

**HIGH COURT LAND DIVISION CIVIL SUIT NO. 752 OF 2017**

## VERSUS

- 1. SSEMWANGA PETER**
- 2. BEKALAZE DEO**
- 3. KAGGWA VINCENT**
- 4. NAKATO MASTULA**
- 5. NANKYA JACQUELINE:.....DEFENDANTS**

**BEFORE: HON. MR. JUSTICE TADEO ASIIMWE**

## JUDGEMENT

The Plaintiff sued the Defendants for a declaration that the plaintiff is the lawful owner of the land in issue, an eviction order against the 5<sup>th</sup> defendant for trespassing on the said land, general damages for trespass

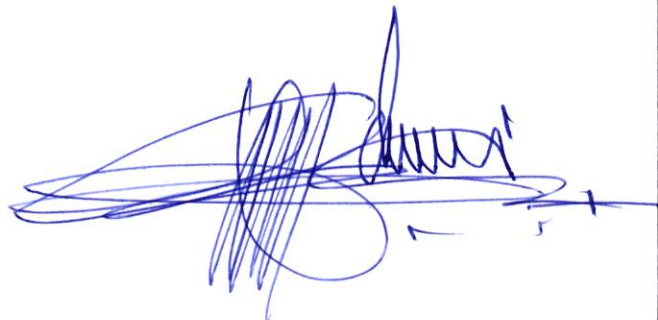


on the suit land, punitive damages for fraudulent behavior of the defendants, costs of this suit.

The Plaintiff's case is that she is the legal owner of the suit land which was given to her by her late husband and has stayed on the same with her children since 2000. That the 1<sup>st</sup> to 4<sup>th</sup> defendant trespassed on the suit land and fraudulently sold it to the 5<sup>th</sup> defendant.

On the other hand, the 1<sup>st</sup> to the 4<sup>th</sup> Defendants denied the plaintiff's case and contended that the suit land never belonged to their father Dononzzio Kivumbi who in turn could not pass it to the plaintiff. That instead the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the owners of the suit land being the registered proprietors of the same. That on the 28<sup>th</sup> day of November the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and the plaintiff entered in to a memorandum of understanding to the effect that the plaintiff retains the suit land. That they executed an MOU wherein they agreed that the suit land be sold and the plaintiff is given another land. That subsequently the suit land was sold with her consent purchase of another land in Gomba,

The 5<sup>th</sup> defendant in her defence stated that she never entered in to any agreement with the plaintiff to defeat her interest. That at the time of purchase, she searched and confirmed that the suit land was in the names of Bakalaze Deo Gracious and Kivumbi peter. That after payment of the purchase, she has since been given transfer forms by registered owners to transfer and register he land into her name.



At scheduling, the following issues were agreed for determination by this Court;

1. Whether the suit property forms part of the estate of the late Dononzzio Kivumbi
2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants were lawfully registered as a proprietor on the suit property.
3. Whether the parties have any interest in the suit property if any, whether such can be impeached by fraud or trespass
4. Whether the 5<sup>th</sup> defendant is a bonafide purchaser of value without notice.
5. Whether the plaintiff is entitled to any remedies sought.

At the hearing the plaintiff was represented by Counsel Kitaka Farouk together with Lufunya Derrick, the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were represented by Counsel Kiwanuka Peter while the 5<sup>th</sup> defendant was represented by Counsel Evans Tusiime

Only counsel for the Plaintiff and the 5<sup>th</sup> Defendant filed written submissions which I shall consider in this Judgement.

## **THE LAW**

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either





party seeking to discharge the legal burden of proof is on a balance of probabilities.

In *Miller V Minister of Pensions* [1947]2 ALL E R 372 Lord Denning stated:

“That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not.”

It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

In a bid to proof their case, the plaintiff led evidence of two witness and closed while the defendants called five witnesses.

PW1 NABULYA RUTH the Plaintiff in her witness statement stated that she is the widow of the late Kivumbi Donozio who passed away living her in possession of a suit Kibanja together with the children of the deceased who they had sired before his dismay. That she has been utilizing the same as the dwelling place and as a house and a garden for their livelihood. That she contributed to the purchase of the said Kibanja and after the death of her husband her step children 1<sup>st</sup> to 4<sup>th</sup> Defendants executed various agreements to defeat her interest in the said Kibanja.



The 5<sup>th</sup> Defendant built a perimeter wall around the suit land and engulfed her and her family on the suit land. That the Defendants fraudulently and with impunity dealt with the suit land without her permission.

In cross examination she confirmed that her husband died in 2003 leaving her with the suit Kibanja although she did not have any documentary proof to the same. she also confirmed that she has never been approached by the other family of the late Kivumbi regarding the suit land and that the children have never bought her any land in Gomba. She finally stated that she never signed any document consenting to the sale of the suit land and that the signature therefore is not hers. That she came on the suit land in 2000 and has since stayed there with her children.

PW2: NALUWEMBO JACKLINE testified that she is a daughter of the Plaintiff and the late Donozio Kivumbi that she stayed on the suit land with the Plaintiff when they have a house and gardens. The suit land belonged to her father and that when he died the 1<sup>st</sup> to 4<sup>th</sup> Defendant fraudulently sold it to the 5<sup>th</sup> Defendant.

On the other hand, DW1 Kaggwa Vicent testified that the suit land did not belong to his father Salongo Kivumbi Donozio but rather his Aunt Catherine Najjemba who gave it to the 1<sup>st</sup> Defendant through a written document dated 23<sup>rd</sup> June 1990. That his father was not buried on the suit land but rather in Entebbe. That the Plaintiff was allowed by the 1<sup>st</sup>



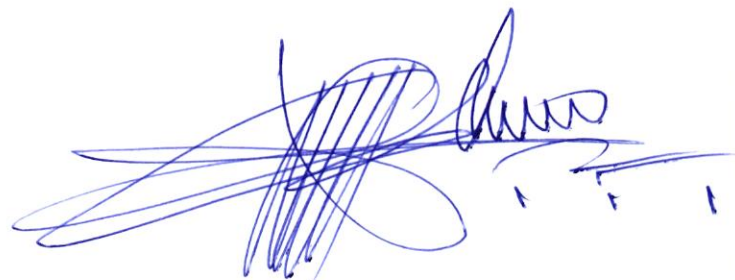


Defendant to occupy the land temporarily but refused to vacate when it was time to vacate.

In cross examination he stated that the Plaintiff is his mother and a wife to his father late Salongo Kivumbi Donozio that he recognises annexure A and C on his statement as he signed on it but did not know what it contained. That the suit land indeed belonged to his father who left it with the Plaintiff in 2003 when he died. That the Plaintiff has been in occupation of the same. He further confirmed that he signed the MOU in good faith and in attempt to save his mother from being treated unfairly, that he had no idea that it was meant to sale the suit land and that he feels bad that the suit land was sold.

DW2: NAKATO MASTULA testified that she is a daughter of Salongo Kivumbi Donozio who has never owned the suit land as he had no rights over it whatsoever. That the suit land was owned by her Aunt Catherine Najjemba who gave it to the 1st Defendant through a written document dated 23rd June 1990. That his father was not buried on the suit land but rather in Entebbe. That the Plaintiff was allowed by the 1st Defendant to occupy the land temporarily but refused to vacate when it was time to vacate.

In cross examination she stated that the Plaintiff is her mother and that her father was the Late Donozio Kivumbi. That she got her share from the Estate of the late Donozio Kivumbi and that an agreement was made that

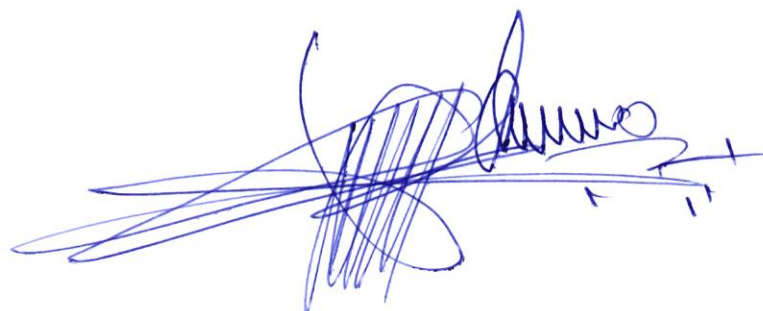


the suit land is retained by the Plaintiff. That the 1<sup>st</sup> Defendant has been a bad administrator who sold off the suit land under everyone's protest. She confirmed that the house on the suit land was built by her father and that has all these material times been occupied by the Plaintiff. She further clarified that the contents of her witness statement are wrong and that the Lawyer did not explain the content so they just signed.

DW3: SSEMWANGA PETER KIVUMBI testified that he is a son of the Late Salongo Donozio Kivumbi and that his father never owned the suit land. That the suit land belonged to a one Catherine Najjemba who gave it to him in a document dated 23<sup>rd</sup> June 1990. That she allowed the Plaintiff a temporary stay on the suit land but she refused to vacate when she was asked to do so.

In cross examination, DW3 confirmed that indeed the suit land belonged to her Aunt Catherine Najjemba who donated it to him as per DE1 and the same was witnessed by Aidah Naluwuge. That his father settled the Plaintiff on the suit land without any ownership rights.

DW5: AIDAH NALUWUGE testified that she is a wife to Salongo Kivumbi Donozio and a co- administrator of the Estate of the Late Salongo Donozio Kivumbi together with Ssemwanga Peter. That the said Salongo Kivumbi Dononsio has never owned a suit land and he had no rights over it whatsoever. That the suit land was owned by Catherine Najjemba who gave it to the 1st Defendant through a written document





dated 23rd June 1990. She further testified that she witnessed the same document.

## **RESSOLUTION**

Although both counsel argued the issues in the order they were framed, I shall resolve issue one and two together, issue 3 and 4 together and issue 5 alone since those resolved together are related.

**ISSUE 1.** Whether the suit property forms part of the estate of the late Dononzzio Kivumbi

**ISSUE 2;** Whether the 1st and 2nd defendants were lawfully registered as a proprietor on the suit property.

From the evidence on record, it was the evidence of the plaintiff that the suit land was given to her by Salongo Kivumbi Dononzio her late husband and she stayed on the suit land with her children since the 2000. Her testimony was corroborated by the testimony of the of PW2 her biological daughter who confirmed that her father the late Salongo Kivumbi Donozio owned the suit land and that her and her mother, the plaintiff have always occupied the same.

On the other hand, the defendants evidence is that the suit land never belonged to the late Salongo Kivumbi Donosio but to a one Catherine Najjemba who donated it to the 1<sup>st</sup> defendant.






However, the defendants evidence was contradictory on all fours. As reflected in their written statement of defence, the 1<sup>st</sup> to the 4<sup>th</sup> defendants contended that the suit land never belonged to Dononsio Kivumbi and as such could not pass it to the plaintiff. That instead the 1st and 2nd defendants are the registered proprietors of the suit land. That on the 28th day of November the 1st ,2nd ,3rd and 4th defendants and the plaintiff entered in to a memorandum of understanding to the effect that the plaintiff retains the suit land. That they later executed another MOU wherein they agreed that the suit land be sold and another land is aquiredsince she complained that the suit land could no longer accommodate her and her children. That the suit land was sold with her consent and an alternative land was acquired for her in Gomba,

To the contrary, in their evidence in chief the defence evidence is that the suit land belonged to a one Catherine Najjemba who donated it to the 1<sup>st</sup> defendant in a document dated 23rd June 1990 and exhibited as DE1. That the 1<sup>st</sup> defendant allowed his father late Dononsio Kivumbi and his wife, the Plaintiff to temporarily stay on the suit land but refused to vacate when he was asked to.

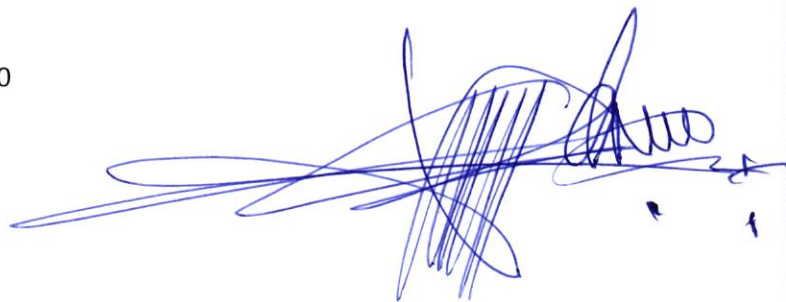
To begin with, one wonders what their actual defence is, whether it was a donation or as a result of the MOU. The defendants' allegations that the suit land was donated to the 1<sup>st</sup> defendant by a one Catherine Najjemba was not pleaded and therefore smuggling it in their evidence in chief was completely an afterthought that this court cannot ignore. A letter to prove

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the said gift was exhibited in this court as DE1, it should however be noted that it was not part of the defendant's trial bundle. This is another indicator that the evidence of a gift was an afterthought.

Besides it is not logical that the 1<sup>st</sup> defendant would allow his father late Dononsio Kivumbi and his wife to stay on the suit land during the life time of his father as if his father had no other land or house. Instead it is evident on record that his father had a wealth of properties and therefore there was no need for the 1<sup>st</sup> defendant to give his father and his wife a temporary stay on the suit land. There is also nothing on record to show that the late Dononsio Kivumbi or the plaintiff was ever asked by the 1<sup>st</sup> defendant to vacate the suit land in vain. The circumstances surrounding the usage of the suit land defeat DE1 in my view.

Further, a petition for letters of administration in the estate of the late of the late Salongo Kivumbi Donosio vide admin cause no. 576 of 2009 was exhibited as CD1. In the petition, paragraph 6 stated that all the three widows mentioned above are in their respective residential homes together with their children since the deceased died when he had built for each respective widow before his death. There is no evidence on record to show that the plaintiff had resided or stayed in another house before the demise of her husband apart from the suit land which she is still occupying.

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In addition, paragraph 8 of CD1 listed the suit land as part of the estate of the Salongo Kivumbi Donosio. If the suit land never belonged to Salongo Kivumbi Donosio, why then was it listed in a petition for letters of administration of his estate by 1<sup>st</sup> defendant if at all the suit land was donated to him.

Further if suit land was donated to the 1<sup>st</sup> defendant, why was its title registered in the names of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant, a stranger who is not related to him.

Besides, if the suit land indeed belonged to the 1<sup>st</sup> defendant, what was the purpose of an MOU between the parties to sell the suit land and buy the plaintiff another piece of land. Did the 1<sup>st</sup> defendant need permission to sell his own land?

This explains why DW1 and DW2 distanced themselves from their evidence in chief which supported the fact that the suit land was gifted to the 1<sup>st</sup> defendant. In cross examination both witnesses confirmed that their evidence in chief was written by a lawyer who did not explain the content there in. They instead supported the plaintiff's case and stated that the Plaintiff is their mother and that their father was the Late Donozio Kivumbi. That the plaintiff got her share from the Estate of the late Donozio Kivumbi and that an agreement was made that the suit land is retained by the Plaintiff. DW2 testified that the 1<sup>st</sup> Defendant has been a bad administrator who sold off the suit land under everyone's protest. She



confirmed that the house on the suit land was built by her father and that at all material times it has been occupied by the Plaintiff.

Be that as it may, the defendants' defence was /is highly contradictory and therefore insufficient to support their case. Further, looking at the title in question, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were registered on title in personal capacity and not as administrators. They got registered on title well knowing the interest of the plaintiff in the suit land and therefore did so to defeat that interest hence acquired title over the suit land unlawfully. Therefore, issues 1 and 2 are answered in the positive.

***ISSUE 3;-Whether the parties have any interest in the suit property if any, whether such can be impeached by fraud or trespass***

***ISSUE 4;-Whether the 5th defendant is a bonafide purchaser of value without notice.***

I have already found that the suit land belongs to the estate of the late Salongo Kivumbi Donosio and the plaintiff and her children as beneficiaries. I have also already found that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were unlawfully registered on title. I shall therefore proceed to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant's title can be impeached by fraud and whether the 5<sup>th</sup> defendant is a bonafide purchase for value without notice of fraud.



The Court in the case of **Fredrick Zaabwe Vs Orient Bank & Others SCCA No, 4 of 2006**, defined fraud 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 of 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. In **Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992**, it was held that; “ *fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters, it was further 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.’* ”

In this case, this court has already found that the 1<sup>st</sup> and 2<sup>nd</sup> defendant registered their names on title of the suit land well knowing the interest of the plaintiff.

In the case of **John Katarikawe v W. Katwiremu & Ors** 14 court held **that** *If a person procures registration to defeat an existing unregistered interest on the part of another person of which he is proved to have knowledge, then such a person is guilty of fraud.*

From the evidence on record, the 1<sup>st</sup> defendant is a stepson of the plaintiff and heir of late Dononsio Kivumbi. He was very well aware that the suit land had been occupied by the late Dononsio Kivumbi since 2000 until he died and the plaintiff continued to occupy the same to date. The action of proceeding to register the land in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' name, defeats the interest of the plaintiff which they very well knew was fraudulent and impeachable as per section 177 of the RTA. They indeed had no good title to pass to the 5<sup>th</sup> defendant unless she was/is a bonafide purchaser for value without notice.

I shall therefore proceed to find out if the 5<sup>th</sup> defendant is a bonafide purchaser for value without notice.

The 5th defendant in her defence stated that she never entered in to any agreement with the plaintiff to defeat her interest. That at the time of purchase, she searched and confirmed that the suit land was in the names of Bakalaze Deo Gracious and Kivumbi peter. That after payment of the purchase price, she has since been given transfer forms by registered owners to effect transfer into her names.

Ideally the doctrine of bonafide purchaser for value without notice is a statutory defence available only to the person registered as proprietor under the RTA. It is not an equitable remedy although its history stems from the common law. It would not even qualify as a remedy for it is only a defence, by a person registered as proprietor under the RTA. **See CIVIL**





**APPEAL NO. 65 OF 2011 NDIMWIBO SANDE and 3 others  
VERSUS ALLEN PEACE AMPAIRE.**

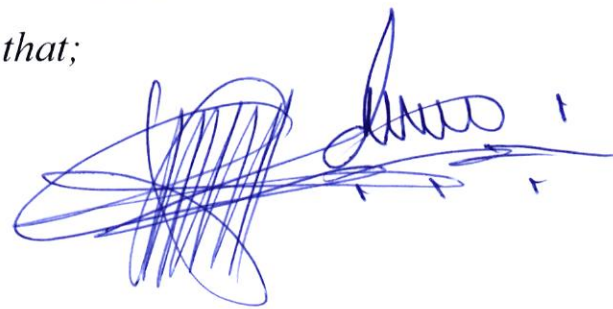
In this case since the 5<sup>th</sup> defendant is not a registered proprietor of the suit land, the doctrine would seemingly not apply to her. However, since the subject matter is titled land which was in the process of being transferred to the 5<sup>th</sup> defendant's name, I will proceed and discuss the doctrine in relation to the 5<sup>th</sup> defendant.

A bonafide purchaser is one who buys in good faith, honesty, without fraud, collusion or participation in wrong doing. See the case of **Daniel Sempa Mbabali vs W.K Kiiza and others (1985) HCB.**

**Further, in Hajji Abdu Nasser Katende vs Vithalidas Haridas & Co. LTD** Court of Appeal (Civil Appeal NO. 84 of 2003) this Court while discussing the doctrine of a bonafide purchaser for value without notice stated the position of the law as follows at pages 21-22 of the lead Judgment of L.L M. Mukasa –Kikonyogo DCJ;-

*“It suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bonafide doctrine as was held in case of **HANNINGTON NJUKI VS WILLIAM NYANZI H.C.C.S NO. 434 /1996** must prove that;*

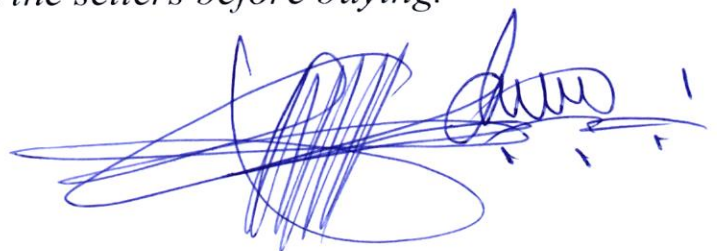
- (1) *he holds a certificate of title*
- (2) *he purchased the property in good faith*



- (3) *he had no knowledge of the fraud*
- (4) *he purchased for valuable consideration*
- (5) *the vendors had apparent title*
- (6) *he purchased without notice of any fraud*
- (7) *he was not party to the fraud*

The 5<sup>th</sup> defendant testified and confirmed that she did a search at the land registry and found title in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant and proceeded to purchase. However, in cross examination she confirmed that she did not inquire from the widow who was occupying the suit land. At locus the plaintiff was indeed found in occupation of the suit land and managed to show court the exact place where she stayed with her late husband. Court was able to observe old cement on ground which the plaintiff pointed at as a spot for their old house in addition to the existing structures and permanent old trees.

Court in **CIVIL SUIT NO.391 OF 2010-ELIZABETH NANTEZA N VS DR. ANTHONY KONDE** *stated that failure to make reasonable inquiries as in due diligence or the purchaser's ignorance or negligence to do so amounted to fraud in the circumstances of the case. Land is never bought from unknown sellers like buying tomatoes or bread. Land is valuable property and all buyers are expected to make exhaustive investigations about both the land and the sellers before buying.*





Indeed, it has been discussed in several cases that carrying out a registry search is not enough when the land in question is occupied by someone. A physical search and inquiry from the occupants is very necessary.

In this case, the 5<sup>th</sup> defendant confirmed that she found the plaintiff in occupation of the suit land but did not make any inquiries from her.

I find that the 5<sup>th</sup> Defendant had actual notice of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's fraud when she carelessly or deliberately refused to make inquiries from the plaintiff who was occupying the suit land with her children. She therefore does not qualify as a bonafide purchaser for value without notice of fraud.

#### **ISSUE 5. Whether the plaintiff is entitled to any remedies**

The Plaintiff sought for the following remedies,

- 1. A declaration that the plaintiff is entitled to an exclusive and unimpeded right of possession and occupation of all that piece of land situated at Mbuya and known as Busiro block 493 plot 42 (suit property)**

I have already found that the plaintiff is the right full owner of the suit property and as a result, she is entitled to an exclusive right of possession and occupation of the suit land, I so declare.

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**A declaration that the defendants and their servants or agents have no claim on the suit property.**

I have already found that the defendants have no interest in the suit property, I so declare.

**An injunction restraining the defendants, her agents or servants from interfering with the suit property.**

An injunction restraining the defendants, their agents or servants from interfering with the suit property is hereby granted.

**Cancellation of title.**

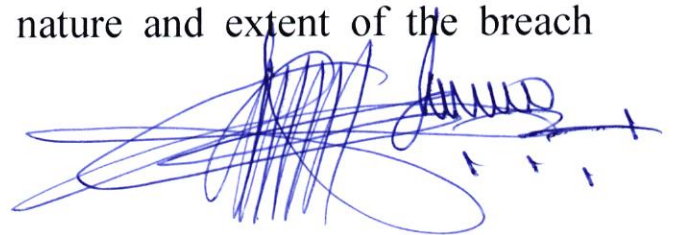
Under Section 64 (1) of the Registration of Titles Act Cap 230. The title of a registered proprietor is indefeasible except in case of fraud.

Once it has been established that the title in issue was obtained by fraud, high court has power under section 177 RTA to direct cancellation of certificate or entry in certain cases.

Therefore, having earlier found that that the 1<sup>st</sup> and 2<sup>nd</sup> defendant acquired title over the suit land fraudulently, I here by direct the registrar of titles to cancel the said land title in the names of the first and 2<sup>nd</sup> defendants.

**General damages**

In assessment of general damages, Courts are mainly guided by the value of the subject matter, the economic inconvenience that the innocent party may have been put through and the nature and extent of the breach

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suffered. In **Charles Acire versus Myaana Engola HCCS No. 143 of 1993** it was also held that;

*“A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong.”*

It is also trite law that in exercising the discretion to grant general damages, Court should not punish the Defendant for the breach but, rather put the Plaintiff in the position he or she was prior the breach complained of. See **Boscheon Civil & Electrical Construction Co., (U) Ltd versus Salini Construttiri Spa HCCS No. 151 of 2008**. Taking account of the inconvenience suffered by the Plaintiff as a result of the Defendant's acts, I am inclined to award Ug shs. 20,000,000/- only (Twenty million shillings) as general damages to the Plaintiffs at the rate of ten percent from the date of judgment till full payment.

### **COSTS**

Costs follow the event. The plaintiff having succeeded, she is entitled to costs. Therefore, the Plaintiff is granted costs of this case against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

In the result, the plaintiffs case succeeds with the following orders; -

1. A declaration that the plaintiff is the rightful owner of the suit property.

2. A declaration that the defendants and their agents have no interest in the suit property.
3. A declaration that the plaintiff is entitled to quiet and exclusive possession of the suit land.
4. A permanent injunction is hereby issued restraining the defendants and their agents or and their servants from interfering, staying or cultivating on the suit land.
5. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently acquired title over the suit land.
6. The Registrar of titles is hereby ordered to cancel title in the names of the 1st and 2nd defendants vide FHRV 1431 FOLIO 19 PLOT 16 Block 435.
7. 20 (Twenty million Ugandan shillings) is awarded to the plaintiff as general damages against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
8. 10 percent interest on general damages per annum is awarded
9. Costs of the suit awarded against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.



TADEO ASIMWE

JUDGE

13/02/2024