

5 **SAFINA NALWEYISOPLAINTIFF**

10 1. **MOSES KALULE**
 2. **ABBAS KABOGO**
 3. **KASULE LUKENGE ISHAKA**
 4. **ABBAS MUKASA KAWAASE.....DEFENDANTS**

15 **JUDGMENT (EXPARTE)**

The plaintiff, Ms Safina Nalweyiso Mukasa filed this suit, seeking orders against the defendants jointly and severally that the sale on the suit land comprised in **Kyaddondo Block 383 plot No. 5356 at Kitende, Kawoto Wakiso district** valued at approximately **Ugx 250,000,000/=** to the 2nd-4th defendants was null and void; an order for recovery of the suit land and houses thereon; an order of compensation of the destroyed rental units on the suit property; general damages; a permanent injunction against the defendants from further trespass onto the suit property; costs of the suit among others.

Q. habg

Analysis of the evidence

By virtue of **section 101 (1) of Evidence Act, Cap. 6**, whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist. (**George William Kakoma v Attorney General [2010] HCB 1 at page 78**).

The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. (**Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha v Attorney General Civil Suit No. 0069 of 2004**).

It is well established law that a cause of action in fraud must be specifically pleaded, particulars thereof provided and the claim proved, to a level higher standard than a balance of probabilities required in an ordinary suit. (**See also; Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC); (Kampala Bottlers Ltd. Vs Damaniaco (U) Ltd (supra))**).

A party faced with pleadings founded in fraud would then know the specific elements of fraud that it needs to rebut or disprove in its defence. **See: Fam International Ltd & Another vs. Mohamed Hamird El-Fatih Civil Appeal No. 16 of 1993 (SC)**.

The term *fraud* has been defined to imply an act of dishonesty. (**Kampala Bottlers Ltd. vs. Damaniaco (U) Ltd SCCA No. 2 of 1992.**); an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right.

In **F.I. K Zaabwe vs Orient Bank and 5 others SCCA No. 4 of 2002**) it was defined as a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he/she shall act upon it to his legal injury.


2

It is anything calculated to deceive, whether by a single act of combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture.

5 **1) Whether Hajji Moses Kalule, the 1st defendant was fraudulent:**

The allegations of fraud raised against the 1st defendant were that he had fraudulently and illegally purchased the suit property well knowing that it was matrimonial home with the plaintiff staying therein with their children who were eventually evicted.

10 Secondly, that after court had ordered him to release the suit property to the plaintiff, his action of mortgaging the suit property to Abaasi Kabogo, the 2nd defendant who threw the plaintiff out of the suit property, yet fully aware that there was an earlier judgment releasing the suit property amounted to fraud.

15 Thirdly, that both the 1st and 2nd defendants had fraudulently obtained court orders from the Execution division of the High Court without disclosing that judgment declaring the sale null and void had been entered in favour of the plaintiff.

20 In his written statement of defence, the 1st defendant represented by **M/s M. Mugimba & Co. Advocates** however denied any involvement in any fraud or occasioning any loss to the plaintiff.

That at one time he was the registered owner of the suit land and had lawfully mortgaged his mailo interest which was eventually sold through a due process of court: vide **Civil Suit No. 166 of 2014** brought against him by the 2nd defendant.

25 This court noted that the orders/decrees, **PExh 4 A** had been granted on 20th October, 2008 vide **Nalweyiso Mukasa & Haji Ahmed Mukasa vs Haji Moses Kalule, Civil Suit No. 132 of 2008** by the Chief Magistrate at Nakawa, in the terms below:



a) That the agreement of sale of the suit property /land and its development at Kajjansi is null and void and is hereby set aside;

b) That the defendant is stopped from trespassing on the 1st plaintiff's matrimonial home/land;

c) That judgment in admission is entered in favour of the defendant as against the 2nd plaintiff in the counterclaim as follows:

i) to refund **Shs. 43,500,000/=** to the defendant;

ii) to pay interest of 24% per annum from the date of judgment until payment is made in full;

The 1st defendant was a party in that suit. There is nothing to show from the court that the said were challenged, reviewed or discharged by any court. Subsequently, a summary suit, **Civil Suit No. 166 of 2014** was filed by the 2nd defendant, Abaasi Kabogo against Haji Kalule, the 1st defendant herein, claiming that Kalule had on 20th January, 2013 borrowed money from the him, amounting to **Ugx 52,000,000/=**.

It was a term in that agreement that the loan had to paid within one month and that should Kalule fail to pay Abaasi Kabogo (2nd defendant in this suit) would be free to sell his land comprised in **Busiro Block 383 plot 5356**.

In the decree extracted on 11th August, 2014, Kalule who became the registered owner of the suit land as at 22nd August, 2008 shortly before the orders of 2008 were made upon failure to pay the loan and failure to file a defence was ordered by court to pay the sum of **Ugx 52,000,000/=**; and costs to Abaasi Kabogo.

After the earlier court's declaration that this was matrimonial property, it was a foregone conclusion that court duly recognized the plaintiff's unregistered interest in the land which was a *kibanja* at the time.

Kalule therefore immediately ceased to have interest in that property and could not validly enter into any subsequent transaction relating to that land contravening the orders of court in the earlier suit.



As a matter of fact the next action ought to have been the issuance by the competent court of consequential orders for the cancellation of the 1st defendant's names from the title for the suit land, which however was never done.

- 5 Having been a party to that suit, Kalule had been fully aware of the plaintiff's rights accruing from the judgment before he entered into the loan agreement with the 2nd defendant; and that explains why he never filed a defence in the subsequent suit: **Civil Suit No. 166 of 2014.**

10 Once he had achieved his objective of recovering his money, secured through a purported loan agreement with the 2nd defendant, with the matrimonial property as his security, he had nothing else to claim from the 4th defendant who still owed him some money. In short he had nothing to lose in that second suit.

15 **Section 39 of the Land Act, Cap. 227** forbids any sale, exchange, transfer, mortgage or lease of any family land, without spousal consent and makes any transaction null and void.

After the order of court was made on 20th October, 2008 several other transactions which did not involve Nalweyiso, (plaintiff) had taken place. As noted earlier, **Civil Suit No. 166 of 2014** was filed by the 2nd defendant, Abaasi Kabogo against Haji Kalule who had no valid interest in the suit land.

- 20 The fact also that the 4th defendant did not challenge the said court proceedings or request to be joined as a party or in any proceeding challenge the decision of court under **Civil Suit No. 166 of 2014** was manifestation that he had either given away his matrimonial home; had no more interest; or colluded with the rest of the defendants to deny the plaintiff the fruits of her judgment.

- 25 In the case of **Fredrick Zaabwe** as cited earlier, it is stated that fraud embraces all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestion



or by suppression of truth and includes all surprise, trick cunning dissembling and any unfair way by which another is cheated.

Not only did the transaction therefore offend **section 39 of the Land Act, Cap.227** thus making it null and void, but it was an act in violation or contempt of the undischarged court orders made earlier in 2008, thus making a mockery of the lower court's decision.

'Contempt of court' is defined as conduct that defies the authority or dignity of court. Civil contempt arises when there is disobedience to judgment, orders or other court process.

Thus any course of conduct which abuses and makes a mockery of the judicial process and which extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice amounts to contempt.

A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. (***Uganda Super League vs Attorney General Constitutional Application No. 73 of 2013.***)

This is meant to deter parties from contempt and send strong messages that a court order should always be obeyed; and that there are consequences for disobedience of court orders.

It is also trite that a court of law never acts in vain and as such issues touching on the contempt take precedence over any other case of invocation of the jurisdiction of court: (***Wildlife Lodges Ltd vs County Council of Narok & Anor [2005] EA 344 (HCK).***)

In all cases a party reserves that right to challenge an offending order and may in addition also apply to court for a stay of execution of that order pending its



review, variation or appeal. That option was readily available to the 1st defendant but he never exercised it.

Without a stay order, any failure by the party intending to act against it would attract sanctions against such party. The plaintiff therefore succeeded in proving
5 that the 1st defendant had acted fraudulently to deprive her of her interest in the suit land.

2. Whether Mr. Abaasi Kabogo, the 2nd defendant was fraudulent in granting a mortgage over the suit property.

The particulars of fraud as pleaded in this suit were that the 1st and 2nd
10 defendants actions intended to defeat the plaintiff's interest in her property, well knowing that that they were illegally dealing with the matrimonial property.

On his part, the 2nd defendant represented by **M/s Ntambirweki Kandeebe & Co. Advocates** contended in his WSD that he filed **Civil Suit No. 166 of 2014** to recover money lent to the 1st defendant.

15 That the 1st defendant however failed to file a defence in that suit and court duly entered judgment against him wherein his interest was attached and sold to satisfy the decretal sum.

He therefore denied involvement with any eviction or fraud as his sole interest had been to recover his fruits of litigation, claiming that the plaintiff was
20 unknown to him. He refuted any claims therefore that he had occasioned loss to her. He also denied collusion and connivance with the defendants.

As already noted above, the mortgage transaction between the 1st and 2nd defendant was made in respect of land which had been a subject of an earlier undischarged court order.

25 Evidence was adduced by the 2nd defendant to prove that he had obtained the suit land following the due process of court. **PEx 5A** is a warrant of attachment



and sale of immovable property for land comprised in **Busiro block 383 plot 5356 at Kitende**, measuring 0.074 hectares.

The order of sale exhibited as **PExh 5B** dated 24TH November, 2014; **PExh 5D** a return of warrant in **EMA No. 2342 of 2014**. Such orders were however based
5 on error, concealment and/or misrepresentation of facts.

The 2nd defendant did not turn up in court to defend himself against the allegations. The conclusion is therefore inevitable that he had constructive notice of the existence of the order and knowledge of the law which barred him from any further dealings with the family/matrimonial property.

10 The mortgage transaction was made in disregard of the court order, the unregistered interests of the plaintiff and therefore void *ab initio*. Had it been brought to the attention of and full disclosure made to court about the nature of the property that had been put up for sale, no court in its right frame of mind would have granted the prayers as sought and granted in that suit.

15 In **Makula International vs His Eminence Cardinal Nsubuga & Anor CA No. 4 of 1981** the principle was laid out clearly that once an illegality is detected or brought out to the attention of court, it overrides all manner of pleadings, including admissions.

Thus all subsequent proceedings and ensuing orders made in execution of the
20 orders granted in **Civil Suit No. 166 of 2014** were in violation of the orders of court and therefore invalid.

The eviction of the plaintiff and her young family that had left them homeless was attributed to the high handed actions of the 2nd defendant. It was in contempt of the existing orders held *in rem*, the violation of which this court
25 holds him liable.



3. Whether Mr. Kasule Lukenge Ishak, the 3rd defendant as the registered proprietor committed fraud:

A party who does not enter appearance and file WSD is deemed to have admitted the allegations in the plaint (***Smith vs Auto Electric Services Ltd (1951) 24 KLR22 K***). Such admission is constructive. (See: ***Asuman B Kiwala versus Chief Registrar of Titles HC MA NO. 106/2004 (2004) KALR – pages 518 – 519***).

Thus where an interlocutory judgment is entered in favour of the plaintiff, the question of liability of the defendant is no longer in issue. What is in issue is the assessment of the quantum of damages. ***Haji Asuman Mutekanga vs Equator Growers (U) Ltd SCCA No. 07/1995***.

A statement of search as of 27th April, 2017, ***PEXh 6*** indicates that the registered owner is currently the 3rd defendant, Mr. Lukenge Ishak Kasule. ***PEXh 9*** is a certificate of title for the suit land.

The certificate indicates that the 1st defendant had acquired land on 22nd August, 2008; and the next entry was made in the names of Ahmed Mukasa husband to the plaintiff, on 4th December 2014. The names of the 3rd defendant Lukenge had subsequently been entered on 5th may, 2016.

As the registered owner, the 3rd defendant is protected from ejection (***section 176 (c) of the RTA***). Similarly, under ***section 59*** of the same Act, the general principle is that a title is conclusive evidence of ownership.

In both instances however fraud attributed directly or indirectly to the registered owner provides the exception to the general rule. (***Ref to: Assets Company Ltd. vs Mere Roihi & Others [1905] A.C. 176***).

The 3rd defendant however did not file any defence to counter the allegations of fraud levelled against him by the plaintiff.



It is the finding by this court that similar principles governing the mortgage and sale of the matrimonial property as highlighted, equally applied to him as they did to the rest of the other defendants.

The land he bought was not available for sale. But secondly he could have been a *bona fide* purchaser for value without any notice of the fraud.

The term is defined in ***Black's Law Dictionary 8th Edition at page 1271*** to mean:

"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."

In the case of ***Omar Salim Mukasa Vs Haji Muhammed & another CACA NO 114 of 2003***; it was held: ***"In equity constructive knowledge is deemed to constitute fraud."***

It has to be noted that due diligence is a requirement of law under ***Section 201 of the Registration of Titles Act Cap 230***. Whether or not there was fraud and whether or not a party was a *bonafide* purchaser for value without notice the question that a court would pose is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. (***David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985***).

Halsbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977, at ***page 27*** provides:

"Prior equitable interest in land can only be defeated by a bonafide purchaser for value without prior notice. Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation."

It goes without saying that a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide*

purchaser for value without notice of the fraud, if he/she fails to make inquiries before such purchase is made.

Thus in ***Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995***), such failure to make reasonable inquiries or ignorance or negligence was held to form particulars of the offence of fraud. These principles applicable to the 3rd defendant.

If the 3rd defendant had made sufficient inquiries he would have discovered that the plaintiff and her young family had been in occupation of the suit land for more than a decade, which should have put him on notice..

10 In ***Vivo Energy Uganda Ltd vs Lydia Kisitu CACA NO. 193 of 2013***, court while laying emphasis on the need for thorough investigation rejected the argument that a certificate of title was enough to establish ownership where there was circumstantial evidence that should have put the defendant on notice, requiring him to go beyond the certificate of title.

15 **4. Whether the actions of Hajji Ahmed Mukasa, the 4th defendant committed fraud:**

The 4th defendant, Hajji Ahmed Mukasa was represented by the firm of ***M/s Lubega & Co. Advocates***. It is not in dispute he is the husband to the plaintiff, and that he entered into a sale agreement with the 1st defendant, Hajji Moses Kalule by which the plaintiff's matrimonial home had been disposed of to the 1st defendant.

Pw2 the plaintiff his wife aged 50 years testified that she was mother of 5 children with her youngest at 16 years, at the time of the hearing. She had no job and was surviving on a small rental left to her by her parents.

25 Her evidence was that she had been staying with her husband who left them following the eviction from the suit land where they had lived for 11 years.



Evidence to support her case was led by her son, **Pw3** Lukyamuzi Jaffer aged 31 years and **Pw4** Kakooza Aslam, aged 32 years, who confirmed that in 2016 they had been evicted from the suit premises.

5 Their mother had put up rentals to take care of the family and had been collecting **Ugx 150,000/=** each month until they were evicted. Their father had put up main house, constituting 3 bedrooms, garage, and sitting room and dining room. He had started selling of portions of the land. That evidence of ownership and occupation was never discredited.

10 This court also noted that the trial court in **Civil Suit No. 132 of 2008** to which he was also a party, had issued orders which were intended to protect the matrimonial property which he shared with the plaintiff.

15 The 4th defendant therefore betrayed the trust of his family when he connived with the 2nd defendant to deprive his family of the home, while also fully aware that his wife had constructed on the suit land rental units from which she was collecting rent for her children.

Such callous acts by her own husband amounted to fraud as they defeated the interests of the plaintiff, resulting in an eviction that affected not only the plaintiff but also their children, some of whom were still minors at the time.

20 The certificate of title on record in this case which was secured over the *kibanja* later indicates that after the 2008 orders were made, he had the title transferred into his names and in violation of the court order and without spousal consent, later sold the land to the 3rd defendant, Lukenge Ishak Kasule.

25 The entries on the title were respectively made on 4th December, 2014 and 5th May, 2016: sufficient proof that fraud was perpetrated by him. In absence of any evidence or other explanation from the 1st defendant to believe otherwise, these were transactions made on the same *kibanja* at Kajjansi already declared by court as matrimonial property, and from which the plaintiff and her children were evicted.

 12

There is no doubt that the 4th defendant was part of and instrumental in the commission of the fraudulent transactions relating to this land, as he had knowledge of the plaintiff's interest as her matrimonial home. Not only had he been party to the 2008 suit but had also derived some benefit out of the suit when the land was returned to the family.

He later dealt with the land without the plaintiff's knowledge and consent. When he sought to evict her from the matrimonial home the plaintiff filed **Civil Suit No. 132 of 2008: Nalweyiso Mukasa and Hajji Mukasa vs Hajji Kalule**, challenging the transaction at the Chief Magistrates' court, Nakawa.

A party who fails to comply with a court order without proper explanation does so at his/her own peril. Whether unclear, null or irregular a party, it cannot afford or be permitted to disobey an order for as long as it remains undischarged. (*see also: Attorney General vs Kiruhura District Local Government & 2 others HCMA No. 35 of 2012*).

Fraud is such grotesque monster that courts should hound wherever it rears its head and wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all transactions. (*Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994]KARL 307*).

In **Bishopgates Motor Finance vs. Transport Brakes Ltd [1949] 1 KB 332**, at page 336-7 it was held that;

"In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give better title than he himself possesses."

That legal principle was emphasized by the Supreme Court in **Halling Manzoor vs. Serwan Singh Baram, SCCA No.9 of 2001** that a person cannot pass title that he does not have.

Under the above circumstances as highlighted, the 4th defendant not only acted in violation of the court order when he transferred jointly owned property without



the consent of his wife but he besides also had no title to pass onto the 3rd defendant, who as established by this court was not a *bona fide* purchaser for valuable consideration of land.

In the premises, the plaintiff's action against the defendants therefore succeeds.

5 **Remedies:**

The plaintiff's prayers include:

- 10 a) a declaration that the sale on the suit land comprised in **Kyaddondo Block 383 plot No. 5356 at Kitende, Kawoto Wakiso district** valued at approximately **Ugx 250,000,000/=** to the 2nd-4th defendants was null and void;
- b) an order for recovery of the suit land and houses thereon;
- c) an order of compensation of the destroyed rental units on the suit property;
- 15 d) general damages;
- e) a permanent injunction against the defendant from further trespass onto the suit property;
- 20 f) costs of the suit.

The plaintiff relied on the evidence of **Pw1** Ms Nanyunja Janet, an employee of *M/s Peak Partners Ltd*, a company dealing with property valuing which conducted a valuation of the properties destroyed during the eviction.

25 The unchallenged valuation report presented by her gave an assessment of the house including the rentals as **Ugx 150,000,000/=**, which this court would consider a fair amount.

General damages.

30 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 takes into consideration the disturbance, mental anguish and inconvenience suffered by the plaintiff in trying to recover the ownership of the land from various parties.

The property kept changing hands/ownership without the plaintiff's knowledge, consent or participation. The fraudulent actions were targeted at depriving her the benefit of her interest, rightly accrued under a valid uncharged order.

Court also bears in mind the fact that fraud was perpetuated by her own husband, the 4th defendant, Ahmed Mukasa in connivance and in collusion with the rest of the defendants. He and the 1st defendant bear a fair share of the liability.

On account of their actions, the plaintiff and her family were rendered homeless. Accordingly, an award of **Ugx 100,000,000/=** would be justified as general damages.

In the premises the following orders are issued:

- a) **a declaration issues that all transactions made in contravention of the orders made in Civil Suit No. 132 of 2008 relating to the land now comprised in Busiro Block 383 plot 5356, which was the subject of that suit, were invalid.**
- b) **Accordingly, an award of Ugx 150,000,000/= is granted as compensation for the destroyed rental units on the suit property which shall be payable by the 3rd and 4th defendants;**
- c) **general damages Ugx 100,000,000/= awarded to the plaintiff 30% of which shall be paid by the 1st defendant; 50% by the 4th defendant; and the balance equally between the 2nd and 3rd defendants;**
- d) **a permanent injunction issues against the defendants from further trespass onto the suit property;**


15

e) *Interest payable in respect to orders b) and c) above, payable at a rate of 15% p.a, from date of delivery of this judgment until payment is made in full.*

f) *costs of the suit.*

5 Under **section 177 of the RTA** court has powers, upon recovery of land from a registered proprietor under any proceedings, to direct as I now hereby do, the cancellation of the certificate of title for the land comprised in **Kyaddondo Block 383 plot No. 5356 at Kitende, Kawoto Wakiso district** from the names of the 3rd defendant and to enter the same into the names of the plaintiff.

10 ***I so order.***



Alexandra Nkonge Rugadya

Judge

29th March, 2023

Delivered by bail
Alexandra
T
29/3/2023