

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO 641 OF 2018

1. NDAGIRE CHRISTINE NSUBUGA

2. NSUBUGA ENOCK

3. MUGERWA JOVAN :::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

1. NALWANGA DIANA

2. NANZIIRA SARAH BWANIKA

3. NALUSIBA MASITULA

4. MUTAZIBWA BEN

5. KAKANDE MOSES

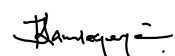
6. SEMPIJJA MUSITAPHA :::::::::::::::::::::::::::::: DEFENDANTS

BEFORE; HON. LADY JUSTICE NALUZZE AISHA
BATALA

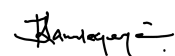
JUDGEMENT

Introduction;

1.The Plaintiffs brought this suit against the defendants jointly and severally seeking the following remedies;



- i) A court declaration that the land (Kibanja) comprised in Nalubudde Bulabi Cell LC1 Kajjansi Town Council, Wakiso District belongs to the Estate of the late Sekasamba Hawa.
- ii) A court declaration that the Plaintiffs are entitled to enjoy their right as the beneficiaries of the Estate of their mother the late Sekasamba Hawa.
- iii) A court declaration that the 2nd, 3rd, 4th, 5th and 6th Defendants are trespassers on the suit property.
- iv) A court declaration that the 1st Defendant fraudulently sold the deceased's suit land (Kibanja) to the 4th Defendant.
- v) A court declaration that all sale agreements are fraudulent, null and void.
- vi) An Eviction Order
- vii) A permanent injunction is issued restraining the Defendants, their agents, assignees, workers or anybody claiming after them from interfering and trespassing on the suit-land.
- viii) General damages
- ix) Mesne profits



x) Interest at court rate from the judgement till pay in full.

xi) Costs of the suit land and any other relief that court deems fit.

Background;

2. Sekasamba Hawa died intestate on the 20th October. During her life time, she bought the suit land (Kibanja) on 27th April, 2004 and the Plaintiffs are the beneficiaries to her estate.

3. In the year 2013, the 1st Defendant who is the mother to the late Sekasamba Hawa executed a sale agreement with the 4th Defendant disguising herself as the owner of the suit land and sold off the Kibanja. The 4th Defendant went ahead and sold off the Kibanja to the 2nd, 3rd and 6th Defendants.

4. The plaintiffs contend that the defendants unlawfully entered the suit land (Kibanja) and the actions of the Defendants are illegal and amount to trespass.

5. The Plaintiffs pleaded the following particulars of fraud;

6. The 4th Defendant using the 1st Defendant in the executions of the sale agreement as the alleged vendor of the

suit land (Kibanja) yet she is not the owner of the suit land (Kibanja).

The 2nd, 3rd and 6th Defendants buying the deceased's suit land (Kibanja) without knowledge and consent of the Plaintiffs as the beneficiaries of the Estate of the Late Sekasamba Hawa.

7. The 1st, 2nd, 3rd, 4th, 5th and 6th Defendants entering and trespassing on the suit land (Kibanja) disguising themselves to be the owners of the same without consent and knowledge of the Plaintiffs.

Representation;

7. The plaintiffs were represented by Namutumba Mercy Winnie of M/s Kongai & Co. Advocates there was no presentation from the defendants.

8. Court gave Pre-Trial directions to all parties and the Plaintiffs acted. Plaintiffs filed witness statements and trial bundles. Even though the defendants were served, they never acted; thus, plaintiffs prayed for Exparte Proceedings under O.9 r 11(2).

Issues for Determination;



1. Whether the Suit Kibanja forms part of the Estate of the Late Sekasamba Hawa (the Plaintiffs mother)?

2. Whether the sale between the 1st and 4th Defendant was lawful?

3. Whether the 2nd, 3rd, 5th and 6th Defendants are trespassers on the suit Kibanja?

4. What remedies are available to the parties?

Resolution and determination of the issues;

Issue 1

Whether the Suit Kibanja forms part of the Estate of the Late Sekasamba Hawa (Plaintiffs mother)

9. Counsel for the Plaintiffs submitted that the Plaintiffs contended that the suit land belongs to the Estate of the Late Sekasamba Hawa.

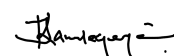
10. Section 101 of the Evidence Act cap 6 states that whoever desires to give judgement to any legal or liability depending on the existence of any facts he/she assets must prove that those facts must exist.

11. The burden of proof lies with the Plaintiff to furnish evidence which by such a reasonable man, might hold more a probable conclusion which the plaintiff contends, on the balance of probabilities.

12. This principle applies to all civil cases even where it is ex parte proceedings.

13. It was pointed out by PW1 who testified that the late Sekasamba Hawa bought the Kibanja from Wagala Edgar. According to paragraph 3, 4 and 5 of PW2's witness statements, PW2 cohabited with the late Sekasamba Hawa as her husband from the year 1990 until she passed away on 20th October, 2006. that during her lifetime, they gave birth to three children hereinafter referred to as Ndagire Christine Nsubuga (PW3), Nsubuga Enock (the 2nd Plaintiff) and Mugerwa Jovan (PW1). he added that in the year 2004, they proposed that the late Sekasamba Hawa purchases a plot of land for the Children at Nalubedde, Bulabi Zone where they headed and found Mr Edgar Wagala who was the owner of the plot.

14. That he showed her around and thereafter the late Sekasamba Hawa together with Mr Edgar Wagala entered into an agreement which was witnessed by the then registered proprietor of the land, Mr. Kakande Moses (the 5th Defendant). a copy of the Agreement for purchase was admitted as Annexure B "a".



15. The Plaintiff's evidence and submissions are to the effect that the late Sekasamba Hawa bought the suit land (Kibanja) from a one Mr. Edgar Wagala.

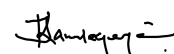
16. Counsel for the Plaintiffs argued that the suit land (Kibanja) was purchased by the late Sekasamba Hawa the mother of the Plaintiffs and was being utilized and kept by the 1st Defendant (Grandmother) of the plaintiffs. Counsel further argued that during the locus visit, the 1st Defendant confirmed that the suit land belonged to the Late Sekasamba Hawa.

17. No evidence was adduced to prove otherwise.

Analysis of Court

18. I am in agreement with Counsel for the Plaintiffs in this suit on the arguments raised on this issue. The evidence presented is clearly in favor of the fact that the suit land belongs to the Estate of the late Sekasamba Hawa.

19. This is confirmed by B"a" the Agreement for Purchase of the Plot between Wagala Edgar and Ms Sekasamba Hawa. This land forms part of the Estate of the Late Sekasamba



Hawa and the Defendants actions on the suit land amount to inter meddling.

20. In this case, what is not in dispute is that the Late Sekasamba Hawa bought the suit land from Edgar Wagala.

The unchallenged evidence of the Plaintiffs being that the late Sekasamba Hawa bought the suit land from Edgar Wagala and kept the agreement with the 1st Defendant does not make the 1st defendant the lawful owner but rather a mere custodian.

21. From the above, it is my finding that at all times, the suit land comprised in Nalubudde Bulabi Cell Kajansi Town Council, Sisa Sub county Wakiso District forms part of the Estate of the late Sekasamba Hawa. Therefore, issue 1 is answered in the affirmative.

Issue 2; Whether the sale between the 1st and 4th Defendant was unlawful?

22. Counsel for the Plaintiffs submitted that the suit property forms part of the Estate of the late Sekasamba Hawa who died intestate. She lawfully purchased the said Kibanja from Mr Edgar Magala, the proprietor of the suit-land and that the 1st

Defendant was just a custodian of the Sale Agreement between Sekasamba Hawa and Edgar Wagala.

23. Section 58 of the Evidence Act Cap 6 states that facts admitted need not be proved. This section in my view applies in this case where the defendants failed to put up a defence to the plaintiff's assertions/ claims.

24. Whichever unlawful transaction comprised of dishonesty is a matter of fraud. **In the case of Kampala Bottlers Ltd Vs Domanico (U) Ltd SCCA No.22 of 1992, fraud was defined to mean actual fraud or some act of dishonesty.**

25. Fraud denotes any act of dishonesty. This has been noted in the case of **Zaabwe Fredrick Vs Orient Bank & Others SCCA No.4 of 2006, Fraud was discussed as, “ An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.”**

25. Therefore, to succeed on fraud, where it is alleged, it must be specifically pleaded and proved beyond the standard required in any ordinary suit.

26. The particulars of fraud as pleaded in this case were; The 4th defendant using the 1st defendant in the executions of the sale agreement as the alleged vendor of the suit land yet she is not the owner of the suit land; that the 2nd, 3rd, and 6th defendants buying the deceased's suit land (Kibanja) without knowledge and consent of the plaintiffs as the beneficiaries of the Estate of the late Sekasamba Hawa; 1st, 2nd, 3rd, 4th, 5th and 6th Defendants entering and trespassing on the suit land (Kibanja) disguising themselves to be the owners of the same without consent and knowledge of the Plaintiffs.

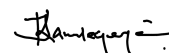
27. In brief, the allegations of fraud are that, the 1st Defendant sold off the suit Kibanja to the 4th Defendant yet she was not the lawful owner of the same.

In the Case of Fredrick J.K Zabwe Vs Orient Bank Ltd (Supra), the court adopted the definition of fraud in BLACK'S LAW DICTIONARY 6TH EDITION at page 660 and went on to define the word fraudulent as follows; " To act with "intent to defraud "means to act wiling fully and

with the specific intent to deceive or cheat; ordinarily for the purposes of either causing some financial loss to another or bringing about some financial gain to self.

28. According to the evidence submitted by PW2 in his witness statement, when the late Hawa bought the suit-land (Kibanja), the suit land was given to the 1st defendant to take care of it and derive sustenance from it in form of food planted and harvested by her, PW3 further testified that in the year 2013, the 1st defendant fraudulently executed a sale agreement with the 4th Defendant disguising herself as the owner of the suit land (Kibanja). Evidence was adduced through “C” an agreement for sale of Kibanja between the 1st and 4th Defendant. This Trial Court also visited locus in quo and at locus, it was established that Sekasamba Hawa purchased the Kibanja and falls under her estate. It was further established that on the Kibanja are occupants.

29. For protection of property and interest, no one can give title of what he or she does not possess. This principle was stated in **Halling Manzoor Vs Serwan Singh Baram SCCA No.9 of 2001** where court emphasized that a person cannot pass title that he does not have.



30. After the suit land had been sold to the late Sekasamba Hawa as a Kibanja in 2004, she was considered as the lawful owner of the suit-land and no one without authority could sell the suit-land or transact on it. No evidence was adduced to prove that the 1st defendant owned the Kibanja that she refers to as “hers” in the Agreement for Sale.

31. Regarding the 4th Defendant, **a person who purchases an estate which he/she knows to be an interest of another whether registered or not other than the vendor is not a bona fide purchaser for value without notice of the fraud if he or she fails to make inquiries before such purchase is made as per the case of Mbaraga Everest Vs Mukabalamba Esther & Ors vide Civil Suit No. 0003 of 2016.**

32. In the case of **Uganda Posts Telecommunications Vs Abraham Kitumba SCCA No.36 of 1995**, it was stated that such failure to make reasonable inquiries or ignorance or negligence was held to form particulars of the offence of fraud.

33. As established from the locus visit, the late Sekasamba Hawa was the lawful owner of the Kibanja who purchased it from Edgar Wagala, an assertion that was not challenged by

the defendants. The 4th Defendant did not take any reasonable steps to establish the lawful owner of the Kibanja before purchasing it.

Analysis of court;

34. In order for a party to claim interest in land, his or her title ought to be derived from someone who had a recognised right and title to as the case of **Godfrey Ojwang Vs Wilson Bagonza CA No.25 of 2002** I shall not depart from this decision regarding the fact that the 1st defendant was a “mere custodian of the Kibanja sale Agreement” had no right to sell the suit land to the 4th defendant without any recognized authority or any other property that falls under the estate of the late Sekasamba Hawa.

35. The 1st defendant sold what she never owned to the 4th defendant. In law, such a sale is unlawful and illegal. Its void ab initio.

36. When buying land whether registered or unregistered, due diligence is a requirement that should be done by a party intending to buy land. No one has a right to deal in the property of a deceased whether land or not without proper

authority, any such act is fraudulent in nature. I therefore find this sale unlawful.

Issues 3. Whether the 2nd, 3rd, 5th and 6th Defendants are trespassers on the suit Kibanja?

I shall proceed to resolve this issue,

37. Counsel for the Plaintiffs in her submissions, cited the Supreme Court case of **Lutaaya Vs Stirling Civil Engineering Company Limited SCCA No.11 of 2002** that stated as follows, “Trespass to land occurs when a person makes an unauthorized entry upon another person’s land and thereby interferes with another person’s lawful possession of that land.” Guided by the above case, a person with the right to sue, may exercise the right to sue immediately they notice any trespass.

38. Counsel for the Plaintiffs submitted that the suit Kibanja was purchased by the Late Sekasamba Hawa from Wagala Edgar and a purchase Agreement was made. The plaintiffs adduced evidence that upon the demise of the late, the defendants proceeded to enter into sale agreements and take


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possession of the suit Kibanja well knowing it formed part of the Estate of the Late Sekasamba Hawa.

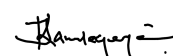
39. Annexure B “a” is an Agreement for purchase of land between Wagala Edgar and Ms Sekasamba Hawa dated 27/4/2004.

40. In the case of **F.D.K Zaabwe V Orient Bank & 5 Ors, HC Civil Suit No. 715 of 1999 [2002]UGHC 40**, trespass was defined as the unlawful interference with one’s property or rights.

41. Court of Appeal in Sheikh Muhammed Lubowa Vs Kitara Enterprises Ltd CA No.4 of 1987 observed that one must prove;

- 1. That the disputed land belonged to the Plaintiff***
- 2. That the Defendant had entered upon it, and***
- 3. That entry was unlawful that it was made without permission or that the Defendant had no claim or right or interest in the disputed land.***

42. I shall now dissect these 3 grounds in consideration to establish whether there was trespass or not on the suit land.



First, I shall establish whether the disputed land belonged to the Plaintiffs.

43. The plaintiffs in this case are beneficiaries of the estate of the late Sekasamba Hawa.

44. In **civil Appeal No.0017 of 2016, Dima Dominic Poro Vs Inyani Godfrey & Apiku Martin**, it was stated that, “by virtue of their status only, beneficiaries of an intestate cannot be said to lack sufficient interest in the subject matter, at least as persons who have suffered legal grievance, whether the issue at hand is an alleged inter meddling or deprivation of any part of an estate by third parties, or as persons directly and wrongfully deprived or likely to be deprived of their legal interest in the estate or where title is likely to be deprived of their legal interest in the estate of whose title to the estate is wrongfully affected, especially when the nature of the injury or loss suffered or likely to be suffered is personal to them.

45. The beneficiaries are interested persons, either directly or through their customary heir or legal representative. They are the best litigants since their interest in the Estate ensures that they present the case as well as it can be presented.” therefore having established that the suit land forms part of

the estate of the late Sekasamba Hawa and the plaintiffs are the beneficiaries, it is safe to conclude that the Plaintiffs have a right to bring a claim of trespass for the suit land.

46. I shall now proceed to the 2nd ground, the defendants entered upon the suit land.

47. In his evidence, PW2 stated that the late Sekasamba Hawa's mother that is the 1st defendant was close to the suit land and they had suggested that she takes care of it and also derives sustenance from it in form of food planted and harvested by her. In this context, I shall define "entered on it" in such a way that all there was an unlawful interference with the suit land.

48. In the Plaintiffs' evidence, the 1st Defendant had called and informed PW2 that she had mortgaged the said Plot with certain money lenders since she was in custody of the Agreement and she proceeded and sold off the suit land to the 4th defendant who went ahead and sold off to other defendants.



49. The unlawful interference in my opinion is an act of trespass since the 1st Defendant invaded the interests and disrupted the exclusive possession of the suit land.

50. PW2 further contended that in the year 2107, she realized that there was construction on going on the suit land and despite several warnings, the 1st defendant continued to sell the suit Kibanja to different people. Therefore, there was an unlawful/ unauthorized entry by the defendants.

51. The entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the suit land.

52. As earlier discussed, the 1st defendant without permission from the beneficiaries, without title or interest at all, had gone ahead to mortgage the suit land. PW2 had paid up the loan and rescued the suit land, the 1st defendant unlawfully without right, claim or interest went ahead and sold the suit land to the 4th Defendant.

53. The Plaintiffs adduced evidence in their trial bundles containing the various sale agreements between the 1st and 4th Defendant marked as Annexure C, of which the 4th



Defendant went ahead and sold to to the 2nd, 3rd and 6th Defendant.

54. The 1st defendant had no good title to her name that is she was not the lawful owner of the suit Kibanja and since the defendants knowingly dealt with the 1st defendant who had no good title,, the 2nd, 3rd, 4th and 5th Defendants are trespassers on the suit land.

55. The 5th Defendant being the land lord as established by PW1 is a party to fraud since he was aware of the actual Kibanja owner but went ahead to assist in the sale by witnessing of the sale Agreements.

56. The Actions of the 1st defendant amount to inter-meddling and therefore since the defendants bought the suit Kibanja from someone who had no requisite authority to sell the property of the intestate, they are held to be trespassers.

57. With the sale agreements pointing to the purported illegal sales and in the presence of the remained trespassers on the Late Sekasamba Hawa's Kibanja

58. Going further, it was the evidence of the Plaintiffs that the Defendants entered and remained onto the suit land without

their consent as beneficiaries of the Estate of the Late Sekasamba Hawa.

59. For and in the circumstances, I find the Defendants to be trespassers and parties to fraud.

Issue 4; What Remedies are available to the parties?

60. The plaintiffs seek the following remedies;

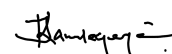
i. A court declaration that the land (Kibanja) comprised in Nalubudde Bulabi Cell LC1 Kajjansi Town Council, Wakiso District belongs to the Estate of the late Sekasamba Hawa.

ii. A court declaration that the Plaintiffs are entitled to enjoy their right as the beneficiaries of the Estate of their mother the late Sekasamba Hawa.

iii. A court declaration that the 2nd, 3rd, 4th, 5th and 6th Defendants are trespassers on the suit property.

iv. A court declaration that the 1st Defendant fraudulently sold the deceased's property suit land (Kibanja) to the 4th Defendant.

v. A court declaration that all sale agreements are fraudulent, null and void.



vi. An Eviction Order

vii. A permanent injunction is issued restraining the Defendants, their agents, assignees, workers or anybody claiming after them from interfering and trespassing on the suit land.

viii. General damages

ix. Mesne profits

x. Interest at court rate from the judgement till pay in full.

xi. Costs of the suit land and any other relief that court deems fit.

61. In light of my holding, the Defendants are illegal occupants of the suit land. I am therefore inclined to grant all the declaratory orders sought.

62. Regarding the Eviction order, it is granted and the land should revert back to form part of the Estate of the Late Sekasamba Hawa. It is on this note that court guides the Beneficiaries to apply and obtain letters of Administration to effectively administer the Estate of the late Sekasamba Hawa and protect the estate from being wasted.

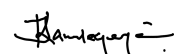


63. A permanent injunction is issued restraining the defendants from interfering with the estate of the late Sekasamba Hawa.

64. General damages, these are granted at the discretion of court and are intended to place the injured party in the same position he or she would have been, had the illegal act not occurred. The law is that damages are awarded at the discretion of court. **See: Hadley v Baxendale (1884) 9 Exch 341.**

65. The court in the assessment of general damages is guided by the subject matter, the economic convenience the plaintiff may have been put through and the nature and extent of the injury suffered.

66. In this case the plaintiffs have demonstrated that being deprived of the land that belongs to the estate of their late mother has occasioned abject inconvenience in every sense. The plaintiffs are entitled to general damages for compensation of being deprived of their right as beneficiaries of the late Hawa. I therefore award the Plaintiffs Ugshs 10,000,000 as general damages.



Mesne Profits;

67. The Definition for mesne profits is set out in section 2 of the Civil Procedure Act. Mesne Profits are defined 2(m) of the CPA as “those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession”.

68. I have considered the Plaintiffs evidence and I find no evidence of the profits which the defendants received from occupying the suit land. This prayer thus fails.

Interest

69. The plaintiffs prayed for interest at court rate. Section 26(2) of the Civil Procedure Act provides for the discretion of court regarding the award of interest.

70. A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against further economic vagaries and the inflation and depreciation of currency in the event that the money awarded is not



promptly paid when it falls due. ***(See; Kinyera v The Management Committee of Laroo Building Primary School. HCCS No 099 of 2013).***

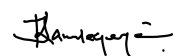
71. In the circumstances of the case, I will award as interest on the sum awarded as General damages at the rate of 10% per annum from the date of this judgment until payment in full.

Costs

72. Under Section 27 of the Civil Procedure Act, costs follow the event. The plaintiffs being the successful parties in this case are entitled to costs of the suit.

73. In the result, the suit by the plaintiffs succeeds against the defendants and judgment is entered against the defendants jointly and severally for the payment of costs general damages at an interest rate of 10% per annum from the date of the judgement until payment in full and costs of suit awarded to the plaintiffs.

I SO ORDER.



Hankeyan

NALUZZE AISHA BATALA

JUDGE

28th /02/2024