THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CS -117-2012

ADE KAGUMAHO :: PLAINTIFF

VERSUS

1. **EDITA NAMIREMBE NSUBUGA**
   (ADMINISTRATRIX OF THE
   ESTATE OF TRYPHENA NALULE)

2. **ZION CONSTRUCTION LIMITED ::::::::::::::::::::::: DEFENDANTS**

BEFORE: HON. JUSTICE. DR. FLAVIAN ZEIJA

JUDGMENT

The background of the matter is that the Plaintiff sued the Defendants for fraud and specific performance. The Plaintiff alleges that she entered into a sale agreement of four acres of land comprised in Kyadondo Block 166 Plot 265 located at Namulonge and Kabubu (herein referred to as the disputed land) at a consideration of UGX. 28 Million (Twenty-Eight Million Shillings). That despite paying the full purchase price and taking possession of the disputed land, the 1st Defendant's predecessor in title Tryphena Nalule (deceased) never availed the certificate of title and instead fraudulently and knowingly connived and executed another sale agreement with the

2nd Defendant. That the 2nd Defendant forcefully and unlawfully entered on the suit land, demolished the Plaintiff's buildings and crops and subdivided the suit land.

The 2nd Defendant filed a Written Statement of Defence denying all the Plaintiff's allegations and put up a Counter Claim alleging that the Plaintiff purchased the suit land without proper verification and in the process trespassed on its land which it had legally and lawfully acquired.

The plaintiff replied to the counter claim and denied all the allegations contained therein. However, the matter suffered a series of adjournments and on 6th February 2018 the trial judge, in a bid to curtail further delay, directed the parties to file their respective trial bundles, witness statements and joint scheduling memorandum, which the parties did. On 7th June 2018 when the matter came up for cross examination of the Plaintiff's witnesses, the trial judge found that the person who was representing the Plaintiff did not have a practicing certificate. The trial judge, in the absence of Counsel for the 2nd Defendant forwarded the matter to the Registrar for re-allocation to another judge.

On 24th October 2019 the matter again came up for hearing but the Defendants were absent. Court directed fresh hearing notices to be issued against the 2nd Defendant which was later done. On 8th November 2019 Counsel for the Plaintiff prayed to serve the Defendants by substituted service which prayer the court granted. Still, the Defendants did not appear in court on the adjourned date, court allowed the Plaintiff to proceed ex-parte. All the Plaintiff's witnesses led their evidence and the Plaintiff's case was closed on 29th November 2019. Almost before judgement could be delivered, the 2nd Defendant instituted an application to set aside the ex-parte proceedings on grounds of ineffective service. Court found that the Defendants were desirous of defending the matter given that they had already filed their Defence and Counter-Claim and so in the interest of justice, the application to hear the case inter-parties was allowed.

It is therefore a series of these events that account for the delay of over 10 years in this case.

Representation

The Plaintiff was represented by M/s Mushabe, Mununguu & Co. Advocates. The 1st Defendant was represented by Kawalya & Co. Advocates. The 2nd Defendant was represented by Sseguya & Co. Legal Consultants.

Preliminary points of law

Counsel for the Plaintiff raised a preliminary objection to the effect that the 1st Defendant who is the administratrix of the estate of the Late Tryphena Nalule cannot in law delegate her powers to her sister DW1 by way of Powers of Attorney because she is a delegate herself. The rationale of section 264 of the Succession Act which I believe is the basis for this preliminary objection is that it was intended to shield away persons not clothed with legal power from exposing estates of deceased persons to the far reaching repercussions of court processes. Such persons however do not include 'duly authorized attorneys.' Order 3 rule 2 of the Civil Procedure Rules is conclusive on court action by recognized agents. It states;

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

and

...

The Plaintiff's preliminary point of law is therefore without basis in law and fails. DW1 is in law a recognized Agent.

I have also taken note of the Plaintiff's preliminary objection in respect to *"Hearsay Evidence"*. I am however of the view that arguments in that respect will be considered while analyzing the evidence as a whole. I now turn to determine the merits of this suit.

Issues

In my view, the cardinal issues for this court's determination are;

a) **Who is the rightful owner of the disputed land?**

b) **What remedies are available to the parties?**

Issue 1: **Who is the rightful owner of the disputed land?**

PW1 (Plaintiff) in his sworn witness statement testified that she made a search in the land registry for Kyadondo Block 166 Plot 265 land at Namuloge, Kabubu with the help of a one Kagodo of Zion Constructions Limited and by letter dated July 15, 2010 (Exhibit P5 attached to the Plaintiff's trial bundle) it was confirmed that the land was unencumbered and the registered proprietor was Tryphena Nalule. That on September 16, 2010 she entered into a sale agreement (Exhibit P3 attached to the Plaintiff's trial bundle) with Tryphena Nalule (deceased) for the purchase of land comprised in Block 166 Plot 265 measuring approximately 4 acres at a price of UGX. 28,000,000 (Twenty-Eight Million Shillings) each at UGX. 7,000,000 (Seven Million Shillings). That with the help of a surveyor she put mark stones, fenced off the land with the help of the neighbors and the LCs. That in January 2011 she contacted the seller Tryphena Nalule for purposes of transferring the suit land but she kept on ignoring her and instead referred her to her lawyer called Brian Kagwa. That she contacted the said lawyer in vain, only for the seller to again refer her to the seller's son named Dr. Nsubuga Isaac who was working at Kampala Hospital. The said Dr. Nsubuga also became evasive and later informed her that the land she purchased belonged to his brother and it had therefore been allocated to her wrongly. This prompted her to report the said seller (Tryphena Nalule) to the Central Police Station under CPS/SD/81/11/01/2011. The matter was temporarily resolved at that level, she started developing the land uninterrupted until 22nd July 2011 when she received a call from one of her workers that unknown people had demolished her structure and went away with items like cement and other equipment. She immediately reported the matter to Kasangati Police Station under ref: 29/22/07/2011. On consulting with the Lands Office, it later emerged that Zion Construction proprietor Kagodo had taken over the land and had also transferred the land title into the 2nd Defendant's names. She lodged a caveat on the title which had then changed to Plot 266 from Plot 265.

During cross examination, PW1 maintained that she purchased the suit land for 28 million shillings in September 2010 when the land did not have any squatters and at the time of agreement, the 1st Defendant handed over mutation and transfer forms but did not handover the Certificate of Title. That the seller Tryphena Nalule (deceased) is the one that introduced her to Kagodo, the proprietor of Zion Construction Ltd who indeed helped her in conducting a search which revealed that Tryphena Nalule was indeed the registered proprietor. That the said Tryphena Nalule showed her the purchased 4 acres out the 386 acres that she owned and also showed her the part which Zion Construction Limited had bought and was already graded in the presence of the LC1 Chairman. That she graded and fenced off the land before getting title and nobody challenged her immediately after taking posession.

PW2 stated that he was contracted by the Plaintiff to construct for her the commercial building on the disputed land and he hired 6 other constructors to help with the job. He found on the land other men who had been allowed by the Plaintiff to grow maize, beans and stay on the land while the construction went on. That when the house had reached the beam and cementing and installation of windows and doors was the only thing remaining, he was called by one Nsubuga (mason) that men had come on the instructions of Kagodo of Zion Construction Ltd and demolished the building and carried away materials like doors and iron sheets which had already been fitted on the building. He immediately arrived at the site and confirmed that indeed the building was demolished whereupon he contacted the Plaintiff. PW2 testified that they had spent UGX. 15,000,000 (Fifteen Million Shillings) on construction as at the date of the demolition. That he arrived at this figure considering the money that was given him to buy sand and cement, including labor.

PW3 who stated that he is a registered valuer holding a Doctorate Degree in Economics, a Masters Degree in Economics and Doctorate in Valuation from the university of Moscow, by his sworn statement, testified that in July 2011 he was contracted by the Plaintiff to inspect and do a valuation survey of the suit land. He visited the site to inspect, assess and value it. That after assessing and analyzing all factors surrounding the said property, he arrived at a market value of UGX. 209, 866,000 (Two Hundred Nine Million Eight Hundred Sixty-Six Thousand Shillings) as of the year 2011. During cross examination however, he stated that the value has

since changed due to the evolution in time and it stood at UGX. 686, 498,000 as of 2018. He confirmed that as at the time of the first valuation, there was a destroyed structure on the suit land, the windows, doors and iron sheets had been plundered and the crops had been destroyed. Asked whether his valuation was based on what he was told, the witness maintained that he personally saw the wreckage and destroyed crops. In re-examination, PW3 was unable to estimate the current value of the suit property but explained that as a matter of course, when updating the market value of property, he considers the original value and tabulates it in the table using District Land Board rates.

DW1, who is a sister to the 1st Defendant with Powers of Attorney to represent her, conceded during cross examination that she was not present when the sale of the disputed land was being effected and neither was she witness to the agreement. She did not know whether her Late Mother showed the Plaintiff the land she was supposed to occupy and she was unaware whether the Plaintiff had constructed any structure on the disputed land. Largely, DW1's testimony was based on the contents of the sale agreement which she is said to have looked at.

DW2, a brother to the 1st Defendant testified that he was not present at the time of executing the sale agreement between his late mother and the Plaintiff although he witnessed it afterwards. He expressed no knowledge of what particular portion of land the Plaintiff had been sold.

Both DW1 and DW2 testified that the Plaintiff forcefully took possession of the vacant plot (now disputed land) yet the same had already been purchased by the 2nd Defendant. That the Plaintiff should have waited for their late mother to first compensate and remove squatters in accordance with agreement instead of allocating herself the vacant portion of the total 368 acres which the 2nd Defendant had already secured after compensating squatters. That the Plaintiff was at all material times aware of the 2nd Defendant's interest in the disputed land at the time of purchase and she actually consulted the 2nd Defendant's officials who assured her that they had kept the 1st Defendant's certificate of title pending completion of subdivision.

DW3 testified that by agreement dated 15th July 2010, the 2nd Defendant entered into a sales transaction with Tryphena Nalule (1st Defendant's predecessor in title) for a portion of land measuring 150 acres to be surveyed from the seller's 368 acres. At the time, the portion in which the 2nd Defendant had interest was occupied by squatters who were compensated and vacated. When the squatters vacated, the 2nd Defendant proceeded to formally survey off its part which became Block 166 Plot 267. That pending the final subdivision process, the Plaintiff consulted and obtained a photocopy of the Certificate of Title from the 2nd Defendant's officials whereupon she was satisfied that the Late Tryphena Nalule was the registered proprietor. That the Plaintiff who had paid for the residual part of the land resorted to distorting and removing mark stones which prompted the 2nd Defendant to report to police. DW3 attached an apology letter dated 27th July 2011 to his witness statement wherein the Plaintiff apologized for her actions. That having reconciled, the 2nd Defendant incurred significant sums in paying the surveyor, hiring a tractor and low bed loader to carry the tractors and fuel for three days in restoring the distorted marks. During cross examination, DW3 denied knowing who demolished the Plaintiff's structures or evicted the Plaintiff from the disputed land.

DW4 testified that he was one of the many bibanja holders who were compensated by the 2nd Defendant to vacate the disputed land. That after being compensated, he personally relocated to another place about 150 metres away from the suit land after which the 2nd Defendant began subdividing, planting mark stones, grading and creating access roads. DW4 attached an agreement (Exhibit D8) showing that the 2nd Defendant had compensated him 3 million shillings to relinquish his kibanja interest. When asked at what level the Plaintiff's structure had reached when it was destroyed, DW4 stated that it was at window level.

The testimony of DW5 the LC1 Chairperson of Nalumuli, Nakyesasa, Kikolo Parish, Busukuma Sub County where the suit land is situated was that the disputed portion of the land was originally occupied by squatters who included Bena Nakasi, Nabaggala Robinah, Ali Senyonga, Agnes Nakiryowa, Kiyingi Godfrey, Butela Geofrey among others who were compensated by the 2nd Defendant and vacated. That when the said bibanja occupants vacated, the 2nd Defendant graded, leveled and created an access road, planted mark stones for its sub plots. That he later noticed a building being hurriedly constructed and mistook it to belong to one of the 2nd

Defendant's clients only to find out later that the construction was being done by the Plaintiff. DW5 however confirmed that the building structure on the suit land had reached window level. At locus, DW5 confirmed that indeed, there was a building structure on the suit land which was demolished by persons unknown to him.

Decision

On the whole, both Defendants by their own evidence do not dispute the fact that the Plaintiff purchased a portion of land measuring 4 acres which was to be cut from the wider 368 acres comprised in Kyadondo Block 166 Plot 265 land at Namuloge and Kabubu. The only unanswered question is whether the said 4 acres are constituted in the disputed land as pleaded by the Plaintiff or part of the residual land after cutting off the 2nd Defendant's 150 acres. Both the Plaintiff and 2nd Defendant produced sale agreements in their evidence in support of their cases. The 1st agreement dated **16th September 2010** was between the Plaintiff and Tryphena Nalule (deceased predecessor in title to the 1st Defendant). Therein, the subject matter was 4 acres out the entire land comprised in Kyadondo Block 166 Plot 265 at Namulonge and Kabubu.

The 2nd agreement dated **15th July 2010** was entered between the 2nd Defendant and Tryphena Nalule for 150 acres, also to be surveyed and cut off from the same Kyadondo Block 166 Plot 265. Clause 6(b) of this particular agreement provides that the Vendor had shown the Purchaser and the latter had identified and appreciated the location where it will survey its part. Apart from the Plaintiff's testimony, there is no similar provision in the agreement of 16th September 2010 to satisfy that indeed the late Tryphena Nalule showed the Plaintiff which portion of the land she was to survey off. And this is what appears to be the pivotal point of contention. I do not think however that the plaintiff dreamt of the location of the land without the 1st defendant showing her the location.

If the competing interests of the two agreements were to be considered, the "***first in time rule***" would apply with its necessary exceptions and modifications. It is a well-established maxim of equity that "where the equities are equal the first in time

prevails". The basic rule, therefore, is that equitable interests rank in the order of creation. So, if two parties have competing equitable rights in the same property, and neither has the legal estate, the right which was created first enjoys priority. The absence of notice of the earlier interest by the party who acquired the later interest is irrelevant, even if he has given value. The exception to this rule would apply to cases where the earlier claimant has been guilty of misrepresentation or fraud, which has induced the creation of another equitable title. ***See: Taylor vs Russel [1891] I Ch 8, at 17.*** The resultant effect when the rule is applied in respect to the agreements before me is that the agreement of 15th July 2020 takes priority over that of 16th September 2020 in the absence of cogent evidence faulting the 2nd Defendant of misrepresentation or fraud.

In this case moreover, the 2nd Defendant went ahead to have his interest registered on **25th January 2011** vide Instrument Number KLA485663. Under Section 59 of the Registration of Titles Act, possession of a certificate of title by a registered person is conclusive evidence of ownership of the land described therein and a registered proprietor of land is protected against an action for ejectment except on grounds of fraud.

Looking at the amended Plaint, the facts giving rise to the claim of fraud are that; On 16th September 2010 the Plaintiff and Ms. Tryphena Nalule entered into a purchase agreement for the sale of 4 acres of land comprised in Kyadondo Block 166 Plot 265 located at Namulonge and Kabubu for a consideration of 28 million shillings. The Plaintiff took posession of the suit land, fenced it, built a permanent building for commercial purposes, planted maize and beans on the rest of the land. Fraudulently and knowingly, the Defendants connived and executed another sale agreement to purchase the same land from the 1st Defendant. That fraudulently, in July 2011, the 2nd Defendant forcefully and unlawfully entered onto the Plaintiff's land, demolished the building, destroyed the crops, took away bags of cement and building materials and equipment valued at UGX. 200,000,000. Fraudulently, the 2nd Defendant went ahead and subdivided the suit land. The 2nd Defendant failed to provide proof of purchase when it was requested by letter dated 6th Feb 2012 attached as annexture "F" to the amended Plaint.

The evidence of the Plaintiff in attempting to fault the 2nd Defendant for fraud was that Kagodo who is an officer of the 2nd Defendant helped conduct a search on the suit land and assured her that it was unencumbered only to turn around and connive with the 1st Defendant to take it over. I have looked at Exhibit P5 attached to the Plaintiff's trial bundle (At page 48). There is no indication that the 2nd Defendant or its officials conducted a search on behalf of the Plaintiff. On the contrary, the document speaks for itself to show that the 2nd Defendant and not the Plaintiff conducted a search in the land registry on 15th July 2010 and ascertained that the Late Tryphena Nalule was indeed the registered proprietor of all that land comprised in Kyadondo Block 166 Plot 265 land at Namuloge and Kabubu. The Plaintiff however also conducted her own search as evidenced by search statement dated 4th July 2011 (Page 49 of the Plaintiff's trial bundle) and found that Tryphena Nalule was indeed the registered proprietor of land comprised in Kyadondo Block 166 Plot 268 land at Namulonge and Kabubu. Although both parties labored to show that they conducted searches as part of their due diligence, what is in issue is not the proprietorship of the disputed land at the time they both purchased but rather the particular portion of the bigger land each was entitled to by reason of their separate agreements. This is largely a question of fact.

The Plaintiff proved that she constructed a structure on the disputed land and the same was destroyed. She however has not satisfactorily proved that the 2nd Defendant fraudulently participated in defrauding her of the 4 acres that had been apportioned to her by the sale agreement entered into with the 1st Defendant. She has further not satisfied court that the 2nd Defendant or its agents are responsible for the demolition of her structure. None of the Plaintiff's witnesses saw who actually demolished the structure and plundered iron sheets and doors. They all relied on the information they were told. PW2 for example stated in paragraph 10 of his witness statement that he was called by one Nsubuga informing him that 'unknown' men had come on the instructions of "Kagodo" and destroyed the building structure. In my view, the said Nsubuga would have been better placed to testify as to who these men were and what prompted him to conclude that they had been sent by Kagodo of the 2nd Defendant Company. In the result I find that the allegation of fraud has not been satisfactorily proved against the 2nd Defendant. In ***Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992***, it was 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 be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."

Having exonerated the 2nd Defendant, I now turn to examine the liability (if any) of the 1st Defendant in these transactions.

It was submitted for the 1st Defendant that the agreement dated 16th September 2010 between the Plaintiff and the Late Tyraphena Nalule is not disputed. The crux of the matter is therefore whether the Late Tryphena Nalule handed over vacant possession of the piece of land which the Plaintiff is claiming.

Counsel for the 1st Defendant capitalized on Clause 3 of the agreement of 16th September 2010 which stipulated that;

"The vendor undertakes to compensate and remove the squatters on the sold land (if any) at their own cost soon after the execution of this agreement". (Emphasis mine)

He argued that by virtue of this clause, the Plaintiff purchased a portion of land which she was fully aware had squatters. The Plaintiff however insisted that the land she purchased was free of squatters. The clause in question is however ambiguous in my view and it is on its own incapable of proving that the land she purchased had squatters. The Phrase "if any" meant that it was a protective close simply put in the contract.

The parol evidence rule assumes that the written document reflects the parties' minds at a point of contracting, hence, the duties and obligations that do not appear in the written document, even though apparently accepted at an earlier stage, are taken not to have been intended by the parties to survive. This however strictly applies where the parties intended the binding agreement to be final. In such cases, court will be disinclined to use evidence of the parties' prior negotiations in order to interpret a written contract unless the written content is incomplete, ambiguous, or the product of fraud, mistake, or a similar bargaining defect. Where the contractual terms are ambiguous, recourse may be made to other extraneous evidence outside the four

corners of the document. ***See;* F *L Schuler AG v Wickman Machine Tools Sales Limited, [1973] 2 All ER 39***

At any rate, the other terms of the Sale agreement dated 16th September 2010 and in particular the true details and description of the property, that was being sold are well described as ***"4 acres out of Kyadondo Block 166 Plot 265".*** The vendor warranted to the purchaser that she was the registered proprietor of all the described land and that there were no legal or other impediments whatsoever and that she (the vendor) would be personally liable for any defects in title or any want of authority to conclude the transaction. The Vendor further undertook to indemnify the buyer in case of any defect in title in respect to the sold property. I have combed through the agreement and at no point did the Vendor disclose that she had sold part of the described land to the 2nd Defendant. It is only later after the Plaintiff had taken possession and demanded for the Certificate of Title that it occurred to her that the Vendor had sold part of the described property to the 2nd Defendant who was in the process of subdivision to her detriment. Moreover, the Vendor's misleading representation under paragraph 5 of the sale agreement dated 16th September 2010 was that she had revoked all previous negotiations and /or offers for sale to other buyers in respect of the sold land. The impression derived from this agreement is that the portion of land sold to the Plaintiff was specific, it was known by both the Vendor and the Seller. It is therefore inconceivable that the Plaintiff could have known of the existence of the land and occupied it without having been shown the land by the 1st Defendant.

The terms of the sale agreement dated 16th September 2010 entered into and executed by the parties, was express and explicit and the parties knew the true import of what was intended to be sold to and in favor of the Plaintiff except that unknown to the Plaintiff, the same property had been sold to the 2nd Defendant.

Additionally, from the date of 16th September 2010 when the sale agreement was executed between the Plaintiff and the Late Tryphena Nalule, the Plaintiff took posession, and utilized the suit land by constructing a permanent structure and growing crops thereon only for the 1st Defendant to later turn around and refuse to hand over the Certificate of Title as agreed upon in paragraph 3 of the sale agreement dated 16th September 2010. Clearly, when the Late Tryphena Nalule covenanted to hand over these documents to the Plaintiff, she was well aware that the same were

in the hands of Zion Construction Limited. This was a fraudulent scheme by the vendor to sell the same piece of land to two different parties.

Fraud has been defined to mean the intentional perversion of the truth by a person 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. It is a false representation of a matter or fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury. ***See; Fredrick Zaabwe Vs Orient Bank & Others SCCA No, 4 of 2006.***

The Plaintiff's post-agreement conduct of growing crops and constructing structures on the disputed land without any resistance from the Vendor is admissible to determine the existence of a contract and to estop the 1st Defendant from denying that the Plaintiff was shown the portion of land which she had purchased. In ***Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd, [1970] AC 572, [1970] Lloyds Rep 269, [1970] 1 All ER***, Viscount Dilhorne, commented:

> ***"I do not consider that one can properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn as to their intention when they entered into the contract, though subsequent conduct by one party may give rise to an estoppel."***

DW5 who is the Chairperson of Nalumuli – Nakyesasa where the subject land is located would have been a vital witness to cement my finding that the Vendor showed the Plaintiff the exact land she had purchased if he had been a truthful witness. Unfortunately, he was untruthful. It was his testimony that he did not know of the Plaintiff's claim in the disputed land although he was the area Local Chairperson. At locus, it turned out that contrary to what he stated in court, he was actually a neighbor to the land. This goes to show that he blatantly intended to conceal his knowledge of the Plaintiff's claim. Being a neighbor to the disputed land, it cannot be that a permanent structure was constructed by the Plaintiff up to the beam level and he did not know that it was the Plaintiff in possession. Apparently

he at one point gave a letter to the plaintiff to report to police although the Plaintiff's lawyer did not exhibit it in court. It was produced at the locus and identified by court.

DW1 (daughter to Vendor) was completely ignorant of all facts constituting the disputed land. She was not a witness to the sale agreement, she did not know whether her mother showed the Plaintiff the portion of land she was supposed to occupy and she was also unaware as to whether the Plaintiff had constructed any structure on the disputed land. DW3 who is a son to the Vendor was one of the witnesses to the sale agreement dated 16th September 2010. During cross examination, he testified that he was not present at the time of executing the sale agreement but he only signed afterwards. He could not tell for certain which portion of the land his Late mother had sold to the Plaintiff although he had been informed that the Plaintiff had taken possession.

DW4 and DW3 's corroborated testimonies examined together with the Plaintiff's testimony point to the conclusion that the Late Tryphena Nalule was utterly dishonest in her dealings and her estate should bear all the blunt. I however have found no evidence attributing the same dishonesty to the 2nd Defendant. It is now trite that the Plaintiff 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 be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. ***See; Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992***

What then is the Plaintiff's remedy? It was submitted for the 1st Defendant that in the same area, the 1st Defendant still has plenty of land and is willing to enforce the terms of the agreement dated 16th September 2010 executed between the Late Tryphena Nalule and the Plaintiff, by compensating squatters and granting the Plaintiff vacant possession of the purchased 4 acres of land. On the other hand, the Plaintiff sought specific performance for the 1st Defendant to transfer to her the portion of land already registered in the names of the 2nd Defendant. In the alternative, the Plaintiff prayed for an order of payment of UGX. 686, 498,000 (Six Hundred Eighty-Six Million Four Hundred Ninety-Eight Thousand Shillings) being the value of the land directly affected measuring 4 acres (UGX. 452, 568,000), value of the building demolished (UGX. 58, 932,000), value of plants, crops and other developments (UGX. 16, 575,000) and disturbance allowance at 30% of the value of the land. It is not clear how the Plaintiff arrived at these figures in her pleadings.

However, PW2 Dr. Ochwo Ochieng who is a valuer and Chief Consultant at OSI International Consultants testified that when he did a valuation of the disputed 4 acres of land in July 2011, its value was UGX. 96,000,000 (Ninety-Six Million Shillings) exclusive of the developments thereon, per the valuation report dated 25th July 2011 attached to the Plaintiff's trial bundle. The Defendants did not adduce evidence controverting this valuation.

As regards the Plaintiff's prayer for Specific Performance, section 64 (2) of The Contracts Act 2010 provides situations where a party may not be entitled to specific performance as follows:

64. Right to specific performance

2)A party is not entitled to specific performance of a contract where—

a) it is not possible for the person against whom the claim is made, to perform the contract;

b) the specific performance will produce hardships which would not have resulted if there was no specific performance;

c) the rights of a third party acquired in good faith would be infringed by the specific performance;

d) specific performance would occasion hardship to the person against whom the claim is made, out of proportion to the benefit likely to be gained by the claimant;

e) the person against whom the claim is made is at the time entitled, although in breach, to terminate the contract; or

f) the claimant committed a fundamental breach of his or her obligations under the contract; but in cases where the breach is not fundamental, specific performance is available to him or her subject

I have already made a finding that the portion of land to which the Plaintiff seeks to lay claim had been purchased by the 2nd Defendant. It is therefore not possible for the 1st Defendant to specifically perform the contract in respect to the particular

portion of land claimed by the Plaintiff. I have also not found cogent evidence proving that the 2nd Defendant's Agents were responsible for destroying the suit property.

Issue 2: What remedies are available to the parties?

In the circumstances, I make the following Orders;

1. This suit succeeds against the 1st Defendant but fails against the 2nd Defendant.

2. The 2nd Defendant's Counter claim succeeds with no Orders as to costs or damages against the plaintiff since the 1st Defendant has been apportioned all the blame for being deliberately deceitful to the detriment of both the Plaintiff and 2nd Defendant. Besides, the 2nd Defendant has been in possession of the suit land and deriving benefit therefrom since July 2011 when the Plaintiff's structures were destroyed. I did not find that the 2nd defendant was disposed of the land at all.

3. Given that the 1st Defendant is unable to specifically perform the contract by availing the particular portion of land claimed by the Plaintiff, the 1st Defendant is ordered to reimburse the Plaintiff to a tune of UGX. 686, 498,000 (Six Hundred and eighty-six million four hundred and Ninety-Eight Thousand shillings) being the value of the suit land as at 2018 derived from the testimony of the valuer plus interest of 10% per annum from 2018 till payment in full.

4. The 1st defendant/her estate is ordered to pay to the plaintiff Special damages for the destroyed building to the tune of UGX. 15,000,000 (Fifteen Million Shillings)

5. The 1st Defendant/her estate is ordered to pay general damages to the plaintiff to the tune of UGX. 80,000,000 (Eighty Million Shillings) to the plaintiff and interest at the court rate from the date of this judgment till payment in full.

6. The 1st Defendant is ordered to pay costs of this suit to the plaintiff and 2nd defendant.

Dated at Kampala this 10th day of March 2023

Flavian Zeija (PhD)
PRINCIPAL JUDGE