

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

CIVIL SUIT NO.04 OF 2005

1. IMMACULATE NAKATO)
2. BABIRYE CAROLYN)
3. TUMWEBAZE CHRISTINE)
4. MBABAZI JUSTINE)PLAINTIFFS

VERSUS

1. KATAYIRA FRANCIS aka JOHN).....DEFENDANT
2. SAMUEL SENYONDO) 5TH COUNTER-DEFENDANT

BEFORE: HON. MR. JUSTICE LAWRENCE TWEYANZE

JUDGMENT

Introduction

The Plaintiffs' action against the Defendant as per the plaint filed in 2005 is for eviction, mesne profits and costs of the suit.

Plaintiff's claim

The Plaintiffs' claim is that: they bought land comprised in Kibuga Block 21 Plot 641 land at Busega from Samuel Senyondo on 14/05/2003; at the time of purchase, there was only one squatter by the names of Joseph Kyeyune Ngobya and the said Joseph Kyeyune Ngobya has since died; the Defendant trespassed on the said land in 2005 and started operating thereon a garage; the Plaintiffs deny the contents of the Counter-claim and do pray that the same be dismissed with costs.

The Defendant's claim

The Defendant's claim is that : he acquired the land upon which he put developments bonafide before the commencement of the suit in 2005 to wit a fully-fledged Residential House, toilets and boys quarters and shops in front; he bought the suit land as a Kibanja and mailo interests from Joseph Ngobya who bought it from Samuel Senyondo and has lived on it since then; the Defendant denies any liability

for the loss if at all for occupation and developments thereon; the Plaintiffs acquired the suit land fraudulently.

5th Counter-Defendant's Claim

The 5th Counter-Defendant's case is that: he denies the allegation of fraud and states that late Joseph Kyeyune Ngobya never bought the suit land from him; the late Joseph Kyeyune Ngobya trespassed on the 5th Counter-Defendant's land comprised in Kibuga Block 21 Plot 641 and erected illegal structures thereon for which the 5th Counter-Defendant sued the late Joseph Kyeyune Ngobya vide H.C.C.S No.788 of 2003 at High Court Kampala.

The Agreed facts

The agreed facts are that: the Plaintiffs are the current registered proprietors of the suit land; the Plaintiffs purchased the suit land from Samuel Senyondo (now deceased); and the late Joseph Kyeyune Ngobya was in occupation of part of the suit land at the time the Plaintiffs bought the legal interest in the suit land from Samuel Senyondo.

Representation

At the hearing of the suit, the Plaintiffs were represented by Counsel Kenneth Kajeke, the Defendant was represented by Counsel Justin Semuyaba while the 5th Counter-Defendant was represented by Counsel Ambrose Tebyasa.

Issues

In a joint scheduling memorandum filed on 6th February 2012, the parties agreed upon the following issues for determination of Court: -

- 1. Whether or not the Defendant lawfully and legally acquired a recognizable Kibanja interest in the suit land as held by the 5th Counter-Defendant.*
- 2. If so, whether or not the Defendant's acquisition of the said Kibanja is tainted with fraud.*
- 3. Whether or not the Plaintiffs' acquisition of the suit land is tainted with fraud.*



4. *Whether the Counter-claim discloses a cause of action against the 5th Counter-Defendant?*

5. *What remedies are available to the parties?*

The Plaintiffs/1st - 4th Counter-Defendants called two witnesses to prove their case to wit: Mbabazi Justine, 4th Plaintiff/4th Counter-Defendant (PW1) and Babirye Carolyn, 2nd Plaintiff/2nd Counter-Defendant (PW2). PW1 lead oral evidence while PW2 was cross examined on her witness statement.

The Defendant/Counter-Claimant on the otherhand called Six witness to defend/prove their case to wit: Prossy Ngobya Nakabazzi (DW1); Kizito Senyonga (DW2); Godfrey Mutiibwa (DW3); Juliet Tumuhimbise (DW4); Kavuma Kabenge (DW5); and Katayira Francis aka John (DW6). The witnesses were cross examined on their witness statements.

The 5th Counter-Defendant called one witness to defend himself in the Counter-claim to wit Kiganda Godfrey (CDW1) who was cross-examined on his witness statement.

Locus visit

When Court visited Locus, it observed that: the Plaintiffs are in possession of the suit land; the Defendant has no developments on the suit land.

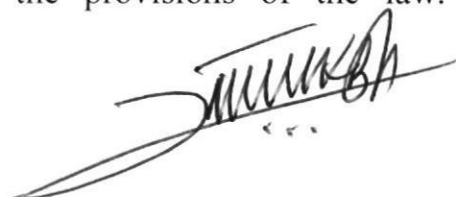
After the hearing, Court directed both Counsel to file their written submissions, the details which are on Court record and I have considered them in my judgment.

Determination of issues

Issue: Whether or not the Defendant lawfully and legally acquired a recognizable Kibanja interest in the suit land as held by the 5th Counter-Defendant.

Plaintiffs' submission

Counsel for the Plaintiffs/1st – 4th Counter-Defendants referred this Court to Section 34(1) & (3) of the Land Act Cap 227 which requires the tenant to seek the consent of the registered owner and submitted that there is no evidence on record that the Defendant/Counter-Defendant complied with the provisions of the law. He

A handwritten signature in black ink, appearing to be 'Munira', with a long horizontal stroke extending to the left.

submitted that the Defendant/Counter-Claimant never acquired a recognized Kibanja interest in the suit land and prayed Court to hold so.

Defendant/Counter-Claimant

With regard to issue 1, I note that Counsel for the Defendant/Counter-Claimant did not clearly submit on it.

He submitted among others that the evidence presented by the Defendant/Counter-Claimant shows that by the time the Plaintiffs bought the suit land, the Defendant/Counter-Claimant was occupying it with a residential house, boys quarters and a garage business. That the Defendant/Counter-Claimant had resided on the Kibanja since 31/5/2004 until 30/12/2008 when his family was evicted in defiance of a Court injunction which was in place. That therefore the Plaintiffs ought to have carried due diligence before purchasing the suit land to find out who was in occupation. He cited the cases of **Nabanoba Desiranta & Another Vs Kayiwa Joseph H.C.C.S No.497 of 2005** among others to support his argument.

He further submitted that it is not proper for Counsel for the Plaintiffs to say that there is no evidence on record that the Defendant/Counter-Claimant did not comply with the provisions of the Land Act. That this scenario was properly explained by DW5 who testified and adduced the sale agreement DEX3 and all receipts of money paid to Samuel Senyondo through his Lawyers M/s Kanya & Co. Advocates.

He concluded by submitting that the Defendant/Counter-Claimant acquired a recognizable interest in the suit land and that Samuel Senyondo could not make another sale agreement of the land and transfer a certificate of title to the Plaintiffs without the Defendant's/Counter-Claimant's knowledge and consent.

5th Counter-Defendant's submissions

Counsel for the 5th Counter-Defendant submitted that the Defendant(DW6) conceded in cross examination that he had no formal consent from Samuel Senyondo before he purportedly purchased a Kibanja on his land as required by the provisions of Section 34 of the Land Act. Counsel submitted that the case of **David Byatike Matovu Vs Richard Kikonyogo H.C.C.A No.3 of 2014** which was cited by Counsel for the Defendant in his submissions pronounces the proper position of the law that the Defendant's purported purchase without the consent of the registered mailo owner as required by the provisions of Section 34 of the Land Act made the purported transaction null and void.

A handwritten signature in black ink, appearing to be 'Samuel Senyondo', is written over a horizontal line.

Counsel further submitted that CDW1 Kiganda Godfrey vide his witness statement explained in paragraphs 3, 4,5,6,7,8,9,10 and 11 that the late Samuel Senyondo has never transacted with the Counter-Claimant in respect of the suit land. That he also explained that the suit land was sold to the Plaintiffs/1st-4th Counter-Defendants on 14/5/2003 vide PEX1 which he witnessed. That he further explained under paragraphs 12,13, 14, 15, 16 and 17 of his witness statement the circumstances under which the Defendant first met his father at High Court vide H.C.M.A No.111 of 2010, DEX11 before Hon. Justice Tabaro.

Counsel submitted that there is credible and cogent evidence on Court record to confirm that the late Samuel Senyondo has never sold any land to the Defendant/Counter-Claimant and that he was never consulted about the purported sale between the Defendant/Counter-Claimant and the late Ngobya Kyeyune Joseph to give his consent as required by law.

Court's decision

A Kibanja is a form of a customary land tenure to be found mainly in the Buganda region and held according to long established rules developed along Kiganda customs. The Court in **Kampala District Land Board & George Mutale Vs. Venansio Babweyala & Ors S.C.C.A No.2 of 2007** held that a customary tenancy must be proved. That such proof would entail for example long occupation, recognition of the owner of the reversion or Landlord (and vice versa) and payment of ground in the case of land in Buganda in some instances payment of a type of land tax or rent.

According to the evidence on record, there is no evidence on record to show that the late Joseph Kyeyune Ngobya was recognized by the then registered owner, the late Samuel Senyondo as a Kibanja holder on his land. The Defendant has not availed Court with evidence of Busulu tickets issued by the late Samuel Senyondo to the late Joseph Kyeyune Ngobya who he purportedly purchased the Kibanja from. This clearly means that the late Senyondo Samuel never recognized the late Joseph Kyeyune Ngobya as a tenant on his land. This is corroborated by the unchallenged evidence of CDW1 in paragraph 19 that his late father never sold any interest to the late Ngobya Kyeyune Joseph as alleged by the Defendant/Counter-Claimant and that at the time he transacted with the Plaintiffs/1st-4th Counter-Defendants, the Counter-Claimant and or Ngobya Kyeyune Joseph never had any interest in the suit land.

I also note the Defendant/Counter-Claimant never adduced evidence of the sale of Kibanja interest between the late Ngobya Kyeyune Joseph and the late Samuel Senyondo.



The Counter-Claimant/Defendant in bid to prove that he had a Kibanja interest on the suit land, tendered in evidence three sale agreements DEX1, DEX2 and DEX3 respectively. I will now review the three sale agreements and make my observations.

(1) DEX1 was a sale agreement between him and the late Ngobya Kyeyune Joseph dated 28/12/2004. With regard to this agreement the details of the suit land are not reflected therein that is Kibuga Block 21 Plot 641 land at Busega; the consent of the registered proprietor is not indicated and also the size of the Kibanja is not indicated.

Again, what is strange with this agreement is that by the time it was executed Ngobya Kyeyune Joseph had long died on 2/02/2004. This is according to the death certificate attached to CDEX3. This very death certificate was used by the Administrators of the Estate of the late Ngobya Kyeyune Joseph vide H.C.A.C No.424 of 2009 as attached to CDEX3 when they were applying for Letters of Administration. I note that this death certificate was confirmed by this Honourable Court when granting Letters of Administration in the aforementioned administration Cause. I further note that the Letters of Administration where the death certificate dated 2/02/2004 was used, have never been challenged and or revoked by this Honourable Court. As such, this Court is inclined to believe the death certificate dated 2/02/2004 as the authentic death certificate and not the one adduced by the Defendant/Counter-Claimant DEX12 because the same has never been confirmed by any competent Court.

Having held that the late Ngobya Kyeyune Joseph died on 2/02/2004, the question now is how did he (the deceased person) execute a sale agreement with the Defendant/Counter-Claimant on 28/12/2004? The answer is that a dead person cannot sign a contract and as such, the sale agreement DEX1 was of no legal effect, a nullity and void abinitio. Since also the consent of the late Senyondo Samuel or the Plaintiffs was never sought, it follows therefore, no interest passed from the late Ngobya Kyeyune Joseph to Katayira Francis aka John as per DEX1.

(2) DEX2 is a sale agreement between Joseph Ngobya and Katayira Francis, the Defendant dated 25/03/2003. With regard to this sale agreement: the Block and Plot number of the registered land on which the Kibanja is situated is not reflected; it does not indicate the size of the Kibanja and the signature/ consent of the registered proprietor. At this point in time, the suit land was still registered in the names of Samuel Senyondo and there is no evidence on the said agreement to show that his consent was ever sought by the late Ngobya Kyeyune Joseph or the Counter-Claimant. The sale agreement above too in my view did not pass any interest to the



Defendant/Counter-Claimant because it was made in contravention of Section 34 of the Land Act.

(3) **DEX3** is a sale agreement between Ngobya Kyeyune Joseph and Katayira Francis, the Defendant dated 31/5/2004. This sale agreement too: does not reflect the Block and Plot of the registered land where it is situated; there is no consent/signature of the registered proprietor; does not indicate the size of the Kibanja; and was also made after the death of the late Ngobya Kyeyune Joseph who died on 02/02/2004 as per attachment to CDEX3. This sale agreement too did not pass title to the Defendant because a dead person cannot execute an agreement and secondly, in the event that the Ngobya was a live, there is no evidence that he sought the consent of the then registered proprietor.

Having reviewed the sale agreements (DEX1-DEX3) which, the Defendant/Counter-Claimant is basing on to claim a Kibanja interest in the suit land, I find that the same are tainted with illegalities aforementioned which this Court cannot sanction. It was held in the case of **Makula International Ltd Vs. His Eminence Cardinal Nsubuga & Anor. (1982) HCB 11**, *that an illegality once brought to the attention of Court cannot be allowed to stand. Such an illegality overrides all questions of pleadings including any admissions made. The import of the case law to this case is that once an illegality is discovered and is brought to Court's attention then whatever actions which were accruing therefrom collapse along with it. No one can be allowed to benefit from the fruits of an illegality.*

Under **Section 34(1) of the Land Act Cap 227** provides that:-

"A tenant by occupancy may, in accordance with this section, assign, sublet, pledge, create third party rights in, subdivide and undertake any other lawful transaction in respect of the occupancy."

Under **Section 34(3) of the same Act** provides that:-

"Prior to undertaking any transaction to which subsection (1) refers, the tenant by occupancy shall submit an application in the prescribed form to the owner of the land for his or her consent to the transaction."

Also under **Section 34(9) of the same Act** provides that:-

"No transaction to which this section applies shall be valid and effective to pass any interest in land if it is undertaken without a consent as provided for in this section, and the recorder shall not make any entry on the record of any such transaction in respect of which there is no consent."

A handwritten signature in black ink, appearing to be 'J. Nsubuga', written over a horizontal line.

The above provisions of the Land Act were considered in the case of **David Byatike Matovu Vs Richard Kikonyogo H.C.C.A No.3 of 2014** where Court held that a transaction made by a Kibanja owner without the consent of the registered proprietor offends the provision of Section 34(3) of the Land Act and that the transaction does not transfer Kibanja holding.

The Defendant (DW6) testified in cross-examination that he did not have the consent of the late Samuel Senyondo before the alleged purchase of the Kibanja. CDW1 in his evidence testified that the late Ngobya Kyeyune Joseph and the Defendant(DW6) did not have any interest in the suit land. It is my finding that the purported transaction between them did not transfer a Kibanja holding to the Defendant/Counter-Claimant.

For avoidance of doubt, it is my finding that the Defendant/Counter-Claimant never acquired a Kibanja interest in the suit land from the late Ngobya Kyeyune Joseph. This is so because Ngobya Kyeyune Joseph had no Kibanja interest in the suit land. That explains why he was sued for trespass in H.C.C.S No.788 of 2003 by the late Samuel Senyondo, the then registered owner. Therefore, Ngobya Kyeyune Joseph could not purport to transfer an interest to the Defendant/Counter-Claimant that he did not have.

The Defendant/Counter-Claimant is/was a trespasser on the suit land comprised in Kibuga Block 21 Plot 641 land at Busega which is currently registered in the names of the Plaintiffs/1st - 4th Counter-Defendants. Issue one is answered in the negative.

Issue 2: If so, whether or not the Defendant's acquisition of the said Kibanja is tainted with fraud.

With regard to this issue, having found issue 1 in the negative, in my view, it is not necessary to resolve it because it has been rendered moot.

In the case of **The Environment Action Network Ltd vs Joseph Eryau, C.A.C.A No. 98 of 2005**, the Court of Appeal while relying on its earlier decision in **Uganda Corporation Creameries Ltd & Another vs Reamaton Ltd, Civil Reference No. 11 of 1999**, stated that it is a well-known principle of law that Courts adjudicate on issues which actually exist between litigants and not academic ones. The Court went ahead to hold that Courts do not decide cases for academic purposes because Court orders must have practical effect and must be capable of enforcement. The Court concluded that such a case would be driven into the limbo of legal mootness.



In the instant case, having answered issue 1 in the negative, I find that issue two has been rendered moot and this Court is not willing to be taken on a purely academic voyage.

Issue 3: Whether or not the Plaintiffs' acquisition of the suit land is tainted with fraud.

Plaintiffs' submissions

Counsel for the Plaintiffs/1st – 4th Counter-Defendants submitted that the Counter-Claimant/Defendant apart from alleging fraud never led any evidence to prove that the Plaintiffs/1st – 4th Counter-Defendants participated in the alleged fraud. That Plaintiffs/1st – 4th Counter-Defendants purchased the suit land on 14/5/2003. That the suit land was transferred into their names on 10/8/2004. That there was caveat lodged on the suit land so as to notify the Plaintiffs/1st – 4th Counter-Defendants about the alleged interest of the Defendant/Counter-claim and or that of the late Joseph Ngobya on the suit land.

Counsel submitted that by the Defendant's/Counter-Claimant's agreements, he was to take possession after complying with the terms of DEX3. That these terms have to date not been complied with. That PW1 told Court in cross examination that they paid the purchase price and the payment for stamp duty was left to Mr. Senyondo to complete. That the Defendant/Counter-Claimant has never produced any evidence before Court to prove that the Plaintiffs/1st – 4th Counter-Defendants participated in the alleged under- declaration of the stamp duty. He submitted that the Plaintiffs/1st – 4th Counter-Defendants never committed acts of fraud in acquiring the suit land and prayed that Court finds so.

Defendant's/Counter-Claimant's submissions

Counsel submitted that on the contrary evidence was adduced to show that the Plaintiffs'/1st – 4th Counter-Defendants' acquisition of the suit land is tainted with Fraud. That this is because the Defendant/Counter-Claimant adduced evidence to show that the dealings of the 5th Counter-Defendant in transferring the suit land to the Plaintiffs/1st – 4th Counter-Defendants was fraudulent and intended to unduly deprive him of his land. That this is proved by the fact that they knew that he was in possession and there was a residential house which he had occupied since 2004 to 2008 a period of four (4) years.

Counsel further submitted that the Plaintiffs'/1st – 4th Counter-Defendants' acquisition of the suit land is tainted with fraud. That there was no respect at all of the Defendant's/Counter-Claimant's Kibanja interest yet the Plaintiffs recognized

A handwritten signature in black ink, appearing to be 'J. Senyondo', is written over the page number.

Ngobya Kyeyune Joseph from whom he acquired it. That the Defendant/Counter-Claimant lived peacefully on the land for four years.

Court's decision

The Court in the case of **Fredrick Zaabwe Vs Orient Bank & Others S.C.C.A No.4 of 2004** defined fraud to mean an intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by words or conduct by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

In the case of **Kampala Bottlers Vs Damanico (U) Ltd S.C.C.A No.22 of 1992**, it was held that fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters. It was further held that the party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is the transferee must have known of such act by somebody else and taken advantage of such act.

The Defendant/Counter Claimant pleaded the particulars as of fraud as follows:-

"a) The actions of the 5th Counter-Defendant in transferring the suit land comprised in Kibuga Block 21 Plot 641 to the first, second, third and fourth Counter-Defendants with full knowledge of the Counter-Claimant's proprietary interest in 0.25 hectares of the land comprised in Kibuga Block 21 Plot 641 amounted to fraud.

b) The actions of the Counter-Defendants in transacting in the suit land after actual and constructive notice of Counter-Claimant's interest in the suit land, house and developments despite his occupancy was fraudulent.

c) The transfer of the suit land by the Counter-Defendants who visited the locus in quo and established Counter-Claimant's interest and occupancy of the suit land was fraudulent.

d) The action of Mr. Samuel Senyondo in transferring the land while fully aware of his interest and occupancy in the suit land was fraudulent,

e) The Counter-Defendants in fraudulently under declaring the purchase price in order to cheat Government of its Revenue payable as Stamp Duty on land comprised in Kibuga Block 21 Plot 64 purchased as shown in the Sale Agreement at UGX.38.000.000/= (Thirty Eight Million Shillings) whereas in the Transfer Forms the Purchase price was declared as UGX.8,000.000/= (Eight Million Shillings) only was fraudulent.



f) The Counter-Defendants in transferring the suit land into their own names at a time when the Defendant/Counter-Claimant had paid more than a half of the purchase price he bought the same land from Joseph Kyeyune Ngobya the original owner was fraudulent.

g) The Counter-Claimant shall aver that the land he occupies is comprised in Kibuga Block 21 Plot 641 situate at Busega and he bought it as a Kibanja and mailo interest from John Ngobya who bought it from Samuel Senyondo and he lived on it and they all along knew his occupation and developments thereon before purchasing it.

h) The Counter-Claimant bought the suit land on the 31/05/2004 from Ngobya Kyeyune Joseph who had a Kibanja interest and developments on the above land which he bought from one Samuel Senyondo.

i) The above mentioned HCCS No. 788 of 2003 between Samuel Senyondo and Ngobya Joseph was settled by consent and judgment to that effect was entered and it has never been set aside, where it was ordered that Ngobya Kyeyune Joseph pays Samuel Senyondo UGX.25, 000.000/= (Twenty Five Million) as the purchase price of the above land and developments thereon and any purchase price thereof was paid in defiance of the consent judgment/decreree.

j) The Counter-Claimant's lawyers then M/s. Kavuma Kabenge & Company Advocates demanded a transfer and title from Samuel Senyondo which was never fulfilled but that he was later surprised to learn that the above land had been transferred by Samuel Senyondo to the current registered proprietors Nakato Immaculate, Babirye Carolyn, Tumwebaze Christine and Mbabazi Justine (the first, second, third and fourth Counter-Defendants

k) The current registered proprietors, the Plaintiffs were very much aware of his interest as purchaser of a Kibanja over the said land from Samuel Senyondo but went ahead to transact a transfer into their names despite the fact that he was in possession of the suit land with Residential houses built thereon and being rented by various tenants.

l) On 9th April 2008, the fourth Counter-Defendant/4th Plaintiff wrote to the Registrar High Court on behalf of all the Counter-Defendants disassociating themselves from H.C.C.S No.4 of 2005 Nakato Immaculate & 3 Others Vs Katayira Francis aka John alleging that they had never instructed or consented to M/s Kityo & Co. Advocates to file the said suit in the High Court therefore the suit is frivolous, vexatious and fraudulent. "



With regard to this issue, I have already held in issue 1 that the Defendant/Counter-Claimant never acquired a Kibanja interest in the suit land from the late Ngobya Kyeyune Joseph and that he is/was a trespasser on the suit land comprised in Kibuga Block 21 Plot 641 land at Busega which is currently registered in the names of the Plaintiffs/1st - 4th Counter-Defendants.

I have perused the Court record and note that the Defendant/Counter-Claimant has not adduced evidence to prove the particulars of fraud aforementioned. What I observe is that instead of highlighting the evidence that proves the fraud alleged, Counsel for the Defendant/Counter-Claimant merely reproduced the particulars of fraud as evidence which is intended to mislead this Court.

With regard to under- valuing the suit property for purposes of cheating Government of the stamp duty, the Defendant/Counter-Claimant has not adduced evidence of the transfer form and consent to transfer to enable Court ably resolve the issue neither has he adduced the evidence that the it the Plaintiffs/1st - 4th Counter-Defendants that allegedly inserted a less figure in the transfer form.

I find that the Defendant/Counter-Defendant has failed to prove against the Plaintiffs/1st - 4th Counter-Defendants. It therefore follows that the Plaintiffs/1st - 4th Counter-Defendants' acquisition of the suit land was not tainted with fraud. Issue 3 is answered in the negative.

Issue: 4 Whether the Counter-claim discloses a cause of action against the 5th Counter-Defendant

Plaintiffs/1st - 4th Counter-Defendants

Counsel submitted that the Defendant/Counter-Claimant tendered before Court several documents in support of his claim against the Counter-Defendants. That all the documents relied upon by the Defendant/Counter-Claimant were never signed by the late Samuel Senyondo as the former Landlord and the Plaintiffs/1st-4th Counter-Defendants as the current registered proprietors of the suit land.

Counsel further submitted that the receipts produced by the Defendant/Counter-Claimant never indicated that the money deposited with the lawyers was ever delivered to Samuel Senyondo. That Samuel Senyondo ceased having interest in the suit land the moment he executed PEX1 and later transferred the land into the names of the Plaintiffs/1st - 4th Counter-Defendants never had any interest to pass to the Defendant/Counter-Claimant. Counsel submitted that the Defendant/Counter-Claimant has failed to prove his claim against the 5th Counter-Defendant on a balance of probabilities.

A handwritten signature in black ink, appearing to be 'Samuel Senyondo', written in a cursive style.

Defendant's/Counter-Claimant's submissions

Counsel submitted that the Defendant's/Counter-claim's Counter-claim discloses a cause of action. That he adduced evidence that the current registered proprietors were very much aware of his interest as a purchaser of the said land from Samuel Senyondo but that went ahead to transact a transfer into their names despite the fact that he is/was in possession of the suit land with a house built thereon and being rented by tenants.

He submitted further that the Defendant/Counter-Claimant adduced evidence that he filed Misc. Application No. LD M.A 02 of 2009 complaining about destruction of his property after disobedience of an interim order issued in Misc. Appl. No. 813 of 2008 as the Plaintiffs/1st – 4th Counter-Defendants went ahead to evict him from the suit property pending the hearing and final disposal of H.C.C.S No.04 of 2005 and Mengo C.S No.1504 of 2007.

5th Counter-Defendant's submissions

Counsel reiterated all his earlier submissions and submitted that the Counter-claim does not disclose a cause of action against the 5th Counter-Defendant as required by the provisions of Order 7 rule 1 and 11 of the Civil Procedure Rules.

He submitted that it is settled law that in order for a claim to disclose a cause of action, the claimant must have enjoyed a right, the right must have been violated and the defendant/respondent to the claim must be liable for the breach as per **Auto Garage Vs Motokov (3) [1971] EA 514**.

Counsel submitted that the 5th Counter-Defendant as the owner of the suit land at the material time comprised in Kibuga Block 21 Plot 641 under a formal sale agreement dated 14/5/2003 sold the same land to the Plaintiffs/1st – 4th Counter-Defendants.

Counsel submitted that the purported sale transactions between the late Ngobya Kyeyune Joseph and the Defendant/Counter-Claimant were neither disclosed to the 5th Counter-Defendant nor his consent sought as required by law.

He further submitted that throughout the proceedings, the Counter-Claimant miserably failed to prove that he had ever entered into any land sale agreement with the 5th Counter-Defendant either for the whole or part of the suit land.

He concluded by submitting that the Counter-Claimant's suit against the 5th Counter-Defendant is misconceived for lack of any basis and the same discloses no cause of action.



Court's decision

A cause of action is defined as every fact which is material to be proved to enable the Plaintiff succeed or every fact which if denied, the Plaintiff must prove in order to obtain judgment of the Court. See: the case of **Wanume Godfrey & Anor Vs Nzirejje Ronald Mutebi & 2 Others H.C.C.S No.574 of 2020.**

In order to prove that there is a cause of action, the plaintiff must show that the Plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable. If the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment. See: **Tororo Cement Co. Ltd Vs Frokina International Ltd S.C.C.A No.02 of 2001.**

Under **Order 7 rule 11(a) of the Civil Procedure Rules**, a plaint may be rejected by the Court when it does not disclose a cause of action.

I have already held in issue 1 that the Defendant/Counter-Claimant never acquired a Kibanja interest in the suit land from the late Ngobya Kyeyune Joseph and that he is/was a trespasser on the suit land comprised in Kibuga Block 21 Plot 641 land at Busega which is currently registered in the names of the Plaintiffs/1st - 4th Counter-Defendants. It therefore follows therefore that a trespasser on the suit land, his Counter-claim does not disclose a cause against 5th Counter-Defendant. His Counter-claim is rejected under **Order 7 rule 11(a) of the Civil Procedure Rules** with costs to the 5th Counter-Defendant. Issue 4 is answered in the negative.

Issue 5: What remedies are available to the parties?

The Plaintiffs in the suit seek for an eviction order, mesne profits and costs of the suit.

The Plaintiffs have proved their case on a balance of probabilities that the Defendant/Counter-Claimant was/is a trespasser on the suit land. An order of eviction is issued against the Defendant/Counter-Claimant or his agents/ servants.

The Plaintiffs prayed for mesne profits but they did not lead evidence to prove them. The prayer for mesne profits is denied.

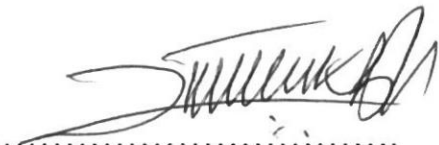
With regard to costs, **Section 27(2) of the Civil Procedure Act** provides that a successful party is entitled to costs unless for a good cause, the Court orders otherwise. See: **James Mbabazi & Another Vs Matco Stores & Anor C.A Civil Reference No.15 of 2004.**



In this case, the Plaintiffs having succeeded in proving their case against the Defendant/Counter-Claimant, I order that the Defendant shall pay the costs of the suit.

In the same vein, since the Defendant/Counter-claimant failed to prove the Counter-claim against the Counter-Defendants, the same is dismissed with costs to the 5th Counter-Defendant. I so order.

Dated at Kampala this 16th day of January 2023.



.....
LAWRENCE TWEYANZE
JUDGE
16/01/2023

