

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

LAND DIVISION

CIVIL SUIT NO. 878 OF 2018

**KYAKUWA MAYIMUNA ;; PLAINTIFF
VERSUS**

1. BAGAVE AGENCY LTD

2. NKUUBI FRED

3. CHIMEA ALEXANDER: DEFENDANTS

Before: Lady Justice Alexandra Nkonge

JUDGMENT:

Introduction:

The plaintiff filed this suit seeking orders/declarations that:

1. *A declaration that the transaction whether sale or mortgage of the suit land is fraudulent, irregular and illegal;*
2. *that there was no sale or mortgage of the suit land and that if any exists it was fraudulent, irregular and illegal owing to the above law and evidence.*
3. *A declaration that the defendants are trespassers and the plaintiff is the rightful owner of the suit land;*



4. A declaration that the registration of the 2nd defendant on the suit land comprised in **Wakiso District Busiro Block 326 Plot 493 land at Nakitokolo** was wrongful, null and void;

5. An order directing the commissioner of land registration and the Registrar of title to cancel the registration of the 2nd defendant's registration secured through fraud, and reinstatement of the plaintiff and the 3rd defendant under **Section 177 of Registration of Titles Act Cap 230**.

6. An order of permanent injunction to issue against the defendants restraining them from alienating, entering or evicting the plaintiff from the suit land;

7. General damages;

8. Punitive and exemplary damages, this prayer ought to be granted given the high handed nature of the actions of the defendants.

Background to the suit:

By way of a brief background, the suit case was first filed in the Chief Magistrates Court of Wakiso, vide **Civil Suit No. 089 of 2019**. It was later dismissed for lack of jurisdiction, following which the plaintiff filed the present suit in this division.

It is the plaintiff's case that on 29th July, 2015, she and the 3rd defendant jointly purchased the suit land comprised in **block 327 plot 493 land at Nabbingo Bataka** measuring 0.079 hectares from Babirye Sumaya Nakabugo and Musajja Ibrahim the administrators of the estate of the late Antonio Kibuuka.

They were registered as proprietors thereon and started constructing their matrimonial home in 2018. The plaintiff discovered that the 2nd defendant who is an agent of the 1st defendant fraudulently transferred the suit land into his names without the consent, authority, approval and/or knowledge of the plaintiff as a co-owner of the suit land, claiming that the 2nd defendant had bought the same from the plaintiff and the 3rd defendant whereas not.

 2

The 3rd defendant also filed his written statement of defence wherein he stated that he gave out the certificate of title to the suit land to the 1st defendant as security for a loan of **Ugx. 15,000,000/=** advanced to his friend, a one Mawejje Bashir.

- 5 The 3rd defendant maintained that the transaction between him and the 1st and 2nd defendants was purely a lending transaction.

The defence by the 1st and the 2nd defendants:

- 10 The 1st defendant is a company in which the 2nd defendant is a director. Both the 1st and 2nd defendants filed their written statement of defence wherein all the plaintiffs' claims were denied.

They claimed to have purchased the suit land from the plaintiff and 3rd defendant at a consideration of **Ugx 30,000,000/=**; and that they were *bona fide* purchasers for value. They also refuted the claim that the suit land was matrimonial property.

15 **The defence by 3rd defendant:**

In his WSD, the 3rd defendant's claimed that he and the plaintiff met in 2012 and the duo cohabited until December 2017 when they developed misunderstandings based on current issues on the suit land, leading to their separation.

- 20 Between them they had been blessed with two children and that they had purchased the suit property and had it jointly registered in their names as proprietors.

- Sometimes in November 2017, the 1st defendant's bank advanced to a one Bashir Mawejje a loan of **Ugx 15,000,000/=** who pledged postdated cheques, a motor vehicle No. UAX 650X NOAH and their title for the suit land as security, with the
25 3rd defendant as a guarantor.



The said Bashir Mawejje defaulted on his loan repayment obligation and disappeared, hence the dispute arising between the parties in this suit. According to him, the transaction was disguised by the 1st and 2nd defendants as a sale for the suit land, whereas not.

5 **Agreed facts:**

It was an agreed fact that the suit land was originally jointly registered in the names of the plaintiff Kyakuwa Mayimuna and the 3rd defendant Chimea Alexandra; and that on the 19th June 2018, the 2nd defendant became registered as the proprietor of the suit land.

10 **Representation:**

The plaintiff was represented by ***M/s Sanywa, Wabwire & Co. Advocates***. The 1st and 2nd defendants were represented by ***M/s Jingo, Sempijja & Co. Advocates***.

The 3rd defendant who filed his own defence represented himself in court.

15 **Issues:**

The Joint scheduling memorandum dated 3rd February, 2021 was filed in this court and the following issues were agreed upon for resolution by court:

1. ***Whether the defendant's transaction on the suit land was a sale or a mortgage?***

20

2. ***Whether the defendants' transaction was fraudulent, irregular and illegal?***

3. ***Whether the defendants are trespassers on the suit land?***

25

4. ***What remedies are available to the parties/***



Consideration of the case:

Issue No. 1: Whether the defendants' transaction on the suit land was a sale or a mortgage?

During the hearing of this suit the plaintiffs presented two witnesses. Kyakuwa
5 Mayimuna the plaintiff herself who testified as **Pw1. Pw2** Erisa Sebuufu, the
handwriting expert presented a report on the findings on the handwriting and
signatures appearing on the questioned documents which the defendants relied
on as evidence of transfer.

The law:

10 **Section 101 of the Evidence Act, Cap. 6** provides that whoever desires any
court to give judgment as to any legal right or liability dependent on the existence
of facts which he or she asserts must prove that those facts exist.

Section 103 further stipulates that the burden of proof as to any particular fact
lies on that person who wishes the court to believe in its existence. (**Sebuliba**
15 **versus Co-operative Bank Ltd [1982] HCB 129**).

Section 110 of the Evidence Act, stipulates that when the question is whether
any person is owner of anything of which he or she is shown to be in possession,
the burden of proving that he or she is not the owner is on the person who affirms
that he or she is not the owner. The plaintiff in this case had the duty to prove
20 that trespass, among other acts alluded to, was committed by the defendant.

Trespass to land occurs when a person makes an authorized entry upon land,
and thereby interferes or portends to interfere with another person's lawful
possession of that land. (**Justine E.M.N.Lutaaya Vs Stirling Civil Engineering**
Co. Civil Appeal No. 11 of 2002 (SC)).

25 Thus in **Sheik Muhammed Lubowa versus Kitara Enterprises Ltd C.A No.4**
of 1987, the East African Court of Appeal court declared that in order to
prove the alleged trespass, it was incumbent on the party to prove that the


5

disputed land belonged to him; that the defendant had entered upon that land; and that the entry was unlawful in that it was made without his permission; or that the defendant had no claim or right or interest in the land. (**Ref also: H.C.C.S No. 118 of 2012, Tayebwa Geoffrey and Anor Vs Kagimu Ngudde Mustafa; Justine E.M.N. Lutaaya Vs Sterling Civil Engineering Co, SCCA No. 11 of 2002).**

The dispute in this instant case rotates around both the circumstances and nature of the transaction by which the 2nd defendant acquired the suit land from the plaintiff and the 3rd defendant who were registered on the certificate of title as joint owners, before the 2nd defendant caused the transfer into his names.

In their defence, the 1st and 2nd defendant claimed the two had sold the land to them. To the 3rd defendant however, it was a loan to one Mawejje and his own role in that transaction was to provide the security and guarantee the loan.

The plaintiff on her part denied participation in the said transaction. She categorically denied having sold the land to the 1st and 2nd defendants.

Section 10(1) of the Contracts Act No.7 of 2010 defines a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

It may be oral or written or partly oral and partly written or may be implied from the conduct of the parties. **Section 10(5) of the same Act** requires a contract the subject matter of which exceeds 25 currency points to be in writing.

Furthermore, it is stated under **section 11(1) (supra)** that a person has capacity to contract where that person is of eighteen years or above; of sound mind; and not disqualified from contracting by any law to which he or she is subject.

Furthermore, by virtue of **section 10 (6)** thereof, a contract of guarantee or indemnity to must be in writing. **Section 68** defines a contract of guarantee to



mean a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which contract may be oral or written.

In ***Yeoman credit ltd vs Latter & Anor [1961] 2All ER 294*** at **296** cited in ***Karangwa vs Kulanju CA No. 3 of 2016***, court ruled that a contract of
5 guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promise.

The law of guarantee is part of the law of contract and the basic principle is that a person who makes a promise to another ought to keep his promise. It is now settled law that once a contract is valid, it automatically creates reciprocal rights
10 and obligations between the parties thereto and when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms. (***See: William Kasozi versus DFCU Bank Ltd High Court Civil Suit No.1326 of 2000***).

Court in ***Karangwa vs Kulanju (supra)*** analyzed the apparent contradiction
15 between **section 10 (6)** which expressly provides that the contract exceeding 25 currency points (***Ugx 500,000/=***) must be in writing and the flexible requirement under **section 68** that a contract of guarantee may be oral or writing. The interpretation to me seems to be however that that requirement is mandatory for as long as the amount exceeds 25 currency points.

20 It was **Pw1**'s evidence in *paragraph 2, 3 and 4* of the witness statement that she purchased the suit land in 2015 with the 3rd defendant jointly, with the intention of constructing a matrimonial home and later in 2017 they were jointly registered on the suit land. She tendered in court, **PExh 1** as the sale agreement and **PExh 2** as the certificate of title as proof of such engagement.

25 However, that in 2018, the defendants fraudulently transferred the suit land into the names of the 2nd defendant, without consent and/or knowledge of the plaintiff.



Under *paragraph 6* of her witness statement, that the 3rd defendant presented the plaintiff's documents to the 1st and 2nd defendant for the alleged transfer and did so without her knowledge.

5 **Pw1** denied any claims that she sold the suit land or transferred any of her interest in the suit land or any part of it as a result of the alleged sale or loan, claiming that she never received any consideration in respect of the suit land.

The 1st and 2nd defendants in their joint WSD claimed the suit land was sold to them by the plaintiff and the 3rd defendant and that they were *bona fide* purchasers for value.

10 **Dw2** the 2nd defendant, Nkuubi Fred, a director in the 1st defendant company told court that the 3rd defendant went to their offices on the 13th November, 2017 with his title.

15 It was his evidence that the 3rd defendant and his wife had duly signed the transfer instruments as vendors. The transaction according to them was not for money lending transaction; nor could it be said that the suit land which they bought was matrimonial property.

That the plaintiff whom they found at her home in Lungujja after inspecting the land with her husband, had signed the transfer instruments and given them a copy of her passport.

20 Both the 2nd defendant and his witness **Dw3**, told court that the plaintiff and the 3rd defendant had presented a transfer form tendered in court as **DExh 2**; consent form, **DExh No. 4** and a copy of the passport of the plaintiff, exhibited as **DExh 3**, all purported to have been signed by them upon which consideration of **Ugx 30,000,000/** had been paid for the suit land.

25 During cross-examination the two defence witnesses however admitted that there was no sale agreement between the 1st and 2nd defendants on the one hand and the plaintiff and 3rd defendant on the other hand.


8

Going by that admission, the agreement in its form did not therefore conform to or satisfy the requirements of **section 10(5) of the Contract Act** as cited, since the amount paid in the transaction exceeded 25 currency points.

Consent of the plaintiff:

- 5 On the issue of consent, **section 38A and 39 of the Land Act** restrict the transfer of family land without the consent of the spouse, who in this case was also joint owner of the suit land. The said laws were in my view, intended for the protection of the property not only for those who were legally married but for the cohabiting parties as well. It is for that reason that I will not delve into the
10 discussion as to whether or not this was matrimonial property.

Suffice to state however that **section 38 A** of the said Act provides a broad definition of what constitutes family land. It includes land which the family agrees shall be treated as ordinary residence, that is *where a person intends to make that place his or her home for an indefinite period.*

- 15 It was the 2nd defendant's evidence that the 3rd defendant and his wife had duly signed the transfer instruments as vendors. The transaction according to them was not for money lending transaction; nor could it be said that the suit land which they bought was matrimonial property.

- That the plaintiff whom they found at her home in Lunguja after inspecting the
20 land with her husband, had signed the transfer instruments and given them a copy of her passport and therefore aware of the nature of this transaction.

As required by **section 11(1) of the Contracts Act**, the two ought to have been parties to the agreement (whether oral or written) to signify their consent since they were joint owners; and had the capacity to sign the transfer instruments.

- 25 The element of consent which was a key to the validity of the contract was not therefore met by the parties in this transaction..



Consensus ad idem and intention to contract:

5 It is trite that for a contract to be valid and legally enforceable, there must be capacity to contract, intention to contract, *consensus ad idem*; valuable consideration; legality of purpose; and sufficient certainty of terms.

If in a given transaction any of these is missing it could as well be called something else. (***Ebbzworld Ltd & Anor vs Rutakirwa Civil Suit No. 398 of 2013***).

10 It was the 3rd defendant contention that the duplicate certificate of title for the suit land had been handed over to the 1st director of the 1st defendant, without any intention to dispose of the suit land, but rather only as a secondary security for the loan obtained by a one Bashir Mawejje for a sum of ***Ugx 15,000,000/=***.

15 The 3rd defendant relied on was a handwritten letter dated 10th August, 2019 addressed to him by Mawejje by which he stated that he was out of jurisdiction and would return to pay back the loan of ***Ugx 15,000,000/=*** which the two had borrowed.

20 He also presented invoices for the company under which the borrower, Mawejje was trading, but which with all due respect I did not find relevant to the matters at hand.

The suggestion in that handwritten letter from Mawejje was that this was a loan jointly obtained between him and Mawejje. (***Ref: D3Exh 2***). There was no evidence in that letter however that the the plaintiff was involved in the transaction.

25 There was also no indication therein that the 3rd defendant was a mere guarantor in this transaction, which implied that he directly benefitted from the transaction

to the exclusion of the plaintiff in a transaction the actual nature of which was never fully explained to her.

It was the duty of the 2nd defendant who disputed that contention to provide credible evidence to dispel that notion. He did not provide it.

- 5 The 3rd defendant specifically denied having on 19th June 2018 received from Namuleme Brenda, the cashier of the 1st defendant, a sum of **Ugx 30,000,000/=** as consideration for the purchase of land as alleged by the 2nd defendant.

Indeed as submitted, the 2nd defendant failed to avail to court any written acknowledgment/receipt for the amount alleged to have been paid by him to the
10 3rd defendant as consideration for the purchase of the suit land.

The said cashier, Namuleme Brenda who was a crucial witness to the defendants' case was not in court to prove the facts of payment of alleged **Ugx 30,000,000/=** to plaintiff and 3rd defendant.

It is therefore reasonable to think as counsel for the plaintiff did, that the
15 omission to produce her in court was based on the fear that it would destroy their case, once the truth was revealed.

Furthermore, in accordance with **sections 42(1) and 67 of the Contract Act 2010**, a contract is to be performed either within a reasonable time or at that time provided by the applicable trade usage/ practice to the contract in question.

- 20 The facts in this case as brought out in evidence from both sides demonstrates that there was no *consensus ad idem* not only on the objective/nature of this transaction but also on the consideration, clarity of intention, leave alone the specific terms and conditions of payment.

Whichever term one would wish to refer to the transaction it failed to meet the
25 requirements of a valid contract and was therefore not enforceable against the 3rd defendant.



Issue No.2: Whether the defendant's transactions was fraudulent, irregular and illegal?

Fraud was defined in the Supreme Court case of **Fredrick Zaabwe vs ORIENT Bank Ltd & Others, SCCA 04/2006** to mean the intentional pervasion of truth
5 for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or by a concealment of that which deceives and intended to deceive another so that he shall act upon it to his legal injury.

10 As submitted, it is not in dispute that the plaintiff and the 3rd defendant were joint owners of the suit land as per land sale agreement exhibited as **PExh No. 1** and land title **PExh 2**, before it was transferred to the 2nd defendant.

The findings from the handwriting expert, Sebuwufu Erias **Pw2** in his forensic reports, **PExh No. 8(a and b)** were clear. The purported transfer instruments
15 presented to court by the 1st and 2nd defendants: that is, transfer form: **DExh. 2**, and consent form **DExh 4**, purportedly signed by the plaintiff were forged documents. The findings in the report of **Pw2** remained uncontroverted.

Court also took note of the fact that what was presented as the consent form in fact lacked the necessary details including the date when the consent was made.
20 This was a clear indication that consent to effect the transfer was procured fraudulently.

During the *locus* visit, it was confirmed that the plaintiff and the 3rd defendant had pooled resources to put up a structure which was still at the foundation level.

25 This was enough to show court that although they were not residing there, they were still in possession of the same. That was intended to be a family residence



It is a maxim of law recognized and established that no man shall take advantage of his own wrong. **See: Nabro Properties Ltd vs. Sky Structures Ltd & 2 others [2002] 2 KLR at page 299.**

The 1st and 2nd defendants claimed to be *bona fide* purchaser. The term is defined in **Black's Law Dictionary 8th Edition at page 1271** as:

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

The defendants had constructive knowledge of the interests of the plaintiff in the suit land before they entered into the transaction. They relied on forged documents to prove that she had consented; and to effect the transfers. Since they acted fraudulently, they cannot rely on the plea of a *bona fide* purchaser.

In the unlikely event therefore that a sale or mortgage of the suit land existed it was fraudulent, irregular and illegal.

In **Makula International Ltd vs H.E Cardinal Nsubuga & Anor CA No. 4 1981** once an illegality is brought to the attention of court it overrides all pleadings including admissions therein and that courts of laws are enjoined not to sanction an illegality.

In response to the 2nd and 3rd issues therefore the evidence indicates that all these fraudulent acts was perpetrated by the 2nd defendant, assisted by the carelessness and negligence of the 3rd defendant. His actions and the role he played in the transaction was a betrayal of the trust of the plaintiff.

It is also a maxim of law recognized and established that no man shall take advantage of his own wrong. **See: Nabro Properties Ltd vs. Sky Structures Ltd & 2 others [2002] 2 KLR at page 299.** The said principle applies to the 2nd and 3rd defendant in this suit.

13

The 2nd defendant who was a director of the 1st defendant company, was therefore a trespasser on the land.

Issue No. 4: Remedies:

5 The plaintiff's prayers were for:

1. A declaration that the transaction whether sale or mortgage of the suit land is fraudulent, irregular and illegal;
- 10 2. A declaration that the defendants are trespassers and the plaintiff is the rightful owner of the suit land;
3. A declaration that the registration of the 2nd defendant on the suit land comprised in **Wakiso District Busiro Block 326 Plot 493 land at Nakitokolo** was wrongful, null and void;
- 15 4. An order directing the commissioner of land registration and the Registrar of title to cancel the registration of the 2nd defendant's registration secured through fraud, and reinstatement of the plaintiff and the 3rd defendant under **Section 177 of Registration of Titles Act Cap 230**.
- 20 5. An order of permanent injunction to issue against the defendants restraining them from alienating, entering or evicting the plaintiff from the suit land;
6. General, and other damages.

General damages:

General damages consist of items of normal loss which a party is not required to specify in his pleading to permit proof. These damages are presumed by law to
25 arise naturally in the normal course of things.



Court may award them where it cannot measure the way in which they are assessed, except the opinion and judgment of a reasonable person. (**See Ronald Kasibante vs SHELL (U) LTD [2008] HCB, at 163**).

5 These may accrue as a consequence due to loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in, had she not suffered the wrong.

10 Thus as stated in **Robert Caussens v Attorney General SCCA No.8 of 1999** it was pointed out clearly that the object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered.

In the assessment of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and extent of the breach. (**Uganda Commercial Bank V Kigozi [2002] 1 EA 305**).

15 The plaintiff may not prove that he/she suffered general damages, it is enough if he/she shows that the defendant owed him duty of care which he/she breached. (**See: Kalemera & Others vs UNILIVER (U) LTD & Anor [2008] HCB 134 at 136**).

20 Based on the above principles and findings, court is inclined to award the plaintiff with general damages payable by the 2nd and 3rd defendants to atone for the inconvenience and for any loss and injury occasioned to her by their actions.

1. The 2nd defendant was a trespasser on the suit land.

25 **2. The 2nd defendant committed fraud in procuring a transfer into his defendant without consent of the plaintiff and without a valid and enforceable sale agreement.**



3. *The registration of the 2nd defendant on the suit land comprised in Wakiso District Busiro Block 326 Plot 493 land at Nakitokolo was wrongful, null and void.*

4. *The Commissioner, Land Registration and the Registrar of title is directed to proceed by virtue of section 177 of Registration of Titles Act, Cap 230 to cancel the title of the 2nd defendant and reinstate on the title the joint into names of the plaintiff and 3rd defendant.*

5. *The 3rd defendant shall refund the sum of Ugx 15,000,000/= paid to him and Maweje as acknowledged, with interest at court rate, payable from the date of delivery of this judgment till judgment in full.*

6. *General damages of Ugx 20,000,000/= payable jointly by the 2nd and 3rd defendants.*

7. *An order of permanent injunction issues against the defendants restraining them from alienating or evicting the plaintiff from the suit land.*

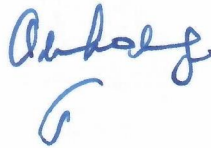
8. *Interest at court rate is payable from the date of delivery of this judgment till payment is made in full.*


Alexandra Nkonge Rugadya

Judge

3rd November, 2023

Delivered by mail



3/11/2023