THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 771 OF 2007

1. KENYENYA WANJALA HERBERT

2. WERE MIRIA

3. ABISAGI NALONGO ..... PLAINTIFFS

VERSUS

1. ROBINAH NABIKOLO

2. PAULO NADDULI

3. AKAMADA SEJJUKO

4. CLEMENT LULE KANTINTI

5. COMMISSIONER, LAND REGISTRATION ..... DEFENDANTS

Hon. Lady Justice Monica K. Mugenyi

Judgment

The plaintiffs, descendants of a one Yonasani Were, claim to be the rightful owners of 26 acres of land described as Kyadondo Block 236 plots 28 and 33 that the said Mr. Were allegedly purchased from a one Kezironi Kasenya. It is the plaintiffs' contention that Yonasani Were paid the purchase price for the said land on various dates between 1947 and 9th September 1951. The first, second and third defendants, on the other hand, are descendants of Kezironi Kasenya, the alleged vendor, and contend that Mr. Were did effect part payment for the land described above but did not complete payment therefore whereupon he transferred 20 acres of the land back to

Mr. Kasenya. Following Yonasani Were's demise in 1961, clan heads purported to distribute plots 28 and 33 amongst the deceased's children including the third plaintiff, and the first and second plaintiffs' father and father-in-law respectively. The said distribution was subsequently confirmed by the Administrator General. However, in 2005 when the first plaintiff sought to secure titles for the respective pieces of land apportioned to the deceased's beneficiaries, he discovered that the first, second, third and fourth defendants held a title to Kyadondo Block 236 plot 63 that entailed land included in plot 28. It was contended by the plaintiffs that plot 2407 had been curved out of plot 28 and was later converted into plot 63 registered in the names of the first, second, third and fourth defendants. Plot 28 was subsequently cancelled on 18th July 2007 vide instrument No. KLA 345512. The plaintiffs thereupon instituted the present proceedings alleging fraud in the cancellation of plot 28 and in the registration of plot 63 that was demarcated therefrom in the names of the afore-cited defendants. The first, second and third defendants, on the other hand, contend that they were duly registered proprietors of Kyadondo Block 236 plot 63. It was their contention that plot 28 had been sub-divided into plots 62 and 63 in February 1955, with plot 63 measuring 20 acres registered in the names of Kezironi Kasenya; and, therefore, the fifth defendant was right to cancel plot 28.

No written statements of defence were filed by the fourth and fifth defendants, the former being deceased. Pursuant to a scheduling conference conducted on 23rd September 2009 the following issues were framed:

1. Which of the certificates of title is valid?
2. Who is the rightful owner of the land in dispute?
3. Remedies available.

At the hearing of this case the plaintiffs were represented by Mr. Noah Sekabojja, while Mr. Brian Othieno represented the defendants. In final written submissions, learned counsel for the defence raised 3 preliminary points of law; the first and third points of law gravitate around the plaintiffs having had no *locus standi* to institute the present proceedings, while the second point of law raised was that the suit was time-barred. I propose to determine these preliminary points of law prior to a consideration of the merits of the present suit. I shall start with the second preliminary point of law, to wit, that the suit is time barred.

It was learned defence counsel's submission that the present suit violated section 20 of the Limitation Act in so far as it was filed well beyond the 12 years limitation period prescribed therein. This court understood learned counsel's argument to be that the evidence on record indicated that Yonasani Were's estate had been distributed by 1973 at the latest therefore any dispute that was premised on a claim to the estate should have been filed by 1985. For ease of reference the pertinent portion of section 20 is reproduced below:

> "**Subject to section 19(1), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued**."

Conversely, it was contended for the plaintiffs that the matter in dispute between the parties was the irregular cancellation of the certificate of title in respect of Kyadondo Block 236 plot 28, and not a claim over property in Yonasani Were's estate as had been advanced by the defence.

Section 25(a) of the Limitation Act postpones the limitation period prescribed in that Act in case of fraud. The section reads:

> "**Where, in the case of any action for which a period of limitation is prescribed by this Act, … the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent, the period of limitation shall not begin to run until the plaintiff has discovered the fraud … or could with reasonable diligence have discovered it**."

In the instant case it was the plaintiffs' case that the first plaintiff discovered the fraud that allegedly underlay the defendants' interest in the disputed land in 2005 when the he allegedly sought to secure titles for the respective pieces of land apportioned to the deceased's beneficiaries. Therefore, it would be from that date that the limitation period started to run. The present suit was filed in 2007 well within the prescribed 12 –year limit. I therefore find that the present suit was brought within time. I so hold.

On the question of the plaintiffs' *locus standi*, it was Mr. Othieno's contention that the first and second plaintiffs were administrators to the

estate of one Portipher Were while the third plaintiff was a beneficiary of the same estate, but there was no nexus between any of them and the estate of Yonasani Were from whom they purport to derive title, as required by section 191 of the Succession Act. It was also Counsel's contention that Yonasani Were's estate was administered by the Administrator General therefore the plaintiffs had no *locus standi* to administer the same. Furthermore, learned Counsel argued that the evidence on record indicated that Yonasani Were's estate had been distributed between the deceased's children but neither Portipher Were nor the plaintiffs benefited from such distribution so as to qualify as beneficiaries of the said estate.

In reply, learned counsel for the plaintiff contended that the first and second plaintiffs were grandchildren of the late Yonasani Were and beneficiaries of his estate by virtue of being children to a one Baraza (deceased), a son to Yonasani Were. On the other hand, the third plaintiff was a daughter to the said Yonasani Were and a direct beneficiary of his estate. It was learned counsel's contention that as beneficiaries to the estate of Yonasani Were, the plaintiffs did not have to first secure letters of administration in respect of his estate in order to file a suit in respect of land. Counsel cited the cases of **Israel Kabwa vs. Martin Banoba Musiga (1996) KaLR 253 [Supreme Court Civil Appeal No. 52 of 1995]** and **Solo David & Mutoto Moses vs. Pagali Abdu & Tukei Anson High Court Civil Appeal No. 27 of 2009** (unreported) in support of this position. Counsel further argued that the plaintiffs claim a share of the disputed land and had developments thereon.

I must state from the onset that the plaint depicts the plaintiffs as having brought the present suit as holders of letters of administration for the estate of Portipher Were, in the case of the first and second plaintiffs; and as a beneficiary of that estate in the case of the third plaintiff, and not as beneficiaries of Yonasani Were as is now asserted in submissions. Nonetheless, this court is mindful of the direction provided in the case of **Uganda Breweries Ltd vs. Uganda Railways Supreme Court Civil Appeal No.6 of 2001** where the trial court was similarly faced with a party's departure from its pleadings. In that case Oder JSC held:

> "**To my mind the questions for decision under ground 2(i) of the appeal appears to be whether the party complaining had fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining (in the instant case the appellant); or whether the**

departure was a mere irregularity, not fatal to the case of the respondent whose evidence departed from its pleadings."

Referring to his earlier decision in **Interfreight Forwarders (U) Ltd vs. East African Development Bank Supreme Court Civil Appeal No. 33 of 1993** (unreported), his lordship observed that in the **Interfreight Forwarders** case the cause of action proved had been a complete departure from what had been pleaded by the respondent. The pertinent part cited is reproduced for ease of reference:

> "**In *Interfreight Forwarders (U) Ltd* (supra) the cause of action as stated in the plaint and reflected in the issues framed by the party at trial was negligence. But the learned trial judge erred when he found in the alternative that the respondent was liable on a different cause of action namely, as a common carrier, which puts strict liability on the carrier for any change or loss to goods he accepts to carry. This court upheld the ground of appeal complaining against the trial judge's finding to that effect on the ground that the cause of action proved was a complete departure from what had been pleaded by the respondent."** *(emphasis mine)*

In the instant case I find that the variance between the plaint and learned counsel's submission herein does not entail a complete departure from the cause of action of fraud that was pleaded. The plaintiffs pleaded such facts in the plaint as would have put the defendants herein on reasonable notice of the nature of the case against them and the nexus between the plaintiffs and Yonasani Were. Thus the contention that the plaintiffs were beneficiaries of Yonasani Were's estate would not cause the defendants any injustice.

Be that as it may, I have carefully reviewed the law applicable to the issue of *locus standi* to institute legal proceedings such as the present suit. Section 191 of the Succession Act that was cited by Mr. Othieno states:

> "**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**."

Section 191 forestalls any right to claim for property of an intestate until letters of administration in respect of his or her estate have been duly granted. In other words section 191 negates *locus standi* to claim for property of an intestate until letters of administration shall have been granted in respect of such estate. The law thus seems to protect an intestate's estate from claims from persons that have not been established as beneficiaries thereof.

Nonetheless, the case of **Israel Kabwa vs. Martin Banoba Musiga** (supra) did recognise legitimate beneficiaries' right to protect their interest in an intestate's estate. In that case the respondent was a customary heir and son to an intestate, and had developments on the land in question. Although he did not possess letters of administration at the time, he successfully instituted legal proceedings for the cancellation of the appellant's title to the suit land on account of fraud. The appellant's first ground of appeal was whether or not the respondent had *locus standi* to institute legal proceedings against him. It was held:

> "**The respondent's *locus standi* is founded on his being the heir and son of his late father. In terms of section 28(1)(a) and 28(2) of the Succession Act as amended, the respondent could very well be entitled to 76% or more of the estate of his father. He is thus defending his interest. His position as heir has been enhanced by the belated grant of letters of administration in that way. Kotham's case is irrelevant. Therefore I think that ground one should fail. It would still fail in my view even if no letters of administration had been obtained because the respondent's right to the land and his developments thereon do not depend on letters of administration**."

The import of the foregoing decision is that as a son and customary heir to the deceased, and therefore a legally recognised beneficiary to his estate under section 27 of the Succession Act, the respondent in that case had an interest in protecting or preserving the deceased's estate and therefore did have *locus standi* to sue without first obtaining letters of administration. The principle therein is that a beneficiary of an estate as prescribed under section 27 of the Succession Act does have *locus standi* to institute legal proceedings for purposes of protecting or preserving an estate. Beneficiaries of an estate of a male intestate, as is the case presently, include lineal descendants of the intestate. *See section 27(1) of the Succession Act*. Although the term 'lineal descendant' is not defined in the

Succession Act, the definition of lineal consanguinity in section 20(1) of the same Act is, in my view, instructive on the meaning to be attached to it. I reproduce section 20(1) for ease of reference:

> "**Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other as between a man and his father, grandfather, great-grandfather and so upwards in the direct ascending line, or between a man, his son, grandson, great-grandson and so downwards in the direct descending line**."

As grandchildren and daughter respectively, the plaintiffs are in the direct descending line of Yonasani Were and were, therefore, his lineal descendants. I therefore find that they were beneficiaries of his estate within the precincts of section 27(1) of the Succession Act and, as such, would *prima facie* have had *locus standi* to institute legal proceedings intended to protect their interest in the intestate's estate as expounded in the **Israel Kabwa** case, but for the reasons I shall highlight below.

The circumstances of the matter before this court are distinguishable from those that pertained to the **Israel Kabwa** case. In that case at the time the suit was brought letters of administration had not yet been granted although the process for such grant had commenced. The respondent in that case had reason to protect the estate pending the grant of the letters of administration and subsequent distribution of the deceased's estate. It seems to me that the suit that may be brought by a beneficiary as envisaged under the **Israel Kabwa** case is one that is instituted prior to the distribution of the intestate's estate so as to avert any inter-meddling with such estate prior to its distribution. This is not the case in the matter before this court. In the instant case PW3, the deceased's son, testified that a 26 acre piece of land comprised in plots 28 and 33 and owned by the intestate had been distributed amongst the deceased's children by the clan heads in 1962, and the said distribution was subsequently confirmed by the Administrator General. His evidence was materially corroborated by PW4, the third plaintiff and daughter to the deceased. The land distribution was also corroborated by PW5, an official from the Administrator General's office. Although the acreage of the land distributed to each recipient contradicts the accounts of PW3 and PW4, PW5's evidence confirmed that the Administrator General's office played a role in the administration of the deceased's estate as testified by PW3 and had completed distribution of the deceased's land by 23rd October 1990. PW1 did testify that only plot 33 was

distributed but given the well corroborated evidence to the contrary, I would disregard his evidence in that regard. Therefore the land that was distributed included the present suit land, which is comprised of 20 acres of land described as Kyadondo Block 236 plot 63 that were curved out of Kyadondo Block 236 plot 28. This would mean that ascertainable portions of the suit land had been distributed to specific and known beneficiaries well before the present suit was filed in 2007.

The cause of action in the instant suit is rooted in fraud. This was pleaded and particulars thereof duly furnished in paragraph 15 of the plaint. The plaintiffs *inter alia* seek the cancellation of the first, second and third defendant's title to the land comprised in Block 236 plot 63 on account of alleged fraud in the registration thereof. Section 176(c) of the Registration of Titles Act (RTA) mandates an action to impeach the indefeasibility of a registered proprietor's interest in land on account of the deprivation of another person's interest in the same land by fraud. For ease of reference I reproduce the said legal provision below:

> "**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—**
>
> **(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."** *(my emphasis)*

In my view, section 176(c) of the RTA is couched in terms that restrict a right of claim thereunder to persons that would otherwise be deprived of land on account of fraud. A person that would be deprived of land by fraud would have had an interest in the land in the first place, whether legal or equitable, that s/he stands to lose. In the instant case, the 26 acre piece of land from which the suit land was demarcated having been distributed amongst the deceased's children in 1962, the beneficiaries of such distribution acquired beneficial ownership of the said land and would thus have *locus standi* to seek the cancellation of the registered proprietor's title for depriving them of such ownership on account of fraud. In other words, the deceased's estate having already been distributed at the time of filing the present suit, it was only such of the beneficiaries that stood to be deprived of their apportioned land that had *locus standi* to institute an

action in fraud. Therefore, for present purposes, it would only be those beneficiaries whose land fell within the boundaries of the disputed land that would have *locus standi* to institute the present proceedings.

I have carefully scrutinised the evidence in this case. The third plaintiff, Abisagi Nalore Nnalongo, was enumerated by PW3 as one of the persons that benefited from the distribution of Yonasani Were's land in 1962. This was confirmed by PW5 who referred to a one Abisagi Bisaka as having received 1.8 acres of land. She did also attest to that fact herself, stating quite categorically that she received her share of her father's land in 1962. The plaintiffs' evidence did also establish that the land described as Block 236 plots 28 and 33 was distributed amongst the deceased's children and the suit land had been fraudulently curved out of plot 28. This clearly established the suit land as having been part of the land that was distributed. However, the plaintiffs' evidence collectively fell short on proof that the specific portion of land that the third plaintiff was allocated actually lay within the boundaries of the suit land so as to bring her within the confines of section 176 of the RTA as a person that stood to be deprived of land on account of alleged fraud. It cannot be presumed that the land that was specifically apportioned to her fell within the confines of the 20 acre piece of land described as Kyadondo Block 236 plot 63 that is in dispute presently. Her claim to the disputed land is a question of fact that must be established by credible, cogent evidence. The plaintiffs bore the burden of proof of this important issue to the required standard. Proof of fraud is established by a higher standard of proof than ordinary balance of probabilities. In the present case, as highlighted above, the plaintiffs' evidence fell short of such proof. I therefore find that the third plaintiff had no *locus standi* to institute the present proceedings.

With regard to the first and second plaintiffs, the evidence on record is that they did not directly benefit from the distribution of Yonasani Were's land. As his lineal descendant, the first plaintiff might have been entitled to benefit from Yonasani Were's estate as provided by section 27(1) of the Succession Act but at the time the present suit was filed in 2007 the deceased's land had already been distributed among his (deceased's) beneficiaries; the first plaintiff was not among the said beneficiaries and was therefore not possessed of beneficial ownership in any of the land so distributed. The first plaintiff was not possessed of any proven beneficial interest in Yonasani Were's estate either therefore the principle advanced in the case of **Israel Kabwa** is inapplicable to him. Similarly, no interest in the suit land has been established with regard to the second plaintiff. She

was the first plaintiff's sister-in-law; wife to his brother, Portipher Were. Therefore, the second plaintiff was not a lineal descendant of Yonasani Were and, contrary to the assertion of learned counsel for the plaintiff, was not a beneficiary of his estate within the precincts of section 27(1) of the Succession Act. This court has not seen any evidence in support of her having had an interest in the suit land. Consequently, I would respectfully disallow the submissions of learned counsel for the plaintiff that the first and second plaintiffs were entitled to institute the present proceedings as beneficiaries of the deceased's estate. In the result, I would agree with learned defence counsel that the plaintiffs had no *locus standi* to institute the present suit.

The foregoing preliminary point of law would dispose of the entire suit but, for completion this being a court of first instance, I shall briefly address the merits of the suit. The crux of the matter herein is which of the titles before this court is valid; the title held by the first and second plaintiffs in respect of Kyadondo Block 236 plots 28 and 33 (Exhibit P4) or the title held by the defendants in respect of Kyadondo Block 236 plot 63 (Exhibit D1).

It was the plaintiffs' case that Yonasani Were purchased 26 acres of land known as MRV 1134 folio 5, which later became known as Kyadondo Block 236 plot 28 & 33. The title was admitted in evidence as Exhibit P4. DW4 later cancelled plot 28 from the title, an action contested by the plaintiffs on grounds that a 1955 sub-division of plot 28 to create plots 61, 62 & 63 was vide the same Instrument No. 128355 that applied to another title MRV 1361 folio 24. Given that it was on the basis of that 1955 sub-division that DW4 had cancelled plot 28, it was argued for the plaintiffs that the cancellation of the title in respect of plot 28 was done irregularly and so too was the issuance of the certificate of title in respect of plot 63 that is held by the defendants. The plaintiffs relied on the evidence of PW1 and PW2 in support of their claims. It was strongly argued for the plaintiffs that a deed of mutation or an equivalent document signed by a land owner are critical documents to authorise a sub-division, in the absence of which and without a court (vesting) order, there cannot be a regular, valid or legally binding subdivision. In this case neither the mutation form nor court order was forthcoming. Similarly critical is a deed of transfer by a landowner as proof of such transfer. There was none in the present case.

Conversely, the defence contended that Yonasani Were had bought 26 acres of land from Kezeroni Kasenya but, upon his failure to complete payment for 20 acres, they were returned to Kasenya and a certificate of title in respect

thereof was subsequently issued to wit Kyadondo Block 236 plot 63. Currently registered in the names of the first, second and third defendants; the title was as at 1955 registered in the names of a one Kasenya from whom the said defendants would derive title. Microfilms admitted on the record as Exhibit D3 showed that Kyadondo Block 236 plot 63 was previously described as MRV 1361 folio 20 and was in existence as at 1955. The defence contended that DW4 had relied on 'Supplementary instructions to survey' dated 24th July 1953 and other records from Entebbe Survey Dept to cancel plot 28. A certified copy of those records was admitted on the record as Exhibit D10. The defence contested the plaintiffs' title as reflected in Exhibit P4, arguing that it was not valid given that whereas it was a title in respect of plot 28, the print attached thereto was in respect of plot 33. PW2, an officer from the Department of Land Registration, who would be knowledgeable on such matters had advanced the position that a print attached to a title must match with the description on land in the title for such title to be valid. Learned defence counsel further argued that the transfer deed presented by the plaintiffs was not signed and was therefore a nullity as per sections 147 and 148 of RTA, as well as the decision in **Zaabwe vs. Orient Bank SCCA No. 4 of 2006**.

I have carefully evaluated the evidence on record and considered the submissions of both counsel. I find that the sale agreements attached to Exhibit P2 clearly establish that Kezeroni Kasenya did sale some land to Yonasani Were. Be that as it may, this court finds PW2's evidence on the allegedly wrongful cancellation of plot 28 erroneous and misleading. First, plots 61, 62 and 63 were never subdivided from plot 28 as testified by PW2; neither were the 3 plots sub-divided under the same instrument number, nor did DW4 create the defendants' title to plot 63 using Instrument No. 128355. The evidence on record was that only plots 62 and 63 were subdivided from plot 28; plot 61 had been demarcated from MRV 1361 folio 23 by Instrument No. 128354. This is clearly depicted in Exhibit P7. On the other hand, plots 62 and 63 were created under Instrument No. 128355. That instrument (No. 128355) created ***both*** plots 62 and 63 from MRV 1361 folio 20 on the one hand, **and** plot 112 from MRV 1361 folio 24. PW2 testified that using the same instrument number for different transactions was an anomaly. He thus faulted DW4 for relying on what in his view were erroneous transactions under Instrument No. 128355 to cancel plot 28. This court disagrees with this position for the reasons outlined below.

The evidence on record is that plots 62 and 63 were indeed subdivided from plot 28. PW2 conceded as much in re-examination, stating that a circle and

a crossing in the prints attached to certificates of title signified that the circled and crossed plot had been sub-divided. He then confirmed that in the print attached to Exhibit P7 plot 28 was encircled and crossed. This court did also observe the encirclement and crossing attested to. Exhibit P7 did depict plots 62 and 63 as having been the end-result of the sub-division. Further, the micro-film records that were adduced in evidence as Exhibit D3 did point to the valid existence of plot 63 way back in February 1955. Microfilms were described by DW2 as the photographing of certificates of title for longevity, testifying that that they were last used in the 1960s. PW2 conceded that they were valid documents but were no longer in use. Therefore, I find ample evidence on record to support a conclusion that as of February 1955 plots 62 and 63 had been sub-divided from plot 28 and the latter plot ceased to exist as was testified by DW4. Accordingly, I find that DW4 was right to cancel plot 28 to avert duplicity of titles in respect of the same piece of land. It follows, then, that any certificate of title purportedly in respect of plot 28, such as was held by the first and second plaintiffs herein, was invalid. I so hold.

In the final result, this suit is hereby dismissed with costs to the first, second and third defendants. It is so ordered.

Monica K. Mugenyi
Judge

27th October 2014