

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**LAND DIVISION**

**CIVIL SUIT NO. 943 OF 2016**

**KAKUGU SYLVAN :::::::::::::::::::::::::::::: PLAINTIFF**

## VERSUS

**KAVUMA FREDRICK :..... DEFENDANT**

**Before: Lady Justice Alexandra Nkonge Rugadya**

## JUDGMENT

### Introduction:

The plaintiff in this suit seeks the following orders against the defendant:

1. A declaration that the plaintiff is the lawful owners of various pieces of land comprised in Kyadondo Ssabaddu **Block 234 plots 1061, 1059, 1062, 1069, 1071 and 1077 lands at Kirinya;**

2. A declaration that the defendant with his agents are trespassers;
3. A permanent injunction restraining the defendant together with his servants or agents from trespassing on the plaintiff's land; and

4. *General damages for trespass and costs of the suit.*

**Brief facts:**

Brief facts:

The plaintiff's case is that some time back in 1997, he bought the various plots of land from a one Darlington Henry Lule who was the registered proprietor at that time and paid his entire purchase price.

That the said Darlington Henry Lule signed for him transfer forms authorizing him to process certificate of titles of which he got and is the registered proprietor; and accordingly, took over ownership and possession of the said lands on which he has been for over 19 years.

- 5 That in 2016, the defendant began to falsely allege that the plaintiff's land forms part of his late father's estate, whereas not. He accused the plaintiff of fraudulently transferring the land in his name vide *KMP/GEF 37/2016* for which the plaintiff was arrested and charged at Nakawa Chief Magistrate court, vide *Criminal Case No. 485 of 2016*, but that the same was decided in the plaintiff's  
10 favour.

The defendant appealed against the plaintiff's acquittal and the appeal was also dismissed. Despite the plaintiff's acquittal of the charges and dismissal of the appeal, the defendant went ahead and continued to trespass onto the suit land by selling it to different people, hence this suit.

15 **Response by the defendant:**

The defendant filed a defence and counterclaim stating that he is a son and administrator of the estate of the late Lubowa William. Lubowa passed away in 1998 and was the registered owner of the land comprised in ***Kyaddondo Block 234, plot 126 Kirinya*** vide *Inst. No. KLA 8421* on 4<sup>th</sup> April, 1957, measuring  
20 9.10 acres. The late Lubowa had purchased the land from Jemusi Luwalira.

In 1987, his late father had taken him around the suit land comprised in ***plots 126 and 175*** and showed him their locations and boundaries and introduced him to the area leader called Lameka Ntambi.

25 That during the NRA, the late Lubowa buried his titles in ground and when the war ended he tried to retrieve them only to find them damaged and beyond recognition.

The land however remained intact and undisturbed till his death. That unknown to him, one Darlington Henry Lule who was then known to the counter defendant



applied and obtained a special certificate of title in 1995 for **plot 126**, without following the legal requirements.

5 The late Lubowa however during that time became very sick and bed ridden. The plaintiff conniving with Darlington Henry Lule and created fictitious transferees without transfer instruments; and obtained titles comprised in **plot 126** which were registered in the fictitious names of Rev. David Seremba and Deborah Kirinya and later into the names of the plaintiff.

10 After obtaining the grant, the defendant tried to administer the land only to discover that the plaintiff/counter defendant had fraudulently subdivided the suit land and created plots irregularly and without any consent or transfer documents.

The defendant filed a police case vide *KMP/E GEF: 37/2016* and upon being investigated it was found that plaintiff had committed fraud in all his dealings. In his counterclaim, he therefore sought a declaration that the land comprised  
15 in **plots 1053 to 1081** were procured by fraud committed by the plaintiff/counter defendant.

His sought for the dismissal of the suit; cancellation of the titles; and to have the title revert to **plot 126, Kirinya Block 234** in the names of the late William Lubowa; and an award of general damages for trespass and fraud; mesne profits  
20 and costs.

**Representation:**

The plaintiff was represented by **M/s Tumwebaze, Atugonza, Kobusingye Advocates and Legal Consultants**, while the defendant was represented by **M/s Mbidde & Co. Advocates**. Unlike the plaintiff, however, the defendant did  
25 not file any written submissions as directed.

During the joint scheduling, the following were the agreed facts:

1. The plaintiff is currently the registered proprietor of the suit land;



2. The defendant possesses letters of administration
3. The plaintiff was prosecuted in the Chief Magistrates court of Nakawa and acquitted of charges against him..

The following were the disagreed facts:

1. The plaintiff fraudulently acquired the suit land.
2. The defendant has any interest in the suit land.

**Issues:**

The following issues were framed and agreed upon for trial:

1. ***Whether the defendant has any interest in the suit property.***

2. ***Whether the transfer and registration of the plaintiff as on owner of the suit land was fraudulently procured.***

3. ***Whether the suit land formed the estate of the late William Lubowa.***

4. ***Whether the defendant is entitled to the remedies sought in the written statement of defence.***

**Issue No.1. Whether the defendant has any interest in the suit property.**

***And***

**Issue No. 3: Whether the suit land formed the estate of the late William Lubowa.**

Given the nature of the transactions in this suit, I will deal with these two issues jointly under two separate sub-issues.

**The law:**

***Section 101(1), 102, 103 and section 106 of the Evidence Act, Cap 6*** provide that whoever desires any court to give judgment as under different to any legal



right or liability dependent on the existence of facts which he or she asserts, he she must prove that those facts exist.

In ***Nsubuga vs Kavuma (1978) HCB 307*** as cited by counsel, it was held that in civil cases the burden of proof lies on the plaintiff to prove his case on the  
5 balance of probabilities.

The plaintiff's argument in the present case was that the defendant has no interest on the suit land comprised in ***Block 234, plots 1059, 1061, 1062, 1069, 1071 and 1077***; and committed acts of trespass on the suit land acquired by him in 1997.

10 ***Trespass to land is said to be committed where a person wrongfully and unlawfully sets foot upon or takes possession or takes material from the land belonging to another. (George Kasedde Mukasa v. Emmanuel Wabende & Others, Civil Suit No. 459/1998). See also: (Justin Lutaya Versus Sterling Civil Engineering Co. Ltd. SC CA No. 11/2002).***

15 The operative word in the tort of trespass to land is "unlawful". It simply denotes that which is contrary to the law and for which the trespasser is ultimately liable. (***See: Kailash Mine Limited versus B4S Highstone Ltd Civil Suit No.139 of 2012***).

Needless to say, the tort of trespass to land is committed not against the land,  
20 but against the person who is in actual or constructive possession of the land. ***HCCS No. 22 of 2015 Ababiri Muhamood & Four Ors versus Mukomba Ananstansia & Taita Wilfred.***

#### **Analysis of evidence:**

##### **Sub-issue No. 1: Prior decision of court on the suit land:**

25 **E**vidence led by the plaintiff which the defendant did not challenge indicates that the land comprised in ***Kyadondo Ssabaddu Block 234 plots 1061, 1059,***



**1062, and 1069 at Kirinya**, ref: **PEXh5**, which were created from **plot 126** were also the subject of the criminal case against the plaintiff.

The plaintiff presented police summons, charge sheet and bail form, **PEXh4**; the statement of Nakabugo Agnes made at police over the defendants case at police  
5 Jinja Rd.

The plaintiff had been tried and acquitted by the trial magistrate and an appeal against that decision dismissed on 27<sup>th</sup> November, 2020. (**ref; HCCA 0045 of 2020: Uganda vs Kakugu Tumwesigye Sylvan, arising from Criminal Case: 485 of 2016: PEXh 7 and PEXh 6**).

10 **Section 7 of the CPA** provides:

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim litigating under the same title, in a court competent to try the  
15 subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by the court.*

Essentially the test to be applied by court to determine the question of res judicata is whether the plaintiff is trying in the second suit or subsequent action to bring before court in another way a cause of action which has already been  
20 put before court of competent jurisdiction in earlier proceedings and which has already been adjudicated upon.

The concept is applicable to every point which belongs to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the same time. (**Boutique Shazim Ltd vs  
25 Norattan Bhatia & Anor, CA No. 36 of 2007**).

In this instance it was applicable to only **plots 1059,1061,1062,1069** which areas could be ascertained, having been created under **plot 126** and adjudicated upon by court.



The law of law limitation could not apply to **plot 175** measuring 0.800 hectares (2 acres), (or its subdivisions) whose origin and current ownership could not be readily established during the trial and at the *locus* visit.

Equally important is the principle as laid out in **Oketch Joy vs. Okumu & Ors**  
5 **Civil Suit No. 539 of 2006** where it was held thus:

10 *“...It is therefore manifest that at the time the 3<sup>rd</sup> defendant was regarded the suit preparing had passed through the hands of two registered proprietors by transfer and was entirely unencumbered. It is a little difficult to understand how the 3<sup>rd</sup> defendant could have been party to, or had knowledge of whatever fraud that may have been committed against the plaintiff over the suit property ...*

In alignment with the above authority, the plaintiff's predecessors in title were Rev. Seremba David and Deborah Seremba on 30<sup>th</sup> November, 1995, under instrument number *KLA 177004*. From the plaintiff's search the two had  
15 acquired the land from one William Ntembowa. Darlington Henry Lule became the next owner from whom the plaintiff later acquired the land.

Before Lubowa's demise in 1998 therefore, a portion of the suit land had changed hands several times; and three years before his demise some years before the plaintiff got registered onto the land, Lubowa had already ceased to be the  
20 registered owner of the land.

Neither the late William Lubowa nor any member of his family including the defendant himself, reported any of the questioned transactions in relation to the suit land or the cancellation of the names of Lubowa from the title. This was also confirmed by the **Pw2** who had been the LC Chairperson at the time.

25 Darlington Lule who obtained interest from Rev. David and Deborah Seremba wife was known to the Lcs as owner remained in undisturbed possession, of **plots 1059, 1061, 1062 and 1069**, unchallenged by the late Lubowa, prior to the time when the plaintiff acquired the land and also enjoyed quiet possession until 2016, the time when the defendant started showing interest.

For those reasons, the defendant had no interest in **plots 1059, 1061, 1062 and 1069**.

**Sub-issue No. 2: Whether the counterclaim was statute barred:**

5 The plaintiff through his counsel however that the claim against him in the counterclaim was statute barred since he had acquired the land in dispute in 1997.

**Section 5 of the Limitation Act** therefore becomes applicable. It provides:

10 ***“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.”***

**Section 6 of the Limitation Act** of the same Act provides that the right of action is deemed to have accrued on the date of the dispossession. The initial year of dispossession was in 1995 and that is when the cause of action started counting.

15 The law on limitation in this instance applied to the plaintiff's acquisition and registration of **plots 1059, 1061, 1062, 1069** in 1997 which plots were also a subject of litigation in the previous criminal suit.

20 As pointed out earlier however the defendant's claim of interest was in respect of the entire **plot 175** and **plot 126**, prior to their respective subdivisions. The plaintiff had dealt with diverse plots of land including **plots 1071 and 1077** which were registered in his names but which had not been subject of the court decision.

25 The plaintiff's case was led through the evidence of three witnesses. **Pw1**, Kakugu Sylvan, the plaintiff himself; **Pw2** Bamutile Seppi and **Pw3**, Sentamu Livingstone.

To prove that the action was statute barred, he relied on the various mortgage agreements between Darlington Lule and plaintiff, tendered in court as **PExh**

**1A- PExh 1C**; a transfer form signed by the Darlington Lule, **PExh2**; agreements made with *bibanja* holders, as **PExh3**.

It was his testimony that he had acquired the land through a loan to Darlington Lule. He referred to various mortgage deeds between them on diverse dates  
5 during the months of January and February, 1997: **PExh 1A-PExh 1 C**.

The various mortgages/sale agreements between him and Darlington David Lule were indeed proof that the transactions were made in 1997 save for the fact that these were for **plots 129, 1064 and 1176** over which he had no certificates of title. It was not clear from his evidence whether there was a nexus between those  
10 three plots and **plots 1059, 1062, 1069, 1071 and 1077** which he was claiming in this suit.

**Pw2** Bamutiire Seppi informed court that he had been the LC 1 chairman at Kirinya where he had resided since 1993 and where the suit land is located. Both **Pw3** Ssentamu Livingstone, the Lc1 mobiliser, and **Pw2** corroborated the  
15 plaintiff's evidence that the plaintiff got the said land from Darlington Lule by clearing various Mortgage agreements; and that the said Darlington Lule had acquired that land from Rev. Seremba and Deborah Seremba.

**Pw2** confirmed that Lule had also signed some documents regarding **plot Nos. 177, and 1053** in relation to a *kibanja* on that land, claimed by Nakamya  
20 Robinah.

In the agreement dated 21<sup>st</sup> December, 1996 between Lule and Nakamya (which did not specify the actual size and location of the land) the title was to be issued to her by 30<sup>th</sup> January, 1997 as compensation for the *kibanja*

In another letter dated 24<sup>th</sup> December, 1996, Lule wrote to the Land office to  
25 authorize the plaintiff to deal with **plot Nos. 177, 1053 and 1054** giving out **plot 1053** as compensation to Nakamya who from the contents of that letter was recognized by Lule as a squatter on the land. Lule's letter was however not witnessed by the LCs.

Bamutiire Seppi **Pw2** who was Chairman LC 1 at the time and **Pw3**, Ssentamu Livingstone, the Lc1 mobiliser supported the plaintiff in his claim. The two were witnesses to another agreement signed by Robinah Nakamya acknowledging receipt of the titles for **plot 177 and 1053**, registered in her names. The titles  
5 were not presented in court.

The transfer forms for **plots 1069 and 1062, 1071 and 1077, 1063 and 1064** (copies of which were however barely readable) but which both parties had signed, as transferee and transferor. None of the transfer instruments were  
10 availed to court in respect of **plots 129, 1176 or 1064** which were referred to in the mortgage deeds.

Also noted was the fact that in 1996 as per the record, a power of attorney had been granted by Darlington Lule to one Byaruhanga Justus and **plots 1053, 1059, 1068 and 1069** were presented on 25<sup>th</sup> June, 1996 as security for a loan from the plaintiff. (**Ref: PExh 3A**).

15 It is not clear how he could have acquired **plot 1053** the same plot that had been given away by Darlington Lule to Robinah Nakamya as compensation. As for **plot 1068**, measuring 0.113 hectares the year in which it was subdivided is not known. No transfer or mutation forms were availed to guide court on these questions.

20 **Pw2** neither knew the defendant nor his late father and also told this court that no case of forgery concerning the suit land was ever reported to him. Both witnesses also confirmed that the plaintiff had been in quiet possession of the suit land for over a period of 20 years and that at the time there were no encumbrances on that land.

25 Whereas therefore both **Pw2 and Pw3** recognized Lule's ownership of the land and the fact that he had settled all the *bibanja* owners on his land, the plot numbers which the plaintiff claimed to have bought from through the various mortgages that is, **plots 129, 1176, 1064, 1068** were not mentioned in the evidence of the plaintiff key witnesses; and indeed no certified documents or

titles were acquired for those plots, yet all these were curved from **plots 126 and 175** which the defendant claimed.

On his part, the defendant/counterclaimant led his evidence through two witnesses: Kavuma Fredrick as **Dw1** and Kiberu Gerald, as **Dw2**. **Dw2** informed court that the land which he however did not specify, belonged to Lubowa, late father to the defendant.

The evidence led by both sides did not help to guide this court to make a clear connection or distinction between the plots of land claimed by the plaintiff in this suit as having been acquired through mortgages; *bibanja* settlements and that which he claimed to have bought as **plots 129,1176, 1064,1068** since no actual sale agreement between Lule and the plaintiff was presented.

The plaintiff in short, relied on mortgage agreements to prove ownership and acquisition of **plots 129,1176,1053 and 1064**. The actual sizes of each could not be readily determined. His evidence of acquisition of these plots was therefore found to be lacking.

The plaintiff needed to satisfy court as to why the very plots he had acquired through the various mortgages had not been duly registered in his names. Under those circumstances and without evidence of actual sale transactions, verified transfers, mutations and dates on which these transactions took place it becomes difficult to be certain as to when the cause of action arose, for the law of limitation to apply. Court would allow itself to engage in speculation.

It is also for those reasons and on account of the fact that numerous transactions were made subsequently which included various third party interests; and given the uncertainties detected on the dates of acquisition, previous ownership, sizes/ boundaries and the errors in plotting as detected, court ordered an investigative survey to be conducted to open boundaries for the entire area in dispute.

The decision followed the locus visit which was conducted on 20<sup>th</sup> January, 2023.



**Findings from the survey:**

Upon failure to agree on a joint survey, each side conducted its own boundary opening exercise.

5 The plaintiff's report dated 2<sup>nd</sup> February, 2023 was filed by **M/s Survey Tech Solutions Ltd**, in respect of the **plots 1059, 1061, 1062, 1069, 1071 and 1077**.

The defendant's surveyor's report on the other hand was dated 9<sup>th</sup> February, 2023. It was filed by **M/s La Terre Konsults**.

10 The findings from the plaintiff's boundary opening report concerned **plots 1059, 1061, 1062, 1069** which were the subject of the earlier suit, covering a total area of **0.416 hectares or 1.02752 acres**.

The report however had scanty information on **plots 1071 and 1077**, the two other plots claimed by the plaintiff but which were not subject of the earlier court decision.

15 It said nothing about **plots 129, 1064 and 1176** and other plots claimed to have been acquired by him through different loan arrangements and *bibanja* settlements.

The findings from that report were as follows:

20 1. **plot 1059** (measuring **0.113 hectares**, as per the certificate of title) was developed with three permanent structures and bordered by a rock foundation.

25 2. **Plot 1061** (whose title was not attached to the report), lies between **plots 1060 and 1062**. In the area schedule attached to the report submitted by the defendant, the plot covers an area of 0.101 hectares.

3. **Plot 1062** was defined by a permanent wall in the west and a rock foundation in the north and south directions. It was acquired by the plaintiff on 9<sup>th</sup> July, 1997 from Darlington Lule who had obtained

registration on 29<sup>th</sup> February, 1996. The report indicates that it borders **plots 1061 and 1063.**

4. **Plot 1069** (covering an area of 0.101 hectares), lies between **1068 and 1070**. The plot is also bordered by an existing access road in the south west direction, as indeed confirmed during the *locus* visit sketch. The plot had been acquired by the plaintiff on 9<sup>th</sup> July, 1997 from Darlington Lule who had obtained registration on 29<sup>th</sup> February, 1996.

5. **Plot 1071** measuring 0.101 as per title, mainly used for agricultural farming lies between **plots 1072 and 1070**. It was acquired by the plaintiff on 25<sup>th</sup> July, 1997 from Darlington Lule who had obtained registration on 29<sup>th</sup> February, 1996. Its location could not however be confirmed by court.

6. As per the plaintiff's survey report, **plot 1077** was for the access roads that were planned for the estate. However, that these were encroached upon by the developments thus rendering some plots inaccessible.

**Specific questions surrounding plot 1077:**

In the letter dated 4<sup>th</sup> October, 2010 by the Commissioner, Land Registration earlier referred to, titled: **Re: Kyadondo Block 234 Plot 126 residue by balance 1077 subdivided from it by Land at Kirinya / Bweyogerere Wakiso District vide KMP/EAST GEF: 37/2016**, the Commissioner had this to say:

*I can however with certainty inform you that the application for a special certificate of title was made by Darlington Henry Lule and it was issued under Inst. No. KLA 74696 of 17<sup>th</sup> of August, 1995. I therefore presuppose that Darlington Lule first applied for special certificate of title, after acquiring it he then presented the special certificate of title together with the two transfers which we have so far failed to trace.*

*Alhaji*

From the above, it is evident that **plot 1077** was created in the 1990s, when Lule was still alive, even before the loan agreements were made by the plaintiff. Based also on the contents of the above correspondents, the special certificate of title was created for **plot 126** by Darlington Lule before the plaintiff became  
5 the owner of **plot 1077**.

It was therefore Lule who was to be faulted for failing to file a notice in the gazette prior to the issuance of the special certificate of title. This court cannot therefore rule out the possibility that such grave omission was done by him in collusion with the office of the Commissioner, Land Registration, who however was not  
10 made party to this suit.

The histology of assessment of **plot 126** as established through the findings by the defendant's surveyor on the other hand shows that the total area of the newly subdivided **plots 1058 to 1081** computes 3.934 hectares/9.721 acres, which created an erroneous difference of 1.104 hectares/2.727 acres compared to that  
15 of the mother **plot 126** which measures only 2.830 hectares/6.99 acres.

It was also noted in that same report that **plots 1078 to 1081** do not actually exist on the ground yet they all appeared in the area schedule of 9<sup>th</sup> July, 2020, attached to that report. The assumption is that these were created out of **plot 1077** claimed by the plaintiff.

20 **Plot 1077** was one of the numerous plots created from **plot 126**. The certificate of title for **plot 1077** indicates that the said plot alone covers an area of 0.613 hectares. It had been acquired by the plaintiff on 25<sup>th</sup> July, 1997 from Darlington Lule who had obtained registration on 30<sup>th</sup> November, 1995.

However, in the area schedule attached to the defendant's report the information  
25 was that it had been resurveyed. A much smaller area of only 0.109 hectares was reflected for **plot 1077**.

Yet the subdivisions made out of it: **plots 1078-1081** were in total, 1.291 hectares (3.188 acres) as compared to 0.613 hectares appearing in the plaintiff's



title or the area as reflected in the schedule as 0.109 hectares for the entire **plot 1077**.

Its measurements exceeded those of **plot 1075** out of which it was created. The reasons and circumstances under which the resurvey for **plot 1077** was made were not given during the trial.

Also noted in that area schedule was the fact that the names of the plaintiff as registered owner to any of the plots of land he claimed as his, were conspicuously missing. Yet the certificates he presented to court for **plots 1059, 1061, 1062, 1069** indicate that he had already acquired titles as early as 1997.

The total area of the new subdivisions in the schedule as noted, exceeded the areas of the mother **plot 126**, which plot before the subdivisions was in the names of William Lubowa, the defendant's father.

The erroneous assumption seems to have stemmed from the belief, genuine or otherwise, that **plot 126** covered 9 acres not 6.99/7 acres as noted in the area schedule.

This confirms the findings from the survey that **plots 1078 to 1081** were non-existent and court's findings and conclusion therefore that the irregular dealings occasioned on this land emanated from the flawed surveys relating to this land, perpetrated by those who stood to benefit from the confusion.

It was also evident from the defendant's report that there were no transfers from William Lubowa who at one time owned both **plots 175 and 126**, as per the schedule.

In absence of any evidence to the contrary, it is reasonable to assume that the subdivisions on **plot 126** (up to the time of creating **plot 1077**) had already been made by the plaintiff's predecessors in title.



Nevertheless, the plaintiff had constructive knowledge and must have consented to the subsequent subdivisions and creation of the non- existent **plots 1078 to 1081**.

5 In the area schedule details for **plot 1176** which he claimed to have acquired from Lule through mortgage were missing. No evidence was shown as to its creation.

10 In that same schedule details of which could not be obtained from the plaintiff's survey report, **plot 129** measuring 0.27 hectares appeared in the names of Paulo Luwalira; and **plot 1064** measuring 0.133 hectares in the names of Darlington Lule from whom the plaintiff had acquired the land as early as 1997.

He failed to satisfy court as to how he could have acquired land through mortgage dealings, with the previous owner in 1996, and ended up as the registered owner for completely different plots.

15 All in all, the errors as detected in the survey obviously affected the accuracy and authenticity of the subsequent subdivisions of what was initially **plot 126**.

**Plot 175:**

As noted in the counterclaim the defendant claimed that **plot 175** belonged to his late father's estate. As per the area schedule, this was initially covering an area of 2 acres.

20 The area schedule indicates that William Lubowa was the owner. Strangely, a one Paulo Luwalira's names also appear in the same schedule as the owner of **plots 175-178**. There is no evidence however that any of them had obtained registration over the said plot or that transfers

25 It is clear nevertheless that **plots 176-178** had been curved out of **plot 175**. It is not clear at what point/when the subdivisions had been made. But the three plots **176-178** added together made a total of 1.940 acres less than the 2 acres forming the original **plot 175**.



It was out of **plot 178** (measuring 0.473 hectares) that **plots 1053 -1057** were created, all of them in the names of Darlington Lule. Each of these were indicating an area of 0.101 hectares; and when added together had an area of 0.505 hectares/1.249 acres.

- 5 Attached were copies of transfer forms, purportedly signed by Lule and the plaintiff, for **plots 1053 and 1057**. These had been used during the Police investigations against the plaintiff, but as per the correspondences earlier mentioned, they could not be traced from the registry. **Plots 1053- 1057** were still in the names of Darlington Lule.
- 10 As noted earlier the documents relied on by the plaintiff indicate earlier transactions between Darlington Lule and Robina Nakamya, one of the *kibanja* owners who from the uncontroverted evidence of **Pw2** and **Pw3**, had acquired the titles for **plots 177 and 1053**.

15 The record indicates that Darlington Lule had authorized the plaintiff to deal with **plot 1053 and 1054** and give Nakamya **plot 1053**, currently measuring is 0.101 hectares. I chose not to delve into the validity or otherwise of that purported authority.

Suffice to note that these were plots created from **plot 175**, land which did not belong to Lule, in the first place; and that what Nakamya ended up with was not  
20 **plot 1053** but rather a smaller area of 0.046 hectares, following further subdivisions of **plot 177** which resulted in the creation of **plots 2733 and 2734** by which Nakamya Robinah retained **plot 2733**, leaving **plot 2734** as the residue by balance.

The transfer for **plot 1053** which was granted to Nakamya as compensation was  
25 therefore not reflected in the names of Nakamya or the plaintiff as the said plot at some point had ceased to exist.

According to the schedule, Darlington Lule appeared to have remained the owner of all the subdivisions made up to **plot 1073**. Whatever happened there



is incomprehensible. It would seem that at some point there was even double plotting.

Indeed, no title for any of those plots was tendered in court as evidence of valid ownership by the plaintiff or valid registration by his predecessors. The  
5 defendant's claim against the plaintiff regarding **plot 175** or any of those created therefrom cannot be upheld.

But the unanswered question therefore was how and when the land comprised  
in **plot 175** which belonged to Paulo Luwalira or William Lubowa for that matter,  
could have been transferred into the names of Darlington Lule; and thereafter to  
10 the plaintiff and later to third parties.

Other errors were detected going by results of the defendant's survey which indicated that **plot 178** actually existed on the ground, in shape and location as per old cadastral print; and computes to 0.489 hectares/1.21 acres on ground compared to that shown in the area schedule which is 0.473 hectares/1.168  
15 acres.

The total area of the newly subdivided plots which computes to 0.505 hectares/1.249 acres as confirmed by the survey report created an erroneous difference of 0.032 hectares/0.079 acres compared to that on area schedule.

The above are a clear indication and conclusion by this court that the subdivision  
20 and creation of **plots 1053 to 1057** of **plot 178**, were not only irregular but also inaccurate.

But be that as it may, the defendant who claimed that the titles for the land had during the NRA war been hidden in the ground and could not be retrieved had to go a step further.

25 He had to prove that these were titles formerly belonging to his father, William Lubowa and not Paulo Luwalira or Nasanaeri Luyombwa (whose names appeared as owner of **plot 176**), neither of whom however had been made party to this suit.



What the defendant succeeded to prove in his counterclaim was that his father may have had interest in the original **plot 175** and that the plaintiff had obtained authority to deal with part of that land from Darlington Lule, a person who had no interest in **plot 175**.

5 The above addresses **issues No. 1 and 3** accordingly.

**Issue No. 2: Whether the transfer and registration of the plaintiff as on owner of the suit land was fraudulently procured.**

10 The general principle is that a *certificate* of title is a conclusive evidence of title and takes priority over any adverse claims. By virtue of **section 176 of the Registration of Titles Act, Cap 230 (RTA)**, save for fraud, it is also an absolute bar and estoppel to an action of ejectment or recovery of any land. (**Refer also S. 64 (1) RTA**).

15 Fraud is such grotesque monster that courts should hound it 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**).

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

25 Counsel for the plaintiff citing **Katende vs Uganda Land Commission Civil Suit No. 573 of 2015; Kampala Bottlers Ltd Vs Domanico (U) Ltd, SCCA No. 22 of 1992; and Zaabwe Fredrick vs ORIENT BANK & others SCCA No. 4 of 2006** referred to the definition of fraud as an intentional perversion of truth for purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.



It is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegation or by concealment of that which deceived and is intended to deceive another so that he shall act upon it to his legal injury.

5 In his counterclaim, the defendant claimed that Darlington Lule together with the plaintiff procured a special certificate of title in 1995 when the late Lubowa William was still alive; obtained the special certificate of title without gazetting the land; causing the transfer of **plot 126** without any transfer instruments; causing transfer from Seremba David and Deborah Seremba to the plaintiff's crony Darlington Henry Lule in a space of 5 minutes, then later to the plaintiff; 10 falsely claiming that the plaintiff was not known to Darlington Lule yet they knew each other before 1997; conniving with the land office to issue alternating area schedules; and committing acts of trespass.

It was also the defendant's claim in *paragraph 4* of his counterclaim that **plots 1053 to 1081** were procured by fraud of the plaintiff/counter defendant and 15 should revert to **plot 126** in the names of William Lubowa.

That at time of his death in 1998 he was the registered proprietor of land comprised in **plot 126**, vide *inst. No KLA 8421 ON 4<sup>TH</sup> April, 1957*, measuring 9.10 acres.

**Consideration by court:**

20 The findings above from the surveys to a large extent partly addressed this issue. The plaintiff denied any acts of fraud, adding that the agreements were witnessed by local council leaders.

In re-examination he stated that the land now is occupied by buildings and that he came to the village where the land is in **plot 1084** and that they did not know 25 the defendant as the owner.

From the earlier findings it is not clear how **plot 1084** was created. It neither featured on the area schedule nor was it any of those plots which were a subject of this suit.

 20

The plaintiff presented certificates of title as proof of ownership of the four plots of land **plots 1059, 1061, 1062, 1069** and also referred to the certified copy of the judgment in Nakawa Chief Magistrate Court, vide **Criminal Case No. 485 of 2016** and the judgment of **High Court Criminal Appeal No. 045 of 2020** confirming to court that no fraud had been committed in respect of only those **plots: 1059, 1061, 1062, 1069**, which were created out of **plot 126**.

On the issue of the fraudulently procured special certificate of title, as noted earlier from the contents of the letter by the Commissioner, Land Registration addressed to the CID, it was not the plaintiff but Lule who had obtained the special certificate of title.

The area schedule relied on by the defendant indicates that **plots 1071 and 1077**, measuring 0.101 hectares and 0.109 hectares respectively (or a total of 0.21 hectares), **(0.5187acres)**, were not part of the earlier judgment.

The irregularities above which detected from the boundary opening reports render the creation of **plot 1077** invalid.

As transferee, the plaintiff had been a *bona fide* purchaser with no notice of any fraud and had no role to play in their creation/subdivision.

The term *bona fide* purchaser is defined in **Black's Law Dictionary 8<sup>th</sup> Edition at page 1271** as:

**"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 **Nafula vs Kayanja & Anor Civil Suit No. 136 of 2011 [2017]** the court cited the authority in **Kampala Bottlers Ltd vs Damaniaco (U) Ltd SCCA No. 22 of 1992**.

The principle as enshrined therein is that the party is required to prove that fraud was attributed to the transferee, either directly or by necessary implication.



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.

As earlier noted, the plaintiff was in possession of a title for **plot 1071** measuring 0.101 as per title, acquired by the plaintiff on 25<sup>th</sup> July, 1997 from Darlington Lule who had obtained registration on 29<sup>th</sup> February, 1996. The said title was in existence but its location could not be confirmed by court during the locus visit.

The plaintiff failed to explain the anomaly on the title for **plot 1077** which created an impression that he owned 0.613 hectares whereas the area schedule attached to the defendant's report a much smaller area of only 0.109 hectares was reflected. **Plot 1077** was fraudulently created out of **plot 1075** considering that **plot 1075** was less in acreage than **plot 1077** after the resurvey.

The plot does not appear anywhere in the plaintiff's own sketch/survey and its ownership and encroachment remained a subject for speculation. It is the plaintiff who stood to benefit from the irregular subdivisions of that plot, which went beyond the actual original size of the mother **plot 126**.

Indeed, **plots 1078-1081** added together make a total area of 1.291 hectares, equivalent to 3.18877 acres, a lot bigger than **plot 1077** from which they were curved.

At locus, it was established that the plaintiff's claim was only 1.5 acres which is comprised in **plots 1059, 1061, 1062, 1069, 1071** which when added together made 0.517 hectares, equivalent to 1.27699 acres and in respect of which the defendant could not raise any act of forgery or fraud or directly link it to him as court had already exonerated him. Yet what he was claiming in this suit was more than 1.5 acres.

The plaintiff could not offer any explanation over the creation of **plots 1078-1081** out of **plot 1077**, land which did not exist. He was accordingly involved in the fraud by which **plots 1078-1081** were created.



As per **section 181 of the RTA** the defence of a *bona fide* purchaser for valuable consideration is only available for a party seeking recovery of land as long as the fraud is not attributed to him.

The illegality of creating subdivisions over non-existent land cannot go unpunished and a court ought not to allow itself to be made an instrument of enforcing obligations alleged to arise out of a transaction which is illegal if the illegality is duly brought to the attention of court. (**May vs Brown Doering MC NAB & Co. (1882) 2QB 728** cited with approval in **Kyagulanyi Coffee Ltd vs Francis Senabulya CACA No. 41 of 2006.**)

10 The above addresses **issue No. 2** accordingly.

**Issue No. 4: Whether the defendant is entitled to the remedies sought in the written statement of defence?**

**General damages:**

15 As stated in **Robert Caussens v Attorney General SCCA No.8 of 1999** it was pointed out clearly that the object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered.

The plaintiff in this case claimed that he suffered mental anguish and distress including financial loss all rising from the defendant's act of entering onto his land and bringing prospective buyers.

20 In respect of **plot 1077** and as established from the findings above, the plaintiff was directly involved in the acts of fraud which led to the irregular subdivisions of land. He did not therefore come to court with clean hands. For that reason, I therefore decline to grant him the **Ugx 60,000,000/=** as an award of general damages.

25 As for the rest of the portions of land in dispute, the administrator of the estate of the late Darlington Lule's ought to have been made party to this suit to help court understand how the late Lule had acquired the special certificate of title



and cause the subdivision of the suit land in the way and manner in which it was done.

Accordingly:

- 5      1. *The issues concerning plots 1059, 1061, 1062, 1069 were resolved and concluded by court in its earlier undischarged decision: HCCA 0045 of 2020: Uganda vs Kakugu Tumwesigye Sylvan, arising from Criminal Case: 485 of 2016, and therefore res judicata.*
- 10      2. *Plots comprised in 1053-1081, with exceptions of those mentioned in the declaration No. 1 above were procured by fraud, partly attributed to the plaintiff/counterclaim.*
- 15      3. *The Commissioner, Land Registration shall cause a fresh survey of the rest of the plots created under plots 126 and 175.*
- 20      4. *The Commissioner, Land Registration shall proceed under section 91 of the Land Act, Cap. 227 to take any appropriate corrective action, including a review of any flawed and double plotting or such other as detected in the subdivisions/plots created thereunder; and cancellation of the plots irregularly created; and reverting the titles to the rightful owners.*
- 25      5. *The fresh survey, review and/or replotting of the area shall however take into account the authenticity of any documents/records of transfer in the custody of/available in the Land office; and any existing developments and lawful interests on the land including those claimed by virtue of plots 1059,1061,1062,1069 which belong to the plaintiff/counter defendant, as earlier decreed by court.*
- 30      6. *The survey shall identify the specific plots/areas belonging to the estate of the late Lubowa William which shall be reverted into his names.*



7. *The parties to jointly bear the costs of the survey which shall be conducted in the presence of the Police, Lcs; owners and occupants of the affected plots.*

5 8. *The counterclaim accordingly succeeds, in part.*

9. *General damages of Ugx 30,000,000/= awarded to the counterclaimant with interest at rate of 15 per cent p.a, payable from date of delivery of this judgment.*

10 10. *Costs to be paid by the plaintiff/counter defendant.*

15   
**Alexandra Nkonge Rugadya**

**Judge**

**29<sup>th</sup> January, 2024**

*Delivered by email*

*29/1/2024*

  
