

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 613 OF 2004

REHEMA NAMULI.....PLAINTIFF

VERSUS

- 1. JAMES MULWANA**
- 2. MUKALAZI KIBUUKA**
- 3. SARAH WALUSIMBI**
- 4. MKANGOMBE KIBUUKA.....DEFENDANTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE
JUDGMENT

The plaintiff brought this suit against the defendants for orders directing the defendants to return the duplicate certificate of title to Block 243 plot 786 land at Kitintale to the plaintiff, cancellation of any entries changing ownership and sub division of the suit land and restoring the plaintiff to the register, mesne profits, and costs of the suit.

The plaintiff's case as deduced from her pleadings is that at all material times, she was the registered proprietor of land comprised in Block 243 plot 786 land at Kitintale. She lives on the suit land. Sometime in 2001 she borrowed U.Shs.30,000,000/= (thirty million) from the 1st defendant to repay a loan she owed to Investment Masters Ltd. On payment of the loan by the 1st defendant, Investment Masters Ltd released the title, together with signed transfer and consent forms, to the 1st defendant. In July 2004, the 2nd and 3rd defendants attempted to survey the land but the plaintiff resisted. The defendants sub divided the plaintiff's land into Block 243 plot 2258 and 2259 without the plaintiff's consent to deprive her of her interest in the property. The 3rd defendant has forcibly taken over collection of U.Shs.1,040,000/= (one million forty thousand) as rent from the houses on the plaintiff's land without accounting for the same. The plaintiff demanded for the return of her duplicate certificate of title from the defendants but they have refused to return the same. She pleads that she never sold or donated her land to the 1st defendant, and that any purported transfer of the suit land by the 1st defendant to the 2nd and 3rd defendants is fraudulent.

The defendants' case as deduced from the pleadings is that the plaintiff freely and voluntarily transferred the suit property to the 1st defendant for value, and that the plaintiff is a dishonest

person. They plead that the plaintiff approached the 1st defendant for purchase of her land. The defendant paid the agreed purchase price of U.Shs.30,000,000/= (thirty million) upon which the plaintiff voluntarily signed the transfer and consent forms to transfer the suit land. The plaintiff also handed over the title to the 1st defendant. The defendants deny that they acquired the suit land fraudulently. Their case is that the plaintiff authorized and participated in the surveying of the land as she guided the surveyor with full knowledge of the purpose of the survey. The 2nd 3rd and 4th defendants contend in their pleadings that they are *bona fide* purchasers of part of the suit property having paid a fair value for the same without notice to them of any defect in the 1st defendant's title to the suit property.

Agreed Facts:

The parties filed a joint scheduling memorandum where the following facts were agreed on:-

1. *The plaintiff was the registered proprietor of the suit property.*
2. *The plaintiff gave the certificate of title and signed transfer forms of the suit land to the 1st defendant.*
3. *The suit property is registered in the names of the 2nd 3rd and 4th defendants.*

Issues for determination:

The following issues were agreed on by the parties with the guidance of court:-

1. *Whether the transfer of the suit property from the plaintiff to the 1st defendant was lawful.*
2. *Whether the transfer of the suit property from the 1st defendant to the 2nd 3rd and 4th defendants was lawful.*
3. *Whether there was fraud in the transaction on the part of the 1st 2nd and 3rd defendants.*
4. *What remedies are available to the parties.*

Preliminary Point of Law:

After the hearing, both Counsel filed written submissions within time schedules set by court. Learned Counsel for the defendants raised a preliminary point of law in his written submissions. He cited **Tororo Cement Co Ltd V Frokina International Co Ltd SCCA No. 2/2001** arguing that a point of law (PO) can be raised and decided upon at any time in any civil proceedings. In brief, the PO was that the plaintiff had departed from her pleadings contravening Order 6 rules 1(1) & (2), and 7 of the Civil Procedure Rules. He cited **Interfreight Fowarders (U) Ltd V East African Development Bank Civil Appeal No. 33/1992** to support his objection. He invited court to find that the plaintiff cannot be permitted to depart from what appears to have been her case in the plaint, to disregard the plaintiff's Counsel's submissions which are not based

on the plaintiff's evidence, and to find that the plaintiff did not adduce evidence to support her claim as required under section 101 of the Evidence Act.

The objection was opposed by the plaintiff's Counsel who submitted that the plaintiff had not departed from her pleadings. He submitted that the plaintiff's reply to the written statement of defence which responded to the defendants' statement of defence is a pleading to the extent that it can cure any defect in the pleadings. He cited **Katuramu V Attorney General [1987] HCB 24** to support his submissions. He also contended that raising the issue of departure at this stage after hearing and contesting the plaintiff's case is not allowed, citing **Darcy V Jones [1959] EA 121**.

It was held in **Tororo Cement Co Ltd V Frokina International Co Ltd SCCA No. 2/2001** that a point of law (PO) can be raised and decided upon at any time in any civil proceedings. It is in the spirit of the said decision that I proceed to address this PO. It is my opinion however that raising a PO and deciding on it is one thing, and sustaining it or overruling it is another.

Order 6 rule 7 of the Civil Procedure Rules provides that no pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading. The court decision in **Interfreight Forwarders (U) Ltd V East African Development Bank Civil Appeal No. 33/1992** emphasizes pleadings as a system through which pleadings operate to define the real matters in controversy with clarity upon which the parties can prepare and present their respective cases and upon which court will adjudicate.

In this case the plaintiff pleaded in paragraph 6 of the pleadings that she entrusted her valuable documents including the certificate of title to Block 243 plot 786 to the 1st defendant. However, in paragraph 1 of her reply to the defendants' written statement of defence, she pleaded that the 1st defendant only came in possession of the title, signed blank transfer and consent forms from Investment Masters Ltd upon his friendly assistance to the plaintiff to repay a loan of Shs.30,000,000/= (thirty million). The disparity in the plaintiff's pleadings and her reply to the written statement of defence forms the basis of the PO by the defendants' Counsel.

On the issue of raising the PO after the hearing, Order 6 rule 28 of the Civil Procedure Rules provides that a party is entitled to raise any point of law by his or her pleading. The object of Order 6 rule 28 is expedition, but only if the point of law is one that can be purely and squarely decided and which will not require proof of some facts. It should have been pleaded, or should arise by clear implication out of the pleadings, and which if argued as a preliminary point, may dispose of the suit. See **Mukisa Biscuit Manufacturing Co V West End Distributors Ltd [1968] EA 696**. The instant PO would, in my view, all other factors being in place, properly be disposed of as a preliminary issue under Order 6 rule 28 of the Civil Procedure Rules.

It is a well established procedure however, that a point of law may be raised shortly before hearing or at the commencement of the hearing. In **Tinyefuza V Attorney General Civil Appeal No. 1/1997**, Oder JSC, while considering the effect of Order 6 rule 28 observed that the

defendant in a suit or the respondent in a petition may raise a PO before or at the commencement of the hearing of the suit or petition. In **National Union of Clerical, Commercial and Technical Employees V National Insurance Corporation Civil Appeal No. 17/1993**, the Supreme Court held that the learned trial judge erred when he deferred ruling on a PO and proceeded to hear the application on its merits and ruled on the merits and PO at the same time, that he ought to have ruled on the PO before proceeding to entertain the application on the merits.

The hearing of this matter was preceded by the filing of a joint scheduling memorandum in this court. The memorandum was signed by both Counsel. The second fact agreed on in the said memorandum was that the plaintiff gave the certificate of title and signed transfer forms of the suit land to the 1st defendant. The defendants' Counsel himself, as is revealed by the record of proceedings, drew the attention of this court to the fact that there is some disagreement on the facts which needed resolving. On going through the joint scheduling memorandum with both Counsel we noted that each side had framed their own issues which were at variance. Court indulged Counsel to formulate agreed issues after addressing the separate sets of issues outlined by each side. This was done with the guidance of court and the full participation of the defendants' Counsel. Learned Counsel for the defendants never raised the objection after the scheduling conference and at the hearing. He went ahead and contested the case through cross examination of the plaintiff's witnesses and calling and examining the defence witnesses before making submissions on the matter.

The PO is based on pleadings filed in court long before the hearing of the case commenced. Though the record indicates that the defendants filed a statement in rejoinder to the plaintiff's reply pleading that the plaintiff had materially departed from her case and that he would pray for the same to be struck out, the defendant's Counsel never made the said prayer but instead went ahead to contest the case.

The developments in this case are similar to those in **Darcy V Jones [1959] EA 121** where the plaintiff's reply introduced an allegation which was inconsistent with the allegation in the plaint. The trial magistrate framed issues and decided upon them on allegations raised in the reply. On appeal the appellant contended that the respondent's reply to the appellant's statement of defence was incompetent in that the allegation put forward in the respondent's plaint was different from that put forward by the reply. The appellant also argued that the trial magistrate was wrong in framing and subsequently deciding on issues based on the allegations introduced by the reply. No objection was made at the trial to the issues framed by the magistrate. It was held that the remedy for breach of Order 6 rule 6 (the equivalent of Order 6 rule 7 in the Uganda Civil Procedure Rules) is an application to strike out the offending pleading either before or at the hearing. If a party omits to take that course and contests a suit on the pleadings as they stand, he cannot subsequently contend that the court ought not to have determined an issue which was open for decision on the pleadings as they then stood, although it would not have been so open had the pleadings been attacked at the proper time.

It is my opinion that the defendant's Counsel in this case had ample opportunity to move court to strike out the offending pleading under Order 6 rule 7 of the Civil Procedure Rules, either before or at the hearing. He chose not to and instead went ahead to contest the case by cross examining the plaintiff's witnesses and calling the defence witnesses. He cannot subsequently, at the stage of submissions when both sides had closed their respective cases, pray court not to permit the plaintiff to depart from what appears to have been her case in the pleadings, although this option would have been seriously considered had the pleadings been attacked at the proper time.

Without prejudice, I consider it important to address the point raised by the plaintiff's Counsel that the plaintiff's reply to the written statement of defence is a pleading to the extent that it can cure any defect in the pleadings, to indicate how this court appreciated the case of each party as made out in the pleadings. The situation raised in the preliminary objection is similar to that in **Katuramu V Attorney General, supra**. In that case the 1st respondent did not plead limitation in his written statement of defence but the 2nd respondent did. The appellant filed a reply to the 2nd respondent's written statement of defence in which he gave his reason for the delay as due to being confined in prison. On appeal, the 2nd respondent's Counsel argued that the filing of a reply was immaterial as it offended Order 7 rule 6 of the then Civil Procedure Rules. The Court of Appeal held that it would be taking too narrow a view to ignore a reply which was part of the appellant's pleadings, and that a court should ensure justice and pay less respect to technicalities. It also held that a plaint did not include a reply by the plaintiff, but a reply formed part of the plaintiff's pleadings and was therefore part and parcel of the case, and that where a reply was filed in answer to a defence, it should be considered together with the plaint with the result that it could supplement or cure any defect in the plaint.

In that regard, for reasons given above, and on the authorities cited, I overrule this PO. This takes me to the issues for determination in the case.

Issues for determination:

The following issues were agreed on by the parties with the guidance of court:-

- 1. Whether the transfer of the suit property from the plaintiff to the 1st defendant was lawful.*
- 2. Whether the transfer of the suit property from the 1st defendant to the 2nd 3rd and 4th defendants was lawful.*
- 3. Whether there was fraud in the transaction on the part of the 1st 2nd and 3rd defendants.*

Resolution of Issues:

Issue 1: Whether the transfer of the suit property from the plaintiff to the 1st defendant was lawful.

The plaintiff as PW1 testified on oath that she has known the 1st defendant for the last forty years. In December 2002 she borrowed U.Shs.30,000,000/= (thirty million) from the 1st defendant who was her friend. She gave the original certificate of title to the suit property to the 1st defendant and remained with a photocopy of the same. After a month she paid the money back to the 1st defendant but he refused to accept it saying he had not expected her to pay back and had already sold the houses. She never signed any transfer documents in respect of the suit property. She denied that the signature on the transfer documents was hers when the same was shown to her. She also denied filling the consent forms and stated that the 1st defendant gave her a blank form when she was receiving the money. In cross examination however, when shown the consent form exhibit **P2**, she agreed that she signed the document. She testified that she has never sold her property to the 1st 2nd or 3rd defendants for U.Shs.15,000,000/= (fifteen million). In cross examination she denied selling half of her land to James Mulwana (1st defendant) and keeping the other half. She also testified that when she went to borrow the money from the 1st defendant she was alone, and that the 1st defendant called a lady called Anna and ordered her to make a draft for her. She testified that she used to get U.Shs.1,040,000/= (one million forty thousand) per month as rent from the houses but the 1st and 2nd defendants told her tenants not to pay rent to her.

PW2 Godfrey Ndawula the Local Council (LC) Chairman of Kitintale zone 12 testified on oath that he was not aware of the plaintiff selling land and has not heard of anyone claiming possession of the houses. In cross examination he testified that he did not think that the plaintiff could sell the property and not inform him, and that everyone who buys property in the area informs him.

DW1 Herbert Wamala testified on oath that the plaintiff was lent money jointly with Sir John Bageine from Investment Masters Ltd in October 2001. After one year all the cheques she had issued bounced and they opted to sell off the security which was the land title for the suit land. On the day their buyer was to purchase the land she informed them that she had a buyer who was the 1st defendant. They received the payment in the form of a cheque a photocopy of which was exhibited as **D1**. The plaintiff signed the transfer forms for the suit land exhibited as **P1** in blank. In cross examination he testified that Investment Masters Ltd was not registered as a mortgagee of the suit land but had an interest in the land and had all the documents given to them by the plaintiff; that they did not transfer the documents in their names; that they are moneylenders; that when the money was paid by the 1st defendant he released the documents to the three ladies, that is plaintiff, Sarah Walusimbi (3rd defendant) and DW4 Ann Namwanje.

DW2 James Mulwana, the 1st defendant, testified that he knew the plaintiff for quite some time, and his company, Uganda Batteries Ltd, was renting her properties. He testified that the plaintiff approached him and told him that her property was going to be sold by Investment Masters Ltd and she had nowhere to stay. She requested him to buy the property so that she and his staff of Uganda Batteries Ltd then renting the property would not be thrown out. He paid Investment Masters Ltd by cheque of U.Shs.30,000,000/= (thirty million) exhibit **D1** which was delivered by DW4 Ann Namwanje. In cross examination, he testified that he bought the suit land from

Investment Masters Ltd and that Investment Masters did not sign transfer forms in respect of the land to him; that he did not meet any officers of Investment Masters Ltd; that he did not sign any sale agreement with the plaintiff but only signed a transfer form; that the plaintiff did not sign the transfer form in his presence; that the suit land was demarcated on his instructions; that he did not sell the land to the 3rd defendant though he signed a transfer form; that he did not sign the consent form transferring the suit land to the 2nd 3rd and 4th defendants; that the consideration in exhibit **P2** was U.Shs.15,000,000/= (fifteen million) while that in exhibit **P5** was U.Shs.25,000,000/= (twenty five million); and that the title was divided into two parts, one to the 2nd defendant and another to the plaintiff.

DW3 Vincent Kawunde testified that he collected rent from the suit premises for the 2nd and 3rd defendants from around 2003 after which the 3rd defendant took over.

DW4 Namwanje Ann testified that the 1st defendant called her and told her to pay Investment Masters Ltd by cheque of U.Shs.30,000,000/= to clear the plaintiff's debt to the said company. DW4 went with the plaintiff and handed over the cheque to Herbert Wamala DW1 who then handed over an envelope verified by the plaintiff to be containing a certificate of title and signed transfer forms. She later, as instructed by the 1st defendant, took DW5 Lukyamuzi to subdivide the suit land.

DW5 Lukyamuzi Frank Lwebuga testified that he went with DW4 and demarcated Block 243 plot 786 into two plots on the instructions of the 1st defendant. He put the main house on one plot and the smaller houses in another, but he did not sub divide the property or create plots on the land.

DW6 Mukalazi Kibuuka testified that he bought part of the suit land from the 1st defendant at U.Shs.30,000,000/= (thirty million). He instructed a surveyor who subdivided the land after which two titles, exhibits **D2** and **D3** were procured.

The plaintiff in her testimony denied ever selling her land to the 1st defendant. She also denied signing the transfer and consent documents in favour of the 1st 2nd 3rd and 4th defendants. The 1st defendant's testimony as DW2 is that the plaintiff requested him to buy the property. In cross examination however he testified that he bought the suit land from Investment Masters Ltd. It was his evidence still in cross examination that he did not sign any sale agreement with the plaintiff but only signed a transfer form, and that the plaintiff did not sign the transfer form in his presence. DW4 Ann Namwanje, the Financial Controller/Ag General Manager for Uganda Batteries Ltd at the time, testified that the 1st defendant called her and told her to pay Investment Masters Ltd by cheque to clear the plaintiff's debt to them. DW4 went with the plaintiff and handed over the cheque to Herbert Wamala DW1 who then handed over an envelope verified by the plaintiff to be containing a certificate of title and signed transfer forms. It is an agreed fact in the joint scheduling memorandum filed by the parties that the plaintiff gave the certificate of title and signed transfer forms of the suit land to the 1st defendant.

The parties exhibited no sale agreement to this court to indicate that the plaintiff sold the suit land to the 1st defendant or that the plaintiff allowed the 1st defendant to transfer the suit land into his names. There is undisputed evidence though, from the testimonies of Herbert Wamala DW1, the 1st defendant as DW2, Ann Namwanje DW4, and exhibit **D1**, that the 1st defendant paid Investment Masters Ltd by cheque of U.Shs.30,000,000/= (thirty million) to clear the plaintiff's indebtedness to Investment Masters Ltd. There is no evidence adduced before court to support the 1st defendant's claim that the said amount of money was in respect to sale of the suit land by the plaintiff to the 1st defendant. The plaintiff's evidence as PW1 is that she borrowed the money from the 1st defendant who was her childhood friend. The 1st defendant DW2 testified in cross examination that he bought the suit land from Investment Masters Ltd. The testimonies of the plaintiff PW1, the 1st defendant DW2, and Ann Namwanje DW4 are clear that the plaintiff did not sign any transfer forms or sale agreement in favour of the 1st defendant before DW1 or DW4. There is also evidence from the same witnesses that the plaintiff did not fill in the particulars of the transfer forms exhibit **P1** and consent forms exhibit **P2** which were used to transfer the land to the 1st defendant.

It is clear from the evidence adduced from both sides that the plaintiff signed the consent and transfer forms exhibits **P1** and **P2** in blank. They were kept by Investment Masters Ltd but eventually handed over to the 1st defendant. The 1st defendant himself testified that the plaintiff did not sign the transfer form exhibit **P1** in his presence and that the forms were filled in by his company's officials. He denied ever signing exhibit **P2**. The adduced evidence shows Exhibit **P2** was signed in blank by the plaintiff. The adduced evidence, particularly the testimony of the 1st defendant as DW2, reveals that the particulars were eventually filled in by the 1st defendant's Company Secretary. There is nothing to indicate that the plaintiff authorized the filling in of the transfer and consent forms exhibits **P1** and **P2**.

The defendants' Counsel argued that a land sale agreement need not be signed by parties to the transaction and that there is no need for them to be in physical presence of each other. The evidence adduced however is undisputable that the 1st defendant cleared a debt of U.Shs.30,000,000/= (thirty million) owed by the plaintiff to Investment Masters Ltd. There is also evidence that the plaintiff signed the transfer forms for the suit land exhibited as **P1** in blank in connection with the loan she got from Investment Masters, and not before the 1st defendant. The plaintiff's land title together with exhibit **P1** were eventually taken from Investment Masters to the 1st defendant by the plaintiff and DW4 when the 1st defendant cleared the plaintiff's indebtedness to Investment Masters. There is no cogent evidence adduced by the 1st defendant to prove his claim that the money was paid as purchase price in respect of sale of the plaintiff's land to the 1st defendant. In that respect, I am not convinced, on the balance of probabilities, that the plaintiff sold the suit land to the 1st defendant.

The 1st defendant in cross examination stated that he bought the suit land from Investment Masters after the plaintiff requested him to do so. It was submitted for the defendants that the suit property was sold by Investment Masters Ltd to the 1st defendant with the consent and approval

from the plaintiff as the mortgagor. Learned Counsel Peter Musoke argued for the defendants that under section 10 of the Mortgage Act a mortgagee can sell the property without applying to court provided the mortgagor's consent and approval was obtained, and that Investment Masters Ltd had the capacity to sell the suit land as mortgagee. He also submitted that this was an outright sale and not a transfer of mortgage since the plaintiff had deposited the duplicate certificate of title as well as signed transfer and consent forms with the 1st defendant.

The plaintiff's Counsel argued in his submissions in reply that section 129 of the Registration of Titles Act is not applicable to this case as the 1st defendant was never a mortgagee of the plaintiff's title, and that section 10 of the Mortgage Act does not apply as there was no mortgage giving Investment Masters powers to sell the land without applying to court.

In **Barclays Bank V Northcote [1976] HCB 34**, it was held that a mortgagee in whose favour an equitable mortgage is created by deposit of title deeds accompanied by memorandum agreeing to execute a legal mortgage with unqualified power of sale on demand is entitled to apply to court to exercise the powers available to a legal mortgagee. He would not execute a legal mortgage without resort to courts. The proper procedure is to sue the mortgagor and obtain a court order for an account to determine the sum due. Then he can obtain a declaration that he is entitled to a charge on the mortgaged land. In addition he should pray for an order that if payment is not made within the time stipulated, he would then realize his security by any or all the remedies availed under the mortgage law.

The court's holding in **Barclays Bank V Northcote** was apparently premised on the observation that the primary remedy of an equitable mortgage is foreclosure and an equitable mortgagee has no legal estate. The effect of foreclosure is to convey the land to such mortgagee free from any right to redeem as foreclosure puts an end to other remedies, which is why the value of the land must be ascertained before the grant. Besides, as was held in **Jakana V Senkaali [1988 – 1990] HCB 167**, before enforcing any of the remedies under the Mortgage Act, the mortgagee should have been registered under the Registration of Titles Act either as a legal or equitable mortgage.

The evidence of DW1 Herbert Wamala is that Investment Masters Ltd was not registered as a mortgagee of the suit land but it had an interest in the land and had all the documents given to them by the plaintiff. DW1 also testified that they did not transfer the documents in their names, and that they are moneylenders. The same witness stated on oath that when the money was paid by the 1st defendant he released the documents to the three ladies, that is plaintiff, Sarah Walusimbi (3rd defendant) and DW4 Ann Namwanje.

There is nothing in the adduced evidence to suggest that a legal mortgage existed between the plaintiff and Investment Masters Ltd. There was neither a loan agreement nor a mortgage deed tendered in court by DW1 to show any powers to sell the suit property. The plaintiff's depositing of her title deed to Investment Masters Ltd was not accompanied by any memorandum agreeing to execute a legal mortgage with unqualified power of sale on demand. In cross examination

DW1 testified that the plaintiff borrowed money and signed an agreement but he did not produce the agreement in court.

There was no evidence that Investment Masters Ltd signed any transfer as a mortgagee when the land was transferred to the 1st respondent. Though the 1st defendant's evidence is that the suit land was sold by Investment Masters Ltd, they do not feature anywhere on exhibits **P1** and **P2** as transferors of the suit property to the 1st defendant to whom they are said to have sold the land. What happened is that DW1 merely handed over the plaintiff's certificate of title and blank transfer and consent forms to the plaintiff, the 3rd defendant and DW4 on receiving and banking a cheque of U.Shs.30,000,000/= (thirty million) issued by the 1st defendant to Investment Masters Ltd.

The defendants' Counsel argued that an equitable mortgage existed between the plaintiff and Investment Masters Ltd under section 129 of the Registration of Titles Act, and that when Investment Masters Ltd sold the suit property to the 1st defendant, they were doing so as mortgagees of the said property.

Section 129 of the Registration of Titles Act provides that an equitable mortgage of land may be made by deposit of the registered proprietor of his or her certificate of title with intent to create a security thereon whether accompanied or not by a note or memorandum of deposit, but every equitable mortgage shall be entered as a caveat under section 139 of the same Act. DW1 Herbert Wamala testified that Investment Masters Ltd was not registered as a mortgagee of the suit land. This infers that not even an equitable mortgage existed between the plaintiff and Investment Masters Ltd. Even if such a relationship existed, the law is that an equitable mortgagee cannot sell property mortgaged to him/her without first seeking and obtaining a court order of foreclosure after filing a suit against the equitable mortgagor. In that regard I find that Investment Masters Ltd had no capacity to sell or transfer the plaintiff's suit land as it was neither a transferee nor a mortgagee of the same.

I do not agree with the arguments of the defendants' Counsel that the property was sold under section 10 of the Mortgage Act by virtue of the plaintiff depositing her certificate of title and signed transfer and consent forms which the defendants' employees filled in to complete the purchase. There is no evidence to suggest that the 1st defendant was ever a mortgagee of the plaintiff's title. Section 10 of the Mortgage Act does not apply as there was no mortgage giving Investment Masters Ltd powers to sell the land without applying to court.

In the circumstances, on basis of the adduced evidence and the authorities cited above, I am not satisfied on the balance of probabilities that the transfer of the suit property from the plaintiff to the 1st defendant was lawful. Issue number 1 is therefore answered in the negative.

Issue no. 2: Whether the transfer of the suit property from the 1st defendant to the 2nd 3rd and 4th defendants was lawful.

The plaintiff pleaded in the plaint that that she never sold or donated her land to the 1st defendant and that any purported transfer of the suit land by the 1st defendant to the 2nd and 3rd defendants is fraudulent. She testified that she has never sold her property to the 1st, 2nd or 3rd defendants for U.Shs.15,000,000/= (fifteen million). She denied filling the consent forms and testified that after a month she paid the money back to him but he refused to accept it saying that he had not expected her to pay back, and that he had already sold the houses. She testified that she never signed any transfer documents in respect of the suit property in favour of the defendants. She denied filling the consent forms and stated that the 1st defendant gave her a blank form when she was receiving the money.

The 2nd defendant testified as DW6 that he bought part of the suit land from the 1st defendant at U.Shs.30,000,000/= (thirty million). He subsequently demarcated the land and procured two titles, photocopies of which were exhibited as **D2** and **D3**. Exhibit **D3** indicates that the suit land comprised in Block 243 plot 786 was transferred from the plaintiff to the 1st defendant on 17/12/2002 under instrument no. KLA 244369, and subsequently from the 1st defendant to the 2nd, 3rd and 4th defendants on 6/8/2003 under instrument no. KLA253101. Exhibit **P2** indicates that part of Block 243 plot 786 measuring 0.150 hectares was eventually registered as Block 243 plot 2258 in the names of the 2nd, 3rd and 4th defendants under instrument number KLA 260665 on 8/6/2004. The 1st defendant testified that he did not sell Block 243 plot 786 to the 2nd defendant, or sell any land or sign any transfer to the 3rd and 4th defendants. The transfer instruments exhibit **P1** and **P2** indicate that the transfer documents in respect of Block 243 plot 786 were purportedly signed by the plaintiff and the 1st defendant in the presence of Sarah Walusimbi Legal Secretary, who is also the 3rd defendant. DW6 testified in cross examination that Sarah Walusimbi signed exhibit **P1** as a witness, and that she also signed the consent form exhibit **P5** where the 1st defendant purportedly applied for consent to transfer Block 243 plot 786 from himself to the 2nd, 3rd and 4th defendants.

Sarah Walusimbi (3rd defendant) did not testify in this suit, but DW6 testified in cross examination that Sarah Walusimbi is his wife and she conducted the transfers on his behalf. DW6, on being shown exhibit **P5**, confirmed that Sarah Walusimbi signed the consent form to transfer Block 243 plot 786 from the 1st defendant to the 2nd, 3rd and 4th defendants. DW6 also confirmed in cross examination that he signed exhibit **P4** the transfer document transferring Block 243 plot 786 from the 1st defendant to the 2nd, 3rd and 4th defendants. Exhibit **P4** reveals that the 1st defendant signed the transfer document as vendor while the 2nd, 3rd and 4th defendants signed as purchasers of Block 243 plot 786. No consideration is indicated in exhibits **P4** and **P5**. Exhibit **P5** the application for consent to transfer Block 243 plot 786 from the 1st defendant to the 2nd, 3rd and 4th defendants was signed by the 3rd defendant, Sarah Walusimbi. DW2 testified that Sarah Walusimbi was his Company Secretary. Exhibit **P5** also reveals that the consideration for transfer of Block 243 plot 786 from the 1st defendant to the 2nd, 3rd and 4th defendants was U.Shs.25,000,000/= (twenty five million) but the 2nd defendant's evidence is that he purchased the property at U.Shs.30,000,000/= (thirty million). No sale agreement was produced in court to

show the vendor/purchaser relationship between the 1st defendant and the 2nd 3rd and 4th defendants in respect of Block 243 plot 786 as well as the said consideration of U.Shs.30,000,000/= (thirty million). The 2nd defendant DW6 testified in cross examination that he did not sign any sale agreement with the 1st defendant.

It is clear from the evidence from both sides that the 2nd 3rd and 4th defendants were not purchasers of Block 243 plot 786. It is already a finding of this court in issue 1 above that the plaintiff did not sell Block 243 plot 786 to the 1st defendant. It is also clear that the 3rd defendant conducted the transfers from the plaintiff's names to the 1st defendant as an Advocate and signed as a witness to the transfer documents. The 3rd defendant also filled in the details of the transfers from the 1st defendant to the 2nd 3rd and 4th defendants. There was no agreement or other convincing evidence produced before court to confirm the 2nd defendant's testimony that he purchased the land from the 1st defendant, or that the purchase price was U.Shs.30,000,000/= (thirty million).

The plaintiff testified that she did not sign any transfer forms in favour of the 2nd 3rd and 4th defendants. Exhibit **P4** was signed between the 1st defendant as vendor and the 2nd 3rd and 4th defendants as purchasers. There is no evidence to show that the plaintiff sold or transferred the suit land to the 2nd 3rd and 4th defendants. It is already a finding of this court that the plaintiff did not sell or transfer the suit land to the 1st defendant either. The adduced evidence shows that all the transactions involving the transfer of the said land, which centered between the 1st 2nd and 3rd defendants in as far as transferring and sub dividing the land was concerned, were without the plaintiff's participation or endorsement.

In the circumstances, on basis of the adduced evidence and the legal authorities on the matter, it is my finding that the transfer of the suit property from the 1st defendant to the 2nd 3rd and 4th defendants was not lawful. Issue no. 2 is therefore answered in the negative.

Issue 3: Whether there was fraud in the transaction on the part of the 1st 2nd and 3rd defendants.

Fraud is defined to include anything calculated to deceive whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture. It includes dishonest dealings in land or sharp practice to deprive a person of an interest in land. Among other things, fraudulent acts may be inferred from facts intent. See **Fredrick Zaabwe V Orient Bank & 5 Ors SCCA 04 OF 2006; Kampala District Land Board & Anor V Venancio Babweyaka & 3 Ors Civil Appeal No. 2 of 2007.**

Fraud must be attributable either directly or by necessary implication to the transferee. The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. See **Kampala Bottlers V Damaniko (U) Ltd, Civil Appeal No. 22 of 1992; Hannington Njuki V George William Musisi [1999] KALR 783.**

Allegations of fraud must be specifically pleaded and proved. The degree of proof of fraud required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must, however, be more than a mere balance of probabilities. See **J. W. Kazoora V Rukuba, Civil Appeal No. 13 of 1992.**

The plaintiff pleaded in paragraph 12 of her amended plaint that the purported transfers of land by and to the defendants is fraudulent. She set out the particulars of fraud to be that the transferee is not a purchaser of the suit land, and that the plaintiff has not transferred to the defendant or any of their nominees. She testified that she did not sign any transfer forms in favour of the 2nd 3rd and 4th defendants. The defendants denied committing the fraud while acquiring the suit land.

There is no evidence to show that the plaintiff sold or transferred the suit land to the 2nd 3rd and 4th defendants. Exhibit **P1** was purportedly signed between the 1st defendant and the plaintiff witnessed by the 3rd defendant. DW2 testified that the 3rd defendant was his Company Secretary and she signed exhibit **P1** as a witness. According to the sworn testimonies of the plaintiff and the 1st defendant however, the document was never signed by the plaintiff and the 1st defendant in the presence of the 3rd defendant. The 1st defendant testified as DW2 that he only signed a transfer form but that the plaintiff did not sign the transfer form in his presence. He also testified that he did not sell the land to the 3rd defendant though he signed a transfer form. It was his testimony that he did not sign the consent form transferring the suit land to the 2nd 3rd and 4th defendants.

Section 147(a) of the Registration of Titles Act defines a witness as that person who was present at the signing of the instrument and can attest to the fact that he or she saw the person alleged to have signed the instrument do so. It is evident in this case that the 3rd defendant did not see the people alleged to have signed the documents actually signing the said documents. The 3rd defendant as an Advocate who acted for the 1st defendant may even be faulted for not exercising due diligence and professionalism as an Advocate when she signed a document as a witness when in actual sense she was never a witness to it. In my opinion this makes exhibit **P1** a lie in itself.

It is also clear from the evidence adduced from both sides that all the transactions concerning the purported executions of exhibits **P1, P2, P3** and **P4** were handled by the 3rd defendant by filling in the particulars, or signing as witness, and, in the case of exhibit **P4**, as one of the vendors. It is also clear that the plaintiff did not give any authority to the 3rd defendant to fill in the documents transferring the suit land in their favour. The 3rd defendant did not testify in this suit, but the 2nd defendant as DW6 testified in cross examination that the 3rd defendant is his wife and that she conducted the transfer on his behalf. DW6 confirmed that the 3rd defendant signed the transfer form exhibit **P5**. In cross examination he confirmed that he signed exhibit **P4** transferring Block 243 plot 786 from the 1st defendant to the 2nd 3rd and 4th defendants. Exhibit **P4** shows that DW6 signed it as one of the vendors and no consideration for the transfer is indicated in the form.

There is no cogent evidence that the 2nd 3rd and 4th defendants purchased Block 243 plot 786 from the 1st defendant. The 3rd defendant conducted the transfers from the plaintiff's names to the 1st defendant as an Advocate and signed as a witness to the transfer documents. It is evident that the 3rd defendant also conducted the transfers from the 1st defendant to herself as the 3rd defendant, and, on behalf of the said 2nd defendant, to the 2nd and 4th defendants. The 3rd defendant's filling in the transfer forms which had been given to her in blank, and her making herself and her spouse and daughter to be transferees of the suit property would render her actions fraudulent. This was so held in **Isaac George Munaabi V Albert Sebude & Another HCT -00 – CV – CS 1293/1997** where the facts are almost on all fours with the instant case.

The 1st defendant DW2 testified that the land purchased from the plaintiff for U.Shs.30,000,000/= (thirty million) was only part of Block 243 plot 786 and that the plaintiff was to keep the part where her residence was. The 2nd defendant DW6 also testified that he purchased and surveyed part of Block 243 plot 786 initially purchased by the 1st defendant, leaving out the part where the plaintiff resided as instructed by the 1st defendant. Exhibit **P1** the transfer form however reveals that the entire Block 243 plot 786 measuring 0.75 acres was transferred to 1st defendant at no consideration. Exhibit **P2** reveals that the same land with the same acreage was transferred by the plaintiff to the 1st defendant for a consideration of U.Shs.15,000,000/= (fifteen million). This contradicts the 1st defendant's evidence that he purchased the suit land from the plaintiff at a purchase price of U.Shs.30,000,000/= (thirty million).

Exhibit **P4** indicates no consideration was paid when the land was transferred from the 1st defendant to the 2nd 3rd and 4th defendants. Exhibit **P5** reveals however that the same land with the same acreage was transferred by the 1st defendant to the 2nd 3rd and 4th defendants for a consideration of U.Shs.25,000,000/= (twenty five million). This contradicts the defendants' evidence that the land was purchased from the 1st defendant by the 2nd 3rd and 4th defendants at U.Shs.30,000,000/= (thirty million). In absence of a sale agreement, the contradictions heavily dent the defendant's evidence regarding purchase price and acreage of the land bought. It renders such evidence questionable and suspect as to whether there was ever a sale, if so, of what land, by who, to who, and for how much.

There is evidence that the transactions were mainly handled by the 3rd defendant to have the suit land registered first in the names of her employer the 1st defendant, and eventually to herself, her husband the 2nd defendant, and her daughter the 4th defendant. There is evidence that at the time of transferring the suit land, the 1st 2nd and 3rd defendants knew that the plaintiff resides on the suit land. It was held in **Charles Lwanga V Xaverio Damulira SCCA 16/1992** that possession was notice to a purchaser upon which he should have made the necessary inquiries. Exhibit **P5** shows that the 3rd defendant when filling the forms falsely declared that there were no houses on the land. This ended in a valuation which was ridiculously low cheating government of appropriate stamp duty. Such transactions are illegal and fraudulent as was held in **Samuel Kizito V Byensiba [1985] HCB**.

The law is that where a purchaser employs an agent, such as an advocate to act on his behalf the notice he receives actual or constructive is imputed on the purchaser. On the authority of **Sejaaka Nalima V Musoke SCCA 12/1985** the fraudulent acts of the 3rd defendant are imputed on the 1st defendant by virtue of her acting as his legal secretary when she was executing the transfer documents. The same fraudulent acts are also imputed on the 2nd defendant who gave full authority to the 3rd defendant to execute transfer documents on his behalf.

Fraud has been defined to include dishonest dealing in land or sharp practice to deprive a person of an interest in land, and fraudulent acts may be inferred from facts intent. It is clear in the instant case that the transactions that led to the suit land being transferred to the 1st defendant and eventually to the 2nd 3rd and 4th defendants were dishonest and without the participation or endorsement of the plaintiff.

The 2nd 3rd and 4th defendants pleaded that they were *bona fide* purchasers for value without notice of any fraud. The burden to prove that one is a *bona fide* purchaser for value without notice lies on the person setting it up. It is a simple plea and is not sufficiently made by proving purchase for value and leaving it to the plaintiff to prove notice if he/she can. See **Sejaaka Nalima V Musoke, supra**. Once the defendant has proved the foregoing on a balance of probabilities, the plaintiff then must strictly prove that the defendant was party to the fraud or had knowledge. In **Hannington Njuki V George William Nyanzi HCCS No. 434 of 1996** it was held that a *bona fide* purchaser must prove that he/she holds a certificate of title; that he/she purchased in good faith; that he/she had no knowledge of the fraud; that he/she purchased for valuable consideration; that the vendor had an apparent valid title; and that he/she purchased without fraud or was not a party to the fraud.

It was an agreed fact that the suit property is registered in the names of the 2nd 3rd and 4th defendants. This is in line with the testimony of DW6, further evidenced by exhibits **D2** and **D3**. The other aspects in my opinion are all answered in the negative, basing on the findings to issues 1, 2 and 3 that the defendants did not purchase the suit land from the plaintiff, and that their transactions on the suit land were fraudulent. Going by the adduced evidenced, I find that the 2nd 3rd and 4th defendants have not discharged the burden to prove, on a balance of probabilities, that they are *bona fide* purchasers for value without notice of Block 243 plot 786 or any part of it.

For reasons given above, and on the authorities cited, it is my finding that the plaintiff has strictly proved fraud against the 1st 2nd and 3rd defendants to more than a mere balance of probabilities in as far as the transferring of the suit property from her names to those of the defendants is concerned. Issue 3 is therefore answered in the affirmative.

Issue 3: Remedies available.

The plaintiff prayed this court for any order directing the defendants to return the duplicate certificate of title to Block 243 plot 786 land at Kitintale to the plaintiff, cancellation of any

entries changing ownership and sub division of the suit land, and restoring the plaintiff to the register.

In **Costa Bwambale & Anor V Yosofati Mate & 3 Ors [2001 – 2005] HCB 76**, the Court of Appeal held that to order for cancellation of title, it must be proved that the second appellant had knowledge, actual or constructive, about the interests of any of the respondents and ignored it. Once land has been brought under the operation of the RTA, it cannot be deregistered except for fraud. That is the legal position as provided for under section 59 of the RTA.

In this case the plaintiff has proved fraud against the defendants who are currently registered as the proprietors of the suit property. This would entitle her to the remedies sought regarding cancellation of the defendants' titles and restoring her name on the register in respect of the suit land.

The plaintiff also pleaded and testified that she lost her rental income from her houses on the suit land. The decisions in **Kampala District Land Board & George Mitala V Venansio Babweyana, Civil Appeal No. 2 OF 2007** and **Kyagalanyi Coffee Ltd V Steven Tomusange, Civil Appeal No. 9 of 2001** are well settled law on award of damages by a trial court. It is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. Damages must be pleaded and proved. The law is that special damages arising from loss of business ought to be strictly proved with cogent evidence. Special damages must be pleaded and proved by the party claiming them as being the direct result of the wrongs or breach committed by the respondent. The quantum of special damages ought to be proved and properly assessed by court.

A claim for loss of business is a special damage which must be strictly proved to show how much business was lost and for how long to enable court come to a reasonable decision on the issue. See **Eladam Enterprises Ltd V S.G.S (U) Ltd & Others Civil Appeal No. 20 of 2002**. Loss of rental income is assessed on the basis of the value of the premises at the time. The Landlord should aver in his pleading what he alleges is the annual value of the premises and must be prepared to prove it. **George Kasedde Mukasa V Emmanuel Wambede & Ors Civil Suit No 459 of 1998** unreported.

The defendants' Counsel argued that the plaintiff is not entitled to claim for mesne profits as she neither pleaded nor proved the particulars of the special damages claimed. I do not agree with this submission. The plaintiff's testimony was clear as to what amount of rent she used to realize from the premises before she lost possession of the same. Her evidence is that she used to get rental income from the houses on the suit land at U.Shs.1,040,000/= (one million forty thousand) per month and she lost ten years without collecting rent from the said houses. She informed court that the rent of U.Shs.1,040,000/= (one million forty thousand) per month was the total collection of all the units rented out. DW4 Vincent Kawunde, a court bailiff/debt collector

testified that he collected rent from the suit properties on the request of the 2nd defendant from around 2003 to 2004, after which the 3rd defendant stopped him and took over. Exhibit **P4** that transferred the land from the 1st defendant to the 2nd 3rd and 4th defendants was executed in July 2003.

This evidence was not challenged during cross examination nor was it rebutted by the defendants. In **Jogga V Bafirawala [1977] HCB 75** the Court of Appeal for East Africa held that the trial Judge was justified to award the figure of mesne profits asked for in the prayer as the mesne profits were not specifically denied in the written statement of defence nor disputed during trial, which meant the appellant had accepted the figure. It was held by the Court of Appeal in **Kyagalanyi Coffee Ltd V Steven Tomusange, supra** that there is nothing to stop a court from awarding special damages on oral evidence if believed and found reliable. The plaintiff's evidence that she was collecting the U.Shs.1,040,000/= (one million forty thousand) as monthly rent for all the units on the suit land was not challenged by the defendants who only adduced further evidence that they started to collect rent first through DW4 a court bailiff/debt collector, and eventually the 3rd defendant took over. There is evidence that the plaintiff has been denied collection of rent in respect of the suit premises since July 2003. The plaintiff would be entitled to mesne profits at U.Shs.1,040,000/= per month since July 2003 to the date of taking possession of the suit property.

Though there was undisputed evidence of the 1st defendant having paid U.Shs.30,000,000/= (thirty thousand) to clear the plaintiff's indebtedness to Investment Masters Ltd he did not counterclaim it in the pleadings or in his evidence, neither was there a prayer for general damages. It is for that reason that I have not made any order on the repayment of the said money or on general damages if the plaintiff had lost the case.

Accordingly, judgment is entered for the plaintiff against the defendants jointly and severally for orders and declarations that:-

- i) The defendants shall return the duplicate certificate of title to Block 243 plot 786 land at Kitintale to the plaintiff.
- ii) Any entries changing ownership and sub division of the suit land should be cancelled.
- iii) The plaintiff's names should be reinstated to the register to land comprised in Block 243 plot 786 land at Kitintale.
- iv) The defendants should pay to the plaintiff mesne profits at U.Shs.1,040,000/= per month since July 2003 to the date of taking possession of the suit property.
- v) The plaintiff is awarded the costs of this suit.

It is so ordered.

Dated at Kampala this 7th day of February 2013.

Percy Night Tuhaise

JUDGE.