was written in full. It is therefore my opinion, that the sample signature/writing could with ease be compared with the questioned signature/writing as both contain letters whose analysis can lead to a logical conclusion. I therefore have no reason to disregard PEX. 10.

Section 43 of the Evidence Act provides that when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to the identity of handwriting or finger impressions, are relevant facts.

The import of this section is that the opinion of a handwriting expert is relevant although not binding. On this, I am persuaded by the case of **Guntaka Hussenaiah Vs. Busetti Yerraiah AIR 1954 Andhra 39** wherein Hon'ble Subba Rao (C.J.) (as he then was) said, "The expert's evidence is only a piece of evidence. A Judge of fact will have to consider that evidence along with the other pieces of evidence. Which is the main evidence and which is the corroborative one depends upon the facts of each case"

In corroboration to PW3's observation that the questioned signature and the sample signature was not authored by the same person is the testimony of PW1

08.09.23

who provided uncontroverted evidence that his father's signature on the memorandum of sale and transfer was a forgery.

I find PW1's evidence on the impugned signature relevant by virtue of **Section 45 of the Evidence Act** which provides that when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact.

That as it is, In **State Vs. Kanhu Charan Barik 1983 Cr. L.J. 133** it was held that, "Evidence of experts after all is opinion evidence. The opinion is to be supported by reasons. The Court has to evaluate the same like any other evidence. The reasons in support of the opinion, if convincing, make the opinion acceptable. There is no place for ipse dixit of the expert. It is for the court to judge whether the opinion has been correctly reached on the data available and for the reasons stated."

In **Divie Vs Edinburgh Magistrates (1953) SC 34 at 40** cited with approval in **Shosho Vs Waniala & 3 Ors HCCA No. 224 of 2014**, it was held that "The duty of the expert witnesses is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence."

In PEX. 10, PW3 stated that she observed fundamental differences between the questioned signature/handwriting in exhibit B (PEX. 6) and the sample handwriting/signatures provided in exhibits A1-A4 (PEX. 4, PEX. 5 (a), PEX. 5(b), and an application for letters of Administration in the matter of the estate of the late Erieza Goobi Mukiibi) and they are different in the manner of construction of letters, design, and relative proportion of letters such as J, W, m, l and a level of graphic maturity, sizes of letters and words and relative heights of letters.

In accordance with that well elaborated manner of comparison provided by PW3 which I have applied to the questioned signature and the sample signatures, and taking into consideration that the Defendant did not object to the specimen signatures being authored by James Wamala, I am persuaded and convinced that indeed the handwriting/signature on the memorandum of sale was not authored by the same person as the author of the handwriting/signature PEX. 6.

It is therefore my finding that there was a forgery in respect of James Wamala's handwriting/signature appearing on the memorandum of sale and transfer.

08.09.23

In regard to PEX. 11 which is also a laboratory report issued by PW3, I am convinced by Counsel for the Defendant's submission that on the said memorandum of sale and transfer, there is no particular name written thereon of the person who appended the witnessing signature. Indeed, it baffles to assume that the witnessing signature was that of Counsel Mutyabule Elijah to go on and make a comparison of that signature with the known signatures of Counsel Mutyabule Elijah. Counsel for the Defendant rightly argued that there is always more than just one advocate in a law firm competent to witness a document. Since the questioned signature of the witness on PEX. 6 cannot be without reasonable doubt attributed to the Mutyabule Elijah, I cannot proceed with examination of the same

In **Erivania Susan Nalwanga & Anor Vs Nelson Serwano Sebinene Senkubuge C. S No. 510 of 2012**, there was evidence of forging the signatures of PW1 and PW2 and Court observed that evidence as evidence of fraudulent conduct.

In the instant case, I find that the forging of James Wamala's signature on the memorandum of sale or transfer in favour of the Defendant amounted to fraud.

It is trite law that an advantage obtained through fraud cannot be allowed to stand. **(See Lazarus Estate Ltd versus Beasley 1956 QB at 712** cited with approval **in Erivania Susan Nalwanga & Anor Vs Nelson Serwano Sebinene Senkubuge (supra)).**

I am alive to the principle that once fraud is detected in a transaction involving purchase of land, then that transaction is illegal and is of no consequence. Court cannot sanction what is illegal once brought to its attention. **(Makula International Vs His Eminence Cardinal & Anor [1982] HCB 11.**

The memorandum of sale and transfer is therefore a nullity. In the absence of a sale agreement to prove purchase, the Defendant can not claim ownership of the suit property.

The certificate of title is in the names of the Plaintiffs as administrators of the estate of the late James Wamala. I thus find that the suit land belongs to the estate of the late James Wamala.

Counsel for the Defendant submitted that the Defendant is a bonafide purchaser for value and that nowhere at all did the Plaintiffs dispute or challenge the fact that Shs. 19,372,800/= for the purchase of the suit land and that there is no evidence adduced by the Plaintiffs that the late James Wamala ever disputed the sale.

08.09.23

It was DW1's testimony during cross examination that the certificate of title for the suit property is not in possession of the Defendant because it was misplaced. Counsel for the Defendant submitted that the Plaintiffs only woke up when they found that the said Plot No. 204 was still registered in their late father's name simply because the title thereto got misplaced at land registry and for that reason the Defendant was not registered thereon.

From the foregoing, it is clear that the certificate of title from the suit land is not in the Defendant's name. I have earlier found that the memorandum of sale and transfer is a nullity therefore there was no sale.

In **Hannington Njuki V George William Nyanzi HCCS No. 434 of 1996** it was held that a bona fide purchaser must prove that he/she holds a certificate of title; that he/she purchased in good faith; that he/she had no knowledge of the fraud; that he/she purchased for valuable consideration; that the vendor had an apparent valid title; and that he/she purchased without fraud or was not a party to the fraud.

Since the Defendant does not fulfil the conditions of a bonafide purchaser for value as encapsulated in the cited case law, the Defendant is not a bonafide purchaser for value.

In the alternative, Defendant's Counsel argued that having been on the land for the last 30 years since 1993 when it took exclusive possession, use and control of the suit land without any interruption and or challenge, the Defendant has since acquired adverse possession of the suit land as against anyone including the Plaintiffs. (Counsel referred to **section 78 of the Registration of Titles Act** and the case of **Hope Rwaguma Vs Jingo Livingstone Mukasa**).

Adverse possession concerns not with the circumstances in which the adverse possessor came to take physical possession of the land but rather that he enjoyed adverse, actual, open, notorious, exclusive and continuous possession of the land for the prescribed statutory period. (**Omunga Vs Agrasiela C. A No. 5 of 2010**) Adverse possession moves hand in hand with limitation period and one becomes an adverse possessor upon the lapse of 12 years within which the cause of action arose.

In this case, I earlier ruled that the suit is not time barred which implied that at the time the Defendant's quite enjoyment was interrupted (when) this matter was filed, time was still running in the Plaintiff's favour. In the circumstances, the Defendant can not claim adverse possession.

I thus find that the Defendant has no claim what so ever on the suit property. The suit property belongs to the estate of the late James Wamala.

08-09-23

Issue 4. Remedies available to the parties.

The Plaintiffs prayed for vacant possession of the suit property which is hereby granted.

On mesne profits, the Plaintiff did not lead evidence to show Court how it would have made profits from the suit land had the Defendant not occupied the land. It was the Plaintiff's evidence that even James Wamala had not taken occupation of the suit land because Ali Fadhul a notorious soldier had taken occupation of the same. The Plaintiffs do not know when Fadhul left the land. Despite the Defendant's occupation of the suit land, the Plaintiffs could still not utilise the land. For the above reason, I decline to award the Plaintiffs mesne profits.

The Plaintiffs prayed for general damages. Having found that the Defendant has no claim of ownership in the suit property which they have utilised for a long period, I shall award general damages of 30,000,000/= and interest at the prevailing Court rate from the date of judgement until payment in full and costs.

In the result, it is hereby ordered as follows.

1. The Defendant is ordered to hand over vacant possession of the suit property to the Plaintiffs.
2. The Defendant pays 30,000,000/= as general damages and interest on the damages at the prevailing Court rate from the date of judgement until payment in full.
3. Costs of the suit to the Plaintiffs.

I so order.

.....

JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
Judgment delivered on 8th September 2023.