

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NUMBER NO. 1002 OF 2004

1. Christine Nakamu
2. Leonard Serunkuma
3. Lovinsa Nakatudde

} PLAINTIFFS

Versus

Kyabongole Farmers Company Limited DEFENDANT

BEFORE: HON. AG. JUDGE REMMY K. KASULE

JUDGMENT

The Plaintiffs claiming to possess equitable interest, sued the defendant company for recovery of land comprised in Bululi Block 212 plot 2, measuring 203.3 hectares, situate at Kyabongole, Bululi District. They also claimed general damages.

The defendant company denied that the Plaintiffs had any such interest or at all in the suit land and thus prayed for the dismissal of the suit. Defendant also counter-claimed for an order that the Plaintiffs and all persons claiming under them vacate or deliver vacant possession of the suit land; by reason of being trespassers thereon. Defendant also counter-claimed general, special damages and mesne profits from the Plaintiffs.

Learned Counsel Frederick Ochieng-Obbo of Frederick, Francis and Associates, Advocates, represented the Plaintiffs, while Adrian Mubiru of Ssewankambo, Mawanda Mubiru & Co, Advocates, appeared for the Defendant.

The hearing of the suit proceeded with seven (7) issues being set up for determination:-

1. Whether the original transfer of title in the suit property of Bululi Block 212 plot 2 from Adoloniko Lubebe to Eryeza Katarwa as Administrator of the estate of Adoloniko Lubebe was lawfully obtained or not.
2. The validity of the original transfer notwithstanding, whether the subsequent transfer from Eryeza Katarwa, as administrator of the estate of Adoloniko Lubebe to Kyabongole Farmers Limited was legally valid.
3. Whether the Plaintiffs are entitled to the remedies claimed, namely the cancellation of the registration of Kyabongole Farmers Limited on the title for Bululi Block 212 Plot 2, Land at Kyabongole and the restoration of Adoloniko Lubebe as the registered proprietor in the said title deed.
4. Whether the plaintiffs are beneficiaries of the estate of the late Adoloniko Lubebe.
5. Whether the defendants are entitled to the reliefs counter-claimed.
6. Whether the suit is misconceived, brought in bad faith or abuse of Court process.
7. whether the suit land should be restored to Adoloniko Lubebe.

In support of the plaintiffs' case, the third Plaintiff, Lovinsa Nakatudde, testified and called one other witness Mrs. Florence Mary Ndibalekera Kanyike, a records officer, Administrator General's Department. Both witnesses for Plaintiffs were cross examined by defence Counsel. The case for Plaintiffs was then closed.

For the defendant only one witness Ibrahim Kitaka testified and only partly.

Partly, because Mr. Ibrahim Kitaka started to give his testimony in chief on 23-09.05, and in the Course of his testimony, Mr. Mubiru, Counsel for the Defendant, sought and was granted by Court, an adjournment because there were documents Counsel wanted to see before continuing with the testimony in chief of this witness. The case was adjourned to a future date as Plaintiff's Counsel did not object to the adjournment.

The case was next called for hearing on 18.11.05, when Plaintiff's Counsel was present, but defence Counsel and defendant were absent. Court adjourned the case to 06.12.05 to enable defence Counsel and Defendant to be present for further hearing.

On 06.12.05 when the case was called, Mr. Mubiru, defence Counsel, sought and was granted an adjournment, with the consent of Plaintiff's Counsel as he, Mr. Mubiru, claimed had not been in touch with his witness. The case was adjourned to 19.12.05.

On 19.12.05 Plaintiffs' Counsel was present, defence Counsel and Defendant were absent. No explanation was furnished to court for their absence. Court thus acceded to submissions of Plaintiffs' Counsel that written submissions be filed and judgment delivered in the case since defence had failed to prosecute their defence with due diligence. Court directed that written submissions for the plaintiffs be served upon Counsel for defendant for him to respond to and also file in Court and serve submissions for the defendant. The case was fixed for mention on 06.02.06.

On 02.02.06 the defendant filed Miscellaneous Application Number 67 of 2006 to have the hearing of the case re-opened and DW1 complete his testimony.

The Application came up for hearing on 14.03.06 when defence/Applicant's Counsel sought an adjournment. It was adjourned to 23.03.06; and on that day defence Applicant's Counsel and defendant/Applicant were absent. The application was again adjourned several times up to 05.06.06.

On 05.06.06 Counsel for plaintiffs/respondents informed Court that it was defence/applicant's Counsel who had informed him of the hearing date of 05.06.06. He was thus surprised that defence/applicant's Counsel and defendant/Applicants were absent. Plaintiffs'/Respondent's Counsel prayed, and Court acceded to the prayer, to have the application dismissed for want of prosecution. The same was so dismissed.

The essence of the first issue is whether or not the original transfer of of the suit land; Bululi Block 212 plot 2, from Adoloniko Lubebe to Eryeza Katarwa was lawfully done.

The evidence of PW1, Lovinsa Nakatudde, and PW2 Mrs. Florence Mary Ndibaleka Kanyike, and according to Certificate of title, Exhibit P1, the suit land had since 19.01.34 been registered in the names of Adoloniko Lubebe. On 02.06.87 by Instrument Number Buk.46852, the same

was transferred into the names of Eryeza Katabalwa, as administrator of the estate of the late Adoloniko Lubebe by virtue of letters of Administration in Administration cause No. 29 of 1987, issued by Grade II Court, Magistrate's Court of Mengo Magisterial Area at Luweero.

There is no dispute that the suit land prior to 02.06.87 was registered in the names of Adoloniko Lubebe, deceased, as proprietor.

The evidence of PW1 is to the effect that Adoloniko Lubebe was her grandfather as he was father to Isaak Kibuuka. PW1 is a daughter of Isaak Kibuuka.

On death, Adolonika Lubebe was survived by 15 children, including the said Kibuuka Isaak.

According to PW2: a Records Officer, Administrator General office, who produced to Court, the Succession Register Book, Page 48, a photocopy of which remained with Court, after seeing the original, and was tendered as Exhibit P6, Adoloniko Lubebe died on 25-01-22. He left no will. He was succeeded by Zekia Sempa, one of his sons.

In accordance with the system then existing in Buganda of dealing with estates, the various lands of Adoloniko Lubebe were distributed amongst his children.

The suit land at Kyabongole (Kyabagole in Register) comprised on P.C. No. 2190, was distributed thus:-

Isaaka Kibuuka (son) – 267 acres

Yairo Sekibungu (son) – 125 acres

Semwanga (son) – 99 acres

Nungu 99 acres

Kasambiza 98 acres

Though distributed as stated above, none of the beneficiaries took out succession certificate to have the land registered into their own names.

Thus the suit land remained registered into the names of Adoloniko Lubeebe up to 02.06.87.

PW1's father, Isaak Kibuuka one of the beneficiaries of the land lived, died and was buried on this land.

PW1 was born on this land in 1949. She has lived all along on this land together with her children and those of her brothers. She has a house on the same, cultivates and grazes on the same. It is only the 1979-85 war that made her leave her home. She permanently returned to the land in 1990 after the war.

PW1's other brothers and their children also lived on this land. A number of them had been killed during the 1979 – 85 armed conflict in Luwero.

Soon after the war in 1987, PW1 learnt that Eryeza Katabalwa was claiming to have acquired the suit land. In 1990 PW1, her sister Christine Nakamu the 1st Plaintiff and others of her relatives such as the second Plaintiff, son of her brother, Stanley Kiwuli, were threatened with evictions and having enclosures and fences put on the suit land to the exclusion of the Plaintiffs as occupiers. She, the two other plaintiffs and her relatives engaged a lawyer to defend their interests in the land.

Through searches made by her lawyer, PW1 found out that Eryeza Katabalwa had fraudulently claimed to be a grandson of Adoloniko Lubeebe and in that capacity obtained Letters of Administration from a Grade II Court, at Luweero.

According to PW1, Eryeza Katabalwa was never a grandson, as claimed in Exhibit P4(d) or in anyway a relative of Adoloniko Lubebe. Further, in the Notice of Application: Exhibit P4 (b) and in the Munno Newspaper of 06.05.87: Exhibit P4(c) the said Eryeza Katabalwa had described himself as "widow" of Adoloniko Lubeeba. This falsehood, according to PW1, was all part of the fraud for Eryeza Katabalwa to take the suit land.

DW1 Ibrahim Kitaka for the defence stated that Eryeza Katabalwa got the suit land from Adoloniko Lubeebe, his grandfather. The same witness also stated that Eryeza Katabalwa got

the suit land by virtue of being a grandson of Adoloniko Lubebe. Then he changed and stated that Eryeza Katabalwa had bought the suit land from one Kibuuka John.

DW1 did not explain how Eryeza Katabalwa came to be a grandson of Adoloniko Lubebe. He also threw no light as to how John Kibuuka came to acquire title or any interest over the suit land.

The Court finds the evidence of PW1 and PW2 truthful. The evidence of DW1, is rejected as unreliable.

It is the holding of Court that Eryeza Katabalwa acted fraudulently when he proceeded to apply to the Grade II Court, Luweero, and was granted Letters of administration to the estate of Adoloniko Lubebe.

He was neither a grandson nor a widow of the deceased. He did so without the knowledge and or consent of the right beneficiaries to the estate, such as the third Plaintiff, whose presence on the land was notice to Eryeza Katabalwa of her interest in the estate of Adoloniko Lubebe.

Since the transferred of the suit land from Adoloniko Lubebe to Eryeza Katabalwa was on the basis of Letters of Administration fraudulently obtained by Eryeza Katabalwa, it follows therefore, and Court so holds, that such a transfer was unlawfully obtained. The same was obtained as a result of fraud on the part of Eryeza Katabalwa.

The first issue is answered in favour of the plaintiffs.

With regard to the second issue, the evidence adduced is that on 13.07.90 by instrument Number Buk.48613 Eryeza Katabalwa transferred the suit land to a Limited liability Company: Kyabongole Farmers Company Limited. Exhibit P1 the certificate of Title is clearly to this effect.

Exhibit P7, the admitted report from the Registrar General, shows that this Company was incorporated on 08.06.90 as No.21856 and that Eryeza Katarwa was a shareholder in the company.

According to Exhibit P3, the transfer, it is Eryeza Katabalwa, Administrator of estate of Adoloniko Lubebe, who transferred the suit land to the company on 29.06.90. Eryeza Katabalwa signed as vendor and also for and on behalf of the company as purchaser.

The company had the land transferred to it as “beneficiaries”. Thus no purchase price is indicated as having been paid by the company to the administrator of the estate of Adoloniko Lubebe.

Knowledge of a fraud by a director or principal officer of a company is imputable on the company itself. This is the more so if the principal player in the fraud is the same as in this case. It is Eryeza Katabalwa who fraudulently obtained Letters of Administration to Adoloniko Lubebe’s estate registered proprietor of the suit land. It is the same Eryeza Katabalwa, who after being fraudulently registered of the land transfers the same to the defendant company and he signs for and on behalf of the company as purchaser/transferee.

Thus the original transfer of 02.06.87 is void ab initio. That being the case the subsequent transfer of 13.07.90 emanating from the original transfer must also be a nullity, the same having been vitiated by the fraud obtaining on the first transfer. This fraud is perpetrated in each of the transfer transactions by Eryeza Katabalwa. This is so because:

“fraud must be directly attributable to the transferee either directly or by necessary implication” : See **Wambuzi CJ (as he then was) in KAMPALA BOTTLERS VS. DAMANICO (U) LIMITED**: Supreme Court Civil Appeal No. 22 of 1992. In this case fraud is directly attributable to Eryeza Katabalwa.

It follows therefore, and this Court so holds, that the subsequent transfer of 13.07.99 Instrument No. Buk.48613, of the suit land from Eryeza Katabalwa to Kyabongole Farmers Company Limited is invalid and void a initio by reason of the fraud attributable to Eryeza Katabalwa, the transferor; and who at the same time also signed for and on behalf of the transferee.

As to third issue, the evidence on record establishes that Eryeza Katabalwa was never a bonafide purchaser for value of the suit land at all stages of his dealings in this land.

Similarly the defendant company in carrying out its acquisition of the suit land through Eryeza Katabalwa has Eryeza Katabalwa's frauds imputed on the company; as he was a principal officer, shareholder and signatory of the company.

In **NAZARALI HASSANALI SAYANI VS. EDWARD MPERESE NSUBUGA: H.C.C.S No. 364 of 1993**: Lady Justice Byamugisha held that a person who claims to be a bonafide purchaser will lose the protection of the law if there is evidence to show fraud on his/her part and that his/her title is liable for cancellation upon proof of fraud on the basis of which court can go beyond the fact of registration.

Court therefore holds that, subject to resolution of issue number 4, the plaintiffs are entitled to the remedy of cancellation of the registration of Kyabongole Farmers Limited from the Certificate of title of Bululi Block 212 plot 2 land at Kyabongole and the restoration of Adoloniko Lubebe as the registered proprietor thereof.

The fourth issue is whether plaintiffs are beneficiaries of the estate of the late Adoloniko Lubebe.

A beneficiary is one for whose benefit property is held by a trustee or executor: See **Osborn's Concise Law Dictionary, 8th Edition, page 45.**

The holder of Letters of Administrator or Probate is a trustee on behalf of the beneficiaries of the estate: See **High Court Civil Appeal (at Kampala) No. 24 of 2004: Fred Sunday and Richard Baseke Vs. Beatrice Busingye and Mugalula Joseph**, unreported.

It follows that had Eryeza Katabalwa, genuinely and without any fraud, obtained the Letters of Administration to the estate of Adoloniko Lubebe, than he would have held the same as trustee for the beneficiaries of the said estate.

As already held, Eryeza Katabalwa, by reason of fraud attributable to him, did not hold such Letters of Administration to the said estate.

As to who are the beneficiaries of Adoloniko Lubeebe's estate, for purposes of this suit, the Register from the Administrator General's office, Exhibit P6 is, in the view of this Court, an independent and genuine source. This Register has the names of those who got the suit land.

PW1, the third plaintiff, stated she was a daughter of Isaka Kibuuka. The Register shows Isaka Kibuuka to have got 267 acres of the suit land, then comprised in P.C. No. 2190.

PW1 also testified to have been born in 1949 on the suit land. She put up a house thereon, stayed thereon with her children and those of her other relatives. She cultivated and carried on grazing on the land. Further, she was allowed by the rest of her brothers owning the land, to stay and look after their respective portions of the suit land on their behalf.

PW1 knew the first Plaintiff as a daughter of Yosamu Ssemwanga, brother of her father, Isaak Kibuuka. Yosamu Ssemwanga had obtained 99 acres of the suit land. As daughter, first Plaintiff, it is safe to infer was a beneficiary to the estate of her father, and thus to that of her grandfather, Adoloniko Lubeebe.

PW1 also testified of knowing the second plaintiff. He is son of Stanley Kiwali, who got 110 acres of the suit land from his father Adoloniko Lubeebe.

DW1 confirmed to court PW1's evidence that as soon as Eryeza Katabalwa started claiming to be owner of the suit land, she, PW1 asserted to Eryeza Katabalwa that she was the true owner of the suit land; and thus opposed Eryeza Katabalwa's taking occupation of the same.

On the whole the evidence of DW1 did not in any way make unreliable the evidence of PW1 and PW2 adduced for the Plaintiffs.

Court therefore finds on the evidence before it that each of the plaintiffs had such an interest in the suit land to entitle each one to be a beneficiary of Adoloniko Lubebe's estate by succession and descent.

The fifth issue is whether the defendant company is entitled to the reliefs counter-claimed. The defendant counter-claimed as against the plaintiffs for an order that the plaintiffs and all persons claiming under the plaintiffs vacate and deliver vacant possession of the suit land to the defendant company, since they were trespassers on the suit land. There was also a counter-claim for general and special damages.

Fraud is an act or conduct of obtaining a material advantage by unfair or wrongful means: See **Supreme Court Civil Appeal No. 59/95 ISREAL KABWA VS. MARTIN BANOBA MUSIGA**, unreported.

Section 176(1) of the Registration of Titles Act, Cap. 230 allows an action of ejectment or one for recovery of land against a registered proprietor of land by the person deprived of land by fraud or one deriving land otherwise, than as a transferee bonafide for value from or through a person so registered through fraud. See: **H.C.C.S No.1010 of 1983 Robert .A. Lusweswe Vs. G.W. Kasule & Another**, Odoki, J. (as he then was).

It has already been held that Eryeza Katabalwa acted fraudulently when he transferred the suit land from his names to those of the defendant company in which company he was also the principal officer of the company who signed for and on behalf of the company on the transfer Instrument. Thus the defendant company directly and/or by necessary implication was privy to the fraud.

The evidence that there is also establishes that PW1 was on the land at all material time. This constituted notice to the defendant company of her interest, and that of the other plaintiffs in the land. The defendant company cannot therefore be said to be a bonafide purchaser for value without notice of the plaintiff's interests in the land: See **CHARLES LWANGA VS. XAVERIO DDAMULIRA SSCA NO.16 OF 1992** and also: **SEMPA VS. KIDZA [1985] HCB 46**.

Court therefore holds that the defendant company is not entitled to the reliefs counter-claimed against the plaintiffs.

The sixth (6) issue is whether the plaintiff's suit is misconceived, brought in bad faith or abuse of court process.

Court has already held that the first and third plaintiffs as grand daughters of Adoloniko Lubeebe are beneficiaries to the estate whose land is being misappropriated through fraud by the defendant company. The second plaintiff has also been held to be a beneficiary to the estate and thus to the suit land by virtue of being the grand son of Adoloniko Lubeebe. The plaintiffs have thus established a cause of action against the defendant company.

On the evidence Court is unable to hold that the plaintiff's suit is misconceived, brought in bad faith or is an abuse of Court process.

The seventh (7) issue is whether the suit land should be restored to the Adoloniko Lubeebe.

The evidence of PW2 and Exhibit P6; the Register from the Administrator General, are to the effect that no one, and certainly not Eryeza Katabalwa or the defendant company had applied to the Administrator General to administer the estate of Adoloniko Lubeebe.

The Letters of Administration fraudulently obtained from the Grade II Court, Luwero, in Administration Cause No.29 of 1987, are invalid ab initio by reason of fraud. So too by reason of the same fraud are the subsequent transfers of the suit land to Eryeza Katabalwa and then to the defendant company.

It therefore follows that the suit land has to revert back to the original registered proprietor, Adoloniko Lubeebe (deceased) and the suit land is to remain so registered until, through proper steps, the genuine beneficiaries to the land become registered of the same as proprietors. It is up to the plaintiffs and the other beneficiaries, if any, of the estate of Adoloniko Lubeebe to take the necessary steps to accomplish this.

There was no evidence adduced as to damages and so court is not awarding any.

In conclusion, the plaintiffs having succeeded on all the issues framed, Judgment is entered for the plaintiffs against the defendant in the following terms:-

- (i) It is hereby declared that the Grant of Letters of Administration to Eryeza Katabalwa as administrator of the estate of Adoloniko Lubebe, made by the magistrate's Court Grade II Luwero, on the 20th day of May 1987 in Administration Cause No.29/87 was procured through fraudulent misrepresentation to the said Grade II Magistrate's Court, Luwero; and as such the said Grant is void ab initio.
- (ii) It is ordered that the said Grant be and is hereby cancelled and vacated by reason of having been procured through fraudulent misrepresentation.
- (iii) It is declared that the registration of Eryeza Katabalwa as registered proprietor of the land comprised in Bululi Block 212 plot 2 as per Instrument Number BUK. 46852 of 2nd June 1987, on the basis of the Letters of Administration granted in Administration Cause No.29 of 1987 issued on 20th May 1987, was procured by fraud by reason of the said Letters of Administration having been fraudulently obtained, and as such the said transfer and registration are null and void ab initio.
- (iv) It is hereby ordered that the said transfer Instrument No. Buk. 46852 dated 2nd June, 1987 transferring the land comprised in Bululi Block No. 212 Plot No.2 from Adoloniko Lubebe into Eryeza Katabalwa, The Administrator of the estate of the late Adoloniko Lubebe, be and is hereby vacated by reason of having been procured through fraud.
- (v) It is declared that the transfer and registration of the land comprised in Bululi Block No. 212 Plot No.2 as per Instrument Number Buk. 48613 dated 13.07.90 from the names of Eryeza Katabalwa into the names of Kyabongole Farmers Company Limited was procured through fraud and the same is void ab initio.
- (vi) It is ordered that the transfer and registration of the transfer as instrument Number BUK.48613 dated 13.07.90 of the land comprised in Bululi Block 212 plot 2 from Eryeza Katabalwa to Kyabongole Farmers Company Limited be and is hereby vacated.

(vii) It is ordered that the land comprised in Bululi Block 212 plot 2, Kyabongole, be restored to Adoloniko Lubebe, as registered proprietor.

(viii) It is also ordered that the defendant company vacates the land in question and deliver vacant possession of the same to the plaintiffs.

All interlocutory orders issued in the suit in the course of the hearing are hereby vacated the same having been overtaken by the orders made in this Judgment.

The plaintiffs are awarded the costs of the suit.

Remmy K. Kasule

Ag. Judge

5th October, 2007