

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

**CIVIL SUIT NO. 0083 Of 2006**

<b>1. NAKWANYI DEBORAH</b>	}		.....		<b>PLAINTIFFS</b>
<b>2. NAKIJJOBA ESEZA</b>					
<b>3. SSEBISUBI GEOFFREY</b>					
<b>4. ZAWEDDE DOROTHY</b>					

[Administrators of the Estate of the Late Samwiri Walusimbi]

**VERSUS**

<b>1. HAMZA KAVA LUTAAYA</b>	}		.....		<b>DEFENDANTS</b>
<b>2. GWOKYALYA SALIIMA</b>					

**JUDGMENT**

**BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA**

The 4 Plaintiffs; **Nakwanyi Deborah, Nakijjoba Eseza, Ssebisubi Geoffrey** and **Zawedde Dorothy** are the Administrators of the Estate of the Late **Samwiri Walusimbi**, the original Plaintiff in the suit. The original Plaintiff; **Samwiri Walusimbi** passed on during the pendency of the suit and he was thereby substituted with the present Plaintiffs in the amended plaint filed on 27<sup>th</sup> April, 2016.

The original Plaintiff **Samwiri Walusimbi (PW<sub>1</sub>)** filed this suit against the Defendants **Hamza Kava Lutaaya** (hereinafter referred to as the 1<sup>st</sup> Defendant) and **Gwokyalya Saliima** (hereinafter referred to as the 2<sup>nd</sup> Defendant) jointly and severally as reflected in both the **original plaint** filed in court on 14<sup>th</sup> March, 2006 and the subsequent **amended plaint** by the administrators filed on 27<sup>th</sup> March, 2016, seeking the following from court;

- a. **An order of specific performance of the agreement of sale dated 14<sup>th</sup> October, 1993** for land comprised in **Mailo Register, Kyadondo Block 156 plot 336 and 342** measuring one (1) acre situate at **Kavule Estate** in Wakiso District.
- b. **An order vesting** the land comprised in Mailo Register Kyadondo **Block 156 plot 336** measuring **0.50 of an acre of land at Kavule Estate** which land is still registered in the names of **Bulaimu Kava**, deceased, in favour of the late **Samwiri Walusimbi** the former Plaintiff as the purchaser thereof and subsequently to be transferred into the names of the Administrators of his estate, the Plaintiffs.
- c. **An order of permanent injunction** restraining the **1<sup>st</sup> Defendant**, his agents, successor in title, assignees and/or legal representatives from entering upon the suit land to collect rent from the Plaintiffs' tenants or to claim ownership of the suit property or to do any act that is prejudicial to the interest of the Plaintiff in the suit property.
- d. Costs of the suit and any further or other orders as the court may deem fit.

The Defendants filed a joint **Written Statement of Defence** (W.S.D) wherein they denied all the Plaintiffs' allegations. They nevertheless filed a counterclaim for the following:

- a. A declaration that the counter defendants' claims and acts in the suit are unlawful and fraudulent.
- b. An order that the counter defendant vacates the suit land.
- c. Costs in the counterclaim.

The Plaintiffs' case as per the pleadings and PW<sub>1</sub>'s evidence, briefly is as follows:-

- a. The Defendants; **Hamza Kava Lutaaya** (1<sup>st</sup> Defendant) and **Gwokyalya Saliima** (2<sup>nd</sup> Defendant) are son and daughter of the late **Bulaimu Kava** who died around 1959.
- b. **Bulaimu Kava** was the registered proprietor of the suit land comprised in **Mailo Register, Kyadondo Block 156 plot 336 and 342 Kavule Estate** each of the area of 0.50 acres (in total measuring 1.00 acre).
- c. Upon the deceased proprietor's (Bulaimu Kava) death, the daughter, (the 2<sup>nd</sup> Defendant) inherited the 1.0 acre of the land from her late father and was issued with a **Certificate of succession** by the **Kabaka of Buganda** through the **Buganda Lukiiko of Mengo** dated **19<sup>th</sup> April, 1961**.
- d. On 14<sup>th</sup> October, 1993, the **original Plaintiff (Samwiri Walusimbi)** purchased the suit land measuring 1 acre from the 2<sup>nd</sup> Defendant after which the Plaintiff deposited the agreement of sale with the **Registrar of Titles** at Kampala Mailo office.
- e. At the time of sale, the 2<sup>nd</sup> Defendant had lodged a **caveat** dated **12<sup>th</sup> October, 1970** over the Certificate of title relating to **plot No. 336 Block 156, Kavule Estate Kyadondo** for purposes of protecting her interest as a successor of 1.00 acre by virtue of a **Certificate of succession No. 34040 dated 19<sup>th</sup> April, 1961** of the land registered in the name of **Bulaimu Kava**, the deceased.
- f. Upon purchase of the suit land, the **original Plaintiff** lodged a caveat onto the suit land on **30<sup>th</sup> May, 1994** to protect his interest

thereon and also took possession of the suit land and developed it by construction of permanent buildings thereon with the consent of the vendor, the 2<sup>nd</sup> Defendant.

- g. That when the original Plaintiff entered and took possession of the suit land, he found that the 2<sup>nd</sup> Defendant had granted a kibanja thereon to a one **Ezelesi Nakilanda** but in the meanwhile, the 2<sup>nd</sup> Defendant had disappeared before executing a transfer of the suit land in favour of the **purchaser i.e. the original Plaintiff**.

The Plaintiff challenges the 1<sup>st</sup> Defendant's Letters of administration which he obtained in 1998 as having been obtained wrongfully and or fraudulently with intention to defraud him of the land he purchased from the 2<sup>nd</sup> Defendant. As a result, the Plaintiff is claiming for an order of **specific performance of the sale agreement** by the 1<sup>st</sup> Defendant and also, Inter alia for a **vesting order** of the suit land in favour of the Plaintiffs, the administrators of the estate of the deceased original Plaintiff.

On the other hand, the Defendants' case briefly is that the 1<sup>st</sup> Defendant is the administrator of the estate of his late father **Bulaimu Kava** who died in 1959 and that the property he is administering include the suit property comprised in **Kyadondo Block 156, plots 342 and 336** which was registered in his late father's names on 24<sup>th</sup> June, 1985 and he transferred the latter plot (plot 336) into his names as an administrator of the estate on **14<sup>th</sup> July, 2005**.

The Certificate of succession alleged by the Plaintiffs to have been granted to the 2<sup>nd</sup> Defendant, his sister, are denied and avers that the 2<sup>nd</sup> Defendant by 1961 (when she is alleged to have been issued with

the Certificate of succession), was a minor and therefore not capable of applying for as Certificate of succession.

The issues for trial as canvassed by both Counsel during their submissions are as follows;-

1. Whether the **2<sup>nd</sup> Defendant** inherited the suit land measuring **one acre** comprised in **Mailo Register, Block 156 plots 336 and 342 at Kavule Estate** from her late father **Bulaimu Kava** in the year 1961.
2. Whether the **2<sup>nd</sup> Defendant's** inheritance of the suit land was lawfully distributed by the **Lukiiko of the Buganda Government** by issuance of **Succession certificate No. 34010 dated 19<sup>th</sup> April, 1961 in conjunction with the office of the Administrator General.**
3. Whether the **2<sup>nd</sup> Defendant** lawfully sold the suit land (her inheritance) to the **Plaintiff (Samwiri Walusimbi)** by **agreement of sale** dated **14<sup>th</sup> October, 1993.**
4. Whether the **1<sup>st</sup> Defendant** obtained lawful registration of his name unto the Mailo Register for land comprised in Mailo Register **Kyadondo Block 156 plot 336 at Kavule Estate** that forms part of the suit land.
5. What remedies are available to the parties.

### **The burden of proof:**

In civil matters, the Plaintiff generally bears the burden to prove his/her case on a balance of probabilities. The Plaintiff in this case, by virtue of **Sections 101, 102 and 103 of the Evidence Act** has the burden to prove the facts alleged by him in the plaint. **Section 101(1)** in particular provides that:

*“Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he or she asserts must prove that those facts exist.”*

Then **Section 103** also in particular provides thus:

*“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

In the instant case, it is incumbent upon the Plaintiff to prove facts constituting his claims on the balance of probabilities to obtain a judgment in his favour.

This court shall tackle issues **1, 2 and 3** together because the evidence relating to each of these issues is entangled with each other.

**1<sup>ST</sup>, 2<sup>ND</sup>& 3<sup>RD</sup> ISSUES:**

**1. Whether the 2<sup>nd</sup> Defendant inherited the suit land.**

And

**2. Whether the 2<sup>nd</sup> Defendant’s inheritance of the suit land was lawfully distributed by the Lukiiko of the Buganda Government by issuance of Succession certificate.**

And

**3. Whether the 2<sup>nd</sup> Defendant lawfully sold the suit land (her inheritance) to the Plaintiff (Samwiri Walusimbi) by agreement of sale dated 14<sup>th</sup> October, 1993.**

It is the submission of Counsel for the Plaintiff that the **Plaintiff, Samwiri Walusimbi** (PW<sub>1</sub>) testified in detail how as a fellow resident of Luteete, Nazaleesi village, lawfully acquired the suit land from

the **2<sup>nd</sup> Defendant** which land she inherited from her late father **Bulaimu Kava** who formerly resided at Luteete, Nazaleesi village, Kiwenda Parish. Kyadondo, Wakiso District. That PW<sub>1</sub> further stated in his testimony that prior to acquisition of the suit land, the **2<sup>nd</sup> Defendant** furnished him with a **Certificate of succession** issued to her by **His Highness, the Kabaka of Buganda** through the **Buganda Lukiiko of Mengo** (also apparently manifest under caveat lodged by her on 12<sup>th</sup> October, 1970 – P. Exh. 4) which proved and confirmed to him that she was the **successor** and sole beneficiary of **the one (1) acre of land at Kavule Estate**, Kyadondo belonging to her late father **Bulaimu Kava**. She did not however, surrender the said **Certificate of succession** to him.

Under this head, the Plaintiff is relying on (a). The **Certificate of succession** issued to the **2<sup>nd</sup> Defendant** which according to Counsel, was **admitted by the Defendants at trial** thus extinguishing any doubt that the suit land belonged to none other than the **2<sup>nd</sup> Defendant** as the beneficiary as clearly manifested in the **caveat** lodged by the **2<sup>nd</sup> Defendant** (P. Exh. 5).

At the outset, I need to state that **Mr. Kiingi's** claim in his submissions that the **Certificate of succession** “was admitted by the Defendants at trial” is misplaced. No **Certificate of succession** was tendered in evidence during the trial. As correctly and rightly submitted by Counsel for the Defendants Mr. Muhwezi, the Plaintiffs pleaded under paragraph 5(b) of the amended plaint;

5(b). *“upon the said deceased's death, the said land was inherited by his daughter **Saliima Gwokyalya** the **2<sup>nd</sup> Defendant** under a **Certificate of succession No. 34040 dated 19<sup>th</sup> April, 1961** issued by*

*then Buganda Lukiiko in accordance with provisions of the Buganda Land Succession Law, 1912...”(Certified true copies of the Certificate of succession as well as mutation form annexed hereto marked “D” and “F” respectively).*

In the annexures of the amended plaint (and the original plaint), the said copy of the Succession certificate (annexture “D”) is missing and or omitted. It was not annexed. This is further fortified by the Plaintiff (PW<sub>1</sub>) himself when he testified that he was merely shown a copy of the Certificate of succession by the 2<sup>nd</sup> Defendant but it was not handed over to him.

Nambi Diana (PW<sub>2</sub>), Registrar of Titles was also able to furnish various documents from her office of the record of the suit land but was not able to produce a copy of that **Certificate of succession** in favour of the 2<sup>nd</sup> Defendant though she claimed as the Plaintiff (PW<sub>1</sub>) did, that she saw it.

In the circumstances above, it is therefore not possible that he **Certificate of succession** which the Defendants clearly denied and traversed seriatim could be said to have again been admitted at the trial. They denied its existence and the burden is on the Plaintiff to prove its existence. To prove the existence of the “*Certificate of succession*”, the Plaintiff relied on the **caveat** lodged by the 2<sup>nd</sup> Defendant on 12<sup>th</sup> October, 1970 (P. Exh. 4) purportedly to protect her interest as a “**successor of 1.00 acres by virtue of a Certificate of succession No. 34040 dated 19<sup>th</sup> April, 1961 ... of the land registered in the name of Bulaimu Kava, deceased being part of the land comprised in the above volume and Folio of the Mailo Register ...**”



The “Volume” and “Folio” of the Mailo Register reflected in the caveat(P. 4) were **Block 156, plots 226 and 284.**

In evidence, the Plaintiff’s (PW<sub>1</sub>) stated that he knew the deceased **Bulaimu Kava** who was the registered proprietor of the land comprised in **Mailo Register, Kyadondo Block 156 plot Nos. 336 and 342 land at Kavule Estate Kyadondo.** In the Plaintiff’s scheduling memorandum notes dated and filed on 29<sup>th</sup> August, 2008, it was the Plaintiff’s agreed fact that;

1. *“**Bulaimu Kava** deceased was the registered proprietor of the land formerly comprised in **Mailo Register Volume 851 Folio 11 as to one (1.00) acre of land at Kavule Estate** which land upon a subdivision survey and conversion to the **New Register** became **Kyadondo Block 156 plots 336 and 342.**”*
2. *“Upon the death of **Bulaimu Kava**, his daughter; the 2<sup>nd</sup> Defendant inherited the said 1.00 acre of land ...”*

Clearly, the above is to the effect that **Kyadondo Block 156 plots 336 and 342** arose from the former **Mailo Register Volume 851 Folio 11.** What is astonishing, this **MRV851 Folio 11** is not reflected on the caveat (P. 4). What is reflected on the caveat (P. 4) is **Block 156 plots 226 and 284.**

Inspite of this, Nambi Diana (PW<sub>2</sub>) presented 2 Certificates of title for **Block 156 plots 336 and 342 Kavule Estate (P. 1 & P. 2)** and during cross examination, she explained that the 2 plots were created in 1985. She also presented the **2<sup>nd</sup> Defendant’s Mutation form (P. 3)** which according to her, was meant to subdivide a big parcel (before the subdivision). This mutation form does not show the original title

from which **plots 336 and 346 Block 156** were created from. Upon being asked in cross examination to explain this, she said *“yes that shows anomaly”*.

In the circumstances of this case therefore, neither he, **Plaintiff (PW<sub>1</sub>)** nor his witness **Nambi Diana Registrar of titles (PW<sub>2</sub>)**, his other witnesses **Robert Musoke (PW<sub>3</sub>)** who witnessed the purchase of the suit land and his Counsel Mr. Kiingi were able to explain or show court the nexus between **plots 226 and 284 Block 156** reflected in the **caveat (P. 4)**(which was meant to protect the 2<sup>nd</sup> Defendant’s interest she acquired by virtue of the Certificate of succession No. 34040 dated 19<sup>th</sup> April, 1961)AND plots 336 and 342 (now in dispute).

The Registrar of titles (PW<sub>2</sub>) attempted to offer a haphazard explanation by conceding that the **caveat (P. 4) was for plots 220 and 284** and that **plots 336 and 342** could have been created from **plots 220 and 284**. She was however, never led by Counsel Kiingi to elaborate again the relationship if any of **plots 220 and 284/plot 336 and 342** with MRV851 Folio 11 which was highlighted in the schedule notes of the Plaintiff as the mother title where plots 336 and 342 emanated from. It is the duty of the Plaintiff to resolve this contradiction by way of presenting the relevant evidence to court.

From the foregoing, I find that the Plaintiff’s evidence fell short of proving that the **Certificate of succession No. 34040 dated 19<sup>th</sup> April, 1961** referred to in the **2<sup>nd</sup> Defendant’s caveat dated 12<sup>th</sup> October, 1970 (P. 4)** was in respect of the suit property. And therefore, I am inclined to believe and agree with Counsel Muhwezi’s submission, that the **plots 336 and 342Block 156**did not exist during the life time of **Bulaimu Kava** and on the date of the alleged issue of

the said **Certificate of succession** in favour of the **2<sup>nd</sup> Defendant**. At the encumbrance page of plot 342 (P. 1), I find that the **2<sup>nd</sup> Defendant's caveat of 12<sup>th</sup> October, 1970** is reflected thereon yet as conceded by the Registrar of Titles, this plot was created in **1985**. She attempted to explain this by stating that the **caveat** could have been transferred to **plot 342** but as I have already observed, she could not explain from which plot of land this **caveat** was transferred from.

The Plaintiff's situation is complicated further by the **Agreement of Sale** of the suit land. **As to whether the 2<sup>nd</sup> Defendant lawfully sold the suit land (her inheritance) to the Plaintiff (Samwiri Walusimbi)**, the Plaintiff relies on the agreement of sale **dated 14<sup>th</sup> October, 1993 (P. 5)**.

In the pleadings, the Defendants deny that the **2<sup>nd</sup> Plaintiff Defendant** sold the suit land to the Plaintiff (PW<sub>1</sub>). The onus is therefore, the circumstances on the Plaintiff to prove that he actually purchased the suit land comprised in **Block 156, plots 336 and 342**. In the **1<sup>st</sup> instance**, this court has already found that the **2<sup>nd</sup> Defendant** neither did she own nor inherit **plots 336 and 342 Block 156** from **Bulaimu Kava** by virtue of the Certificate of succession. It follows therefore that she could not have sold the suit land to the Plaintiff. This is fortified by the fact that the sale agreement itself, its body does not describe the land sold to the Plaintiff as the suit land. As Counsel for the Defendants correctly and rightly submitted, in the impugned **Sale Agreement (P. 5)**, the suit property described as **Kyadondo Block 156 plots 336 and 342** is not stated in the body thereof. It was super imposed on the agreement after everybody had signed. No one countersigned after the description of the land was imposed later. Even the alleged **Certificate of succession** is not mentioned in the

Agreement. That also important to note is that the alleged purchaser (PW<sub>1</sub>) and alleged seller (2<sup>nd</sup> Defendant) did not sign the so called agreement to have a binding effect of them.

In his testimony, **Robert Musoke (PW<sub>3</sub>)** who claim to had witnessed the agreement of sale of the suit land (**plots 336 and 342**) land at Kavule Estate on **14<sup>th</sup> October, 1993** explained that the transaction of sale took place in the presence of the 2<sup>nd</sup> Defendant's sister a one **Maliyamu Nakirijja** and her brother **Umaru Lutaaya** who were both residents of Nazaleesi village and both signed on the agreement as witnesses. At the time, PW<sub>3</sub> was the General Secretary R.C.I Nazaleesi village.

During cross examination however, PW<sub>3</sub> conceded that the Plaintiff did not sign on the purchase agreement. But that he only paid the 2<sup>nd</sup> Defendant for the suit land. He did not explain what could have been the reason why the Plaintiff (PW<sub>1</sub>) failed or omitted to sign the agreement of sale of the suit land he was purchasing.

In **EDWARD GATSINZI & ANOR. VS. LWANGA STEVEN H. C. C. S. NO. 690/2004**, citing **HUSSEIN JUMP VS. RAPHAEL BWAMI H. C.C. A DR M. F. P. 6/1990**, it was held;

*“Where sale of land is involved, the purchaser cannot be by mere presumption, there must be actual performance with a written memorandum or not **duly signed by the parties** and the failure to prove the same would render the claim baseless.” (The bolding is mine)*

The endorsement/signature attributable to the **2<sup>nd</sup> Defendant** on the agreement of sale appear different from her endorsement/signature on her **caveat dated 12<sup>th</sup> October, 1970 (P. 4)** and in particular the

name “*Salima*” or “*Saliima*” etc. The onus is on the Plaintiff to explain the above shortcomings affecting the agreement of sale in question. In this case, neither the Plaintiff nor PW<sub>3</sub> who witnessed the agreement did give any explanation as to why the Plaintiff did not endorse or sign the agreement he intends in this case to enforce “**specific performance**”. The lack of the Plaintiff’s signature on the agreement he intends to enforce renders the agreement suspicious. He cannot enforce what he never intended in the 1<sup>st</sup> instance, to bind him. The onus is on the Plaintiff to satisfy court that the agreement he intended to rely on and enforce is credible. The Plaintiff’s evidence fell short of proving the credibility of the agreement.

In conclusion, I find that the 2<sup>nd</sup> Defendant did not inherit the suit land comprised in **Block 156 plots 336 and 342** from her late father in 1961 because it has not been shown by the Plaintiff that a **Certificate of succession** to that effect existed. If the 2<sup>nd</sup> Defendant had failed and or refused to give the Plaintiff a copy, the Plaintiff could have obtained a copy or other proof of the Succession certificate from **Mengo Lukiiko office or the Administrator General’s office** in the Succession Register since Counsel for the Plaintiff claimed that the Certificate of succession was issued in conjunction with the Administrator General’s office.

Lastly, there was no legally binding agreement of sale of the suit property between the parties.

The 1<sup>st</sup> three issues are therefore found in the negative against the Plaintiffs.

#### **ISSUE NO. 4:**

**Whether the 1<sup>st</sup> Defendant obtained lawful registration of his name unto the Mailo Register for land comprised in Kyadondo Block 156 plot 336 at Kavule Estate that forms part of the suit land.**

It is the evidence of the **1<sup>st</sup> Defendant (DW<sub>1</sub>)** that he is the **Administrator** of the estate of his late father **Bulaimu Kava** who died in 1959. The Letters of administration are vide **H. C. A. C. No. 364 of 1988** (P.9). The estate he administered included the suit land comprised in **Kyadondo Block 156 plots 342 and 336** registered in his late father's names as on 24<sup>th</sup> June, 1985 and he later transferred the latter plot (**i.e. plot 336**) into his names as an administrator of the estate after retrieving it from the **Non Performing Assets Recovery Trust** (NPART) in 2005 as it had been mortgaged to the bank. The involvement of NPART in plot 342 is not in dispute (see letter dated 07<sup>th</sup> April, 1999 from Counsel for the Plaintiffs addressed to the L.C.1 Chairman of Kiwenda Central zone; the Plaintiff's Counsel letter to the Legal Secretary NPART caveat dated 10<sup>th</sup> October, 1997). This explains why the NPART caveat dated 10<sup>th</sup> October, 1997 under Inst. 191357 (P. 1) was withdrawn on 02<sup>nd</sup> December, 2012 as clearly explained by the Plaintiff himself during cross examination. It is not in dispute that **plots 336 and 342 Block 156 were created in 1985** as the Registrar of Titles (PW<sub>2</sub>) explained. It is therefore unfair as Counsel for the Plaintiffs demands at P. 4 of the Plaintiff's submissions in rejoinder to require the 1<sup>st</sup> Defendant to explain how the Bulaimu's name came to be entered on the Certificate of title for **plots 336 and 342 in 1985** when **Bulaimu Kava** had passed away in 1959. It is however possible that someone's name could be entered on the Certificate of title when he is already dead as long as he started the process when still alive or where the Land Registry is already furnished with sufficient evidence

that the land belongs to him and is entitled to be registered thereon. However, in this case, if there was any fraud, this ought to have been explained by the Registrar of titles (PW<sub>2</sub>). Secondly, such fraud cannot be attributed to the 1<sup>st</sup> Defendant but to the immediate transferee i.e. **Bulaimu Kava** and a one **Ignatius Bakasigaho** who mortgaged the plot 336 Certificate of title to the bank. In any case, the suit land belonged to the 1<sup>st</sup> Defendant's father and fraud on it if any, it was him to complain and not the Plaintiff who does not have any vested interest in the estate of the deceased.

From the foregoing it follows therefore, the previous issues having been resolved against the Plaintiff, the suit remained vested in the estate of the late **Bulaimu Kava**, administered by the 1<sup>st</sup> Defendant upon grant to him of **Letters of administration** by court vide H. C. A. C. No. 364/1988 (**p. 9**).

Regarding the Plaintiff's claim that upon purchase of the sit land in 1993, he entered upon the suit land, took physical possession and constructed both commercial and residential buildings, it is the Defendants' case that the Plaintiff unlawfully took possession of the suit **plot 336 in 1999** (Defendants' scheduling memo notes filed on 03<sup>rd</sup> October, 2008). On record, there are correspondences; the first one is dated **19<sup>th</sup> March, 1999** from Were & Co. Advocates who were by then acting for the family of the late **Ibrahim (Bulaimu) Kava** addressed to the L.C. 1 Committee of Kiwenda Central and they were complaining to the L.Cs that about certain people that were pouring building materials on their plot located at **Kavule, Kiwenda**. The present firm of the Plaintiff's Advocates responded by writing to the Chairman and members of L.C.1 Kiwenda Central on **07<sup>th</sup> April, 1999**

warning them that actually the plot in issue is comprised in **2 plots; 336 and 342 of Block 156** each measuring 0.50 of an acre land at Kavule Estate, Kyadondo and that it belonged to the Plaintiff.

This remained to be the position regarding the suit land up to 2006 when the 1<sup>st</sup> Defendant was at it again by letter on record dated **03<sup>rd</sup> January, 2006** addressed to the Plaintiff demanding for him to vacate the suit land.

In the circumstances of this case, from the foregoing, it cannot therefore be said that the Defendants sat on their rights and acquiesced the take over and possession of the suit land. The Plaintiffs were put on alert about their claims. The **1<sup>st</sup> Defendant** has been throughout the years consistent about his claims for the suit land against the **Plaintiff**.

The Plaintiff again attempted to defeat the 1<sup>st</sup> Defendant's interest by arguing that the 2<sup>nd</sup> Defendant from whom he derives interest had sold a kibanja portion out of the suit land to a one **Ezelesi Nakilanda** as per the document on record **dated 18<sup>th</sup> June, 1968** and that the 2<sup>nd</sup> Defendant used to obtain **obusulu** from her as per the document on record dated **04<sup>th</sup> July, 1993**. I have carefully perused the documents on record in respect of **Nakilanda Ezelesi** dated **18<sup>th</sup> June, 1968** and **04<sup>th</sup> July, 1993**. It has not been shown by the Plaintiff by way of evidence that the documents in question or the kibanja referred to are in respect of the suit land described as **plots 336 and 342 Block 156**, Kavule Estate.

It is clear in evidence that the late **Bulaimu Kava** lived and was a resident of **Nazaleesi village**. It is therefore not likely that he owned



there the suit land measuring **one acre** ONLY hence it is incumbent upon the Plaintiff to show by way of evidence that the documents in question refer to the suit land. The Plaintiff's evidence fell short of that proof.

In the present case, the 1<sup>st</sup> Defendant having acquired the Certificate of title for plot 336 is protected by law under **Sections 176(c), 64(1) and 59**; no action shall be sustained against a person named as registered proprietor except in cases of fraud, the estate of the registered proprietor is paramount except in cases of fraud and the Certificate of title is conclusive evidence of ownership. The Certificate of title is indefeasible except on grounds of fraud; **KAMPALA D. L. B & ANOR. VS. N. H. & C. C.; S. C. C, APPEAL NO. 2/2004**. In the instant case, the Plaintiff complain that the 1<sup>st</sup> Defendant filed a caveat on the suit land but that it was fraudulently removed, and that the 1<sup>st</sup> Defendant's Letters of administration dated 22<sup>nd</sup> November, 1988 are false.

As regards fraud, it is the law that in addition to pleading it, it has to be strictly proved and the standard of proof is higher than on the balance of probabilities; **PATEL VS. MAKANJI [1957] EA 314**. **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; KAMPALA BOTTLERS VS. DAMANICO (U) LTD S. C. C. A. NO. 27/2012.**

In the instant case, the burden is on the Plaintiff to establish fraud. I find that the Plaintiff's particulars of fraud are based on the presumption that the Plaintiff had a valid claim or interest in the suit land by virtue of a **Certificate of succession of the 2<sup>nd</sup> Defendant**

whom he claims he derived interest from. In this case, it had already been established by court that the Plaintiff has no interest in the suit property. Besides, the claims of fraud by the Plaintiff against the 1<sup>st</sup> Defendant are not backed by any evidence.

Under ***Section 134 Registration of Titles Act***, I find and hold that the 1<sup>st</sup> Defendant obtained lawful administration of his name unto the Mailo Register for land comprised in **Mailo Register, Kyadondo Block 156 plot 336** which forms part of the suit land.

#### **ISSUE NO. 5:**

##### **What remedies are available to the parties;**

Having found that the Plaintiff had no interest in the suit **plots 336 and 342 Block 156**, it follows that this court cannot compel the Defendants jointly and/or severally to specifically perform the contract of the purchase of the suit land by the deceased Plaintiff **Samwiri Walusimbi** from the **2<sup>nd</sup> Defendant**. The purchase agreement if at all it was executed between the parties, it had no binding effect. Besides, it was not shown that it was in respect of the suit property.

The Plaintiff is therefore in the circumstances not entitled to the prayers in the amended plaint. The entire claim is therefore dismissed with costs to the 1<sup>st</sup> Defendant.

On the other hand, the counterclaim is allowed on the following terms:-

1. It is declared that the counter defendant's claims and acts in the suit land are unlawful and fraudulent and it is ordered that the counter defendants vacate the suit land.

2. The counterclaim is allowed with costs payable to the 1<sup>st</sup> Defendant.

Byaruhanga Jesse Rugyema

**JUDGE**

**21/10/2020**