

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

CIVIL SUIT NO. 0010 OF 2008

NYUMA ALBERT _____ PLAINTIFF

=VERSUS=

MAWA ALFRED _____ DEFENDANT

JUDGMENT

Background

It appears the defendant Mawa Alfred and one Stephen Koma Itto were friends. How did they become friends and for how long is not relevant to this case. What is relevant is that although each side says it in a different

way, the two did work together in business. To day, Stephen Koma is dead. He died on the 16th March 1998. About a year before his death, he became sick and his health progressively retarded till death. He is survived by 13 children 8 of whom are now adults of above 18 years and 5 are still minors. He had 3 wives and 2 died before him. The remaining one opted to live with her parents before the death of her husband.

If records are to be gone by, late Koma was an industrious hard working man. He ran entertainment business, a hard ware shop, an eating place, tender supply, and a garage. On the side of properties he had urban land inform of commercial and residential plots. He also owned a few animals.

It is part of the above wealth that he left now making the subject of this dispute. That enterprise is AGANA A Complex. AGANA A Complex was an entertainment business running a disco and video halls. It is located on plots no. 12, 14 and 16 Marinda Road in the Town Council of Moyo.

In respect of the above the plaintiff who is the administrator of the estate of late Koma Itto, contends that the defendant was not a joint owner of the business but an employ of the deceased. Plots 12, 14 and 16 were leased by administrator in the names of the deceased and the titles were got after his death. The administrator contends that the land in plots 12, 14 and 16 is the property of the deceased estate.

From evidence of PW2 who is a biological son of the deceased, after late Koma's death, the defendant continued working together with the family till when he is alleged to have assumed all the powers and diverting proceeds of the business to personal use.

On the other hand the defendant does not agree that he was an employee of the deceased. His case is that the two were partners in business with equal shares of 50% each. He contends further that even the land in issue is owned between the two as joint tenants.

According to him the two applied for the lease together and paid for it. In his evidence other than in the pleadings he said the titles were got through fraud.

Before this matter came to court there were attempts to get a home-found solution to it. Apparently the defendant ignored the effort. He did not attend the meetings. The plaintiff, then who had secured letters of administration brought this suit.

In the suit the plaintiff sought orders from this court for an injunction, eviction, an order for rendering a true account and payment upon it, general damages and cost of the suit. In the written statement the defendant denied all the claims and prayed that the suit be dismissed. There was however no counter claim.

By agreement of both counsel the following issues were framed, namely;-

- 1. Whether the defendant was a joint tenant with the deceased?**
- 2. Whether the defendant and the deceased had a joint venture business in AGANA.A. Complex**
- 3. Whether the certificate of titles in the names of the administrator of estate are lawful.**
- 4. Remedies available to the parties.**

I am hesitant to proceed with determination of the above issues the way they are. The reason being that they are not comprehensive enough to cover all the pleadings and evidences adduced. For that reason I will change them as follows:-

- 1) Whether the defendant and the deceased were partners in the business styled as AGANA.A. Complex and if so.**
- 2) Whether the defendant is liable to render a true account to the estate of the deceased partner and pay proceeds thereto if any.**
- 3) Whether the defendant and late Stephen Koma Itto were joint tenants as proprietors of plots 12, 14 and 16 Marinda Road.**
- 4) Whether the titles processed and procured over plot 12, 14 and 16 by the administrator of late Itto Koma's estate are lawful.**
- 5) Remedies available to the parties.**

It is my considered view that if the above issues are answered the dispute between the parties would be better and more comprehensively resolved than if the framed issues (by counsel) were the ones considered. I will handle the issues in the order I have framed them

ISSUE 1

Whether the deceased and the defendants were partners in the business under the name of AGANA .A. Complex.

On the above issue the pleadings of each party were as below.

In paragraph 4 (iii) and (iv) of the plaint the plaintiff alleged that the defendant was a business supervisor who on the death of the late Stephen Koma unlawfully took control of the business.

To the contrary the defendant pleaded in the written statement paragraph 4 (b) and (d) that he was a joint owner in the business with the deceased and denied the plaintiff's claims.

I will now consider the evidence adduced by both sides before concluding whether either of the discharged the evidential legal burden to prove its case. As I do so I will keep in mind the law relating to the burden of proof in section 101 and 102 of the Evidence Act.

Evidence Act. The effect of the two sections is that whoever alleges a fact before court and seeks judgment in his or her favour has the burden to prove that fact.

On the side of the plaintiff two witnesses were called. PW1 the plaintiff as administrator of the estate of late Koma Itto and PW2 a son of the deceased. The plaintiff also relied on a number of documents. The relevance of which will be dealt with later. The relevant part of PW1's evidence on this issue runs as below

“The defendant contends that the deceased's property in the will included property jointly owned. In particular the business. That the proceeds should be jointly shared equally that the premises belonged to both of them, that he has exclusive power to manage that part of the estate property”.

In cross examination PW1 said

“My case is entirelyly about AGANA .A. Complex. It is on the three plots”.

In re-examination he stated;-

“The 50% interest claimed by Mawa was the issue contested”.

Under courts examination he answered that

“Involvement of the children in the administration of the estate would help inmanaging the estate”.

PW2 relevantly on the issue of the deceased and the defendant being partner will be review next. He was 29 years when he testified, on 8th December 2009. That means he was 18 – 19 years old when he his father died. He said

“I know Mawa Alfred. He used to work together with my father Stephen Koma Itto in Moyo Town. I did not know what they were doing”

He added what according to the evidence he was told by his father. It runs as below

“When Koma Itto was sick in the bed I was still in school. On 12/3/1998 I came to see him with my sister DIPIO STELLA. He told us that, he called Nyuma Albert, my brothers Victor Otto, Sarah, Mzee Ezere and our grandfather ITO RUMBE. He told us his condition is bad. That he may get problems with his property. He said he had employed MAWA Alfred as a DJ for the disco that Mawa had no property there. The disco hall was for Koma Itto”

PW2’s evidence further showed that after the death of his father that occurred in 1998 the plaintiff and the defendant worked/operated together

till 2004 when they developed misunderstandings. The defendant then reported/complained to the meeting of elders that he would no longer work with the plaintiff.

PW2 relevant to the issue under consideration added to his evidence

“My self, Nikaru Saviour, my brother MIDRA RONALD started working with MAWA. We used to distribute the money equally after setting off costs”.

The same witness cited instances of failure or refusal to render accountability as a loan secured from a bank to buy a generator which was not bought but the business (Disco) repaid the loan. Interestingly the defendant did not deny this piece of evidence in his testimony nor was PW2 cross-examined on it in challenge.

In his ending part of evidence in re-examination PW2 he only came to know what his father and the defendant were doing together after his father died. That after his father’s death he knew that the deceased and the defendant operated a disco hall.

In this judgment I need to separate two periods. The first period is the period before death of STEPHEN ITTO and the second one is after his death.

It is only the period before his death that can be used to determine if there existed a partnership or not.

The period after his death regardless of what actions or events that followed cannot bind the deceased except where there was such an agreement by virtue of S.36 (1) of the partnership Act which provides;-

“Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the deathof any partner”

Consequently even if it were to be found that a partnership truly existed evidence which related of events after the death of ITTO KOMA can not be used to decide if a partnership existed. This concerns PW2’s evidence to the effect that after death of the deceased they continued working with the defendant. Such events cannot be visited on the deceased unless the same was a subject of an agreement between the deceased and the defendant. I have not found such agreement in the evidence before this court. Consequently the only relevant period is the period before death.

In the period before death it is the defendant who alleged that a partnership existed. S.109 of the Evidence Act provides

“When the question is whether persons are partners.....and it has been sworn that they have been acting as such, the burden of proving that they do not stand.....is on the person who affirms it”.

Despite having the legal burden under the above section to first show that the deceased and the defendant acted as partners before the burden is shifted to the plaintiff who affirmed the non-existence of the partnership, the

defendant surprised me when he did not say anything about it in his evidence in-chief.

Had counsel for the plaintiff chosen to be tactical in approach and cross-examined him not, court would not have had any evidence from the defendant on this claim of a partnership. However through his cross examination and DW2, he was able to put up some valuable evidence for courts' consideration. The relevant part of his evidence is cross-examination as follows

“I knew the late Koma from 1984 to his death in 1998.....our relationship was that we had business relationship, we used to do everything together”.

Afterwards he added,

“We had a joint venture with late ITTO Koma. This joint venture was for entertaining business, recreation and accommodation centre. We were supposed to share the profits equally. There is documentation that we had a joint venture agreement”.

He however contradicted himself to suggest that there was no written agreement and added.

“We had a joint venture in entertainment business. It was a mutual understanding not written”

While answering questions on Exh. P.10 he gave another relevant piece of evidence and said

“We had a mutual agreement for 50% (shares) although Exh. P.10 says a different thing”.

He, the defendant called a witness to support his claim on existence of a partnership. DW2 Joel ARUMADRI. DW2 told court that he wanted to introduce video shows at AGANA and approached the deceased together with the defendant for that permission.

According to him the permission was granted by the two of them, they allowed him to operate without rent payment. He could also supply beers. He never saw the defendant operating as a DJ and knew the business to be theirs.

DW2 however knew nothing about their other dealings like land ownership. Because of those events as he narrated them DW2 believed that the deceased and the defendant were partners.

Another important piece of evidence on this issue is contained in the documents both sides presented to court and received as Exhibits. I will consider the relevant ones.

- (i) Exhibit P.7 – It is a letter from Ms Mwesigwa – Rukutaria & Co Advocates dated 21 May 2003 addressed to the defendant as a notice of intention to be sued. In substance the letter challenged the defendant’s claim of **50% share** in the estate of the deceased.

- (ii) The defendant on 27th May 2003 replied to the contents of Exh. P.7. His reply on the issue sounds rather arrogant other than offering an explanation of how he owned the interest he claimed. He replied

“Although you may be misinformed by your client on the allegations contained in your charges, I simply wish to grant you a go-ahead to sue me”.

That is how arrogant Exh. D-5 sounded other than giving a detailed account of how he owned the 50 % share he claimed.

- (iii) Exh. P – 8

It contained minutes of a meeting organized by Mr. TAKO Samuel the Asst. CAO on 27th 08. 2005 over the estate of Stephen ITTO Koma at the residence of Mr. Michael Angula. It was attended by 20 people who included the District CAO, children and relatives of the deceased.

In Exh. P.8, relevant to the issue before court, the Asst. CAO made the observation which for emphasis I will reproduce below

“Mr. MAWA claims that he has an equal share (50%) in AGANA (A) COMPLEX a joint venture with late Stephen Koma. This could not be true since there is no evidence to that effect. Therefore, there is a need to investigate this claim so as to avoid possible future conflict between the two families”

It is also of interest to note that Mr. MAWA ALFRED did not attend this very important meeting where his interests were being discussed. I do believe the Asst. CAO being a government official with no side in the issue must have informed him of the same. Neither did he deny knowledge of such meeting having been held when he testified before court. If he had attended in presence of all he would have been able to justify his claims with any kind of proof.

(iv) Exh. P.9 is a letter written by Mr. TAKO Emmanuel in his official capacity as the CAO to the Administrator General of Uganda. The CAO informed the Administrator General of six points which resulted from the meeting he held in Exh. P.8.

I am particularly interested in point 3 and 5. In point No.3 the District CAO stated

“In that regard I convened the family meeting on 27.Aug.2005 and established the following facts.

3. That late Stephen Koma had a joint venture (AGANA A complex) with Mr. MAWA ALFRED”

I find the above conclusion surprising. This is because in the meeting the chairman said there was no prove of MAWA’s claims yet MAWA never attended the meeting he referred to.

One wonders on what evidence the CAO based his finding when he wrote exhibit P.9 that was not available when he made the remarks above in Exh. P.8. The fact that Mawa was not part of the family meeting process is supported by the way Mr. TAKO wrote point No.5 in Exh. P.9. He stated

“That Mr. ALDRED MAWA was reported to have refused honouring the will signed by the late (KOMA)”

It is true from the minutes of the meeting that report was made by the plaintiff. That means MAWA never took any part in the meeting.

In absence of a cogent explanation as to why the CAO concluded as he did in point 5 of his letter, contrary to his earlier finding that MAWA's claim was not supported by evidence, the same cannot be accepted by this Court. The two positions are too contradictory to be true.

(v) Exh. P-1, according to PW1 this document is a will. It is dated 1st December 1997. The deceased signed it on 1st December 1997 the first part. It has a second hand written part which he signed on 8/3/1998. This part is not witnessed. For the part that is not handwritten and was signed by the deceased on 1/12/1997, it was purportedly witnessed by 3 witnesses on 21/03/1998.

About this Will it was the true evidence of PW1 that the deceased died on 16/03/1998. That by the time of his death they did not have the Will. That they found the document in his belongings after death and that, that is when the 3 witnesses appended their signatures to the document.

A document discovered after death of a testator, executed in a manner described by PW1 when the testator is already dead can not be a Will for any purpose in a Court of law. I entirely agree with the reasoning advanced by learned counsel Ondoma Samuel for the defence that Exp. P-10 violated the provisions of S.10 of the Succession Act.

Exh. P-1 therefore is devoid of any valuable evidence for this court's consideration.

S.50 of the Succession Act sets down the manner in which execution of a will is carried out. Of essence, it is signed in the presence of the testator and by his/her direction. That means that the 3 witnesses who signed on Exh. P.1 did so not in presence of the deceased nor under his direction or upon his request. In short, it was contrary to the law and it cannot stand as a valid will.

(vi). Exh. P-10 dated 12/03/1998 headed instructions by Mr. Stephen ITTO to his children and relatives, 4 days after its making, the maker died. The relevant part of this exhibit on the question of partnership rains as follows

“We had no any agreement. I only gave him 25% revenue because of the role he played in operating DISCO and other services to help his family”.

In the ending remarks of Exh. P-10 the maker indicated that he made the instructions when his health situation was so bad in shape. That he could not write but verbally dictated the words. Apparently these words were written down by PW1.

In his evidence PW1 confirmed that the deceased made the verbal instructions in his presence. The plaintiff sought to rely on Exh. P-10 as a document yet without oral explanation it cannot be understood since the maker himself said he could not author a document due to his failing health. If Exh. P-10 is accepted as documentary evidence it would offend the provisions of S.58 and S.92 of the evidence Act. In order to understand Exh.

P-10 the oral evidence of PW1 would be needed. This is not acceptable. Under S.58 of the Evidence Act, All facts except the contents of documents may be proved by oral evidence.

For those reasons Exh. P-10 will not be accepted by this Court as documentary evidence but the evidence of PW1 which relate to this matter and which he gave orally in Court will itself remain acceptable as oral evidence of the plaintiff.

I have laboured to trace any piece of evidence which relate to the establishment of the fact that a partnership existed between the deceased and the defendant. The defendant did not as required under S.109 of the Evidence Act first establish that such a relationship existed. If he had done so then the burden shifts to the plaintiff to disapprove it. He ignored all the chances he had prior to this to establish that he and the accused acted as partners.

I will cite the important occasions he ignored for purposes of emphasis.

- 1) He refused to attend the family meeting the deceased called before his death occurred.
- 2) He did not attend the meeting organized by Asst. CAO Mr. TAKO who as a government official was independent minded.
- 3) As early as 2003, M/s Mwesigwa – Rukutara & Co. Advocates for the plaintiff wrote to him challenging his claim on the estate for 50% share holding. He was warned he would be sued. He did reply to

this letter in such arrogant and meaningless manner. His reply was devoid on any relevant explanation perhaps the advocates expected from him by their letter.

Having failed to prove his claims at those earlier occasions, the only opportunity he used was when he appeared before court where all his efforts in evidence went on property and not partnership. He did not produce any written arrangement between him and the deceased but called it a mutual understanding. Mutual as he called, it he would have given evidence to this court to make it believe that the deceased and him

- a) Operated a business.
- b) The business made profit/profits.
- c) At the rate of 50% such profits would be shared or
- d) In event of a bad business year the losses would be equally shared.

The period he claimed to have worked with the deceased is over 10 years. In that period he would have been able to give clear instances or even figures proving his case but he did not.

It is not enough for a person claiming to be a partner to prove mere sharing of the business proceeds or that the two or the firm they operated had joint tenancy or property.

In the present case the defendant put a lot of emphasis in his evidence on the issue of property but the law does not. For purposes of clarity I will verbatim reproduce S.3 of the ***partnership Act (Cap. 114)***

S.3 provides

In determining whether a partnership does or does not exist, regard shall be had to the following rules

- a) Joint tenancy, tenancy in common, joint property, common property on part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

- b) The sharing of gross returns does not of itself create a partnership whether the persons sharing those returns have or have no joint or common right or interest in any property from which or from the use of which, the returns are derived.

Unfortunately on the part of the defendant his evidence and that of his witness DW2 all sought to establish that since there appeared to be a joint business and perhaps according to them joint ownership of property, that perse created a partnership.

S.3 as cited above does not allow that kind of definition.

I in the start stated what would have amounted to existence of a partnership and that is what S.3 (c) provides for. That was not proved in this case. All the pieces of evidence I reviewed above, including oral testimony of PW1, PW2, DW1 and DW2 and documentary contents did not contain any information to suggest the existence of a partnership as defined under the law. I would therefore answer the first in the negative.

ISSUE 2

Whether the defendant is liable to render a true account to the estate of the deceased (partner) and pay proceeds thereto if any?

The above issue depended on the answers to the first issue as the first had ended with (if so) meaning if court had found that a partnership existed. My finding is that no such business firm existed. This court can not therefore order the defendant to render an account upon no basis.

However DW1 admitted in his own evidence that he operated the business of AGANA A complex. PW1 and PW2 also confirmed it. Having found that he was not a partner, his continued presence in the affairs of the deceased must have placed the plaintiff as the administrator and the family into financial hardship. PW2 complained of lack of accountability on the part of the defendant. He cited a loan for purchase of the generator which was not purchased but the estate paid back the loan. The defendant never denied those accusations or offered his own version of events.

The above situation would in my view qualify to be put into account when assessing any damages to be awarded should court find it proper to make such an award.

ISSUE 3

Whether the defendant and the late Stephen ITTO Koma were joint tenants as proprietors of plots 12, 14 and 16 Marinda Road Moyo Town Council.

The pleadings of the plaintiff on this issue is brief. It is given in seeking an order that the defendant be evicted from plots 12, 14 and 16 Marinda Road Moyo T.C as the deceased is the proprietor of the same. Apart from attaching the photocopies of the titles, the plaintiff did not place the background facts how the title were acquired.

In reply by way of written statement of defence, the defendant was initially concerned with the correct number of the plots. This issue was later consented to on 19th Nov. 2009. It was agreed that the suit land is comprised in plot 12, 14 and 16 Marinda Road Moyo T.C. In gist, there appears not much by way of pleadings on the side of the defendant. It is only paragraphs 4(b) and 5(ii) which refer to plots 12, 14 and 16. It can be suggested that in 4(b) the defendant pleaded that the suit land accommodated a joint business concern. And in 5 (ii) the defendant pleaded that the plaintiff *unilaterally* acquired land titles over these places of land.

Unlike his evidence which even introduces the element of fraud and a clear challenge to the manner of acquisition, nothing like that was pleaded.

I will however at this level, in interest of justice, place not much emphasis on the technical area of this case. Much of my concern will go to the actual questions of the substantive dispute between the family of the deceased and the defendant.

Both sides gave evidence on this issue. PW1's relevant evidence on this issue as he narrated it before court is as follows

“The deceased included Mawa’s name in his application for lease in three plots because the Town council would not grant them all to him alone”

He added that

“I made fresh applications because the initial lease had expired. Plot 33 was applied for separately, plots 35 and 37 were applied

for in one application, the three plots lease were extended (to full term) 49 years.....they came in the names of JOHN STEVEN ITTO.

All were in the names of the deceased. The defendant stopped me from using these plots. These plots are developed. Plot 14-16 is partly in use. He exclusively uses these properties as commercial properties.....Plot 12 have a structure used as a video hall for public entertainment..... We got an injunction in 2007. The property is rented by the defendant contrary to the injunction”.

In cross examination he maintained his evidence but added that

“My case is entirely about AGANA (A) Complex. It is on the three plots. I applied alone because it was an extension. The expired offer was in the names of the two, the deceased and the defendant”

On the side of the defendant he gave evidence disagreeing with the plaintiff and maintaining that the plots are jointly owned.

He said that

“We submitted an application to Moyo T.C. authorities. I and late Koma made the application.

He submitted to court Exh. D1, D2, D3, D4 and D6 which all showed that the land was applied for in the two names as early as 6th February **1992**. However his signature does not appear on any of the exhibits he submitted. He explained to court that

“I did not sign the documents but my college did sign on our behalf. The document is stamped by the managing director of AGANA Engineering Construction Moyo”

He claimed he made a financial contribution towards the payment of premium and ground rent. That the money was paid by the two in equal shares.

It was DW1’s evidence that if the lease process had been completed, he would have signed but it was not completed for the reason that his friend who was pursuing the matter started being sick.

During cross-examination, learned counsel for the plaintiff got interested in the documents submitted to court and he asked DW1 about these documents. He answered that

“I had person copies of all the exhibits I tendered in court. I had originals of those documents”.

Although no originals were exhibits but photocopies apparently from the land administration file.

Against that evidence Mr. Mamawi learned counsel for the plaintiff argued that there was no joint tenancy over the land in dispute. He relied on S.59 of the Registration of Titles Act and the case of **Abdu Karim Vs Kabarebe H.C.C.A No. 373 of 1991** for the contention that a certificate of title is conclusive evidence of title and that the person named therein is the proprietor of the land. According to him since the deceased’s administrator

was named in Exh. P2 and P3, he could not be challenged on grounds of any informality or irregularities in the application or previous proceedings to the registration.

Mr. Ondoma Samuel for the defendant did not agree. He argued at length that the deceased and the defendant were joint tenants. He reasoned that all the requirements for existence of a joint tenancy were present in favour of his client. He referred court to unity of possession, interest, time and title. In so doing he relied on exh. DE1, DE2, DE3, DE4 and DE 6 which exhibits showed that the defendant's name appeared on all documents along side the name of the deceased.

He concluded by pleading the doctrine of the right of survivorship. He argued that since Mr. Itto Koma died, the land in dispute now wholly belongs to the defendant to the exclusion of the deceased's estate. He relied on the case of *WRIGHT VS CUBBONS* (1949) 78 CLR 313 to justify his reasoning that the deceased's right/interest in the land was extinguished by death.

RESOLUTION

It is the evidence of DW1 that the lease he was a party to was not registered. This is confirmed by the documentary evidence he exhibited in court. None of Exh. DE1, DE2, DE3, DE4 and DE6 was in proof of registration.

S.54 of the RTA provides that no instrument that is not registered is effectual in establishing or passing over title. Several decided case are in his direction See **KATARIKAWE VS WILLIAM KATWEREMU [1977] HCB 187.**

With the above being the position at law it would be very difficult to comprehend why learned counsel Mr. Ondoma for the defendant adopted a line of argument in which he sought this court to rule that there was title. As if that is not enough, that there was a title for joint tenancy. Without proof of registration no joint tenancy can be inferred. S. 56 of the R.T.A defines a joint tenancy as below

S. 56

“Two or more persons who are persons who are registered as joint tenants shall be deemed to be entitled to the land as joint tenants”

While Black Burns Law dictionary defines a joint tenancy as

“A tenancy with two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession” (emphasis mine)

The definition above in all aspects alludes to a registered interest by referring to identical interest under the same instrument. In the case before me as I have said there is no proof of registration whatsoever. It appears to me that joint tenancy is matter of law to be proved by registration and can not be claimed as an equity without evidence to support it.

However even if the defendant sought to claim a joint tenancy by reason of equity as **having an interest in property as a beneficial owner** he would still need evidence to proof his claim.

In the above regard I will consider four aspects, these are:-

- a) The documents DW1 presented.
- b) Proof of payment
- c) Any other circumstantial evidence.
- d) Failure to finalize the lease process.

Documents

I have already stated that the defendant claimed to have originals of the exhibits he presented to court. He called them personal copies. That means they were issued to him as a co-owner. However all the exhibits were mere photocopies developed from the file kept by the land administration office as they were duly certified by the same office. That would mean that DW1's claim of having personal copies in original form was false. He answered the question that way in order to create an impression that he was part of the leasing process.

Payments

Exhibit D2 is letter from Moyo town Council the clerk's office. It is dated 18/12/1992, it is addressed to Stephen Itto Koma (the deceased) and Alfred Mawa (the defendant). It advised the two to pay premium of shs. 250.000= and rent of 25,000= upon approval of the lease.

When asked about payment for the lease the defendant claimed that he paid an equal contribution with the defendant claimed that he paid an equal contribution with the defendant. He never presented any documentary evidence to prove this payment. He did not describe to court how he paid the equal contribution in absence of an official receipt. I would have

expected him to tell court that he paid it directly or through the deceased. He did not have the receipt issued to him after payment.

In all cases where a beneficial owner claims that he/she has a beneficial interest of equity in the property even where it is registered in the names of another person, having paid or supplied consideration for the acquisition of such an interest, is crucial for examination by court. In **AIDA MUKASA VS THOMAS MWEBAZE & 2 OTHERS HCCS No. 203 OF 1991** (unreported)

The plaintiff's husband registered property bought using funds of both himself and his wife in his names only. The wife knew of it but accepted it. Later the husband sold off the land and the house thereon. The purchaser sought to evict the plaintiff from the house and the wife sued. The final Judge framed an issue whether the plaintiff was a legally a co-owner of the property with the husband who had sold the land. In answering that court framed issue, the Judge resolved as below;

“As between the first and second defendants on one land, and the plaintiff on the other, there is uncontroversial evidence that the plaintiff contributed materially to the purchase of the suit land, as well as the residential premises that was later constructed on it. The plaintiff explained to this court how and where she obtained the funds she contributed towards the purchase of the house. She sold the land which she inherited from her father situate in Singo and used the proceeds thereof to help in the construction of the house”

The plaintiff in that case went to the particular details of her role in house construction. The Judge quoted her to have given the and of evidence below

“I contributed.....I bought cement. I would contribute by purchasing bricks. I could buy cement. Say about 10 bags. The cement was costing about 14=. The proceeds from the sale of my land went to the purchase of this land. We did not care whose names the land was registered”

The above is the kind of effort I would have expected DW1 to put up to explain to court the detail how he paid and or the nature of his contribution towards the constructions on plots 12 and 14-16 Marindi road. Evidence of PW1 proved that these plots have structures on them which the defendant took over. Construction of a house is a process not an event. Sometimes it takes a long time so much so that the defendant seeking to establish his interest in the land as a joint owner ought to have told court how this process was gone about. Just like AIDA Namukasa did before the trial Judge in the case I have cited.

In another case **S.M. SEKABANJA Vs A.SAJJABI & 3 ORS [1983] HCB 54**

A group of individuals pooled resources and bought land but the certificate was issued in the names of the 1st defendant who sold the land to another person without disclosing the interest of the other common holders. Court held on the balance of probabilities the plaintiff and his witness had proved that the plaintiff contributed towards the purchase of the land in dispute.

Equally in the present case if DW1 was to establish that he had any interest in the suit land he, ought primarily have proved that he contributed towards

the purchase of the land or construction of the houses on the plots 12 and 14-16 Marindi road. He has failed to do the same before this court.

PW1 explained that the deceased decided to include the defendant's name in the lease application just for him to fulfill the requirement as the allocating authority could not allocate the land to one individual by reason at its size.

I find a lot of merit in that explanation. This court and those superior to it have before accepted such explanations. I will cite an example in the Australian case of **CALVERLY =VS= GREEN [1984] 155 CLR 244** on appeal the High Court of Australia accepted that a husband included his presumed wife's name on the title in order to meet the requirement by a finance company that there had to be a joint tenancy before obtaining finances. Court declared the property to be belonging to the appellant only.

Back home the Supreme Court of Uganda in **HELLEN OYERU =VS= FLORENCE NAMULI MATOVU Civil Appeal No. 007 of 2008**.

Mr. Matovu who acted as the vendor's advocate advised her that since she was a person from West-Nile, it was insecure to register her land interest alone in her names, Florence Namuli's name was included for that purpose. Namuli did not pay for the property. On Appeal to the Supreme Court, My Lord Tsekooko who wrote the lead Judgment agreed with that reason and stated

“Let me point out that the protection suggested by Mr. Matovu in 1980 was not illusoryas late and may June 1982 the custodian board and Ministry of Finance harassed the appellant about the ownership of the house. Her fears as a person from West-Nile were brought out very clearly when she was cross-examined.

She had to put another person in one wing of the property for security reason”

On the question payment for the purchase of the property the court ruled that Namuli Florence the respondent got no interest in the property as she did not prove contribution towards its purchase. The said all evidence relating to negotiations for sale, the sale itself that provided the purchase money and ownership of the property has to be evaluated.

So in order to prove equitable joint interest payment pr contribution must be proved.

Finalizing the leasing process

I have found it to be of interest to mention that the defendant told court that he did not sign the lease because it was not made. That the lease was not finalized due to the deceased’s falling sick and eventual death. If it is true that this lease was being pursued by two applicants common sense would dictate that upon the deceased’s falling sick, the healthy and surviving applicant would have followed up the lease to its logical conclusion even before the death of the deceased but not to abandon it. This shows that the defendant was not involved in this lease process.

Secondly the application for the lease is dated 06.02.1992 Exh. D1, Exh. D2 which informed the applicant’s of the approval of their lease application dated 18.11.1992. In Exh.D4 dated 24/09/1993 the Town clerk Moyo T.C requested the land officer to issue a lease offer to the applicants. These are the defendant’s own exhibits. It becomes questionable if a lease offer was to be issued on 24/09/1993 and the lease was not completed due to the

deceased's failing health, was he sick by 24/09/1993 to March 1998 when he died?

There is no evidence to support that theory or explanation. It is only evident that the defendant was never involved in the lease process and only wanted to benefit from the death of his friend who appeared to be the only one who knew the truth. After his death he accessed the land office lease file without any original document and sought to establish a claim on this lease. I consequently find that there is no evidence or legal basis for me to hold that there was a joint tenancy over the disputed land.

ISSUE 4

Whether the titles processes and procured over plots 12, 14-16 Marindi road by the administrator of the estate of late Stephen Itto Koma are lawful.

From the evidence, the titles which are under questions are Exh. P.2 as LRV 3146 – Folio 14 for plot 12 Marindi Road and Exh. P.3 as LRV 3143 folio 9 for plots 14-16 Marindi road all situate at Moyo Town Council.

From the pleadings the plaintiff accepts to have got the above titles in the names of the deceased and this is so indicated. Although the names are slightly different entered as John Stephen Itto (Trading as AGANA) complex of P.O Box 33 Moyo. Both parties seem to be agreeable that that reference referred to late **Stephen Itto Koma**.

Earlier when considering the foregone issue No.1 indicated how the defendant pleaded about this matter. Despite the fact that the plaintiff

provided the necessary particulars about these land titles in paragraph 3 (b) and in detail paragraph 4 (ii) and attached the same as annexure B and C, there was no equivalent reply in defence about the illegality or fraudulence in acquisition of these titles.

While considering the last issue No. 1 declined to be concerned about technicalities of pleadings because there was no procedure requirement to do so. In case of illegality of a title or its being challenged on grounds of fraud the position of the law is different. I can not say I will ignore it as I did earlier. It was only during his evidence that DW1 introduced the plea of fraud. His advocate adopted it from that point and argued in its support. The plaintiffs advocate did not agree with this line of acting. He raised two important points. One that such conduct was a departure from a party's pleadings and secondly that fraud can not be inferred but must be pleaded with detailed particulars on which it is based.

From the written statement of defence which was self drafted and filed into court by the defendant paragraph 5 (ii) is stated that

5(ii) “The land title secured by the plaintiff unilaterally under LRV 3146 Folio 14 plot 12 Marundi road and LRV 3143 folio 9 plot 14-16 Marundi road Moyo town council (see annexure B & C) is completely different from the land/estate under dispute which is jointly held by late Stephen Itto Koma as joint tenant”.

The above could have been a correct pleading at that time. However later by consent of both parties a surveyor was engaged and it was established that

this is the same land. Consent to that effect was signed and filed in court on 19/Nov/2009 by Mr. Mamawi for plaintiff and Mr. Samuel Ondoma for the defendant.

At that point in time it was incumbent upon the defendant to amend his pleadings and if he so desired plead fraud and illegality in acquisition of the title. No such amendment was effected until the time of giving evidence. I agree with the arguments advanced by Mr. Mamawi and the cases he cited. Most applicable of these is the decision in **INTERFREIGHT FORWARDERS (U) LTD =VS= EAST AFRICAN DEV'T BANK S.C Civil Appeal No. 0033/1993** where it was held by ODER JSC (RIP) that

“A party is expected and is bound to prove his case as alleged by him and as covered in issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what is alleged in his pleadings except by way of amendment of pleadings”.

The above position of the law as clearly stated binds this court. I cannot at this stage of the trial purport to allow the defendant to advance and prove a case he has never pleaded even after being put on notice as way back as 10th Jan 2007 when the action was filed against him. I would for those reasons refuse the defendant to raise a new case.

The second reason is that fraud an allegation must be specifically pleaded. It is such a serious allegation that the person so accused of it must be notified and prepare an answer. Unfortunately here I am not considering a case of.

Insufficiency of the pleadings like failure to specifically state particulars but a case where there was no pleading at all. In **Kampala Bottlers =Vs= Damanico (U) Ltd [1990 – 1994] EA 141** the above reasoning was upheld. The same case stated that fraud must be attributed to the transferee directly or by necessary implication. In the present case the estate must have been guilty of some fraudulent act or must have known such an act by somebody else and took advantage of such an act. The point is that all the above must be reflected on the face of pleadings before evidence to prove such acts is given orally or otherwise before court.

Having not at all pleaded any fraudulent act on the part of the estate, the defendant cannot raise the same now, I would agree with learned counsel for the plaintiff that S.56 of the R.T.A squarely applies to this case.

The second aspect I have to consider in answering this issue is the difference between the lease in which the defendant claimed joint tenancy and the lease in exhibit P2 and P3.

Under exh. D4 the first lease was approved under MIN. NO MTC/LAN/1 of 5/3/1993 this is the lease that the DW1 agreed was never finalized.

The evidence of PW1 is that he applied for a fresh lease when the first one expired and the same was granted.

This new lease was approved by the District Land Board vide minute No. 003/DLB/2003 (1) of 18th – 19th Aug 2003. Exactly 10 years after the first lease. It was within the powers of the District Land Board to allocate land to a new applicant upon expiry of the first lease. I do not see the plaintiff having any powers to influence the decision of the board apart from making an application. The defendant did not adduce any evidence to prove that the plaintiff knew of his alleged equitable interest in the land by the time he

applied. In any event I have already ruled that such equitable interest never existed.

For those reasons I do not agree with Mr. Ondoma the learned counsel for the defendant that the plaintiff registered the land in the names of the deceased to defeat an existing equity. No such equity existed. Consequently **KATARIKAWE VS KATWIREMU** (Supra) is not applicable.

Lastly on this issue I must make comment on the manner in which Exh.P.2 and P.3 were executed. The lease agreements inside the two titles indicate that the agreement of lease was between Moyo District Land Board and JOHN STEPHEN ITTO the board was the lessor and Itto Stephen was the lessee.

By the time of application, for the land, and its being granted PW1 did not hide the fact that Stephen Itto was dead. He did not purport to apply in his names but the names of the deceased. However when it came to execution of lease he signed it on behalf of the dead. In my view this was an error. It would have sufficed for the lease to indicate that the lessee is deceased. The board must have granted the land on the basis of the old files where the deceased appeared as the applicant. That way it never appeared that a dead man was applying for the land.

However the plaintiff act of signing for the deceased though erroneous was done in preservation of the estate. Such an argument for acts done in preservation of the estate arose in **ISRAEL KABWA =VS= MARTIN BANOBA MUGISA SC C.A. No. 52/1995** (unreported) TSEKOOKO

J.S.C. did not agree with decision in **KOTHARI –VS- QURESHI [1967] EA 564** as it had been presented by counsel. That position is that an administrator of the estate of an intestate does not have rights over the estate until after he has obtained letters of administration. He quoted S.191 of the Succession Act which provides that

“Letters of Administration entitle the administrator to all rights belonging to the intestate as effectively as if the administration has been granted at the moment after his death”

After that quotation the learned Judge added

“This section shows that moment letters of administration are granted the rights of the holder of the letters of administration relate back to the moment after the death of the deceased this is re-enforced by the subsequent section S.192, S.192 stated

“letters of administration do not render valid any intermediate acts of the administrator tending to the simulation or damage of the intestate’s estate”.

The acts of the administrator which are rendered INVALID are only those which diminish or damage the estate”

I find a lot of help in the reasoning of his Lordship in relation to the plaintiff’s application for the land and his signing of the lease. Since the act of acquiring and preserving land in which the deceased had interest was not diminishing or damaging the estate, his acts would be justified under S.192 of the Succession Act.

There is another area of the law which explains and justifies the plaintiff's action of applying for the extension of lease. That is S.28 of the Registration of Titles Act. For purpose of clarity I will reproduce the section in this judgment, S.28 RTA states

“In case the applicant or a person in whose names the applicant has requested that the certificate of title shall be issued dies between the application and registration of the certificate, it shall be registered in the names of that applicant or that person as the case may be and the land shall devolve or pass in the like manner as if the certificate has been registered prior to the death of the applicant”.

The above section shows that a certificate of title can be issued to a person known to be dead. Its application to the present case is only limited by the fact that by the time of his death the deceased had not applied, for the lease extension. However this omission is cured in my view by the fact that Stephen Itto Koma's application was not an application of first instance but an application for extension of lease or renewal of the lease that had expired. In conformity with the provisions of S.28 quoted above the title was issued in the names of the deceased.

I would therefore not reason like counsel for the defendant reasoned that no such title would be issued by reason of death.

REMEDIES

In the earlier part of this judgment I ruled that since the defendant had not been a partner with the deceased and the two issues were framed by court as one to be a result of the other, there was no basis upon which an order to render a true account to the estate and payment thereon would be made. I maintain that I will not make such an order.

However my observation from evidence is that as PW1 put it he could no longer work with the defendant. The defendant took over the estate of the deceased. PW2 confirmed that fact. PW2 also talked of cases of lack of accountability. He cited a loan that was secured on account of the estate to purchase a generator which was never bought but the estate repaid the loan. To my surprise no evidence was given to contract those accusations by the defendant.

The general picture created is life of strife and difficulties on the part of the children of the deceased. The defendant made them to look as if their father never left any wealth to cater for them.

Yet the defendant was emphatic to say that AGANA B Complex is for him only and his family a fact the deceased told his children.

At the same time he took over all the estate of the deceased in which he failed to prove any interest by way of evidence. He acted in a crafty manner in securing land office documents. He got them certified to create an impression that the land that belonged to his deceased friend was lies. Such conduct can not be said to have not caused difficulty to the family I agree with the holding in **TANZANIA SANJI CORPORATION =VS=**

AFRICAN MABLE CO. LTD [2002] EA 613 C.A.T (Court of Appeal)

that

”General damages are such as the law will presume to be direct natural or probable consequence of the act complained of. The plaintiff told this honourable court that he had faced problems with the defendant who has since stopped the plaintiff from carrying out his duties as an administrator to the detriment of all the beneficiaries”.

The above is exactly what happened to the plaintiff before me and the children of late Stephen Itto Koma. According to evidence of PW2 normal relationship ceased in 2004. That is a period about 8 years. I would therefore find that the plaintiff established his claim for damages. I would in the result award shs. 20.000.000= as damages to cover the period of eight (8) years of deprivation of the deceased’s beneficiaries by the defendant.

I finally find that the plaintiff established his case on balance of probabilities and I enter judgment for him against the defendant and make the following orders;-

1. A permanent injunction is hereby issued against the defendant and any body claiming under him or acting on his authority from intermeddling or interfering with the estate of late Stephen Itto Koma.
2. That the defendant ceases to operate the business of AGANA A Complex with immediate effect and vacate the premises of that business.

3. That the titles under LRV – 3140 Fol. 14 for plot 12 and LRV 3143 Fol. 9 for plots 14-16 all on Marindi Road are valid land titles belonging to the deceased's estate.
4. That the defendant do vacate with immediate effect all the land comprised in plot 12 and plots 14-16 Marindi Road and on failure to do he be evicted under forceful execution of this order.
5. That the defendant pays to the estate of late Stephen Itto Koma shs. 20.000.000= as general damages with interest thereon at court rate from the date of judgment to date of payment in full.
6. That the defendant pays the costs of this suit to the estate of the deceased.

I so order

NYANZI YASIN

18/10/2011

11/10/11

Mr. Nyuma Albert in court

Mr. Mawa Alfred in court

Joyce court clerk

Court: Any of the deceased's children in court.

Mr. Nyuma – I do not have the children of the deceased in court.

Court: I notice that the plaintiff is merely an administrator of the estate which has adult children now. On inquiry he told me that he left some home.

I am surprised why in a matter which concerns the whole family it only that has excluding in children.

Secondly this is a matter where advocates appeared and none in the court now. For those two reasons judgment will not be delivered and adjourned to 18/10/11. Parties are directed to ensure the presence of their advocates.

Signed Judge

11/10/11

18/10/2011

Mr. Samuel Ondoma for the defendant

Mr. Madira Jimmy holding brief for Mr. Mamawi Billy for plaintiff.

Charles Dramani court clerk

Mr. Mawa Alfred present.

Mr. Nyuma Albert, Anikulu Saviour son of the deceased

Mundra Ronald, Michael Dulu Jugula.

They are our clan members.