

THE REPUBLIC OF UGANDA

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

CIVIL SUIT NO. 068 OF 2011

MODIA INVESTMENTS (U) LTD :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1.SULAIMAN SSEREMBA
2.SERUNJOJI DESMOND
3.VIOLET DOROTHY NAMUGANGA
4.MOSES DENIS KIWOGOYA
5.COMMISSIONER LAND REGISTRATION :::::::::::::::::::::::::::::: DEFENDANTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The Plaintiff brought this suit against the defendants for a declaration that Plaintiff is the lawful proprietor of the suit land comprised in **Plot 177 Block 208, Kyadondo at Kawempe**, that the 1st - 4th defendants are trespassers, mesne profits, cancellation of land titles comprised in **Plots 2502/2503, 1363 and 2501, Block 208, Kyadondo**, eviction order, permanent injunction, general damages and costs of the suit. The plaintiff is a company incorporated in Uganda with limited liability and the registered proprietor of land comprised in **Plot 177 Block 208 Kyadondo at Kawempe** (herein after referred to as the suit land)
- [2] It is the plaintiff's case she acquired the suit land from Kawempe Financial Services Limited, a registered mortgagee in or about 2010. That on 4/8/2010, the plaintiff caused for the survey and opening of the boundaries of the suit land but the surveyor met resistance from the 1st - 4th defendants who were claiming to be the rightful proprietors of the land

by virtue of being in occupation and possession of certificate of titles for lands comprised in **Plots 2502 - 2503 and 2501, Block 208, Kyadondo**.

- [3] The plaintiff contended that the 1st - 4th defendants' titles were created hanging in air as the same were superimposed over the plaintiff's land by the Commissioner Land Registration; the root **Plot 1364 Block 208 for Plots 2502 /2503 or 2501** were not connected with the plaintiff's certificate of title, **Plot 2501** in particular is/was forged as it does not mirror or reflect the registry copy and that the instrument creating the plaintiff's certificate preceded that of **Plot 1363**. That the 1st - 4th defendants therefore unlawfully occupied the suit land and fraudulently procured the aforesaid respective land titles in order to legalise their otherwise illegal occupation.
- [4] Lastly, that despite glaring evidence of fraud committed by the 1st - 4th defendants or their predecessors in title in procuring the aforesaid impugned land titles, the 5th defendant refused or neglected to cancel the impugned land titles despite the plaintiff's request for their cancellation, thereby facilitating the 1st - 4th defendants to occupy and claim ownership of the suit land.
- [5] In their defence, the 1st - 4th defendants denied the plaintiff's allegations while the 5th defendant never filed a defence.
- [6] The 1st defendant averred that he purchased a kibanja that now forms **Plots 2502 and 2503 Block 208 Kyadondo** from **Prince Badru Kakungulu** through his brother **Prince Swaibu Sebadu** who was its caretaker and acquired vacant possession of the same. That later, he purchased another portion of land/kibanja from a one **Sserwanga** (deceased), who was the step father of the 3rd & 4th defendants which now forms **Plot 2501 Block 208 Kyadondo** but that he later, handed it over and signed transfer forms to the 3rd and 4th defendants upon their father (Ssembatya Lule Godfrey) refunding the purchase price he had paid to **Sserwanga** hence the 3rd and 4th defendants accordingly obtained title to **Plot 2501**.
- [7] It is the contention of the 1st defendant that he is a bonafide purchaser for value without notice of any fraud for **Plots 2501, 2502 & 2503** which were

subdivided from **Badru Kakungulu's** mailo title comprised in **Plot 1364 Block 208 Kyadondo**.

- [8] The 2nd defendant averred that he is the representative of the estate of the late **James Mutyaba**, the registered proprietor of the suit land now comprised in **Plot 1363 Block 208, Kyadondo** which the said **Mutyaba** purchased from the late **Badru Kakungulu** in or around 1975. He contended that he was also a bonafide purchaser for value without notice of any fraud, if any.
- [9] The 3rd and 4th defendants on their part averred that they are registered proprietors of **Plot 2501, Block 208 Kyadondo at Kawempe** which they acquired on 19/11/1996 when they were still minors from their deceased father, the late **Ssembatya Lule Godfrey** who had lived on the suit land before 12/1/1989 when a one **Mohammad Kizza Mpindi** is alleged to had been registered as proprietor thereon as proved by the deed plan in the certificate of title which clearly indicate that **Plot No.2501** existed on the ground by the time of their registration as proprietors.

Counsel legal representation

- [10] The Plaintiff was represented by **Mr. Muhurizi Julius** of **M/s Tibaijuka & Co. Advocates, Kampala** while the 1st – 4th defendants were represented by **Mr. Muhamood Kakeeto** of **M/s Mayanja, Nakibuule & Co. Advocates, Kampala**. Both counsel filed their respective submissions as permitted by this court for the determination of this suit.
- [11] During joint scheduling conference, the parties framed the following issues for determination of the suit as follows:
1. *Whether the certificate of title held by each of the parties is a valid certificate.*
 2. *Which of the parties is entitled to the suit land.*
 3. *Whether there has been trespass on the part of the defendants or their predecessors in title.*
 4. *Whether there has been fraud on the part of any of the parties or their predecessors in title.*
 5. *What remedies are available to the parties.*

[12] In his submissions, counsel for the defendants raised **2 preliminary objections** of which this court is obliged to first handle and determine. However, Counsel contended that he brought it to the attention of court, that he intended to raise preliminary objections at the commencement of the trial, but that the then trial judge, Justice Murangira (Retired) guided that the preliminary objections be factored in the submissions.

[13] The objections are premised on two grounds:

1. *That the Plaintiff company and her transferor being foreign companies had no capacity to obtain mailo interest in the suit property and deal in the same, vide Kyadondo Block 208 plot 177, nor locus standi to institute this suit.*
2. *That the plaintiff company and her predecessor, had no capacity to deal in the suit land nor institute this suit without any resolution and power of attorney authorising the same.*

[14] Counsel for the 1st - 4th defendants submitted while relying on **Article 237 of the Constitution, Section 4 of the Land Act** and the authority of **Lakeside Properties Vs Sam Engola & 4 Ors, HCCS No.251/2010**, that non-citizens cannot own in perpetuity, mailo land. That in the instant case, as per the plaintiff's Articles of Association, it is not a local company and because of its allegedly questionable Resolution (**P.Exh.30**) with a clause restricting issuance and/or transfer of shares to only Ugandan Citizens. That the same apply to **Kampala Financial Services Ltd (KFS)** from whom the plaintiff derives its interest of the suit land. Counsel submitted that in the premises, this court should find that the plaintiff company and KFS had no capacity to transact in the suit property and therefore their entry on the certificate of title was in error and the same is void ab initio. That as a result, the plaintiff has no locus standi to institute a suit and litigate in respect of Mailo interest.

[15] As regards the 2nd preliminary objection, counsel for the defendants submitted that it is trite law that a company acts or transacts on the authority, strength and through a resolution duly passed and registered. Relying on the authority of **Rubaga Building Co. Ltd Vs Gopal Devsi Vekaria & Anor, HCCS No.534/2014** and **Bugerere Coffee Growers Ltd**

Vs Sebadduka & Anor [1970] 1 EA 147, that in absence of any such resolution, the company cannot act or effect any transaction, nor have the audacity to institute a suit.

- [16] Counsel submitted that in the instant case, **Muhurizi Julius** (PW1) conceded in his evidence that there was no Resolution allowing the sale and transfer of the suit property to the Plaintiff company and authorizing the plaintiff company to institute a suit. That **PW1** specifically stated that the Company Resolution was not necessary.
- [17] Counsel for the plaintiff on the other hand submitted that **O.15 r.2 CPR** requires issues of both law and fact arising in the same suit, if court is of the opinion that the case or any part of it may be disposed of on the issues of the law only, try those issues first, and that for that purpose may if it thinks fit, postpone the settlement of the issues of fact until the issues of law have been determined. That in the instant case, neither the defendants moved this court to frame and resolve the issues of law as alleged in the defendants' submissions nor court ever on its own motion required the parties to the suit address court on the alleged issues of law.
- [18] While relying on the persuasive authority by Benin Judicial Division, **Adugabo Vs Ibe C.S No. CA/B/258/2012, Yaya Vs Obur & Ors, HCCA No.81/2018 and Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A 696**, counsel argued that the defendants did not plead facts which might lead to the formulation of the issues now raised in submissions in reply and the same having not been raised as points of law during trial, the evidence adduced by the defendants, if any, in respect of the plaintiff's non-compliance with **S.40 (4) (7)(e) of the Land Act** without the same having been canvassed by the parties cannot stand because the evidence which is not founded on pleaded facts goes to no issue as it lacks any base or foundation to rest upon.
- [19] Counsel for the Plaintiff groused about the order by this court for authentication of the Plaintiff's Company Resolution (**P.Exh.30**) that was allegedly registered with URSB as an act of partiality for according to him, the order was prejudicial to the plaintiff's case.

Competence of the preliminary objections

- [20] To begin with the last argument of counsel for the plaintiff, it is a bluff for counsel to agitate that court compromised its impartiality when it ordered for the authenticity of the Plaintiff's own document, the Company Resolution that was tendered in evidence at its own instance during cross examination of Court witness No.1, **Sekitto Moses**. Counsel for the defendant had complained of its authenticity and court ordered for its verification from **Uganda Registration Services Bureau (URSB)** where it was allegedly registered. In my view, court has unfettered powers and retains a right to admit documents as exhibits which are authentic as conferred upon it by its inherent powers for purposes of curtailing abuse of court process and it cannot be faulted on that approach. The plaintiff had relied on the Resolution to show that the company had amended its Articles of Association to include a clause restricting issuance and/or transfer of shares to only Ugandan citizens in compliance of **S.40(7)(e) of the Land Act**. In my view, it was crucial for court upon a complaint from counsel about the genuineness of Resolution to determine its authenticity.
- [21] In the instant case, counsel for the plaintiff complained in his submissions in rejoinder to the preliminary objections that because the objections were not pleaded, then, since the same were not canvassed by the parties, go to no issue and that therefore, this court would have no material facts or evidence upon which to decide the alleged preliminary objection on points of law.
- [22] In **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] 696**, Law J.A held;
- "A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit."*
- Tsekooko JSC in **Tororo Cement Vs Frokina International Ltd, SCCA No.2/2001 [2002] UGSC 24** observed thus:
- "...preliminary point of law can be raised by the defendant at the commencement of the hearing of the action even if the point had not been pleaded in the written statement of defence."*

Obviously it is proper and good practice to aver in the opposite party's pleadings that the pleadings by the other side are defective and that at the trial a preliminary point of objection would be raised. But failure to plead does not in my opinion bar a party from raising the point. There is, of course advantage in raising a likely preliminary point in the pleadings. This puts the opposite party on notice so that the party is minded to put its pleadings in order before court hearing. In that way, court's time may be saved if parties can sort out preliminary matters in advance."

[23] In the instant case, the 1st and 2nd defendants had pleaded in their W.S.D under **paragraph 3** (later abandoned by the 2nd defendant in his amended WSD) thus:

"The first and second Defendants shall raise a preliminary objection to the effect that the plaintiff's suit against them is prolix, misconceived, an abuse of court process and should be summarily dismissed and struck out with costs."

In my view, the above pleadings by implication though they lack full particulars, put the plaintiff on notice of the intended preliminary objection. If a party pleads a preliminary objection and omits to set out the details or particulars thereof, the opposite party has the option of requesting for better particulars, and if they are not given, apply for an order under **O.6 r.4 CPR** to be supplied further and better particulars. It provides thus;

*"A further and better statement of the nature of the claim or defence, or **further and better particulars of any matter stated in any pleading**, may in all cases be ordered upon such terms as to costs and otherwise as may be just."*

[24] In this case, the plaintiff did not opt to request for further and better particulars regarding the pleaded preliminary objection. However, be that as it may, the preliminary objection regarding locus standi raised by the defendants is an assertion of law and going by the above 2 authorities, **Mukisa Biscuits Manufacturing Co. Ltd** and **Tororo Cement Ltd**, if a preliminary objection is not pleaded, then evidence should be led

regarding the intended preliminary objection so that the opposite party is given an opportunity to counter or rebut it.

- [25] In the instant case, during the cross examination of **Julius Muhurizi** (PW1), the Managing Director of **Kampala Financial Services** (the transferor of the suit property) and donee of powers of Attorney from the Plaintiff Company was cross examined on whether there was a Company Resolution by **Kampala Financial Services** (KFS) to sell the suit property to the plaintiff company and whether it is a Ugandan company, his answer was that there was no Resolution and KFS was a Ugandan company. In my view, the foregoing was sufficient opportunity by the plaintiff to rebut the intended preliminary objection and **PW1** did so. In the premises, I find that the preliminary objections are competent before this court.

Whether the plaintiff company and her transferor had capacity to deal in and obtain mailo interest

- [26] As regards whether the plaintiff company and its transferor, **Kampala Financial Services** were both foreign companies with no capacity to obtain mailo interest in the suit property and deal in the same, the burden is on the defendants to prove the claim since he or she who asserts must prove, **Ss. 101-103 of the Evidence Act.**

- [27] To establish whether the plaintiff company and her transferor, KFS are foreign or not, one has to look at their Articles of Association and allotment of shares in view of **S.40 (4) & (7)(b) of the Land act** which provides thus:

*"40 (4) Subject to the other provisions of this section,
a non-citizen shall not acquire or hold mailo or free hold.*

7 (b) For the purposes of this section, "non-citizen" means-

(a)

*(b) In the case of a corporate body, a corporate body in which
the **controlling interest** lies with non-citizen"*

According to **S.40(8) of the Act**, "controlling interest" means-

*"(a) In the case of companies with shares, the majority shares
are held by persons who are not citizens."*



In the instant case, no evidence was led by the defendants that either the Plaintiff company or Kampala Financial Services, the transferor, are companies with shares, the majority of which are being held by persons who are not citizens. I have had the opportunity of looking at the Articles of the Plaintiff company (**P.Exh.29**), I find it a Ugandan company by virtue of its shareholding by only citizens. As regards KFS, no Articles of Association were tendered in evidence.

[28] Counsel for the defendants however relied further on **S.40(7)(e) of the Land Act** to challenge the suit. The **Act** provides that a company incorporated in Uganda whose Articles of association do not contain a provision restricting transfer or issue of shares to non-citizens is a non-citizen within the meaning of **S.40 of the Act**. It is counsel for the Plaintiff's submission that by virtue of the Plaintiff's Company resolution (**P.Exh.10**), the Articles were amended to include the clause restricting the transfer or issue of shares to non-citizens. Counsel for the Defendants submitted that the Resolution is a suspect and or a forged document.

[29] I have looked at the report of **Uganda Registration Services Bureau (URSB)** regarding the impugned Plaintiff's Company Resolution. The report is not evidence that the Resolution is forged. The report is to the effect that
"A search conducted on our records reveal that the attached resolution is not reflected on our data base."

[30] The Resolution in question is dated 15th Feb.2010 (**P.Exh.30**). I take judicial notice of the fact that the migration of storing documents from the old "analog", physical way to "digital", capturing them in the data base by various Government institution is a recent move. The URSB report does not disclose that the URSB officials cross checked with the URSB physical Register and found the plaintiff's Resolution which bear a URSB stamp, registered by its official **Kamusiime Rachel**, designated as a registrar of URSB, was found missing.

[31] In this case, I find it evident that the Plaintiff company presented its company Resolution for registration with URSB and since it was duly received as per the stamp of URSB, which is not denied in the report, the plaintiff had no duty to see to it whether or not it was captured or entered

in the URSB data base. The plaintiff's duty ended at its presentation of the Resolution for registration and not beyond that. It had no charge and control over the subsequent procedures at URSB. The authenticity of the signature of the Registrar who endorsed on the Resolution receiving it, was not denied.

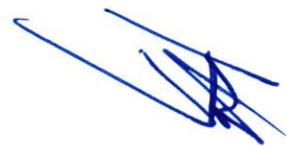
[32] In the premises, this court would not be in position, in absence of any other evidence contrary to the above, to find the Resolution (**P.Exh.30**) a suspect and or a forgery. In conclusion therefore, I put no emphasis on the evidence of **PW1** who during cross examination stated that he was not seeing the restrictive clause limiting the issuance and transfer of shares to non- Ugandan citizens when the plaintiff's Articles of Association were put to him since the amendment is reflected on the Resolution and not in the Articles.

[33] Besides, **PW1** is not the company itself. He was merely a donee of the powers of Attorney. The evidence of the donee of powers of Attorney is restricted to proof of those acts or transactions he had done in his capacity as so of which he would be having personal knowledge and not the acts of the principal within its knowledge and not passed on to the donee; **Ann Nakanwagi (Through her lawful Attorney Simon Waiswa) Vs Abdu Mawejje, HCCS No.770/2016 (Land Division)**.

[34] The principle of the law was clearly stated in **Man Kaur Vs Harta Singh JT 2010(10) SC 365 (2010)10 SCC 512** as,

"Where the law requires and contemplated the plaintiff or another party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder."

[35] In this case, **PW1** the attorney holder would not give evidence regarding whether the Plaintiff had a Resolution or not in place of his principal, the Plaintiff company, for this was an act done by the principal of which the Attorney would not have personal knowledge.



[36] There is nevertheless evidence in this case, that the Plaintiff's Articles of Association through an amendment, as reflected in the company's Resolution (**P.Exh.30**) provided for the Restrictive Clause on transfer of shares to non-citizen. As a result, I find that the defendants failed to discharge the onus on them to prove that the Plaintiff company is not a citizen.

[37] As regards the transferor, KFS, no evidence was led by the defendants that it is a non-citizen since its Articles of Association were not tendered in evidence. In any case, it is evident that the transferor, KFS did not acquire land but only dealt in the land as mortgagee and in that capacity sold and transferred the suit land to the plaintiff to realise its security, under the powers derived from the Mortgage Deed and the Mortgage Act.

[38] In the premises, from the discussion above, I find the 1st preliminary objection devoid of any merit and it is accordingly dismissed.

Whether the plaintiff company and her predecessors had capacity to deal in the suit land or institute the suit without any Resolution.

[39] It is trite that for a company to transact any business or an action to be brought in the name of a company, there must be authority to do so otherwise the transaction or the suit will be a nullity, **Danish Mercantile Vs Beaumont & Anor [1951] CH.680**. The burden of proof is on a defendant to establish that the transaction and institution of the suit were without authority. The authority to act does not necessarily have to be in the form of a Resolution, **Rubaga Building Co. Vs Virbhai Nangi Kerai, HCCS No.534/2014** and **Navchandra Kakubhai Vs Kakubhai Kalides & Co. SCCA No.10/1994**.

[40] The general authority of a company to enter into any transaction has to be derived from the Articles of Association. In this case, it has not been shown by the defendants that the sale by KFS of the suit property as a way of realisation of its security and the purchase of the property by the plaintiff

was inconsistent with their Memorandum and Articles of Association as to render the transaction ultra vires the powers of the company.

[41] Secondly, KFS transferred the suit property to the plaintiff (**P.Exh.5**) under the powers derived from the Mortgage Deed and the Mortgage Act. Under **S.26 of the Mortgage Act**, a mortgagee is empowered under the mortgage to realise his or her security by way of auction/sale and under **S.29 thereof** the purchaser acquires good title except for fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice. By the provision of **S.30 of the Act**, a mortgagee is not permitted to purchase the mortgaged land without leave of court. The implication is that a mortgagee is bound by law not to retain the property under mortgage to himself or herself and therefore, has to dispose it of to realise his security. In the premises therefore, I find that neither the Plaintiff company nor its transferor of the suit property required a company Resolution before undertaking the transaction in question.

[42] On the principle in **Foss Vs Harbottle [1843] 67 ER 189**, the absence of the Resolution would only aggrieve the shareholders and Directors of the company if the purchase prejudiced the company. In absence of any grievance by the company itself or its shareholders who are the right parties to complain, the plaintiff's acquisition of the property with or without a resolution would not nullify the transaction.

[43] In the premises, I find that there is no evidence that was led by the defendants that the transaction between the Plaintiff company and the transferor of the suit property lacked authority. As regards a company resolution, there was no requirement for either the transferor, KFS to dispose of the suit property under the Mortgage or the plaintiff company to purchase property to first secure company resolutions. I therefore find that **Julius Muhurizi** (PW1) rightly stated that a company resolution was not necessary before the 2 parties could transact.

[44] On the issue of the Plaintiff's company filing a suit in the name of the company without a resolution, this in my view has been settled by the supreme court in **United Assurance Co. Ltd Vs AG Civil Appeal**

No.1/1986 where Wambuzi CJ (as he then was) after reviewing the earlier cases on the subject, **Buikwe Coffee Estates & Ors Vs Lutabi & Anor**, (1962) EA 326 and **Bugerere Coffee Growers Ltd Vs Sebaduka & Anor** (1970) EA 147 doubted the statement that for a company to authorise the commencement of proceedings it must do so either by a resolution of the company or that of its Board of Directors, in the following words:

“Every case must be decided on its own facts. Looking at the various authorities and the law...unless, of course the law specifically requires a resolution as appears to be in instances specifically provided in the companies Act, authority to bring action in the name of the company is not one of those instances where a resolution is required.”

See also **Production Ltd Vs Soon Yeon Hong & Anor**, HCMA No.190/2008, **Ms Tatu Naiga & Co. Emporion Vs Vergee Bros Ltd**, SCCA No.8/2002 and **Navichandra Kakubhai Vs Kakubhai (Supra)**. In **Kasala Growers Co-op Society Vs Kakooza Jonathan & Anor**, SCCA No.19/2010 Okello JSC had this to say:

“It has been stated by this court on a number of occasions that a resolution of the board of directors of a company is not always necessary for institution of a suit in a name of the company.”

[45] In the instant case, the plaintiff company having given powers of Attorney to PW1 (P.Exh.2) “....to sue on our behalf or represent our company in the pursuance of Civil Suit No.68/2011” a suit which had previously been filed by the plaintiff company is further evidence that the plaintiff company recognised and approved or adopted and ratified the institution of the suit. This is permissible in law as per Jenkins, L.J in **Danish Mercantile Vs Beaumont & Anor (supra)**, where he stated;

“...Even if it is conceded for the purposes of argument that the proceedings were in the first place brought without authority, the liquidator in fact adopted the proceedings on behalf of the company and thus cured the original defect, on the ground that such a ratification relates back and cures the want of authority in the original act of the purported agent, just as in any other case of ratification.

The Judge decided that point in favour of the plaintiffs and in my judgment he was clearly right in doing so.”

In this case, it has not been shown that the donee of the powers of Attorney was not an advocate in the firm of **M/s Tibaijuka & Co. Advocates** that instituted this suit. The donation of the powers of Attorney to **PW1** accordingly cured the original defect of the want of authority.

[46] In conclusion, I hold that in the premises, that there is no complaint from any of the directors or shareholders of the plaintiff regarding the institution of the suit, thus no wrong was done to the company. In such a case, there would be no requirement for authorisation of the company's relevant organs in form of a resolution, **Foss Vs Harbottle (Supra)**. The Plaintiff authorised the filing of the suit through other legally recognisable forms, in this case, by donating a power of attorney to **PW1**.

[47] As a result of the above, the 2nd preliminary objection is also found devoid of any merit and it is accordingly dismissed

Merits of the suit

Issues No.1 & 2: (a) Whether the certificate of title held by each of the parties is a valid certificate.
(b) Which of the parties is entitled to the suit land.

[48] The 5th defendant, Commissioner Land Registration, despite having been served with the summons to file a defence, did not file a WSD, but being a Statutory office responsible for land registration in Uganda, court had its Senior Registrar, **Mr. Sekitto Moses** as a Court witness for purposes of ensuring determination of all matters in controversy in relation to the parties regarding the suit land certificates of title.

[49] Counsel for the plaintiff submitted that the genesis or root of the impugned titles allegedly registered in the 1st, 2nd, 3rd and 4th defendants' names undoubtedly did not originate from the same **Badru Kakungulu** former registered proprietor of **Kyadondo Block 208, plot 177** as there is no evidence to support the alleged subdivision having been authorised by Commissioner Land Registration (**P.Exhs.1,3,4 and 19**). That the certificate

of title held by the plaintiff was registered under the Registration of Titles Act under Instrument No. **KLA 64733 dated 26th April 1972** and the impugned land title certificates were created much later as shown below:

- i. **Plot 1363 Block 208 Kyadondo was registered under Instrument No. KLA 9127 dated 10th August 1979.**
- ii. **Plot 1364 Block 208 Kyadondo was registered under Instrument No.98138 dated 15th April 1981 and the same was subdivided to create plots 2501, 2502 & 2503 (P.Exhs.3,4,8,9 and 10).**

According to counsel, the aforesaid was not controverted by the defence in cross examination and accordingly stands unchallenged.

Counsel submitted that the genesis of the title fraud or forgery by the 1st - 4th defendants or their predecessors in title commenced by subdividing the plaintiff's deed plan as clearly shown by the Area schedule (**P.Exh.19**) leaving the plaintiff's mother title, **Block 208 plot 177** intact yet it ought to had been submitted by the original proprietor, **Badru Kakungulu** and the same cancelled on the basis of the subdivisions. Indeed, upon complaints of the plaintiff, the referred to **Plots 1363,2501,2502 and 2503** were cancelled in the area schedule record book (Kalamazoo) and reverted to the original **Plot 177 Block 208 Kyadondo** but the impugned land titles in the hands of the 1st - 4th defendants remained on the register unaffected though in reality the plots no longer existed.

[50] Relying on the authority of **St. Mark Educational Centre Vs Makerere University, Civil Appeal No. 4 of 1997 [1998] UGCA 20**, counsel submitted that fraud was committed when the impugned titles, which are now without land on ground, were superimposed over the plaintiff's rightful title and unlawfully smuggled into a land registration system under the RTA where they appeared as parallel interest which could not be discovered through an ordinary search.

[51] Counsel for the 1st - 4th defendants on the other hand submitted that the suit properties vide **Kyadondo Block 208 Plots 2502-2503, 1363 and 2501** belong to the defendants respectively as they hold certificates of titles of the same and were registered before the plaintiff's company since they derive their interest from **Prince Badru Kakungulu** who was the registered proprietor of **Plot 1363** in around 1979 and **Plot 1364** in around 1981.

[52] By way of background, on the 21/6/2010, **Kampala Financial Services Ltd** (KFS), under a mortgage transferred the suit property comprised in **Plot 177, Block 208 Kyadondo** to the Plaintiff company for a consideration of Ugx 80,000,000/= and the same was accordingly registered in the plaintiff's name on 27/7/2010 (**P.Exhs.5 & 4**).

[53] On the 4/8/2010, the Plaintiff contracted '**D**' & '**E**' **Geo mapping & Surveying Consults Ltd** to reopen boundaries of the suit land but during the exercise of opening the boundaries, the surveyors encountered resistance from people among whom were the 1st - 4th defendants who claimed to be owners of the suit land. However, later, with the help of police providing security, the exercise of boundary opening was done and concluded. On 12/8/2010, the plaintiff company was furnished a boundary opening report (**P.Exh.7**). It is the Plaintiff's contention that according to the report, the 1st - 4th defendants occupied the plaintiff's land under a claim of ownership of the land as registered proprietors of their respective portions of land viz; **Plots 1363, 2501 and 2502-2503 Block 208, Kyadondo**. This was later confirmed by a search in respect of the impugned plots where it was found that the 1st - 4th defendants held title certificates thereof issued by the Commissioner Land Registration respectively (**P.Exhs.11-13**) hence the instant suit.

[54] The undisputed evidence on record is that the 1st defendant was first registered on **Plot 1364** measuring 0.30 ha. before it was subdivided into **Plot 2501** currently registered in the 3rd and 4th defendants' names (**P.Exh.9**), while the residue plots 2502-2503 are currently registered in the names of the 1st defendant (**P.Exh.8**). In short, **Plots 2501, 2502 & 2503** originated from the 1st defendant subdivision of **Plot 1364** that was registered under **Instrument No.98138** dated **15th April 1981**. As regards **Plot 1363** currently in the names of **James Mutyaba**, it was registered under **Instrument No.KLA 9127** dated **10th August 1979**. According to the defendants, the original owners of both **Plots 1364 and 1363** was **Prince Badru Kakungulu**, the registered proprietor thereof in 1981 and 1979 respectively, from whom they derive their respective interests. The plaintiff's land on the other hand was registered under **Instrument No.**

KLA 64733 dated 26/4/1972 under the names of **Badru Kakungulu** (P.Exh.3).

[55] It is apparent from the above, that the Plaintiff's claim is that its title (plot 177) is rooted in the mailo of **Badru Kakungulu** dated 26/4/1972 while the defendants claim that their respective titles **Plots 1363** and **1364** are also rooted in the mailo of **Badru Kakungulu** dated 10/8/1979 and 15/1/1981 respectively.

[56] From the above, it is apparently clear that the plaintiff's certificate of title and her predecessors came into existence earlier in time than that of the defendants and their predecessors. It is not in dispute that both parties' disputed portions of land refer to the same and one piece of land at **Kawempe on Block 208 Kyadondo**.

[57] In the premises, on the basis of the above unchallenged evidence as regards the dates of registration of the impugned 1st, 2nd, 3rd, and 4th defendants' certificates of title vis a vis that of the plaintiff, the certificate of title of the plaintiff registered much earlier in time in line with **S.48 RTA** would take priority over the impugned Defendant's title certificates unless it is shown that the plaintiff committed fraud in its registration. This is the position of the law as also set out in **J.W.R Kazoora Vs M.L.S Rukuba, SCCA No.13/1992 [1993] UGSC 2**, it was held that,

"The Respondent having been the 1st person to register his interest in the suit property and not having been shown to have committed fraud in registration, he had better rights to the suit property than the Appellant."

[58] In regard to **Plot 2501** in the names of the 3rd and 4th defendants, according to the plaintiff, it is overtly a forged document as it does not correspond with the white page (Registry copy of the title). Indeed, this court has had the opportunity to scrutinize the copy of the certificate of title for **Plot 2501** in the names of the 3rd and 4th defendants (**P.Exh.17**). It does not correspond or is inconsistent with the white page (Registry copy). On the 1st and 4th defendants' copy (**P.Exh.17**), the initial Registered proprietor **Sulaiman Seremba** who is reflected on the white page, is missing.

- [59] 2ndly, whereas the 1st - 4th defendants claim their interests from **Plots 1364 and 1363** in the names of **Prince Badru Kakungulu** whose registration dates 1981 and 1979 without reference to **Plot 177** there is evidence from the **Area schedule** (Part of P.Exh.19) that the impugned plots were surveyed off from the plaintiff's land (**Plot 177**), that is, the subdivision of the Plaintiff's Deed plans of which the plaintiff's complaint is that they were done without her consent and without the sanction of the Commissioner Land Registration as evidenced by the Commissioner's letter to the District Surveyor (**P.Exh.19**) and the fact that the plaintiff's physical title (plot 177) remained intact with no evidence of it ever having been subdivided. If the Commissioner Land Registration had sanctioned the subdivision, one would expect the original proprietor **Badru Kakungulu** to would have submitted his mother title to the lands office for that purpose and **Plot 177** (as per the Area Schedule) would have been definitely affected. It would not remain intact as it is in the present form.
- [60] As a result of the above anomaly, the plaintiff complained to the Commissioner Land Registration and the impugned plots were accordingly cancelled in the Area schedule record book (Kalamazoo) and reverted to the original **Plot 177 (P.Exh.20)**.
- [61] The implication of the above therefore is that the said impugned plots no longer exist though the defendants remained with physical title certificates and also still reflect on the register.
- [62] **3rdly**, further proof of anomalies of fraud is the fact that on the mailo certificate of title of **Badru Kakungulu** from whom the plaintiff's derive their interest of Plot 177 (**P.Exh.3**), there was a lease hold interest created in 1955 for 49 years in the names of **Naghibhai .L. Patel** (as per **P.Exhs.13 & 15**) and therefore, none of the impugned plots would be lawfully created by subdivision on **Plot 177** while the lease hold interest of **Naghibhai L.Patel** subsisted.
- [63] The Senior Registrar of titles **Sekitto Moses** (Court witness), the Ministry of Lands Housing and Urban Development, the official custodian of all documents related to land, clarified that suit **Plot 177 Block 208 Kyadondo** has never been subdivided to create the impugned plots i.e,

Plots 2501, 2502, 2503 and 1363. What was subdivided was the Deed plan constituting **plot 177** as per the Area Schedule report and on a complaint, the subdivision was cancelled and reverted to the plaintiff. As regards **plot 1364 Block 208, Kyadondo**, as per the subdivision it was mutated from **plots 1413,1416,1494,1495** etc and not **plot 177** and therefore the current impugned plots i.e, **Plots 2501, 2502 and 2503** whose root of the title is **plot 1364** was never curved out from **Plot 177** thus the plaintiff's **Plot 177** is still intact as it has never been subdivided.

[64] During cross examination, the Court witness explained that it was not clear as to how **Plot 1363** was created in favour of Prince **Badru Kakungulu** and it does not even appear on the mutation form that created **Plot 1364**. Lastly, he explained that instrument for **Plot 1364** does not reflect as a subdivision but a survey from Blue page purporting to divide **Plot 177** to create **Plots 1363 and 1364**.

[65] The conclusion one gets from **Mr. Sekitto's** evidence is that the instruments creating **Plots 1363 and 1364** from which the 1st - 4th defendants derive their interests do not relate to **Plot 177**. It is not in dispute that the plaintiff's **Plot 177** and the impugned **Plots 1363 and Plots 2501, 2502 and 2503** mutating from **Plot 1364** refer to the same and one Plot of land at **Kawempe on Kyadondo Block 208**, the suit land. Since the plaintiff's **Plot 177 Block 208 Kyadondo** takes priority over the impugned plots on account that it was registered and or brought under the operation of the Registration of Titles Act earlier in time, i.e, on 26/4/1972, I find that the impugned plots were unlawfully procured by double plotting and superimposed on the suit **Plot 177** from which the plaintiff derived legal interest. These constituted acts of fraud within the meaning of **St.Mark Educational Centre Vs Makerere University (supra)** where it was held that Fraud was committed when the mailo land was superimposed on the freehold land of the Respondent or the original owners of those plots in question.

[66] In his defence, the 1st defence averred that he is a bonafide purchaser for value without notice of any fraud from Prince **Badru Kakungulu** for kibanja now forming **Plots 2502 and 2503 Block 208 Kyadondo** and another kibanja now forming **Plot 2501** from a one **Sserwanga**, but which

he later transferred to **Ssembatya Lule Godfrey** for his children, the 3rd & 4th defendants. He contended that the **Plots 2501, 2502 and 2503** were all subdivided from **Badru Kakungulu's** mailo comprised in **Plots 1364, Block 208 Kyadondo**.

- [67] For the 2nd defendant, his case is that he is a representative of the estate of the late **James Mutyaba**, the registered proprietor of **Plots 1363, Block 208 Kyadondo** which he purchased from **Badru Kakungulu** in around **1975** and he is therefore also a bonafide purchaser for value without notice of any fraud.
- [68] As regards the 3rd and 4th defendants, they averred that they are registered proprietors of **Plot 2501, Block 108 Kyadondo** which they acquired from their late father **Ssembatya Lule Godfrey** who had lived on the land for a long time, even before 1989.
- [69] The plea of bonafide purchaser for value is a legal defence, the party putting up such a defence has the onus to establish it, See **Nana Y. Owusu & 2 Ors Vs Hydraform Estates Ltd, SCCA No.34/62/2013 [2014] GHASC 150**.
- [70] In the instant case, the 1st defendant, though he filed his WSD, never appeared to testify in court so that he is interrogated and tested to any extent as to the valuable consideration which he gave in order to show the bonafides or malafides of his purchase and also the presence or the absence of notice, **Pilcher Vs Rawlings [1871-72] 7 LR Ch.App.259 at 269** and **Hannigton Njuki Vs William Nyanzi HCCA No.434/1996**. As a result of the above, I do find that the 1st defendant from whom immediately the 3rd and 4th defendant derived interest has not established that he acquired the impugned **Plots 2501, 2502 and 2503 Block 208 Kyadondo** as a bonafide purchaser.
- [71] As regards the 2nd defendant, **Serunjogi Desmond (DW2)**, he never adduced any evidence to support his claim that his late father **James Mutyaba** acquired **Plot 1363** as a bonafide purchaser for he had no evidence of either the consideration that was paid or that he was the registered proprietor by attaching and exhibiting a copy of the certificate of title of

the land in question. The same apply to the 3rd and 4th defendants. The defendants majorly relied on their long stay on their respective claimed plots of land but which occupation appear controversial and also not proved because, in the first instance, no evidence was adduced for example, by the 3rd and 4th Defendants as to how the 1st Defendant acquired the kibanja (that led to creation of plot 2501) which he sold to **Nabunya Marghret** (DW5) as per **D.Exh.1** or whether their alleged occupation and transaction in the land with **Sserwanga** and later, **Nabunya** (DW5) was with the knowledge and consent of the then prescribed authority as was required by law, **S.4(2) of the Land Reform Decree**, See also **Paul Kiseka Ssaka Vs 7th Adventist Church, SCCA No.8/93**.

- [72] In absence of such consent of the then prescribed authority, the purported occupation of the land by the 1st defendant and transactions leading to his successor, **Nabunya Marghret**, the mother of the 4th and 3rd Defendants was unlawful. His interest in law must be one capable of surviving the parties and must be recognisable to the whole world, **Native Provincial Bank Vs Anisworth (1965) AC 1175**. In this case, it apparent that the 1st defendant had never had any lawful interest in the land in question to later on pass to his successor.
- [73] It follows therefore from the foregoing, that the 1st, 3rd and 4th defendants have no interest to boast of as far as their defence is concerned.
- [74] In conclusion, I find that the plaintiff adduced and led evidence which on the balance of probabilities proved that the impugned land titles being held and relied on by the 1st - 4th defendants are null and void and confer no proprietary interest in land, and in any case, their titles as already observed, do not relate to the suit property, **Plot No.177 Block 208 Kyadondo**. They are merely hanging in air but purporting to refer to the suit land. The 1st defendant and the 2nd defendant's father (the late James Mutyaba) and the 3rd and 4th defendant's predecessors were privy to the fraud as its immediate beneficiaries. There claimed long stay on the land cannot in law confer unto them any legal interest in the suit land as it is apparent that their predecessors owned "air".



[75] As a result of the above, I find the 1st and 2nd issues in favour of the plaintiff. It is the plaintiff with a valid title. The 1st - 4th defendant's land titles are null and void. It is therefore the plaintiff that is entitled to the suit land described as **Plot 177, Block 208, Kyadondo at Kawempe, Kampala**. The defendants' counter claim in the premises has no merit, it is accordingly dismissed.

Issue No.3: Whether there has been trespass on the part of the defendants or their predecessors in title.


[76] In this case, upon the plaintiff being registered on the suit land on 4/8/2020, he engaged surveyors to open boundaries of the suit land for purposes of taking physical possession. The surveyor was resisted by the defendants who were claiming to be lawful proprietors of the land as evidenced by the impugned respective title certificates in their names.

[77] This court having found that the defendants' impugned titles were illegally and or fraudulently procured yet the defendants were in occupation of the suit land on account of the impugned title certificates, then their occupation of the land without the consent of the Plaintiff, the registered proprietor was illegal and constituted trespass; **Lutaaya Vs Stirling Civil Engineering Co. Ltd [2009]1 E A 279**. The 3rd issue is in the premises found in the affirmative.

Issue No.5: What remedies are available to the parties.

Declaration of ownership

[78] This court having found that the plaintiff is the rightful owner of the suit land, it follows that the plaintiff is entitled to the relief; the plaintiff is the lawful proprietor of **Plot 177 Block 208 Kyadondo** and the 1st, 2nd, 3rd and 4th defendants are trespassers thereon.



Cancellation of the impugned titles

[79] In the instant case, there is evidence that the Commissioner Land Registration cancelled the survey Deed plans constituting the impugned plots. However, the impugned titles remained on the register. This court having found and confirmed that the impugned titles were fraudulently procured, the 5th defendant is directed to cancel them on the grounds of fraud.

Permanent injunction

[80] The defendants having been found to be trespassers on the suit land, a permanent injunction accordingly issues restraining the 1st, 2nd, 3rd and 4th defendants from further trespass on the suit land.

Mesne profits

[81] **S.1 (m) CPA** defines “mesne profits” of property to mean those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession. In this case, it is evident that the 1st - 4th defendants are in occupation of the suit land and they accordingly derived benefits at the detriment of the plaintiff who from July 2010 when he acquired the suit land, was entitled to the exclusive occupation of the suit land. The plaintiff is therefore entitled to mesne profits which the defendants earned from the suit or the plaintiff would have earned if it were not for the trespass. The plaintiff however did not lead evidence as regards the present type of land user or the rental income of the structures thereon the land.

[82] Counsel for the plaintiff however implored this court to apply the formula for determination of the question of mesne profits by factoring the capital value of the land, the purchase price, to the period of trespass at an annual rate of 30% of the capital value as was formulated in **Adrabo Stanley Vs Madira Jimmy, HCCS No.24/2013 (Arua)**. In the premises, counsel sought for mesne profits of Ugx 301,920,000/= arrived at by multiplying the

capital value of the land as Ugx 80,000,000/= by an annual rate of 30% by 12 years and 7 months as at 27/2/2023 when the final submissions for this suit were filed as the period the defendants have been in unlawful occupation and or trespass onto the plaintiff's land. For purposes of consistency in awarding mesne profits, I adopt such legally recognisable formula, and award the Plaintiff mesne profits of **Ugx 301,920,000/=**.

General damages

[83] As regards general damages, in trespass, it is actionable per se. The plaintiff is entitled to recover damages for the loss occasioned as a result of the trespass, **Painento Semalulu Vs Nakitto Eva Kasule, HCCA No. 04/2008**. So, in this case, though the plaintiff did not adduce evidence as to what damage he suffered as a result of the trespass, that does not itself disentitle her damages; **James Bwogi & Sons Enterprises Vs KCC & Anor, SCCA No.9.2017**. In the instant case, it is evident that the Plaintiff company was humiliated and its officials distressed when her surveyor went to open the boundaries of the land and found resistance from the defendants. It had to require the intervention of police before the exercise could be accomplished. Considering the fact that the land is also located in Kawempe, an upscale Kampala suburb and the plaintiff has been denied enjoyment of the land from 2010 to date) thus subjecting her to economic loss, I award the Plaintiff general damages in the sum of **Ugx 150,000,000/=**.

Costs

[84] As per **S.27 CPA**, costs are awarded at the discretion of court and follow the event. In this case, the plaintiff being the successful party, it is granted the costs of the suit.

[85] In conclusion, judgment is given in favour of the plaintiff with the following orders.

- a) A declaration that the plaintiff is the lawful proprietor of **Plot 177 Block 208 Kyadondo** and the 1st, 2nd, 3rd and 4th defendants are trespassers on the suit land liable for eviction.

- b) The Commissioner Land Registration is directed to cancel the 1st, 2nd, 3rd and 4th defendants' certificates of title comprised in **Plots 1363, 2501, 2502 and 2503 Block 208, Kyadondo at Kawempe.**
- c) A permanent injunction issues restraining the 1st, 2nd, 3rd and 4th defendants from further trespass on to the suit land.
- d) The Plaintiff is awarded mesne profits of **Ugx 30,190,000/=** for the suit land.
- e) The Plaintiff is awarded general damages of **Ugx 150,000,000/=** and costs of the suit.
- f) The defendants are liable for the mesne and general damages jointly and severally.

Dated at Kampala this 3rd day of **November, 2023.**



.....
Byaruhanga Jesse Rugyema
JUDGE.