

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

CIVIL SUIT NO.241 OF 2012

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1. NAKIWU ESTHER)
2. ABSOLOM SEKABIRA)
3. KEFA KYAMBADDE)PLAINTIFFS

VERSUS

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1. MUSOKE SULAIMAN)
2. KISAKYE RICHARD)
3. NAMIRIMU RUTH)
4. MBAZIRA DICKSON)DEFENDANTS

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CONSOLIDATED WITH CIVIL SUIT NO.483 OF 2012

1. RUTH NAMIRIMU)
2. MBAZIIRA DICKSON)PLAINTIFFS

VERSUS

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1. YOWASI MUKASA)
2. ABSOLOM SEKABIRA)
3. KEFA KYAMBADDE)
4. ESTHER NAKIWU)
25 5. SULAIMAN MUSOKE)
6. LIVINGSTONE LWANGA)DEFENDANTS

BEFORE: HON. MR. JUSTICE LAWRENCE TWEYANZE

JUDGMENT

30 **Introduction**

The Plaintiffs' claim against the Defendants as per the amended plaint filed on 4th November 2020 is premised on trespass to land and they bring this suit seeking a permanent injunction restraining the Defendants and their agents from trespassing

upon as well as interrupting the Plaintiffs' use and enjoyment of the suit land; a declaration that the suit land rightfully formed part of the Estate of the late Musa Kanamwangi; a declaration that the Plaintiffs are the rightful owners of the suit land; an order for vacation of a caveat lodged by the 3rd and 4th Defendants on the
5 Certificates of title for the suit land; general and punitive damages as well as costs of the suit.

Plaintiffs' claim

10 The Plaintiffs' claim as per the amended Plaint dated 04/11/2020 is that: the Plaintiffs are the registered proprietors of the suit land comprised in Kyaggwe Block 386 Plots 5, 12 and 13 land at Sai, Mukono District; the suit land was originally owned by the Plaintiffs' late father late Musa Kanamwangi who died testate on
15 14/08/1984; the late Kanamwangi left a will and codicil bequeathing the suit land amongst all his eight children; each child took possession of their respective portions of the suit land and the portion measuring 20 acres was left undistributed to form the family burial grounds; in 2007 the Plaintiffs discovered that the 1st Defendant and Christopher Mukasa had falsely declared that the suit land belonged to their late brother Geresom Zziwa; that Sekabira Absolom, the 2nd Plaintiff
20 discovered that his signature was forged when applying for the Letters of Administration for the Estate of the late Geresom Zziwa; after the discovery of the forgery, the late Sekabira reported the case of forgery against Mukasa Christopher and the 1st Defendant vide SD Ref:CRB 2836/08 at Jinja Road Police Station; in 2010 upon discovery of the fraud, the Plaintiffs filed an application against the
25 fraudsters Christopher Mukasa and Sulaiman Musoke, the 1st Defendant and an order was issued directing that the names of the Respondents be cancelled and the Plaintiffs' names be entered on the register as owners of Plots 12 and 13, the suit land; after confronting the 1st Defendant and Christopher Mukasa, the pair willingly signed transfer forms and handed over the certificates of the title with the remaining
30 land to Yowasi Mukasa, the 2nd Plaintiff, the 3rd Plaintiff and the 1st Plaintiff who were the surviving children of the late Musa Kanamwangi; the later then transferred the titles into their names; the Plaintiff discovered that two years after their father's death in 1986, their late brother Geresom Zziwa had fraudulently transferred the Certificate of title into his names without a duly transfer forms; the 2nd -4th
35 Defendants are claiming the suit land as children of the late Geresom Zziwa ; the 2nd Defendant has since contrived acts of trespass by purporting to fraudulently sell of a portion of the suit land to one Sentongo Joshua under the guise that the land

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belonged to his late father Geresom Zziwa; the 3rd and 4th Defendants have also contrived acts of trespass by lodging the caveat against the certificates of title for the suit land in the land office and have also interfered with and prevented the Plaintiffs from peacefully enjoying their suit land; the Plaintiffs assert that the suit land formed part of the Estate of their late father Musa Kanamwangi and the deceased unequivocally distributed it to all his children which they undisputedly took possession of hence the suit.

The Defendants' claim

The Defendants denied all the Plaintiffs allegations in their joint Written Statement of Defence filed on 19/01/2021 and even set up a Counter-claim against the Plaintiffs. It is their defence that: they are all children and beneficiaries to the Estate of the late Geresom Zziwa who died testate in 1993; at all material times, their late father was the sole registered proprietor of the suit land comprised in Kyaggwe Block 386 Plots 5, 12 and 13 among other properties; upon his demise, the deceased left a will clearly distributing his property and left custody of his properties and certificates of title in the hands of the 1st Defendant for execution in accordance with the will; in pursuance of the deceased's wishes, the Executors (Absolom Sekabira, 2nd Plaintiff, Musoke Sulaiman, 1st Defendant and Christopher Mukasa) obtained Letters of Administration vide Administration Cause No. 327/2007 and started administering the deceased's Estate; in as much as some property was distributed in accordance with the deceased's will, the trustees particularly Absolom Sekabira, 2nd Plaintiff and Sulaiman Musoke, 1st Defendant hatched fraudulent plans and or colluded and intermeddled in most of the deceased's Estate with intent to defraud the same contrary to the will and to the detriment of most of the beneficiaries; the 2nd Defendant had a right to sell his beneficial share and interest in his father's Estate; the registration of the Plaintiffs on the certificates of title for land comprised in Kyagwe Block 386 Plots 5, 12 and 13 was fraudulent in as far as the same was bequeathed to the Defendants and other beneficiaries of the Estate of Geresom Zziwa which the Plaintiffs were aware of; the Plaintiffs who are not the Administrators and or legal representatives of the Estate of the late Musa Kanamwangi have no locus standi to lay claim on the suit land which was not part of his Estate at the time of his death and the registration of the suit land into the Plaintiffs' individual names was done illegally and or fraudulently; the 2nd-4th Defendants as the children and the beneficiaries of the Estate of their late father Geresom Zziwa are the rightful owners of the land and properties left by the deceased as per his will dated 29/09/1993.



Defendants' Counterclaim

In the Counter-claim, the Defendants seek for: a declaration that the Defendants are
5 rightful beneficiaries of the disputed land comprised in Kyagwe Block 386 Plots 5,
12 and 13 situate at Sai which was illegally, unlawfully and fraudulently registered
in the names of the Plaintiffs, an order for cancellation of the Plaintiffs names from
the named certificates of title, mesne profits, general damages plus costs of the suit.

10 It is their claim that: they are all children/beneficiaries of the Estate of the late
Geresom Zziwa; at all material times, their late father was the sole registered
proprietor of the suit land comprised in Kyagwe Block 386 Plots 5, 12 and 13 among
other properties; upon his demise, the deceased left a will clearly distributing his
property and left custody of his properties and certificates of title in the hands of the
15 1st Defendant for execution in accordance with the will; however, in as much as some
property was distributed in accordance with the deceased's will, the trustees who
included Sulaiman Musoke, 1st Defendant and Absolom Sekabira, 2nd Plaintiff
connived, hatched fraudulent plans and or colluded with the Plaintiffs/Counter-
Defendants herein and intermeddled in most of the deceased's Estate with intent to
20 defraud the same contrary to the will and to the detriment of most of the
beneficiaries; the Counter-Defendant's actions and conduct are illegal, fraudulent
and unlawful in as far as they constitute intermeddling in the Estate of the deceased;
the Plaintiffs/Counter-Defendants have on several occasions fabricated cases against
the Counter-Claimants and other beneficiaries to deter, intimidate and threaten them
25 from pursuing their interests and that of other Defendants; as a result of the threats,
harassment and intimidation they have suffered great loss, inconvenience and grief
to which they will seek general damages among others.

During the pendency of the two suits, some parties passed away and these are:
30 Absolom Sekabira (2nd Plaintiff in C.S No.241/2012 & 2nd Defendant in C.S No.483
of 2012), Musoke Sulaiman (1st Defendant in C.S No.241/2012 and 5th Defendant in
C.S No. 483 of 2012), Yowasi Mukasa (1st Defendant in C.S. No. 483/2012) and
Livingstone Lwanga (6th Defendant in C.S No.483/2012). Therefore, this case Civil
Suit No.241/2012 shall proceed only in respect of 2nd-3rd Plaintiffs/Counter-
35 Defendants and 2nd-4th Defendants/Counter-claimants.



Representation

At the hearing of the suit, the Plaintiffs were represented by Counsel Stanley Kawalya while the Defendants were represented by Counsel Ambrose Tebyasa.

Issues

The following issues were raised for Court's determination: -

- 1. Whether the Plaintiffs are the rightful owners of the suit land.*
- 2. Whether the Defendants are trespassers on the suit land.*
- 3. Whether the Plaintiffs fraudulently acquired the suit land*
- 4. Whether the 3rd & 4th Defendants rightfully lodged a caveat on the suit land.*
- 5. What remedies are available to the parties?*

Having reviewed the pleadings and evidence of the parties, I find it necessary to add a sixth issue. This arises by implication from the Plaintiffs' amended plaint of 2020 and needs to be addressed in order to completely dispose of the controversy between the parties. This issue is added pursuant to O.15 r.5(1) of the Civil Procedure Rules, and is:

Issue No.6

Whether the suit land forms part of the Estate of the late Musa Kanamwingi

The Plaintiffs called three witness to prove their case against the Defendants. Kefa Kyambadde, the 3rd Plaintiff (PW1), Nakiwu Esther, the 1st Plaintiff (PW2) and Sentongo Joshua (PW3). The three witnesses were cross examined on their witness statements.

The Defendants on the other hand called three witness to defend the case. Mbazira Dickson, the 4th Defendant (DW1), Namirimu Ruth, the 3rd Defendant (DW2) and Kisakye Richard, the 2nd Defendant (DW3). The three witnesses were cross examined on their witness statements.



In addition, Court summoned Mr. Wamala Ali, the Registrar of Titles, Mukono Zonal Office as a Court witness.

Locus in quo

5 Court visited locus and observed that: the Plaintiffs (PW1) and (PW2) have no developments on the suit land; Mbazira Dickson (DW1) has a home, banana and coffee plantation on Plot 13; the Defendants have a house that belongs to their late father Geresom Zziwa, it is a very old house built in 1960s, all the Defendants were
10 born from it and is occupied by the son of DW3; there is a burial ground belonging to all the relatives of the late Musa Kanamwangi; Plot 12 is used for digging by the Defendants; Plot 5 has sugarcane plantation of Namirimu Ruth (DW2); and the house of the late Kanamwangi on the suit land (Plot 13).

15 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

I will resolve the issues in the following order 6, 1&3, 2, 4 and 5.

Issue 6: Whether the suit land forms part of the Estate of the late Musa Kanamwangi.

20 The unchallenged evidence of the 3rd Plaintiff (PW1) is that the original owner of the suit land was the late Musa Kanamwangi who acquired it in 1962. That the suit
25 land then was comprised in Kyaggwe Block 386 Plot 4 measuring 54.2 acres. That the late Musa Kanamwangi left a will and codicil bequeathing the suit land amongst his children and also prescribing 20 acres to be left for burial grounds. That two years after Kanamwangi's death in 1986, one of his sons Geresom Zziwa
30 fraudulently transferred the certificates of title for the suit land into his names without the knowledge of the Plaintiffs. That the Plaintiffs discovered that the late Geresom Zziwa had fraudulently transferred the suit land into his names in 2008. That upon the said discovery, the Plaintiffs filed a suit in 2010 against the Executors of the will of Geresom Zziwa for cancellation of their names on the title and an order
35 was issued by Justice Opio Aweri wherein Court ordered that the land title be transferred into their names as surviving children of the late Musa Kanamwangi.

PW1's evidence was corroborated by the evidence of PW2 because their evidence in the witness statements was the same.

5 In cross-examination, PW2 informed Court that she knew of the transfer from her father to Geresom Zziwa but did not remember the date. That she knew that the transfer can be affected long after the deceased's death. That she did not remember whether the grant of letters of Administration to the Estate of the late Geresom Zziwa was returned to Nakawa Court. She confirmed that before the death of Geresom
10 Zziwa in 1993, the titles for the suit land Kyagwe Block 386 Plots 5, 12 & 13 were registered in his names. She further informed Court they did not take out a case to challenge his registration on the certificates for the suit land because they were ignorant of how to proceed. Regarding the Court Order in M.C No.267/2010, PW2 stated that she was not in Court so she could not explain more about it.

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The Defendants' evidence especially that of DW2 was that the late Geresom Zziwa was their father who died testate around the month of October 1993 and his will was read out to the family in December 1993 by a one Kakumirizi Vincent. That in the said will their late father distributed out his property especially land to all his
20 children and widows, his sister Nakiwu Esther, brothers Absolom Sekabira and Kefa Kyambadde-Plaintiff were present at the ceremony. That after the reading out of the will, the said Kakumirizi went out to ask if there was any person dissatisfied with the deceased's will and all the relatives including the Plaintiffs were contended with their fathers will. That the Executors distributed all the properties excluding Kyagwe
25 Block 386 Plots 5, 12 and 13 which required Letters of Administration, which Letters were acquired in 2008. That after obtaining the Letters of Administration, the Defendants demanded for their shares from the Executors but in vain. That when they decided to check in Mukono Lands office, they discovered that all the titles were already transferred into the names of the Plaintiffs and another person Yowasi
30 Mukasa using a Court Order purportedly issued by the High Court Land Division. That when they confronted Sulaiman Musoke one of the Executors, he told them that the titles were forcefully taken from him by the Plaintiffs claiming that they were theirs. That when they inquired about the authenticity of the Court Order in M.C No.267/2010, they were informed by High Court Land Division that the suit
35 was non-existent in the records. That upon perusing the files, they established that Plot 5 was transferred into the names of the Plaintiffs from the names of her late

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father Geresom Zziwa when he was already dead. That for Plots 12 and 13 they established that they were transferred into the names of the Plaintiffs from the names of the Administrators of their Father's Estate yet none of them is a child or a beneficiary to that land. That they (2nd - 4th Defendants) are biological children to the late Geresom Zziwa and entitled to his Estate land comprised in Kyagwe Block 386 Plots 5, 12 and 13.

DW2's evidence was corroborated by the evidence of DW1 and DW3 which was to the effect that the suit land belonged to the Estate of their late father who died testate in 1993. That in his will he distributed the suit land to the Defendants and other beneficiaries. That without their consent, the Plaintiffs transferred the suit land into their names yet they were not beneficiaries of the Estate of their late father.

Court's Decision

In this case, what is not in dispute is that the suit land initially belonged to the late Musa Kanamwangi who died testate in 1984 and left the will and its codicil dated 1963 and 1964 respectively.

There is no evidence on record to show that the Plaintiffs or any other person have the grant of probate/Letters of Administration for the Estate of the late Musa Kanamwangi.

PW1 and PW2 informed Court that they discovered that their late brother Geresom Zziwa had fraudulently transferred the suit land from her late father's names into his names in 2008. PW2 told Court that before the death of Geresom Zziwa in 1993, the titles for the suit land Kyagwe Block 386 Plots 5, 12 & 13 were registered in his names. She further informed Court they did not take out a case to challenge his registration on the certificates for the suit land because they were ignorant of how to proceed.

This Court notes that in order to challenge the registration of the Executors of the will of the late Geresom Zziwa on Plots 12 & 13, the Plaintiffs in 2010 purportedly filed Miscellaneous Cause No. 267 of 2010 against the two Executors for cancellation of their names from the title.

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For Plot 5, the Plaintiffs purported to transfer it directly from the name of the late Geresom Zziwa into their names, which was illegal.

- 5 For avoidance of doubt, the land comprised in Kyagwe Block 386 Plots 5,12 and 13 does not form part of the Estate of the late Musa Kanamwingi. The suit land forms part of the Estate of the late Geresom Zziwa. Issue 6 is answered in the negative.

Issue: 1 Whether the Plaintiffs are lawful owners of the suit land

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and

Issue 3: Whether the Plaintiffs fraudulently acquired the suit land

Plaintiffs' submissions

- 15 With regard to the Plaintiffs' registration on Kyagwe Block 386 Plot 5, Counsel for the Plaintiffs did not specifically address this issue in his submissions. He did not guide Court on how the late Geresom Zziwa who died in 1993 transferred the title for Plot 5 into the Plaintiffs name and two others in 2008. What is clear from CWEX1 is that the Plaintiffs got registered on the title without using a Court Order PEX5.
20 According to CW1, the Plaintiffs used a direct transfer from Geresom Zziwa into their names

- With regard to the Plaintiffs' acquisition and registration on Kyaggwe Block 386 Plots 12& 13, Counsel for Plaintiffs never addressed Court as to why the Plaintiffs
25 acquired and got registered on the certificate of title for Plots 12 and 13 using a transfer from the Administrators/Executors of the late Geresom Zziwa yet they were not children or beneficiaries to his Estate.

Defendants' submissions

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- With regard to Kyagwe Block Plot 5, Counsel for the Defendants submitted that the acquisition and registration of the Certificate of Title for Plot 5 were illegal and or fraudulent and that the entry of their names on the Certificate of Title ought to be cancelled because they were registered on the title for Kyagwe Block 386 Plot 5 on
35 31/07/2008 by a direct transfer from the names of Geresom Zziwa who had died over 10 years. Counsel further submitted that PW2 confirmed in her testimony

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during cross examination that Geresom Zziwa never transferred the suit land into their names. She claimed that they got the transfer from the Administrators of the Estate yet the Administrators were not registered on the Certificate of Title for Plot 5.

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With regard to Kyagwe Block 386 Plots 12 and 13, Counsel for the Defendants submitted that the Defendants led evidence to prove that the Plaintiffs had no interest in the suit land since they were not children or beneficiaries of the Estate of the late Geresom Zziwa. That this evidence was confirmed by PW2 who stated in her cross-examination that they (Plaintiffs) were not beneficiaries of the Estate of Geresom Zziwa and that the late Geresom Zziwa did not give the suit land to any of them in his will.

Counsel for the Defendants submitted that for Plots 12 and 13 it is evident that on the Certificate of title CWEX2/PEX1 that the transfer was effected by the Administrators of the Estate of the late Geresom Zziwa. That however, as stated in paragraphs 2-4, 6-10 of DW2's witness statement and DEX1 & DEX2, Geresom Zziwa died testate and distributed the suit land to his children, the Defendants. That PW2 conceded in cross-examination that none of the Plaintiffs was a child or beneficiary to the Estate of the late Geresom Zziwa and that he did not give the suit land to any of them.

Counsel also submitted that the entry of the proprietorship of the Plaintiffs on the certificate of title for Plots 12 and 13 reveal that the same was registered on 14/04/2011. That however as Court may have noted, when it visited locus in quo, one of the co-registered proprietors on plots 12 and 13 Yowasi Mukasa died on 28/08/2009.

Counsel submitted in addition that the transfer of the land to the Plaintiffs who are/were not beneficiaries or children of the late Geresom Zziwa in total disregard of his will was both illegal, fraudulent and contrary to the provisions of **Section 74 of the Succession Act** as amended.

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Court's decision

To prove the ownership of the suit land, the Plaintiffs adduced the evidence of Certificates of the Title for Plots 5, 12 and 13 registered in their personal names as per PEX1.

According to **Section 59 of the Registration of Titles Act Cap 230**

"No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all Courts as evidence of particulars set forth in the certificate and of entry of the certificate in the register book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any Estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that Estate or interest or has that power".

However, the provisions of **Section 59 of the Act** reproduced above is fettered by the provision of **Section 176 of the Registration of Titles Act**, the relevant part whereof is as follows: -

"176 Registered proprietor protected against ejectment except in certain cases

No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases-

(a)...

(b)...

(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud"

In the case of **Haji Numani Akulamusa Vs Friends Estates Limited C.A.C.A No.104 of 2018** Court cited with approval the case of **Hariprasad Ramabai Patel**

Vs Babubhai Kalidas Patel H.C.C.S No.981 of 1990 where Karokora J (as he then was) stated as follows:

5 *"A certificate of title is conclusive evidence of ownership of the suit property. No submission or oral evidence can be called to vary the certificate of title unless fraud, lack of consideration or illegality is proved".*

Also in the case of **Kampala Bottlers Ltd Vs Damanico (U) Ltd SCCA No.22 of 1992**, Wambuzi CJ cited with approval, the holding by Odoki J as he then was in **Robert Lusweswe Vs Kasule & Anor H.C.C.S No.1010 of 1983** on the effect of fraud in land acquisition. He stated that for the plea of fraud to succeed,

10 *"... .. fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known such act by somebody else and taken advantage of such act".*

15 In the instant case, the registration of the Plaintiffs on the suit land Certificates of Title as registered owners was challenged by the Defendants on ground of fraud and or illegality. In their Counter-claim, the Counterclaimants/Defendants particularized fraud as follows:-

"Particulars of fraud

- 20 (i) *Using their position of elders in the clan to unlawfully enter upon the late Geresom Zziwa's certificates with intent to defraud.*
- 25 (ii) *Conniving, intimidating and or hoodwinking some of the Administrators of the late Geresom Zziwa's Estate purposely to defraud the suit property.*
- 30 (iii) *Obtaining registration of the suit land into their names when they are not part of the beneficiaries of the Estate of Geresom Zziwa.*
- 35 (iv) *Fabricating an order of Court and or using a non-existent Court order to obtain registration on Certificate of Title for Kyagwe Block 386 Plots 12 and 13.*
- (v) *Obtaining registration to the suit land comprised in Kyaggwe Block 386 Plot 5 from the names of Geresom Zziwa in 2008 when he was long deceased into their names without any transfer instrument from the deceased person.*



(vi) *Betraying and using their fiduciary position to intermeddle into the Estate of the late Geresom Zziwa to the detriment of the beneficiaries.*

(vii) *The Plaintiffs/ Counter-Defendants obtaining registration of the suit land into their personal names and laying claims to the same as beneficiaries of the Estate of the late Musa Kanamwangi when it was not part of his Estate and without any grant to any of them in respect of Musa Kanamwangi's Estate."*

Plaintiffs' acquisition and registration on Kyagwe Block 386 Plot 5

I have perused the Certificate of Title for Plot 5 CWEX1 and observe that before the Plaintiffs' registration, the registered proprietor was the late Geresom Zziwa and by 2008 he was long dead. The Registrar of titles CW informed Court that the Plaintiffs got registered on the title for Plot 5 on 31/07/2008 under Instrument Number MKO95742 and that it was a transfer from the late Geresom Zziwa. CW1 further informed Court that the transfer was not by a Court Order but by an ordinary transfer. PW2 also confirmed in her cross examination that Zziwa never transferred the suit land into their names. That they got the transfer from the Administrators of the Estate of the late Geresom Zziwa. I also note that the Administrators of the Estate of the late Geresom Zziwa were never registered on the title for Plot 5 as alleged by PW2 in her evidence.

What is clear as per CWEX1, which is a Certificate of Title for Plot 5 is that the Plaintiffs got registered on the title without using a Court Order. According to CW1, the Plaintiffs used a direct transfer from the late Geresom Zziwa into their names. The question that begs an answer is how did Geresom Zziwa who died in 1993 sign a direct transfer form for plot 5 in favour of the Plaintiffs and two others in 2008?

There is no evidence from the Plaintiffs regarding how the deceased person executed a transfer form in their favour.

Without the evidence to the contrary, I find that the Plaintiffs registration on Kyagwe Block 386 Plot 5 was tainted with illegalities and fraudulent which this Honourable 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.

Having found that the Plaintiffs' registration on Plot 5 was tainted with illegalities and fraudulent, an order is issued directing the Commissioner Land Registration to cancel the names of Nakiwu Esther, Yowasi Mukasa, Absolom Sekabira and Kefa Kyambadde from the title of Kyagwe Block 386 Plot 5 at Sai and re-instate the names of Geresom Zziwa as a registered proprietor.

10 Plaintiffs' acquisition and registration on Kyagwe Block 386 Plots 12 & 13

With regard to Kyagwe Block 386 Plots 12 and 13 (PEX1), I note that before the Plaintiffs got registered on it, the same was registered in the names of the Administrators of the Estate of the late Geresom Zziwa. I have already held in issue 6 that the suit land formed part of the Estate of the late Geresom Zziwa for reasons aforementioned. This therefore means that anybody to acquire any interest in the suit land (Plots 12 and 13) must follow Succession Law.

It is not in dispute that the late Geresom Zziwa died testate leaving a will which bequeathed the suit land among other properties to his beneficiaries and the will was admitted in evidence as DEX1. The said will was confirmed by the High Court vide Administration Cause No.327/2007. I have not found any Court Order challenging the will and probate/Letters of Administration for the Estate of the late Geresom Zziwa. According to the translated version of the will, the suit land was among others was bequeathed to Kisakye Richard, the 2nd Defendant, Mbaziira Dickson, the 4th Defendant and his siblings.

The Plaintiffs who are not the children and or beneficiaries according to the late Geresom's will have not adduced evidence of how they acquired the interest in the suit land Plots 12 and 13. There is no evidence that the Defendants as beneficiaries of the Estate of the Geresom Zziwa consented to the transfer of Plots 12 and 13 since the same was bequeathed to them in the will.

A will is the last testamentary disposition of the wishes of a deceased person. Under **Section 74 of the Succession Act Cap 162**, the intention of the testator is not to be set aside because it cannot take effect to full extent but effect is to be given to it as

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far as possible. **See: Paulo Kaweesa Vs The Administrator General & 3 Others H.C.C.S No.918 of 1993.**

In the instant case, the intention of the testator was that the suit land should be given to the Defendants among others. This intention as reflected in the deceased's will has never been set aside by anybody including the Plaintiffs. As such, any transaction on the suit land required the consent of the Defendants as beneficial owners of the suit land. Therefore, in the absence of evidence to the contrary, I find that the transfer from the Administrators to the Plaintiffs was unlawful and or fraudulent contrary to **Section 74 of the Succession Act** as submitted by Counsel for the Defendants.

An order therefore is issued directing the Commissioner Land Registration to cancel the names of the Plaintiffs and any other persons from the Certificate of title for Kyagwe Block 386 Plot 12 and 13 and reinstate the names of Geresom Zziwa as a registered proprietor.

Issue 1 is answered in the negative while issue 3 is answered in the affirmative.

Issue 2: Whether the Defendants are trespassers on the suit land.

The law on trespass to land was clearly stated in the case of **Justine E.M.N Lutaaya Vs Stirling Civil Engineering Company SCCA No.11 Of 2002** as follows:-

"Trespass to land occurs when a person makes unauthorized entry upon the land and thereby interferes or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass."

To prove trespass, the Court in the case of **Sheik H Mohamed Lubowa Vs Kitaka Enterprises Civil Appeal No.4 Of 1987 (SC)** held that;

"It is incumbent on the Appellant to prove that the disputed land belonged to him. That the Respondent entered upon that land and entry was unlawful in that it was made without permission or that the Respondent had no claim or interest in the land."



In the instant case as per the holding in Lutaya's case, the only person to sue for trespass is a person who is in possession of the suit land. The Plaintiffs led no evidence to prove that they were in possession of the suit land before they filed the suit. Apart from being registered on the certificates of title for the suit land which registration is being challenged by the Defendants in their written Statement of Defence and Counterclaim, the Plaintiffs have never been in possession of the suit land. By the time the Plaintiffs got registered on the Certificates of title for the suit land, the Defendants and other children of the Estate of the late Geresom Zziwa were already in occupation of the suit land.

Even when Court visited the locus in quo, it observed that the Plaintiffs have never been in possession of the suit land neither do they have any development on the land. On the contrary, Court observed that the Defendants who are children and beneficiaries in the Estate of the late Geresom Zziwa are in possession of the suit land. There is a house of the late Geresom Zziwa on Plot 13 which was built in 1960s and the same is being utilized by the beneficiaries of his Estate, Namirimu Ruth, the 3rd Defendant (daughter of the late Gersom Zziwa) has a sugar cane plantation on Plot 5

On this issue, having held in issue 6 that the suit land belonged to the Estate of the late Geresom Zziwa, it follows therefore that they are not trespassers on the same. A person cannot be a trespasser on his/her own property. For avoidance of doubt, the suit land belongs to the Estate of the late Geresom Zziwa. Issue 2 is answered in the negative.

Issue 4: Whether the 3rd & 4th Defendants rightfully lodged a caveat on the suit land.

Section 139 of the Registration of Titles Act Cap 230 provides that any beneficiary claiming an interest in the land may lodge a caveat with the Registrar of Titles forbidding the registration of any person as a transferee or proprietor of any instrument affecting the interest until after the notice of the intended registration is given to the caveator.

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

For a caveat to be valid, the caveator must have a protectable interest legal or equitable to be protected by a caveat otherwise the caveat would be invalid. See: the case of **Simon Kataabu Vs Richard Simbwa A& Anor H.C.M.C No. 121 of 2020**

5 It is not in dispute that the 3rd and 4th Defendants are children and beneficiaries of the Estate of the late Geresom Zziwa and having held that the suit land belongs to his Estate, it follows therefore that the 3rd and 4th Defendants rightfully lodged a caveat as beneficiaries to the Estate of the late Geresom Zziwa to protect their beneficial interests. Issue 4 is answered in the affirmative.

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Issue 5: What remedies are available to the parties.

With regard to remedies, I find that the Plaintiffs have failed to prove the case against the Defendants. The Plaintiffs suit is dismissed with no orders as to costs because
15 these are close relatives.

The Defendants/Counter-Claimants have proved their case against the Plaintiffs/Counter-Defendants and judgment in the Counterclaim is entered in following terms:-

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(a) A declaration is made that the suit land comprised in Kyagwe Block 386 Plots 5, 12 and 13 forms part of the Estate of the late Geresom Zziwa.

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(b) A declaration is made that the Plaintiffs/Counter-Defendants' acquisition and registration on the certificates of title for Kyaggwe Block 386 Plots 5, 12 and 13 was procured illegally and or fraudulently.

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(c) An order is issued directing the Commissioner Land Registration to cancel the names of the Plaintiffs/Counter-Defendants and any other person from the Certificates of Title for Kyaggwe Block 386 Plots 5, 12 and 13 and reinstate the name of Geresom Zziwa.

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(d) An order is issued against the Plaintiffs/Counter-Defendants to give vacant possession to the Defendants/Counter-Claimants.

(e) An order of eviction is issued against the Plaintiffs/Counter-Defendants, their agents and anyone claiming under them from the suit land.



(f) A permanent injunction is granted restraining the Plaintiffs/Counter-Defendants and their agents from interfering with/ dealing in the suit land.

5 (g) The Prayer for general damages and interest on general damages are denied because they were not proved.

(h) The prayer for mesne profits is denied because they were not proved.

10 (i) No order is made as to costs.

Dated at Kampala this 16th day of January 2023.

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

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