

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 0751 OF 2018**

NAMPINGA THERESA:::PLAINTIFF

VERSUS

**1. LUBEGA GEORGE
2. SERUMA SIMON GUWATUDDE
3. NAKIRYA MARY:::DEFENDANTS**

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. The subject of the dispute is land comprised in Busiro Block 421 Plot 42 at Ziru measuring approximately 3.642 hectares (approximately 9 acres) adjacent to the Kampala – Entebbe Expressway. The land was formerly owned by the late Emmanuel Bamugye, who died in May 1999. Nakirya Mary, Mpinga Matia (deceased) and Guwatudde Simon inherited the land in their capacity as children of the late Emmanuel Bamugye. The late Mpinga Matia, the 2nd defendant (Guwatudde Simon) and the 3rd defendant (Nakirya Mary) are nephews and nieces of the plaintiff (Nampinga Theresa) respectively.
2. In 2006, the plaintiff purchased land measuring 6 acres of the suit land from the late Mpinga Matia and the 2nd defendant (Simon Guwatudde) at a price of UGX 2.5 million per acre. She began to pay in instalments and by June 2012, the



plaintiff had paid a sum of UGX 8,550,000 to the sellers leaving a balance of UGX 6,450,000.

3. Meanwhile, in 2009, Lubega George (the 1st defendant) purchased a parcel of land of the suit land measuring 9 acres from the 2nd defendant (Simon Guwatudde) and Nakirya Mary at a price of UGX 12 million (Exh.P5). The 1st defendant also purchased an additional 3 acres of the suit land from the late Mpinga Matia at UGX 7,500,000 (Exh.P6). On the 9th July 2013, the 1st defendant was entered as the registered proprietor of the suit land.
4. In essence, both the plaintiff and the 1st defendant claim to have purchased the same parcel of land measuring 6 acres out of the suit land from the same sellers (the late Mpinga Matia and the Simon Guwatudde).
5. A dispute then arose between the plaintiff and the 1st defendant as to who is the rightful owner of the land. The plaintiff brought this suit seeking to be declared the rightful owner of the land among other reliefs, and the 1st defendant counterclaimed seeking to be declared the rightful owner of the land.

Representation:

6. At the hearing of the suit, the plaintiff was jointly represented by Mr. Asuman Nyonyintono and Mr. Allan James Mwiggo while the defendants were represented jointly by Mr. Obed Mwebesa and Mr. Segamwenge Hudson. Both parties filed written submissions which I have considered.

The plaintiff's evidence:

7. The plaintiff produced 3 (three) witnesses to prove her case. PW1 (Janet Lubandi), PW2 (Muliika Michael) and PW3 (Charles Mazinga).
8. The plaintiff adduced evidence of the following documents that were exhibited:
 - i) Exh.P1 – Photocopy of certificate of title for Busiro Block 421 Plot 42;
 - ii) Exh.P2 – Photocopy of the 1st acknowledgment of payment made by the plaintiff to Mpinga Matia;
 - iii) Exh.P3 – Photocopies of the receipts;
 - iv) Exh.P4 – Photocopies of the receipts;
 - v) Exh.P5 – Photocopy of sale agreement between Mary Nakirya and Lubega George dated 25th November 2009;
 - vi) Exh.P6 – Photocopy of sale agreement between Mpinga Matia and Lubega George dated 19th December 2011;
 - vii) Exh.P7 – Photocopy of the search report.

The defendants' evidence:

9. The defendants produced 3 (three) witnesses to prove their case: DW1 (Simon Guwatudde), DW2 (Nakirya Mary) and DW3 (Lubega George).
10. The defendants adduced evidence of the following documents that were exhibited:
 - i) Exh.D1 – Temporary injunction in Misc. Application No.145 of 201.

Preliminary points of law:

15. I wish to begin this discussion by addressing the points of law that were raised by counsel for the defendants.
16. It was argued for the defendants that the transaction by which the plaintiff acquired the land is tainted with illegality to the extent that the sellers of the land did not have letters of administration when they purported to sell the land to the plaintiff.
17. Exh.P1 (the certificate of title for the land comprised in Busiro Block 421 Plot 42) shows that in 2006 when the plaintiff purchased 6 acres of the land from late Mpinga Matia and Guwatudde Simon, it was still registered in the names of the late Emmanuel Bamugye. On the 2nd July 2012, the Administrator General was entered on the title deed as the administrator of the estate of the late Emmanuel Bamugye. On the 31st October 2012, the beneficiaries of the estate of the late Emmanuel Bamugye (Nakirya Mary, Mpinga Matia (deceased) & Guwatudde Simon), who were also children of the deceased, were entered on the title deed as registered proprietors.
18. Although the late Mpinga Matia and Guwatudde Simon were not registered proprietors of the land comprised in Busiro Block 421 Plot 42 at the time that they agreed to sell 6 acres of the land to the plaintiff, they eventually became registered proprietors of the land in 2012 after distribution of the estate by the Administrator General.
19. According to *section 192 of the Succession Act (Cap 162)* and some decided cases such as *Joseph M. Nviri v. Palma Joan Olwoc & 2 Others, H.C.C.S No.*

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20. Besides, as beneficiaries of the estate of the late Emmanuel Bamugye, the late Mpinga Matia and Guwatudde Simon had an equitable interest in the land and therefore, had legal capacity to pass on that equitable interest to the plaintiff. In the case of *Erina Lam Oto Omgom v Opoka Bosco and Anor (Civil Appeal 91 of 2019) [2020] UGHC 185*, Justice Stephen Mubiru held that:

21. The second point of law raised by counsel for the defendants is that an oral contract over the value of 25 currency points is barred by the *Contracts Act (2010)*.

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26. According to *Megarry & Wade: The Law of Real Property*, 9th Edition, Stuart Bridge, Elizabeth Cooke and Martin Dixon, Sweet & Maxwell, London, 2019 at paragraphs 14-051 to 14-061), upon conclusion of a contract for sale of land, the buyer acquires an equitable interest in the land which is enforceable against third parties. As Justice Stephen Mubiru held in the case of *Erina Lam Oto Omgom (supra)*:

“An equitable interest is valid against the entire world, except for the bona fide purchaser of a legal estate for value without notice actual, constructive or imputed. The onus is on the purchaser to establish himself as such; and it is a heavy burden to discharge.” (underlining is mine for emphasis)

27. The seller of land is legally obliged to preserve the beneficial interest of the buyer until it is finally handed over to the buyer after full payment of the purchase price. It is irrelevant that the date of completion of the contract is at a future date. In the words of the authors of *Megarry & Wade (supra)*:

“[...] the purchaser becomes the owner in the eyes of equity from the date of contract.”

28. The moment that a contract for sale of land was concluded between the plaintiff and the 2nd defendant and the late Mpinga Matia, there was created a relationship of trustee and beneficiary. Although the plaintiff was yet to complete payment of the purchase price and therefore, assume all the rights and entitlements to the land, the 2nd defendant and the late Mpinga Matia became trustees of the plaintiff. They could not be seen to engage in acts that were detrimental to the land that had already been sold to the plaintiff. They had a legal obligation to preserve the land. The attempt by the 2nd defendant and the

late Mpinga Matia to sell the same parcel of land to the 1st defendant was a clear breach of the trustee-beneficiary relationship with the plaintiff created in equity. According to *Megarry & Wade at paragraph 14-052 (supra)*:

“The vendor’s principal obligation under this curious form of trust is to manage and preserve the property with the same care as is required of any other trustee. Equity imposes duties on the vendor to protect, pending completion, the interest which the purchaser acquired under the contract [...] for example, a vendor was held liable when between contract and conveyance a trespasser removed a large quantity of surface soil from the land, for [which] with reasonable vigilance he should have observed and prevented the damage.”

29. In the case before me, PW1 (Janet Lubandi) testified that in 2006, the plaintiff (Nampinga Theresa) purchased land measuring 6 acres of the land comprised in Busiro Block 421 Plot 42 Land at Ziru from the 2nd defendant and the late Mpinga Matia at a price of UGX 2.5 million per acre. She began to pay in instalments and by June 2012, the plaintiff had paid a sum of UGX 8,550,000 to the sellers. She further testified that as soon as she paid the first instalment, the plaintiff took possession of the land in 2007 and started farming seasonal and non-seasonal crops on the land.
30. The plaintiff’s evidence was corroborated by PW2 (Muliika Michael) and PW3 (Charles Mazinga).
31. PW2 testified that:



“[...] I know the plaintiff [...] and [she] is in occupation of land that borders my land at Ziru.”

32. PW3 testified that:

“That I have been seeing the plaintiff’s workmen cultivate on the suit land since 2007 and everyone in the area knows that the land belongs to the plaintiff, Theresa Lubandi Nampinga.”

33. According to DW3 (George Lubega), who is also the 1st defendant, in 2009 he purchased 9 acres of the land comprised in Busiro Block 421 Plot 42 Land at Ziru from the 2nd defendant (Simon Guwatudde) and the 3rd defendant (Nakirya Mary) at a price UGX 12,000,000 (Exh.P5). The 1st defendant purchased an additional 3 acres from the late Mpinga Matia at a price of UGX 7,500,000 (Exh.P6).

34. From the evidence on record, part of the land that was purchased by 1st defendant measuring 6 acres had earlier on in 2006 been sold to the plaintiff. In short, both the plaintiff and the 1st defendant claim to have purchased the same parcel of land at different times from the same sellers, the plaintiff claims to have purchased the land in 2006 while the 1st defendant claims to have purchased the same land in 2009.

35. DW 3 (Simon Guwatudde), testified that the plaintiff attempted to buy the land but failed. He claimed that this is the reason why no formal agreement with the plaintiff was concluded. He further claimed that the plaintiff resorted to paying small amounts of installments into his account without his approval and consent.

36. PW1 (Janet Lubandi) testified that by June 2012, the plaintiff had paid a sum of UGX 8,550,000 out of the initial agreed sum of UGX 22.5 million (see Exh.P3(a) to P3(j) and P4(a) to P4(h).
37. According to the plaintiff's written submissions, when Nakirya Mary opted out of the agreement, the plaintiff continued paying the late Mpinga Matia and Simon Guwatudde for their 6 acres of land. This means that after the Nakirya Mary opted out of the sale agreement, the plaintiff had to pay a total of UGX 15 million, out of which by June 2012, UGX 8,550,000 had been paid leaving a balance of UGX 6,450,000.
38. The 2nd defendant did not rebut the plaintiff's evidence that by June 2012, UGX 8,550,000 had been paid.
39. On the authority of *Megarry & Wade (supra)*, the 2nd defendant and the late Mpinga Matia could not legally sell the same parcel of land to the 1st defendant in 2009 yet they had sold the same land to the plaintiff in 2006. According to *Megarry & Wade (supra)*, the 2nd defendant and the late Mpinga Matia had a legal obligation to preserve the suit land until the plaintiff had completed payment of the purchase price as agreed between the two parties. In law, the 2nd defendant and the late Mpinga Matia could not pass good title in 6 acres of the suit land to the 1st defendant to the prejudice of the plaintiff's equitable interest in the land.
40. DW3 (George Lubega) testified that he is the registered proprietor of the land comprised in Busiro Block 421 Plot 42 Land at Ziru. He relied on Exh.P1, a certificate of title for the land which shows that he was entered as the registered proprietor on the 9th July 2013.

41. Under *section 176 (c) of the Registration of Titles Act (Cap 230)*, a registered proprietor of land can be ejected on grounds of fraud. As to what amounts to fraud, in the case of *Kampala District Land Board & Chemical Distributors v. National Housing and Construction Corporation, Civil Appeal No. 2 of 2004*, the Supreme Court of Uganda (per Benjamin Odoki, CJ) held that:

“It is now well settled that to procure registration of title in order to defeat an unregistered interest amounts to fraud.”

42. Benjamin Odoki, CJ citing the case of *John Katarikawe v. William Katweremu & Others (1977) H.C.B.187*, further held that:

“Although mere knowledge of unregistered interest cannot be imputed as fraud under the Act, it is my view that where such knowledge is accompanied by a wrongful intention to defeat such existing interest that would amount to fraud.”

43. PW1 (Janet Lubandi) testified that the 1st defendant fraudulently procured registration as proprietor of the suit land to defeat her interest in the land. In paragraph 5(r) of the plaint, the plaintiff pleaded that the 1st defendant was fraudulent to the extent that he purported to buy the land yet he had constructive notice that the suit land was not available for sale.

44. There is evidence on record to prove that prior to buying the suit land in 2009, the 1st defendant was informed that the suit land had already been sold to the plaintiff earlier in 2006 but he disregarded this information and went ahead with the purchase.

48. While DW3 (George Lubega) claimed in his testimony that he carried out due diligence on the land prior to purchase, during cross examination, DW3 failed to adduce evidence such as a search report or boundary opening report to confirm the due diligence that he carried out.
49. Accordingly, it is my finding that at the time that the 1st defendant decided to buy 6 acres of the suit land (2009), he was aware that the plaintiff was already in possession of the land having purchased the same land in 2006. She had even started construction of a permanent building on the land. Secondly, the 1st defendant made inquiries with PW3 (Charles Mazinga), LC1 chairman of the Ziru village and was informed that the land he intended to buy had already been bought by the plaintiff.
50. Notwithstanding these discoveries, the 1st defendant went ahead to buy the land. Thereafter, the 1st defendant moved swiftly and procured registration as proprietor on the 9th July 2013. The 1st defendant's actions were calculated to defeat the equitable interest of the plaintiff. In law, this amounts to fraud.
51. I am fortified in this conclusion by the decision of the Supreme Court of Uganda (per Benjamin Odoki, CJ) in the case of *Kampala District Land Board & Chemical Distributors (supra)*.
52. Issues No.1 & 2 are answered in the affirmative.

Issue No.3: Whether the counterclaimant is entitled to the reliefs sought in the counterclaim?

53. The 1st defendant claimed several reliefs in the counterclaim, including a claim for special damages of UGX 10 million and general damages of UGX 40 million. The reliefs were based on the assumption that the 1st defendant is the lawful owner of the 6 acres of the suit land. I have decided in Issues No.1 & 2 that the 1st defendant is not the lawful owner of 6 acres of the suit land having acquired it fraudulently. The 1st defendant is entitled to only 3 acres of the suit land that he purchased from Nakirya Mary.

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

Declaration that the plaintiff is the lawful owner of 6 acres of the suit land

54. As Issues No.1&2 were answered in the affirmative, I declare that the plaintiff is the lawful owner of 6 (six) acres of the land comprised in Busiro Block 421 Plot 42 Land at Ziru.

Declaration that the 1st defendant trespassed on the plaintiff's land

55. According to the Supreme Court of Uganda in the case of *Justine E. M. N. Lutaya v. Stirling Civil Engineering Company Ltd*, Civil Appeal No. 11 of 2002 (*per* Mulenga, J.SC) trespass to land occurs when a person makes an unauthorised entry upon the land. In the instant case, I have decided in Issues No.1&2 that the 1st defendant fraudulently acquired 6 acres of the suit land. The plaintiff adduced evidence that the 1st defendant entered the land and

demolished structures erected by the plaintiff. The 2nd defendant and the late Mpinga Matia attempted to sell land that no longer belongs to them, which interferes with the plaintiff's interest in the land. I therefore, declare that the defendants trespassed on the plaintiff's land.

Permanent injunction against the defendants

56. A permanent injunction is issued against the defendants, their assigns, successors in title or any other person deriving title from the defendants from dealing in the suit land or interfering with the interest of the plaintiff's ownership of 6 acres of the suit land.

General damages

57. The plaintiff has been denied the use of the land for about 10 years. Ordinarily, the plaintiff would be entitled to general damages as compensation for the inconvenience that she has suffered. However, I also note that the plaintiff and the 2nd and 3rd defendants are biologically related. An award of general damages is likely to fuel further acrimony in the family. I therefore decline to make any award of general damages.

Cancellation of the 1st defendant's certificate of title for the land comprised in Busiro Block 421 Plot 42 Land at Ziru and the subsequent title deeds for the 61 plots mutated from the Plot 42

58. *Section 177 of the Registration of Titles Act (Cap 230) provides that:*

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Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order.”

- “Section 177 of the RTA vests powers in the High Court to direct the Commissioner to effect any order of cancellation of a certificate of title made by the High Court.”*

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comprised in Busiro Block 421 Plot 42 Land at Ziru and any subsequent mutations of Plot 42.

Registration of the plaintiff as the registered proprietor of 6 acres of the suit land

62. According to the evidence on record, the agreed purchase price of 6 acres of the suit land purchased by the plaintiff was UGX 15 million, out of which by June 2012, UGX 8,550,000 had been paid leaving a balance of UGX 6,450,000.
63. I declare that there is an outstanding balance of UGX 6,450,000 (Uganda shillings six million four hundred and fifty thousand) being the balance of the purchase price due to the estate of the late Mpinga Matia and Simon Guwatudde from the plaintiff. The sum of UGX 6,450,000 shall be paid in accordance with my further orders set out below.
64. Subject to payment of the outstanding balance of the purchase price in accordance with the orders in this Judgment, pursuant to the provisions of *section 177 of the Registration of Titles Act (Cap 230)*, I order the Commissioner for Land Registration to process a certificate of title for 6 acres out of the land comprised in Busiro Block 421 Plot 42 Land at Ziru in the name of Nampinga Theresa.

Costs of the suit

65. Considering that the plaintiff and the 2nd and 3rd defendants are biologically related; and further considering that I have granted some form of relief to the

Remedies not pleaded for by the parties

“It is clear from the above that there was no specific prayer for cancellation of the 5th Appellant’s certificate in the application directly. The orders specifically sought for in the application were for cancellation, nullification and setting aside of the execution and the attachment and sale of the suit property. It is my finding, therefore, that the order of cancellation of the 5th Appellant’s title was a consequential order which the two learned Justices rightfully gave as a direct consequence of their orders nullifying and setting aside not only the decree of the High Court and the Consent judgment on which it was based, but the execution and the sale of the suit property as well. In my view, and on the basis of their findings and orders which I shall address in details later on in this judgment, they could not leave the matter hanging. Further, the case of Odd Jobbs v. Mubia [1970] EA 476, is to the effect that a court can decide an un-pleaded matter if the parties have led evidence and addressed court on the matter in order to “arrive at a correct decision in the case and to finally determine the controversy between the parties.”


- 3) An order directing the Commissioner for Land Registration to cancel the entry of Lubega George as the registered proprietor on the certificate of title for land comprised in Busiro Block 421 Plot 42 Land at Ziru and any subsequent mutations of Plot 42;
- 4) An order directing the Commissioner for Land Registration to process a certificate of title for 6 acres out of the land comprised in Busiro Block 421 Plot 42 Land at Ziru in the name of the plaintiff (Nampinga Theresa);
- 5) An order directing the Commissioner for Land Registration to process a certificate of title for 3 acres out of the land comprised in Busiro Block 421 Plot 42 Land at Ziru in the name of the 1st defendant (Lubega George);
- 6) The sum of UGX 6,450,000 due from the plaintiff to the estate of the late Mpinga Matia and Simon Guwatudde shall be paid directly to the 1st defendant (Lubega George);
- 7) The estate of the late Mpinga Matia is ordered to refund UGX 1,050,000 (Uganda shillings one million fifty thousand) to the 1st defendant (Lubega George).
- 8) Simon Guwatudde is ordered to refund UGX 6,000,000 (Uganda shillings six million) to the 1st defendant (Lubega George).
- 9) The total sum to be received by the 1st defendant (Lubega George) shall be UGX 13,500,000 (Uganda shillings thirteen million five hundred



thousand only) which is the amount of the purchase price that the 1st defendant (Lubega George) paid to the late Mpinga Matia and Simon Guwatudde.

- 10) The defendants are trespassers on the 6 (six) acres of the land comprised in Busiro Block 421 Plot 42 Land at Ziru owned by the plaintiff (Nampinga Theresa);
- 11) A permanent injunction is issued against the defendants, their assigns, successors in title or any other person deriving title from the defendants from dealing in the plaintiff's land or interfering with her interest in the land;
- 12) Each party shall bear its own costs.

I SO ORDER.


BERNARD NAMANYA
JUDGE
10th March 2023

10 March 2023 at 8.30am.


Mwigo Allan James	Counsel for the plaintiff
Natukunda Jackline holding brief for	Counsel for the defendants
Obed Mwebesa	
Janet Lubandi	Lawful Attorney of the plaintiff
Lubega George	1 st defendant
Esther Nakawungu	Court Clerk

Allan James Mwigo:

The matter is for Judgment. We are ready to receive the Judgment.

Court:

Judgment delivered in open chambers.


BERNARD NAMANYA
JUDGE
10th March 2023