

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 690 OF 2004

1. **EDWARD GATSINZI**
2. **MUKASANGA RITAH ::: PLAINTIFFS**

VERSUS

LWANGA STEVEN ::: DEFENDANT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

J U D G M E N T:

Edward Gatsinzi and Mukasanga Ritah (hereinafter referred to as the “Plaintiffs”) jointly brought this suit against *Lwanga Steven* (hereinafter referred to as the “Defendant”) seeking orders of cancellation of the Defendant’s names from the certificate of title for land comprised in **Buruli Block 219 Plot 2** (hereinafter referred to as the “suit land”); that they be registered on the title to the suit land as Administrators of estate of late Augustine Lwamulangwa, and costs of the suit.

The Plaintiffs initially on 21/09/2004 sued the Chief Registrar of Titles jointly with one John Sekimpi; the latter from whom the Defendant claims to derive interest in the suit land. On 18/09/2009 the Plaintiffs amended their plaint and included one Sekitoleko Shaban then claiming to be the representative of the estate of late John Sekimpi who by then had died. On 15/02/2012 the Plaintiffs yet again amended their plaint and dropped the Chief Registrar of Titles and Sekitoleko Shaban and maintained Lwanga Steven as the only Defendant who by then had become registered as proprietor on the title to the suit land.

On 10/04/2012 the Defendant filed an amended written statement of defence with a counterclaim seeking orders of eviction against the Plaintiffs from the suit land and/or vacant possession, a permanent injunction against the Plaintiffs or anybody claiming under them from any further acts of trespass on the suit land, general damages and costs of the counterclaim. On 03/05/2011 Counsel for the parties filed scheduling notes which were adopted by court with two issues proposed by the Plaintiffs’ Counsel as follows;

- (i) *Whether the Plaintiffs are bona fide occupants on the suit land*
- (ii) *Remedies available to the parties*

The Defendant proposed four issues as follows:

- (i) *Whether the plaint discloses a cause of action against the Defendants.*
- (ii) *Whether the Plaintiffs are bona fide occupants on the suit land.*
- (iii) *Whether the 3rd Defendant is a bona fide purchaser.*
- (iv) *What are the remedies available to the parties?*

Owing to the several amendments mentioned above, the parties again jointly adopted the following issues at the trial;

1. *Whether the Plaintiffs have an interest in the suit land.*
2. *Whether the Defendant is a bona fide purchaser.*
3. *What are the remedies available for the parties?*

Background facts.

The Plaintiffs' father one late Augustine Lwamulangwa on 02/07/1980 got registered as proprietor on the certificate of title for land comprised in Buruli **Block 219 Plot 2**. Together with his family, they had occupied the suit land prior to his registration and utilized it for cultivation and grazing cattle. On 30/07/1991 Augustine Lwamulangwa died and he was buried on the suit land. In 2004, one John Sekimpi started laying claim of ownership over the suit land as Administrator for the estate of one late Salimini Kabalu who was previously registered on the title in 1934 and died in 1960. John Sekimpi's lawyers *M/s. Sengoba & Co. Advocates*, in letter dated 19/05/1993 moved the Chief Registrar of Titles under **Section 178(a) of the Registration of Titles Act** to cancel Augustine Lwamulangwa's entry from the title on grounds that he was erroneously registered on the suit land, and that his names should be removed to enable the children of Salimini Kabalu to register their beneficial interest.

The Chief Registrar of Titles on 14/06/1993 issued notice to Augustine Lwamulangwa, who by then was dead for about two years, stating that his registration in 1980 was done in error and that his name would be cancelled and Salimini Kabalu's reinstated on the title. In the same notice the Chief Registrar of Titles required Augustine Lwamulangwa to forward the duplicate certificate of title to for scrutiny.

On 06/07/1993, *M/s Kityo & Co. Advocates* acting for the late Augustine Lwamulangwa's family responded to the notice informing the Chief Registrar of Titles that Augustine Lwamulangwa

died some years earlier, and that his family members who were minors were in possession and physical occupation of the suit land, and that the process of administering the deceased's estate had not yet been done. Further citing **Section 59 of the Registration of Titles Act**, *M/s Kityo & Co. Advocates* warned the Chief Registrar of Titles against the intended action without first obtaining a High Court order. The Chief Registrar of Titles, nevertheless, on 20/12/1995 cancelled Augustine Lwamulangwa's entry on the title in favour of the Salimini Kabalu on the ground that the signature of the Land officer against Augustine Lwamulangwa's entry in the Register was forged by someone. The Chief Registrar of Titles went on to register John Sekimpi the Administrator of the estate of Salimini Kabalu vide **Administration Cause No. 0129 of 2003** as proprietor on the title on 17/10/2003. John Sekimpi then sold the suit land to the current Defendant who got registered on the title on 19/06/2008.

On 22/07/2004 the Plaintiffs who had become of age obtained Letters of Administration for the estate of their late father Augustine Lwamulangwa and on 21/09/2004 instituted this suit against the Chief Registrar of Titles and John Sekimpi seeking, *inter alia*, for an order of cancellation of *Instrument No. BUK 53003* and *No.57796* under which Salimini Kabalu was re-entered on the title as proprietor and John Sekimpi as Administrator of the estate respectively. The Plaintiffs further sought an order that the suit land be transferred in their names as Administrators late Augustine Lwamulangwa's estate.

Evidence.

Gatsinzi Edward the 1st Plaintiff (PW1) in his evidence more or less repeated the above stated background facts. The Defendant for his part disputed the Plaintiffs' claims and adduced evidence of four witnesses. The main thrust of his evidence is that the Defendant was approached by John Sekimpi the then registered proprietor of the suit land who wanted to sell the same. The Defendant proceeded to the suit land and found the family of one late Mbwana who confirmed to him that there were no any other *Kibanja* holders on the suit land and that the family of the Plaintiffs was and is still living on the adjacent land belonging to one Mutina Nakanwagi.

Further, that the said family of late Mbwana had no objection to the Defendant purchasing the suit land and promised to buy their *Kibanja* interest in the land in future. That after confirming the names on the title particulars and what was on the ground the Defendant purchased the suit land and was later registered as proprietor on 19/06/2008. The Defendant insisted that the Plaintiffs are resident on the neighboring land belonging to the estate of late Mutina Nakanwagi,

and that he had no knowledge of the alleged or of any fraud or error in title of his predecessors, if any, as none was brought to his attention, and that he did not personally participate in the alleged fraud. The Defendant also denied that the Plaintiffs have any gardens or graves of the suit land.

Submissions.

M/s Kiyemba & Matovu Advocates represented the Plaintiffs, and *M/s Ocheing. Harimwomugasho & Co. Advocates* the Defendant. Both Counsel filed written submissions to argue their clients' respective cases. The submissions are on court record and I am very thankful to both Counsel for the same. I however need not reproduce the submissions in this judgment but I will occasionally make specific reference to them as and when necessary.

Resolution of issues:

Issue No. 1: Whether the Plaintiffs have an interest in the suit land.

The Plaintiffs claim interest in the suit land as Administrators of the estate of their late father Augustine Lwamulangwa, vide Letters of Administration (*Exhibit P6*). According to copies of the certificate of title (*Exhibit P1 and D1*) Augustine Lwamulangwa was registered as proprietor on the title on 02/07/1980. On 20/12/1995, however, the Chief Registrar of Titles exercising powers under ***Section 178(a) Registration of Titles Act*** cancelled Augustine Lwamulangwa's entry and reinstated Salimini Kabalu previously registered on the title on 26/01/1934 vide *Instrument No. 24962*.

The Chief Registrar of Titles was prompted to act by John Sekimpi the Administrator to late Salimini Kabalu's estate on grounds that the signature of the Land officer against the entry of Augustine Lwamulangwa's name on the title was forged. John Sekimpi was then registered as proprietor on the title on 17/10/2003 vide *Instrument No. 57796*, and in 2004 started claiming ownership of the suit land from the Plaintiffs, who on 21/09/2004 instituted this suit against him. Evidence in *Annexure G*, (the Death Certificate) and *Annexure H* (the L.C.1 letter of Kibaanda village then called "RCs") shows that John Sekimpi later died on 07/04/2008 and that the Defendant was registered on the title on 19/06/2008 vide *Instrument No. BUK 82912*.

Based on the above facts in evidence, the issue as to whether the Plaintiffs have any interest in the suit land or not depends on whether their late father Augustine Lwamulangwa himself had any lawful interest in the suit land that could pass on to them as Administrators and /or beneficiaries or both, as the case may be. This inevitably calls investigation into circumstances under which Augustine Lwamulangwa's entry on the title was cancelled.

Exhibit PI, and D1 copies of the certificate of title show that Augustine Lwamulangwa was entered on the register on 02/07/1980 next after Salimini Kabalu who was registered in 1934 and died in 1960. It is not clear from evidence as to how and when the late Augustine Lwamulangwa came on the suit land, but by the time of his registration in 1980 he had been in occupation and use of the suit land for quite some time. It is also evident that as at the time Lwamulangwa got registered in 1980 the title was still in names of Salimini Kabalu.

The Chief Registrar of Titles on 20/12/1995 cancelled Augustine Lwamulangwa's entry on the title on grounds that the suit land was erroneously registered in his names, and that the signature of one Muira Kibirige an official of that Land office against the entry was forged by someone. Chief Registrar of titles never indicated in the notice who had committed the alleged forgery, but *M/s Kityo & Co. Advocates* acting for the family of late Augustine Lwamulangwa responded to the notice and informed the Chief Registrar of Titles that Augustine Lwamulangwa had died more than a year earlier, and members of his family who were minors were in possession of the land, and that the process of administration of the estate had not yet been done. Also, that in view of **Section 59 RTA (supra)** the Chief Registrar of Titles could only have recourse to the intended action by obtaining an order of the High Court. However, on 20/12/1995, the Chief Registrar of Titles proceeded to cancel Augustine Lwamulangwa's entry on the Register and reinstated Salimini Kabalu's names thereon.

The power of the Chief Registrar of Titles was provided for under **Section 69 of the Registration of Titles Act (Cap 205) (1964 Edition)** which was the law in force at the time. The said section was repealed by **Section 97 of the Land Act, No. 16 of 1998**, which provides as follows;

“The Registration of Titles Act is amended by repealing Section 69 and paragraph (a) of Section 178.”

The provision was replaced by the current **Section 91 of the Land Act (Cap.227)** which provides for the power of the Commissioner for Land Registration (previously the Chief Registrar of Titles). The repealed **Section 69 (supra)** provides that;

“In case it appears to the satisfaction of the registrar that any certificate of title or instrument has been issued in error or contains any misdescription of land or boundaries, or that any entry or endorsement has been made in error on any certificate of title or instrument, entry or endorsement has been fraudulently or wrongfully obtained or that any certificate of title or instrument is fraudulently or wrongfully

retained, he may in writing require the person to whom such document has been so issued or by whom it has been so obtained or is retained to deliver up the same for the purpose of being cancelled or corrected or given to the proper party, as the case requires; and, in case such person refuses or neglects to comply with such requisition, the registrar may apply to the High Court to issue a summons for such person to appear before such Court and show cause why such certificate of title or instrument should not be delivered up for the purpose aforesaid; and if such person when served with such summons refuses or neglects to attend before such Court at the time therein appointed, it shall be lawful for the Court to issue warrant authorizing and directing the person so summoned to be apprehended and brought before the Court for examination.”[Emphasis mine].

A careful reading of the provision reveals that the actions of the Chief Registrar of Titles in the instant case were, with due respect, grossly irregular, illegal, and done in utter disregard of the law.

Nowhere under **Section 69 (supra)** was the Chief Registrar of Titles empowered to cancel an entry of any person on a title, even if the entry had been erroneously or illegally or fraudulently and wrongfully procured without first giving a hearing to the person to be affected by the decision. The purpose of the notice was to summon the person to attend to the Chief Registrar of titles, but the notice could not serve as or substitute the requirement for a hearing. If the person failed or neglected to appear in accordance with the notice, the Chief Registrar of Titles was required to apply to the High Court to compel the person by summons to appear before the Court and show cause why action should not be taken on the title. If the person still failed or neglected to appear, the High Court would issue a warrant of arrest against the person to be apprehended and be brought before the Court for examination. The clear import of the provision is that even where the High Court issued summons or warrant of arrest no cancellation would be effected without first “examining” the person on his or her entry on the title.

My findings are fortified by the fact that reference to the phrase “fraudulently” was deliberately omitted by the Legislature from provision on the powers of the Commissioner for Land Registration under the amending **Land Act, (supra)** when fraud is alleged. It is trite law that where allegations of fraud on title are made the burden lies on the person alleging the same to file a suit in court for the cancellation of the entry. This is because, as was held in the case of

A.K. Detergents Ltd. v. G.M. Combine (U) Ltd. (1999) KALR 536, the allegations of fraud are quite serious in nature and require to be specifically pleaded and proved before a court of law beyond mere balance of probability though not necessarily beyond reasonable doubt. Needless to state that, fraud is not an “error” or “mistake” because it goes to the root of the title and requires proof to the standard stated in *A.K. Detergents Ltd. v. G.M. Combine (u) Ltd case (supra)* and the level of adjudication that could be by the Chief Registrar of Titles. Recourse had to be had to the High Court in all such cases where fraud was alleged.

In the instant case, if indeed the signature against the entry of Augustine Lwamulangwa’s names on the title was forged, that would amount to fraud. Since Augustine Lwamulangwa had not appeared as per the notice, it was a requirement of the law under *Section 69 (supra)* for the Chief Registrar of Titles to apply to the High Court to issue a summons for the defaulting party to appear before the Court and show cause why his entry on the title should not be cancelled. At no time was the Chief Registrar of Titles empowered to take a unilateral decision to cancel an entry. Therefore, by cancelling Augustine Lwamulangwa’s entry and re-entering names of Salimini Kabalu on the title, the Chief Registrar of Titles acted *ultra vires* his statutory power, which rendered his actions and decision null and void.

Another point to take note of is that by the time the Chief Registrar of Titles issued the notice on 14/06/1993, Augustine Lwamulangwa then the registered proprietor had died on 30/07/1991 more than a year earlier. This fact was duly brought home to the Chief Registrar of Titles in a letter dated 06/07/1993 by *M/s Kityo & Co. Advocates* acting for the family of late Lwamulangwa. The Chief Registrar of Titles was also put on notice that the certificate of title was held subject to the provisions of *Section 59 RTA (supra)* and that the intended cancellation could only be justified by an order of the High Court.

Section 59 (supra) essentially provides for the indefeasibility of a certificate of title and the registered proprietor as follows;

“No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the

certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.”

A registered proprietor of land is protected under **Section 176 RTA (supra)** .The relevant part thereof states as follows;

“No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases—

(a);

(b);

(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;...”

When **Section 69(supra) 59(supra) and 176(supra)** are read together, they leave no doubt that the Chief Registrar of Titles acted contrary to the law in cancelling Augustine Lwamulangwa’s entry and substituting the names of Salimini Kabalu on the title. The failure to comply with provisions of the law meant that the Chief Registrar of Titles exercised power illegally with material irregularity, which rendered his actions on the title null and void. It was held ***Makula International Ltd. v. His Eminence Cardinal Nsubuga & A’ nor [1982] HCB 11*** that an illegality once brought to the attention of court cannot be condoned.

Apart from the above, it also found that by taking a decision affecting rights of the Plaintiffs without according them opportunity to be heard the Chief Registrar of Titles exercised power improperly. This invariably violated the cardinal principle of natural justice as relates to a fair hearing, and that a party shall not be condemned unheard. It is settled that an administrative body/person acts improperly and or illegally where it/he exercises its/his power to decide a question without affording a party affected by the decision an opportunity to be heard, or where the procedure adopted in dealing with the dispute is contrary to principles of natural justice. See: ***Re: Musinguzi Geoffrey and Kiruhura District Local Administration, HCT– 05 – CV – MA – 193 – 2011 (unreported)***. It is also the trite law that a decision reached by an administrative body/person which violates principles of natural justice shall not be left to stand. See: See ***Sharp***

v. Welefield (1981) A.C 173 which was relied upon in *Re: Interdiction of Bukeni Fred Misc. Appl.No. 139 of 1991*, per Musoke – Kibuuka J.

The other fatal shortcoming in the decision to cancel Lwamulangwa's entry on the title is that the notice of cancellation was issued by of the Chief Registrar of Titles more than a year after Augustine Lwamulangwa had died, and the process of administering the estate had not yet begun - a fact that was duly notified to the Chief Registrar of Titles. It meant that the estate, of which the suit land was part, fell under **Section 25 of the Succession Act (Cap 162)** and automatically devolved on the Administrator General as representative of the deceased entitled to administer the property under the law. For the purpose of the notice of cancellation, therefore, the Administrator General was under **Section 4 of the Administrator General's Act (Cap.153)** legally the proper party imbued with the *locus standi* to be heard in matters of the deceased's estate.

It is, however, rather disturbing that the Chief Registrar of Titles did not find it proper to redirect the notice to the Administrator General concerning the suit land which at the time was part of the deceased's estate. The failure rendered the decision of the Chief Registrar affecting the title legally ineffective, which also rendered the subsequent entries on the title ineffective. It follows that the position of the Register of titles must be restored to that obtaining as at 02/07/1980 before cancellation of Augustine Lwamulangwa's entry. This logically means that the Plaintiffs as Administrators and beneficiaries of the estate of late Augustine Lwamulangwa would have an interest in the suit land. *Issue No. 1* is answered in the affirmative.

Issue No. 2: Whether the Defendant is a bona fide purchaser.

In the case of *Amratlal Purshottam & A' nor v. Gian Singh Bhambra, H.C.C.S. No. 289 of 2010 (Land Division) (Unreported)* it was held that a *bona fide* purchaser is one who buys property for value without notice of another's claim over the same property and without actual or constructive notice of any defects in, or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for the property without notice of prior adverse claims. Further, that to qualify as a *bona fide* purchaser one must have done proper due diligence and exercised reasonable caution before entering into a transaction that would ultimately be binding upon him or her.

Similarly in the case of *Haji Nasser Katende v.Vithalidas Halidas & Co. Ltd, C.A.C.A. No. 84 of 2003* it was held that for a purchaser to rely on the *bona fide* purchaser doctrine he must prove

seven elements which are that he holds a certificate of title, he purchased the property in good faith, he had no knowledge of the fraud, he purchased for valuable consideration, the vendor had apparent valid title, he purchased without notice of any fraud, and he was not party to the fraud.

“*Bona fide purchaser*” is simply a common law doctrine that evolved as a defence against allegation of fraud. In *David Sejjaka Nalima v. Rebecca Musoke, C.A.C.A. No. 12 of 1985* it was also held that before a purchaser can claim protection as a *bona fide purchaser* without notice of the fraud under **Section 181** of the *RTA(supra)* he or she must act in good faith, and if he or she is guilty of fraud or sharp practice, that person ceases to be innocent and therefore loses the protection.

To prove his claims as a *bona fide purchaser*, the Defendant led evidence that he was approached by John Sekimpi to sell him land and that after inspecting the land he purchased the same, but that no sale agreement was ever made. The Defendant tendered in court an acknowledgement note dated 19/04/2007, *Exhibit D2*, for part payment of the purchase price for land in **Block 219 Plot No. 2 situate at Kakooge LC1 Zone Buruli – Nakasongola**, and testified that it is the only document he has that serves as a sale agreement.

After carefully reading the said *Exhibit D2*, I find that it grossly contradicts the Defendant’s testimony in all respects that no sale agreement was made. The note in fact makes a specific reference to “a sale agreement” between the parties made on 19/04/2007. The relevant extract of the note states;

“...which I have sold to him as per the Agreement of sale dated 19th April, 2007.”
[Emphasis mine].

The contradiction remained unexplained as to whether it is the note that is false or the Defendant’s testimony, but whichever the case, none helps the Defendant’s case at all.

In the first instance, the note shows that Shs.5, 800,000/= supposedly acknowledged by John Sekimpi was only part payment (installment) of the purchase price for the suit land, but it does not state how much the purchase price was or whether it was ever paid fully. In the second instance it shows that Shs. 5,800,000/= was first installment of the purchase price of the land “... *as per the Sale Agreement of sale dated 19th April, 2007*”, yet the Defendant maintained in his testimony that no such sale agreement exists or was ever made at all.

These unexplained contradictions are so fundamental that they go to the root of the matter. It means, *inter alia*, that there was no sale agreement between the parties and as such there is no

proof of the alleged sale. The purported note simply makes reference to a nonexistent sale agreement and it cannot be relied upon because it tells a lie about itself. The purchase price remains unknown for some unknown reasons. As was held in ***Hussein Juma v. Raphael Bwami, H.C.C.A N. DR. MFP6/1990***, where sale of land is involved the purchase cannot be by mere presumption. There must be actual purchase with a written memorandum or note duly signed by the parties and the failure to prove the same would render the said claim baseless. Therefore, without proper proof of the sale the Defendant fails the test as a *bona fide* purchaser.

The next issue relates to whether the Defendant was aware of the infirmities and claim of the Plaintiffs in the suit land before he purportedly purchased the same. It should be noted that the Defendant was added as party to the suit on 18/09/2009 after he was registered on the title on 19/06/2009. In his defence filed on 17/12/2009 he denied any knowledge of the Plaintiffs' claims over the suit land and averred that he had nothing to put him on notice of any adverse interest in the suit land, and that he is a *bona fide* purchaser for value without notice of any encumbrance. He filed a counterclaim and prayed for, among others, an order of eviction of the Plaintiffs from the suit land and vacant possession.

By seeking orders of vacant possession and the eviction of the Plaintiffs from the suit land in his counterclaim, in my view, it means that the Defendant by implication acknowledged that Plaintiffs were in possession and physical occupation of the suit land; a fact that the Defendant was or ought to have been aware of before he purchased the land. Otherwise there would be no need for him to seek orders to evict them from the land. That being the case, the Plaintiffs' physical presence should have reasonably put the Defendant on notice and as part of his due diligence he should have inquired from them what their interest was in the land before buying. It would appear that he ignored this fact.

In the case of ***Nabanoba Desiranta & A' nor v. Kayiwa Joseph & A' nor, H.C.C.S. No. 496 of 2005***, Aweri Opio J (as he then was) quoting the case of ***UP&TC v. Abraham Katumba [1997] IV KALR 103*** held that as the law now stands a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser without notice. Further relying on the case of ***Taylor v. Stibbert [1803 – 1813] ALL ER 432***, the Learned Judge held that the defendant failed to make reasonable inquiries of the persons in possession and as such his ignorance or negligence formed particulars of fraud.

Applying the same principles to the instant case, the Defendant by his conduct committed fraud which is directly attributable to him, and as such loses protection as *bona fide* purchaser, which renders his title impeachable.

At the same time, I have failed find any relevance to the Defendant's reference to the adjacent piece of land belonging to one Mutinwa Nakanwagi because it is a separate piece of land from the one the Plaintiffs are now litigating about. The description of the suit land is succinctly clear in *Exhibit P1 and D1* copies of the certificate of title. If the Plaintiffs currently occupy that particular piece of land, such ought to be a subject of a different case altogether, but should not be used as a diversionary ploy against the real claim of the Plaintiffs in the suit land in this case.

I further find that the Defendant fails the test of a *bona fide* purchaser owing to the fact that by 2008 when the he purportedly purchased suit land, the vendor John Sekimpi was already battling a court case with the Plaintiffs in respect of the land. Court record shows that on 15/10/2008 the Court issued an interim order restraining John Sekimpi "*and his successors in title*" from trespassing, evicting or in any way dealing with the suit land. On 03/02/2009 when the lawyers of John Sekimpi sought to add the current Defendant to the suit the Court further ordered that; "*meanwhile the interim order subsists.*" The existence of the court case and the court orders relating to ownership of the suit land are facts the Defendant was and or ought to have been reasonably aware of if he carried out any due diligence at all. The orders issued by court against John Sekimpi before the Defendant allegedly bought the suit land bound the Defendant as well as Sekimpi's "*successor in title.*"

Court orders are orders *in rem* and are issued against the whole world. Court orders are not issued in vain and they bind everybody whether they are parties to the case or not in respect of the same subject matter of the suit. See: ***Bashaija Kazoora John v. Bitekyerezo Medard &the Electoral Commission, H.C. Election Petition No. HCT – 05 – CV – EP – 004 – 2004, per Bamugemereire J(unreported); Muriisa Nicholas v. Attorney General & 3 O'rs , H.C. Misc. Appl. No. 035 of 2012(unreported).*** With these observations, I find that the defence of *bona fide* purchaser is not available to the Defendant in the circumstances.

The next aspect of *Issue No.2* relates to whether the Defendant was registered on the certificate of title through fraud, and if so whether the fraud is attributable to him. The position of the law

as relates to fraud is well settled. In the case of *Fredrick J. K. Zaabwe v. Orient Bank & 5 O’rs*, S.C. C.A No. 4 of 2006,(at page 28 of the lead judgment)Justice Katureebe JSC, relied on the definition of fraud taken from *Black’s Law Dictionary, (6th Ed) at page 660* as follows;

“An intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. 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... A generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestion or by suppression of truth and includes all surprise, trick, cunning dissembling and any unfair way by which another is cheated. “Bad faith” and fraud are synonymous and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness etc. ..As distinguished from negligence, it is always positive intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo by speech, or by silence by word of mouth or by look or gesture.”

The above extensive definition, in my view, encapsulates all aspects of what constitutes fraud. Further in the case of *Kampala Battlers Ltd v. Damanico (U) Ltd., S.C.C.A No. 22of 1992*, Wambuzi, CJ (at page 5 of his judgment) quoting the trial judge on the definition of fraud that stated that;

“It is well established that fraud means actual fraud or some act of dishonesty.”

In the case of *Waimiha Saw Milling Co. Ltd.v. Waione Timber Co. Ltd.(1926) A.C 101 at page 106*, it was held that fraud implies some act of dishonesty. Also in *Assets Co. v. Mere Roihi (1905) A.C 176*, it was held that fraud in actions seeking to affect a registered title means actual fraud, dishonesty of some sort not what is called constructive fraud; an unfortunate expression

and one may opt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud. See also: ***David Seijaaka v. Rebecca Musoke, (supra)***.

Regarding the standard of proof in cases of fraud, it has been held that it is slightly beyond balance of probabilities required in ordinary civil cases but not beyond reasonable doubt as required in criminal cases. See: ***UNTA Exports Ltd.v.Customs(1970) EA & Margaret Musango v.Francis Musango [1970] HCB 226; Amama Mbabazi &A' nor v. Musinguzi Garuga James, Election Petition No. 12 of 2012; Ndaula Ronald v. Hajji Nadduli Abdul, Election Petition Appeal No. 20 of 2001; Kampala Bottlers Ltd. v. Damanico (U) Ltd.(supra)***.

The particulars of fraud as set out in paragraph 5 of the plaint against the Defendant are the buying the suit land knowing of the Plaintiffs' interest in the same; transferring land into his names after dubiously removing the caveat lodged thereon by the Plaintiffs; and purchasing the suit land well knowing that the Plaintiffs were *bona fide* occupants of the same with a pending court case. The Defendant for his part denied any knowledge of the alleged or of any fraud or error in title of his predecessors, if any, as none was brought to his attention. He also denied that he personally participated in the alleged fraud.

Exhibit P1 and D1, copies of the certificate of title to the suit land show that the Defendant got registered on the title on 19/06/2008 just over two months after the death of John Sekimpi the vendor. *Exhibit P7 and P8* respectively (proof of death) show that John Sekimpi died on 07/04/2008 and that he was buried on 08/04/2008. Entries on title go further to show that the Defendant was registered directly after John Sekimpi with no other intermediate person as the Administrator of John Sekimpi's estate. This raises serious questions as to the propriety and legality of the Defendant's registration on the title.

Section 191 of the Succession Act (supra) provides that;

“Except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.”

In this case, as at the date of John Sekimpi's death no other entries had been made on the title in the names of the Defendant. Even assuming that the Defendant had purchased the land prior to John Sekimpi's death, only equitable interest could pass to him, but legal title still remained in

the estate of late John Sekimpi. It was thus illegal for Defendant to have got himself registered on the title for land that legally belonged to the estate of the deceased with no evidence to show that any legal representative of late John Sekimpi's estate had effected such a transfer. Equally, it was illegal for the Chief Registrar of Titles to have allowed the Defendant to deal in the estate of a deceased person without first requiring production of Letters of Administration.

I am acutely alive to the fact that an illegality does not necessarily amount to fraud. However, where there is failure or omission to take an essential step, as was in this case, fraud may be inferred. In this case John Sekimpi died on 07/04/2008 which was known to the Defendant who nonetheless later got himself registered on the title on 19/06/2008. This was an illegality in the registration process directly attributable to the Defendant as purchaser amounting to fraud. He actively participated in the fraud and has come to court with unclean hands seeking to perpetuate the fraud and illegality which he knowingly committed.

Regarding the particulars of fraud alleged that the Defendant dubiously removed the caveat lodged on the suit land by the Plaintiffs; I have not found any evidence that links the Defendant to that particular allegation. The caveat was removed on 21/01/2007 which was much earlier before the Defendant purportedly purchased the land from John Sekimpi on 19/06/2008.

The other issue that came out of the pleadings and evidence of both parties concerns the law of limitation. By letter "Annexure B" dated 19/05/1993 from *M/s.Sengoba & Co. Advocates* to the Chief Registrar of Titles, John Sekimpi sought to recover land on which the Plaintiffs' father had been registered for over twelve years from 02/07/1980 and was in possession and physical occupation prior to his registration. **Section 5 of the Limitation Act (Cap. 80)** provides that;

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."

Section 6(1) (supra) provides that;

"(1) Where the person bringing an action to recover land, or some person through whom he or she claims, has been in possession of the land, and has while entitled to it been dispossessed or discontinued his or her possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."

Given the position of the law cited above, it would follow that in May 1993 when John Sekimpi sought to recover the suit land purportedly belonging to the estate of late Salimini Kabalu, who

had been disposed of the same in 1980 when Augustine Lwamulangwa got registered thereon, the action was barred by limitation. Similarly the Chief Registrar of Titles' hands were tied by the law of limitation and he ought not to have taken action to cancel the entry of Augustine Lwamulangwa in 1995 or to re-enter Salimini Kabalu on the title.

John Sekimpi's letter to the Chief Registrar of Titles to cancel Lwamulangwa's entry on the title amounted to "action" to recover land within the meaning of **Section 1(1) (a) of the Limitation Act (supra)**. Statutes of limitations are by their nature strict and inflexible enactments. They are not concerned with the merits. Once the axe falls, it falls, and the party who takes benefit of the limitation would of course insist on his or her strict right under the statute. See: **Vincent Rule Opio v. Attorney General, [1990-1991] KALR 68; Onesiforo Bamuwayira & 2 Or's v. Attorney General (1973) HCB 87; Hilton v. Satton Steam Laundry [1946] IKB 61 at page 81**. It would follow then that the reinstatement of Salimini Kabalu's names on the Register was caught up by limitation, and John Sekimpi as Administrator of the estate legally had no title in the land to pass to the Defendant.

Accordingly, the Plaintiffs have proved their claim to the required standard. The Defendant has failed to prove his claim in the counterclaim. It is declared and ordered as follows;

- 1. Judgment is entered in favour of the Plaintiffs.**
- 2. It is declared that the Plaintiffs are bona fide occupants of the land comprised in Buruli Block 219 Plot 2.**
- 3. The Commissioner for Land Registration is directed to register the Plaintiffs as Administrators of the Estate of Late Augustine Lwamulangwa.**
- 4. The Defendant's counterclaim is dismissed with costs to the Plaintiffs.**
- 5. The Defendant's Certificate of Title for Buruli Block 219 Plot 2 is hereby cancelled**
- 6. A permanent injunction is issued against the Defendant or his agents, and servants from evicting the Plaintiffs from the suit land.**
- 7. The Plaintiffs are awarded costs of the suit.**



BASHAIJA K. ANDREW

JUDGE

26/08/2014