

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 713 OF 2021

5 **NKUBITO ALLAN ::::::::::::::::::::::::::::::COUNTER CLAIMANT**

VERSUS

1. **DR. LUBUNDE EDWARD**
2. **THE COMMISSIONER LAND REGISTRATION::: COUNTER DEFENDANTS**

JUDGMENT: (EXPARTE)

10 **Introduction:**

The counter claimant, Allan Nkubita filed this suit seeking cancellation of title for land comprised in **Busiro Block 439 Plot 1847 formerly Plot 569** (herein after referred to as the suit land) which he claims were fraudulently registered in the names of Dr. Lubunde Edward, the 1st counter defendant.

15 On 20th June, 2022, **M/s Wakabala & Co. Advocates** wrote to this court notifying it of the counter defendant's failure to file a defence to the counter claim.

Brief background:

By way of a brief background, Dr. Lubunde Edward filed **Civil Suit No. 0713 of 2021**, seeking several orders against the defendant/counter claimant, *inter alia*, challenging as fraudulent the
20 transaction between the two defendants, relating to **Busiro Block 439 plot 1847 formerly plot 569**, land at Katabi measuring approximately 0.0140 hectares (0.0346 acres) (suit land); that the 2nd defendant was a trespasser on the suit land; and an order of vacant possession to be issued against him.

The main suit abated on 2nd December, 2021, following the plaintiff/counter defendant's failure
25 to take out summons for directions within the 28 days as stipulated by the **Civil Procedure rules**.

A default judgment was subsequently entered by the Registrar on 24th August, 2022 and the matter proceeded *ex parte*, after court had satisfied itself that the counter claim had been duly

served to the counter defendants, neither of whom however filed a defence. The matter therefore proceeded *ex parte* against both the Dr. Lubunde and Commissioner, Land Registration.

Gist of the counter claim:

5 In the counter claim it is averred that on the 10th day of June, 2022, Nkubito Allan entered into an agreement of sale of the suit land with Dr. Lubunde, the 1st counter defendant and his wife, at a consideration of **Ugx 85,000,000/-** (*eighty five million shillings*).

That Dr. Lubunde paid a sum of **Ugx 25,000,000/-** (*twenty-five million shillings*) cash and also made an exchange of kibanja, valued at **Ugx 20,000,000/-** (*twenty million shillings*), to make a total of **Ugx 45,000,000/-** (*forty-five million shillings*).

10 The balance of **Ugx 40,000,000/=** (*forty million shillings*) was to be paid within a period of six months from the date of the said sale. However, that Dr. Lubunde had defaulted on the payment of the purchase price within the agreed period which prompted Nkubito to sell the land to one Nziza Patrick, (2nd defendant under the suit) as per agreement dated the 26th day of December, 2020, whereupon he informed Lubunde of this development. Dr. Lubunde however rejected the
15 offer to refund the money.

That at the time of sale, the title for the suit land was with UNRA which was demarcating off its portion which it had compulsory acquired, awaiting return of the residue to Nkubito only to discover later that Dr. Lubunde had picked the title from UNRA for the residue of the land and fraudulently register himself on the title, with no colour of right whatsoever. He claimed that the
20 registration of the 2nd counter defendant.

At the time, the title for the suit land was in the names of the Nkubito's father, Charles Brian Kwizera who had never transacted with Dr. Lubunde to effect transfer and registration. According to him, the signatures appearing as those of Charles Brian Kwizera on the transfer and mutation forms were forged. An expired passport of 2013 was also used to fraudulently register Lubunde
25 on the title to the suit land and that Lubunde never took possession and occupation of the suit land, though he has tried to do so several times.

It is on that basis therefore that the prayer was made by Nkubito to have the title issued in Lubunde's names cancelled as he had no claim whatsoever on the suit land; and general damages and costs to be awarded to Nkubito.

30 The counterclaimant was represented by **M/s Wakabala & Co. Advocates.**



Issues:

During the scheduling, three issues had been framed for determination by this court to wit:

1. ***Whether the registration of the 1st counter defendant on title to the suit land was fraudulent.***
2. ***Whether there is lawful justification to warrant cancellation of title for the suit land in the names of the 1st counter defendant.***
3. ***What remedies are available to the parties?***

Since the first two issues are inter connected I will deal with both jointly.

Issue No. 1: Whether the registration of the 1st counter defendant on the suit land was fraudulent:

And

Issue No. 2: Whether there is lawful justification to warrant cancellation of title for the suit land in the names of the 1st counter defendant.

The law:

It is now settled law that once a contract is valid, it automatically creates reciprocal rights 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***).

According to ***Section 42(1) and Section 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.

Breach of a contract refers to a situation where one party to a contract fails to carry out a term of the said contract. It occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. ***See: Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690.***

It follows therefore that when one party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy.

Amber 3

It is trite law that in all civil matters, the onus rests on the plaintiff who must adduce evidence to prove his or her case on the balance of probabilities if she is to obtain the relief sought. **See: Sections 101-103 of the Evidence Act, Cap.43.**

5 In this matter, the counter claimant raises the issue of fraudulent actions attributed to the counter defendants.

Fraud is defined in the case of **Fredrick Zaabwe Vs Orient Bank Ltd & 5 Others SCCA No. 4 of 2005** to include “means which human ingenuity can devise and which are resorted to by one individual to get advance over another by false suggestion or suppression of truth and includes all surprised trick, cunning dissembling and any unfair way by which another is cheated.

10 It is well established law that a cause of action in fraud must be specifically pleaded, particulars thereof provided and the claim proved at a higher balance of probabilities. (**See: Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC).**) A party faced with pleadings founded in fraud would then know the specific elements that it needs to rebut or disprove in its defence. **See: Fam International Ltd & Another vs. Mohamed Hamird El-**
15 **Fatih Civil Appeal No. 16 of 1993 (SC).**

Fraud which must therefore be specifically pleaded and proved includes all acts, omission and concealments which involve a breach of legal or equitable duty, trust or confidence.

The particulars of the fraudulent actions against the 1st defendant/counter claimant and 2nd defendant as raised in the main suit were that:

- 20 1. The 1st defendant mortgaging /selling off the suit land to the 2nd defendant well knowing that the suit land had already been sold off to the plaintiff/counter defendant;
- 25 2. The 1st defendant /counterclaimant executing a new sale agreement with the 2nd defendant well knowing that he had executed the same with the plaintiff/ counter defendant;
3. Failure by the plaintiff/counter defendant to notify the plaintiff of the sale before entering into a transaction with the 2nd defendant.

30 **Analysis of the evidence:**

Nkubito Allan in this case relied on the evidence of two witnesses, himself as the counter claimant testified as **Pw1**. His brother, Andrew Kananura testified as **Pw2**.

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Pw1 alleged that Lubunde, the 1st counter defendant had committed an act of fraud when he registered himself on the title for the suit land, yet he had jointly with his wife Lubunde Esther purchased the land, as per **PExh 2 and PExh 6** in the counter claimant's trial bundle.

It was Lubunde's contention in the main suit however that he was the lawful owner of the suit land. In *paragraph 4 (h)* of the plaint it was alleged that unknown to him on 26th December, 2020 without his consent and knowledge or that of his wife, Nkubito had mortgaged the suit land to Nziza Patrick in form of a land sale transaction, as security for a loan worth **Ugx 50,000,000/=**, which he had failed to pay; and started laying baseless claims.

In *paragraph 4 (i)* that in June, 2021 without his consent and approval or that of his wife, Nziza had illegally entered the suit land; placed building materials thereon, and started setting up illegal structures.

That when confronted the 1st defendant had admitted that he had indeed mortgaged the suit land to Nziza, the 2nd defendant, thus depriving him of his land and that such actions and conduct had subjected him to mental anguish and distress, entitling him to damages.

He therefore sought a declaration that he was the lawful owner of the suit land; that the sale transaction between the defendants was illegal; an order vacant possession against them; general and punitive damages, among other orders.

The 2nd defendant, Nziza Patrick however in his reply claimed to be a *bona fide* purchase. He did not file a counter claim but in his defence under the main suit he denied the claims that the transaction between them had been fraudulent.

Nkubito in his defence to the suit claimed however that he had sold the suit land to Nziza who was freely developing the land since there was no claim against him.

The issue of fraud as raised can be categorized as follows:

a) Whether or not the sale agreement between Nkubito and Lubunde was valid:

It is not in issue that Nkubito had derived his interest in the disputed land from **PExh 1**, under a gift deed by his father Kwizera Charles Brian, dated 27th February, 2017, for land measuring, 55ft x 45ft x 55ft x 50ft, located at the High way, Abayita Ababiri. The said *kibanja* was originally part of **plot 569, Block 439** and the transaction was endorsed by Kitubulu LC1, Kabale sub-parish on the same date the transaction was made.

Pw2 Andrew Kananura gave his testimony as holder of powers of Attorney (**PExh12**) granted to him by his father on 18th May, 2016 by Charles Kwizera in respect of the suit land. The

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instrument gave him custody of the original title. His evidence corroborated that **of Pw1**, his brother.

His role under the instrument of power had been to undertake negotiations comprised in **Busiro, Block 439, plot 569** with UNRA and pursue compensation for the part of the land acquired during the construction of the Entebbe-Express High way.

He claimed that Kwizera however only signed transfer forms in favour of UNRA but not for Lubunde and thus any transaction purportedly involving Kwizera and Lubunde was fraudulent, a claim which Lubunde however never made any response to.

The witness also confirmed that Nkubito had been given the residue of the land after UNRA had demarcated off its portion. That he was surprised therefore that when he went to pick the title from UNRA he found that Lubunde had already picked it. He claimed not to have known how Lubunde had manipulated the system and removed the title from UNRA and got himself registered onto the title. His conclusion therefore was that UNRA had connived with him and the office of the 2nd counter defendant to facilitate and effect the illegal transfer.

It is also crucial to note that by virtue of *clause (d)* of his deed of attorney **Pw2** had been granted absolute powers to institute legal proceedings against trespassers on that land; and against any failure to pay consideration in relation to the land.

The donor also declared that all acts matters executed by his attorney if done under his names and in relation to the land would be deemed valid and would be ratified by him as the donee.

Attached onto the main plaint is the sale agreement dated 6th February, 2021, the validity of which Nkubito however refuted. It was the same document attached as **PExh 6** to the counter claim, alleged to have been signed on each of the five pages by both parties.

What Nkubito did not refute was the handwritten Luganda agreement, dated 10th June, 2020 between him and Lubunde showing a sketch of 41ft x 52 ft x 42 ft x 52 ft which appeared to be slightly smaller than the residue that Nkubito originally claimed as his gift.

Unlike the agreement filed by Nkubito, the one by Lubunde had attachments of acknowledgments by Nkubito, of the various amounts received by him from Lubunde defendant on various dates, between 31st August, 2020 and 2nd November, 2020, as part payments of the total consideration.

Nkubito did not appear to deny the signature appearing as his on those separate acknowledgments. As at that date of 2nd November, 2020, it is clear therefore that a sum of **Ugx**

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16,000,000/= was yet to be paid by the counter defendant to settle the entire claim, not **Ugx 45,000,000/=** as alleged in his pleadings.

Neither side denied the fact that Lubunde on 10th June, 2020 had sold the land to Lubunde and his wife Lubunde Esther, at a sum of **Ugx 85,000,000/=** nor the claim that the consideration was never paid in full.

It is not in issue that a sum of **Ugx 25,000,000/=**, had been paid to Nkubito in cash. Lubunde and his wife also agreed by way of an exchange in part, to sell their land at Mpala Bubuli, valued at **Ugx 20,000,000/=**, thus leaving a total sum of **Ugx 45,000,000/** as the balance, which was reflected in the agreements presented by either side. It comes a bit of a surprise therefore that the title that came out had excluded his wife's names.

In another agreement **PExh 6**, it was in Lubunde's pleadings that on 6th February, 2021, the same parties had subsequently entered into another transaction. In *clauses 1.0 and 2.1* thereof however, it is stated that prior to the execution of the agreement, out of a total purchase sum of **Ugx 85,000,000/=**, **Ugx 69,500,000/=**, had been paid to Nkubito as consideration for the suit land, leaving an unpaid balance of **Ugx 7,500,000/=**.

The two parties had agreed as per that agreement that this amount would be paid in installments. Nkubito however maintained that the only agreement that he had made with Lubunde was that of 10th June, 2020. He therefore denied the signatures appearing as his on the agreement dated 6th February, 2021.

It was his counsel's submission that there was no way Nkubito could have sold the suit land to Lubunde on 6th February, 2021 when he had already sold the same land to Nziza Patrick; and no way that Lubunde would have been registered on title to the suit land when he had paid only **Ugx 40,000,000/- (forty million shillings)** out of the agreed **Ugx 85,000,000/= (eighty-five million shillings)**.

That the transfer and registration of Lubunde on the title to the suit land had been premised on payment and completion of the full purchase price, which he never paid, concluding therefore that this was an act of fraud by Lubunde.

Court noted the discrepancies in amounts alleged to have been made in settlement of the claim between the two parties. This created some serious doubt about the outstanding sum as averred in this counter claim which discrepancies could probably have been explained by Lubunde. Lubunde however failed to turn up in court.



What comes out clearly is that the total outstanding amount was never paid to Nkubito as consideration before Lubunde became registered owner of the land. He did not therefore fulfill the terms and conditions of the original contract.

PEXh 3, is another agreement entered on 26th December, 2020 which proves to court that upon failure to settle the outstanding amount, the same *kibanja* was sold by Nkubito at a sum of **Ugx 50,000,000/=** to one Nziiza Patrick, which amount was paid in full. Nziiza was already in possession thereof and implies that the subsequent transaction between Lubunde and Nkubito could not have been valid.

Furthermore, Nziiza had paid a sum of **Ugx 25,000,000/=** for the title for the land. Nziiza under that arrangement was given a go ahead to effect transfer in his names as soon as UNRA which had the title was done with the subdivision of the land.

At the material time of these transactions, the certificate of title was still under the names of Kwizera. **PEXh 7 and PEXh 8**, the transfer and mutation forms reveal that on 14th April, 2021 they had been signed by Kwizera as the registered owner. The circumstances under which Lubunde however seized the title and had part of the land transferred into his names were not properly explained.

The authenticity of the transfer and mutation forms signed by Kwizera, the registered proprietor remained doubtful also given the fact that **Pw2** was the holder of powers of attorney and there was nothing on record to show that such powers had been withdrawn by the donee at the time of entering any of the said transactions.

The presumption that Kwizera had been out of the country at the time of selling the land was never rebutted by Lubunde. That also lends credence to the claim therefore that Kwizera never transacted with Lubunde and that the signatures appearing on the said forms as his had therefore been doctored. Nkubito is however also faulted for disposing of the land without involving **Pw2** as attorney for the registered proprietor.

Requirement for consent:

The principles governing land transactions were enshrined in the case of **John Katarikawe vs William Katwiremu [1977] HCB 187** where it was held that in the land system based on registration there are basically two interests, the registered estate and other registerable interests.

Registered interests are known as rights *in rem* and bind the whole world. The other rights are rights *in persona*; such often arise from contracts for sale of land before transfer. It is only the



genuine purchaser who acquires an equitable interest in the nature of a right in *persona*, enforceable only as against the vendor.

The concept of prior consent of the owner/occupant of land before any transactions is made obtained proper reinforcement and proper codification upon the enactment of the **1995 Constitution and the Land Act, Cap.227**, to the extent that a holder of a *kibanja* may assign, sublet, pledge, create third party rights, subdivide and undertake any other lawful transaction in respect of the occupancy. (**section 34(1) of the Land Act, Cap. 227.**)

By virtue of **section 34(9)** thereof, no transaction to which that section applies is considered valid and effective to pass any interest in land, if undertaken without consent. **Section 35(1) and (2)** is also clear that the first option to assign or sell the *kibanja* is given to the owner of the land.

In a similar manner, the owner of land who wishes to sell the reversionary interest in land is also required to give the first option of buying that interest to the occupant. **Section 36** thus also entitles both holders of the interest to mutually agree on any subdivision, and whether or not each should have exclusive ownership or hold land as joint proprietors.

In this instance, a gift made by the registered owner of the land created two separate or adverse interests over that land. Nkubito before the sale no doubt held an equitable interest over the land registered in his father's names. When subdivisions were made, UNRA had carved off its interests, with the residue as **plot 1847**.

It is not a matter in dispute that Nkubito was fully aware that UNRA had been authorized by his father to take off a portion of land originally comprised in **Busiro, Block 439, plot 569** acquired for the Entebbe Express Highway land, leaving the residue to him. He was under obligation to secure the consent of Kwizera, the land lord before entering into any of the transactions relating to the *kibanja* for as long as it remained a part of titled land.

Execution of the impugned sale agreement in a manner not envisaged by the power of attorney and by a person not authorized under the said instrument was considered to be void. (Ref: **Progressive Group of Schools Ltd and 2 others vs Barclays Bank of Uganda Ltd t/a ABSA Bank U Ltd and Anor Civil Appeal No. 349 of 2020**). If an act is void, then it is a nullity and every proceeding which is founded on it is also incurably bad. (**Fredrick J. K Zaabwe (supra)**).

Inconsistencies and irregularities in the area measurements:

This court observed that the sale agreement **PExh 6** for the land comprised in **Busiro, Block 439, plot 569** refers to an area of *0.49 hectares*, a lot more than what was initially gifted to the

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counter claimant and also far exceeded what was reflected in the title for **plot 1847, (PExh 5)** or the area schedule as the actual size of **plot 569**.

Even more absurd is the fact that the title for **plot 1847** reflects the same area of *0.049 hectares* as in **plot 569**, the mother plot out of which it had been created.

- 5 From the area schedule presented upon request by this court, **plot 1846** measuring **0.047 hectares** remained in the names of Charles Kwizera while only *0.002* hectares remained as the residue.

The acreage in the sale agreement **PExh6** did not therefore tally with what appeared on the rest of the documents on the record, including the certificate of title. It goes all without saying that
10 Nkubito could not sell to Lubunde more than what he owned.

Allegations of connivance:

The counter claimant testified that the Lubunde had connived with the UNRA officials and the 2nd counter defendant and obtained documents that had been presented to UNRA to demarcate off its portion and used the same to illegally transfer and register himself on the title to the suit
15 land.

It is not in doubt that UNRA at some point held the title. However, the circumstances under which it had handed over the title to Lubunde and not the duly appointed attorney or the actual owner who purportedly signed the transfer forms remain unclear. It also leaves this court wondering as to why UNRA was never made party to the counter claim.

20 **Other issues raised:**

As submitted, this was jointly acquired land that ought to have been jointly registered in the names of Lubunde, the husband and wife as joint buyers. Nonetheless, it was registered in the names of the husband alone on 27th May, 2021 which raised other issues that could have been answered by Lubunde himself.

- 25 His further unchallenged claim was that his signatures were forged by Lubunde in a bid to fulfill his illegal actions. In the case of **Makula International Vs Cardinal Nsubuga Wamala SCCA No. 4 of 1981**, it was held that courts of law do not sanction what is illegal and once brought to the attention of court it overrides all questions of pleadings including admissions made thereon.

Fraud is such grotesque monster that courts should hound it wherever it rears its head and
30 wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all

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transactions. (**Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994]KARL 307**).

It is trite law that that fraud that vitiates a land title of a registered proprietor must be attributable to the transferee and that fraud of a transferor not known to the transferee cannot vitiate the title. **See: Wambuzi C.J, Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 2012.**

The evidence led by Nkubito is sufficient to prove that: Lubunde never paid the full consideration for the purchase of the suit land within the agreed period, which forced Nkubito to look for another buyer to whom he sold his interest in the land; that Lubunde never bought the land as the sale agreement with him was rescinded. Thus the circumstances under which he got the title in his names were suspect.

The counterclaimant did not however lead evidence to pin the involvement of the 2nd counter defendant in the fraud. All the above therefore puts to rest both **issues No. 1 and 2.**

Issue No.3 : Remedies:

The counter claimant prayed for a *declaration that the Registration of the 1st counter defendant on title to the suit land was illegal and fraudulent; that the 1st counter defendant has no claim whatsoever on the suit land; general damages; and costs.*

General damages.

General damages are awarded at the discretion of court. Counsel cited the case of **Uganda Commercial Bank Vs Kigozi (2002)1 EA 305**, by which court guided that the consideration for an award of damages should be mainly the value of the subject matter, the economic inconvenience that a party has been put through and the nature and extent of the breach or injury.

This court taking into consideration the disturbance, mental anguish and inconvenience suffered by the counter claimant in trying to recover the ownership of the land and bearing in mind the fact that fraud was committed with Lubonde's knowledge and participation, an award of **Ugx 20,000,000/=** is granted as general damages to the counterclaimant.

Section 177 of the RTA gives this court power to order the Commissioner, land Registration as I hereby do, to cancel the title for the land comprised in **Busiro Block 439, plot No.1847**, since Lubonde has no interest therein.

In the premises,



1) the counter claim is therefore allowed;

2) Lubunde, the 2nd counter defendant has no claim of interest in the suit land comprised in Busiro Block 439, plot No.1847;

3) since Nkubito, the counter claimant received money from Lubunde, the 1st counter defendant he is hereby ordered to refund all the money paid out as part consideration to Lubunde;

4) Costs awarded to the counterclaimant.

Alexandra

Alexandra Nkonge Rugadya

Judge

20th March, 2023

Delivered by email
Alexandra
24/3/2023