

UGANDA / JUDGMENT

Male v Nsubuga and Another (Civil Suit No. 240 of 2008) [2022] UGHCLD 116 (31 May 2022)

[2022] UGHCLD 116

COURT

HC: Land Division (Uganda)

BEFORE

Nkonge, J

CASE / FILE NUMBER

Civil Suit No. 240 of 2008

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMALA****LAND DIVISION****CIVIL SUIT NO. 240 OF 2008** **S** **$\mathbf{L}$** **BENEDICT MALE ::::::::::::::::::::**

VERSUS

1. NSUBUGA SAMUEL 10 2. GEORGE WILLIAM SEMIVULE ::::::::::::::::::::::::::::::

Before: Lady Justice Alexandra Nkonge Rugadya

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JUDGMENT

Introduction:

The plaintiff filed this suit seeking orders for cancellation of title of the land comprised in **Busiro Mengo** Block 314, plots 448 and 314; general damages for fraud; a permanent injunction restraining the defendants from interfering with the suit land; and costs of the suit.

The plaintiff claimed that he had bought seven acres of the land from the late Nsubuga Ernest who signed transfers into his names and handed over to him a duplicate title. He claimed therefore to be the lawful owner of the land having taken vacant possession to date.

The plaintiff handed over the transfer documents and title to his surveyor to one Baba to effect the transfer. However the surveyor died after lodging the said documents in the said registry, but before effecting the transfer.

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He later discovered that the 2nd defendant, had his name registered on the disputed land purporting to have bought it from the 1st defendant.

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The plaintiff was represented by M/s Matoltu & Matovu & Co. Advocates. The defendants were represented by M/s Nsubuga Mubiru & Co. Advocates.

Some preliminary issues were raised by counsel for the plaintiffs by which he requested court to consider his earlier ex parte submissions. I however declined to grant that request since the submissions were premised on ex parte proceedings which had been set aside and which no longer constituted part of the court record; more so on they were based on evidence that had not been subjected to cross examination.

> The ensuing decision also therefore ceased to be the judgment of this court, as it was to be superseded by the interparty decision awaiting to be delivered in this matter.

> In that regard, I am grateful to the authority of *Eriaku Drosiku as Jlnmg Rog Jut'ua Civil Reuision No. 0002 of 2077* cited by counsel for the defendants, key principles of which I find applicable to this case.

At the scheduling, the following were the agreed issues:

202, Whether the 1st defend.d'at's transfer and. sale of the ,q.^d. to the 2nd deJendant was ur:lld on account fraud?

25 The core issue in this matter as understood by this court is whether or not the purported agreements invariably entered between the respective parties in this suit were valid. I will accordingly deal with the aspect of validity of the various agreements in respect of this land, in two sub titles:

15 I have read the pleadings, studied the evidence presented and submissions made by each side,
which I shall not reproduce here, but which I have considered very carefully in this judgment.

The plaintiff relied on the evidence of four witnesses. He testified as **Pw1** and in his evidence told court that the land in dispute was formerly the property of Erinesti Nsubuga who died in 2005. He had bought from him a total of 7 acres on 10th May, 2002 for *Ugx 9,900,000/=* for all the acres and the consideration had been paid in instalments.

That the family members had been witnesses on the sale agreement. The deceased signed the transfer forms in 2003 upon payment of the last instalment. He then gave the forms to his surveyor the late Balaba, who however died before completing the work.

For **plot 448**, the plaintiff presented **PEXh 4** which were the transfer Forms for that plot by the 25 deceased, bearing the stamp of 12th July, 2005. These were purportedly signed by the deceased in the names of Samuel Nsubuga, the 1st defendant. Consideration for the transaction was indicated as a gift.

The plaintiff claimed that upon the surveyor's death, he tried to look for the sale agreements, but could not find them. He however started utilizing the land, started up a farm which he later

30 relocated to another area; put up a two bedroomed house and left someone there as a caretaker. That he also allowed Robinah Nalukenge Nsubuga, the widow of the late Nsubuga to grow some crops on the land.

The plaintiff who did not give details about the exact portion of the disputed land which he had allowed the widow to utilize, informed court that he discovered later around March, 2008 that the 2nd defendant had chased away his people from his land.

That he had reported the matter at the I-C following which a meeting had been convened to resolve the matter. He was advised by the LCs to go to court since the matter was beyond their jurisdiction.

As per **PEXh 8**, the matter had also been reported to Police and Nsubuga Samuel had recorded a statement which is dated 4th December, 2011. This was three years after the suit had been filed. It appears however that no follow up was made in respect to that case,

- From the evidence of **Pw3**, one of the children of the deceased, their God father one George William Lumala had custody of the land titles for the land owned by their late father. At a family meeting held with him on the 3rd September, 2006 he had provided information on the status of the estate and names of people to whom the late had sold land, but where no transfers had been effected yet. The plaintiff's name appeared on that list. 10
- Furthermore, that the 1st defendant, one of the elder brothers, was to assist the plaintiff in mutation of the land and causing a transfer in the names of Mr. Male Benedict. The family were shocked to discover later following the threats made to the widow that the 2nd defendant, one George William Semivule was claiming to have bought the land from Samuel Nsubuga the 1st defendant). That since the 1st defendant never reported back to anyone about the responsibility he had been given he had acted dishonestly. 15 20

The witness who presented letters of administration tendered in as PExh 7, The said grant had been issued to two daughters and two sons of the late Nsubuga on 17th December, 2010, some two years after this suit had been filed. PurS further stated that she and her co administration never sold or transferred the said land to either Nsubuga Samuel or George William Semivule.

That neither consent nor authority had been granted to the 1st defendant to deal with the estate. The family meeting had merely tasked the 1st defendant to assist the plaintiff in mutation of the land and causing a transfer in the names of Mr. Male Benedict (the plaintiff). 25

That position however did not tally with the plaintiff's evidence in paragraph 8 of his statement, for according him, the sale agreements and duly signed transfer instruments had been given to the surveyor who died before effecting the transfer. He never mentioned the 1st defendant as the recipient of those instruments. 30

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Court also noted that the details of that meeting, the names of the family members who attended it and the particulars of the specific titles which the God father had released to 1st defendant were all not provided in court.

No minutes of that meeting were presented; and besides, Mr. Lumala the person who had custody of the titles was never summoned to testify in court, and no reasons were given as to why he did not attend.

Although therefore the name of the plaintiff came up, what was conspicuously missing from that interaction as narrated by the witness was the actual number of acres that the plaintiff had acquired and the details of the plots from which the land he claimed had been created. There was no actual record of what had transpired in that meeting.

Pw2 and Pru3's evidence that the meeting took place on 3rd September, 2006. However by that time the land had already been sold by the 1st defendant; the sale agreement already signed between the two defendants; and the 2nd defendant already registered on the title. (Refer to DExh 7 (Ind DExh 2).

It did not come out from the plaintiff's evidence whether or not during the family meeting any member had raised any concerns against the 1st defendant's actions relating to the suit land. Without such evidence, the family is deemed to have had constructive knowledge of both the legal interest and physical occupation of the 2nd defendant at that time. 15

Going by the evidence of Pur2 and Puts, I do not see how the family could have trusted the 1st defendant, enough to hand over any other titles to him if he had made the transfer of plot 448 irregularly into his names and subsequently in the names of the 2nd defendant. 20

Therefore it was also a distinct possibility that the titles which may have been handed over to him at that meeting excluded those in dispute since the transaction with the 2nd defendant and transfers to him for plot 448 had already been effected by that time.

Having noted all the above, I would now proceed to consider the validity of the contract between the plaintiff and the late Nsubuga. 25

It is settled law that once a contract is valid, it automatically creates reciprocal rights and obligations between the parties thereto and when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms. (See: William Kasozl versus DrcU Bank Ltd High Court Civil Suit No.7 326 of 2000J. 30

The underlying principle governing contractual relations as duly recognized and codified under section 70 of the Contracts Act, No. 7 of 2010 is that a contract arises when an agreement

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made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound. It may be an oral or written commitment or may be implied from the conduct of the parties.

Certain Conditions to the Effect of a Contract

For a contract to be binding, its terms ought to be certain leaving no room for speculation, violation, breach or frustration. The parties must in all instances have the capacity to contract: which includes the age of eighteen years or above; a person of sound mind. A party should not be disqualified from contracting by any law to which he or she is subject.

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This court would consider it as a key term of the agreement that the consideration of Ugx 6,600,000/= had to be paid within 2 months in respect of four (4) acres. This was contained in the agreement PExh 2, purportedly signed by the deceased and the plaintiff.

Pur2, Robinah Nalukenge Nsubuga, the widow of the late Nsubuga corroborated the evidence of the plaintiff who was known to her as a family friend that he had purchased the land from her late husband, with whom they had seven children. 15

In paragraph 4 of her statement she mentioned a total 7 acres, which the plaintiff claimed to have purchased in three phases. She testified that 6 acres were created from plot 448, Block 374 and 1 acre from plot 340, Block 374, to make a total of 7 acres.

20 She had signed as a witness to the agreements PExh 2 dated 10th May, 2002 and PExh 3 dated 15th May, 2002. It was duly noted by this court however that she did not sign PExh 3 which is dated 31st May, 2003, the one which appeared to have sealed off the entire transaction.

According to the plaintiff, this had been a three phased transaction. In the first phase he bought 4 acres; 2 acres in the second phase; and an acre in the third phase. However, from the contents of PExh 2 which the widow Pw2 had signed, there was mention of only four acres.

A careful scrutiny of each of the above documents revealed that 3 acres were to be carved off from plot 448 and an acre from plot No. 340, Out of the Ugx 6,600,000/= a sum of Ugx 1,500,000/= was made as part payment on that day. A further sum of Ugx 7,800,000/= as shown in PExh 1 was alleged to have been paid on 15th May, 2002, in the presence of Par2.

The rest of the money totaling Ugx 3,000,000/= was to be paid to the vendor within 2 months, that is by 10th July, 2002. Whether or not the plaintiff had fulfilled that part of the deal, and on the actual date as intended is not known since such evidence was missing. 30

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But what comes out clearly is that the third document PE:h3 had been signed one year later. Secondly, under unclear circumstances, the number acres had increased from 4 acres to 6 acres, with the price for each acre now indicated as Ugx 7,650,000/=. The rest of the details concerning the actual plot number(s) from where the 6 acres were to be created were all left out in that document.

4,4, Yosia Muwumuza aka Yosia Kizito (as per statutory declaration on record) one of the children of the deceased and Robinah Nsubuga Nalukenge told court that 7 acres had been sold to the plaintiff at an agreed sum of Ugx 9,900,000/=. That the final instalment had been paid on 31st May, 2003. Court noted however that that Put4 had neither been a party nor a witness to that transaction.

Thus contrary to what the plaintiff wished this court to believe, this appeared as more or less a single transaction intended to be paid out in three phases for the 4 acres but not 6 or 7 acres, as purported to have been bought by the plaintiff. Thus what was originally intended on 10th May, 2002 under PExh 2 was different from what was indicated under the 15 agreement/ acknowledgment dated 31st May, 2003, (PExh 3), Besides also was the fact that the full payment of the consideration had to be effected within a period of two months only, not one year later.

Ultimately there had been no written expression of the intention of both sides to sell 7 acres as the plaintiff and his witnesses seemed to suggest in their individual testimonies. As dictated by section 92 of the Evidence Act, Cap. 6, (the rule against parole evidence), oral evidence that tends to add to, create variations or contradict any written agreement cannot be admitted. 20

Since the completion and execution of a written contract is typically the concluding point in the bargaining process, one's ordinary expectation is that the document itself will contain all the conscious and important elements of the deal.

The parole evidence rule assumes that the formal writing would reflect the parties' minds at a point of maximum resolution, The rule applies to written agreements which are intended by the parties to be a complete integration of the terms of the contract and intended to be final. 1Aftol vs Doka" Cnttl Appeal 7 of 20M [2076 . 25

To that extent, this court found the contradictions and inconsistencies in the plaintiffs case so far as it relates to the size and payments of consideration hard to reconcile, bringing to doubt the actual intention of the contracting parties, 30

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Since Pw2, the widow and Pw4 were not witnesses to the third undertaking, (PExh 3), their evidence on that score was hearsay and could not therefore be relied on to confirm exactly what had been paid and what was actually paid for.

Capacity of the deceased to enter into binding relation:

- On the issue of the capacity of the deceased to enter into a binding relationship as raised by \$ \mathsf{S} \$ counsel for defendants, the underlying principle is as enshrined in the provisions of **section 11(1)** of the Contract (supra), which states that a person has capacity to contract where he/she is of eighteen years and above; of sound mind; and not disqualified from contracting by any law to which he or she is subject.
- 10 As noted by this court, the first two agreements alleged to have been made between the deceased and the plaintiff was in May, 2002, thumb printed by the deceased and signed by the plaintiff. On the third one, PExh 3 made in 2003, the deceased's name had also appeared as the vendor.

However he never signed or thumb printed that agreement. I cite below what someone else had written on his behalf:

15 However due to my illness I have not been able to append my signature to this transaction which is why I have chosen my daughter Nakkazi Rebecca who is 18 years of age and my granddaughter Mulinda Codrine who is 13 years of age so that they can both sign on my behalf and therefore Mr. *Male Benedict does not owe me any money. (emphasis mine).*

The value, consequences, meaning and implication of the contents of that document ought not be overlooked, as it served both as an acknowledgment of the consideration by the deceased who 20 according to the plaintiff was too sick. Yet going by the contents of that document a seemingly fresh contractual engagement was in the offing, purported to have been being entered between the two parties.

Given the fact that the document was not signed/thumb printed by the deceased, the author of 25 the document ought to have been called as one of the key witnesses in this suit. But just like the rest of the witnesses to that agreement/acknowledgment, he was not called in to testify and confirm the correctness of the contents thereof. His name did not even appear at all on that record as the author.

Besides, no explanation was offered as to why the deceased chose his child of 18 years and his 30 grandchild of 13 years to be the witnesses, instead of any of the other elder children or the widow(s), whose interests here were at stake. There was no endorsement by the LC.

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The defence evidence that the deceased was believed to have lost his mind also came up through the evidence of Dur2 Mr. Luc Joseph who at the material time was the LCI Chairman and who knew the family quite well. It brought out another angle to the dispute.

5 The plaintiff himself did acknowledge in his testimony that the deceased at the time of signing the agreement had been so sick, even to the point of being unconscious. The suggestion made therefore that the deceased was so sick, or had become a person of unsound mind could only imply that he lacked the mental capacity to sign or thumbprint the purported sale agreements and instruments of transfer of the land.

The procedure to be followed for managing the state of a person of unsound mind is streamlined under Rule 3 (1) of the Administration of the Estates of the Persons of Unsound Mind (Procedure) Rules S, iVo. 155-I, which I need not reproduce here.

Suffice to state that the act ensures that the property of a person in such state must be preserved. As such there must be a management order issued by court. But even then, by virtue of section 4(Q) of Administration of the Estates of Persons of unsound mind, Cap.755, the manager would require special permission from court to make any transfer or otherwise deal with the estate. Since the plaintiff in this case was a friend to the family, he ought to have known better, and not take advantage of his friend's vulnerability.

All in all, no court would in fairness endorse any transaction made by a party in that state, The plaintiff could not therefore rely on any such documents, with all its inconsistencies and gaps as noted to allege as he did that the deceased had at the time the mental capacity to transact; that the intention by the deceased was to sell him 7 acres; the full consideration had been paid; and that entire family witnessed the transaction.

Validity of the transfers:

In paragraph 4 (d) and (e) of the plaint, it is pleaded that the deceased had handed over signed transfer instruments and a duplicate certificate of title to the plaintiff which he had handed over to the surveyor, However the copies of the said documents were not made available to court. 25

The widow Pu2 however contradicted the plaintiffs claim when in paragraph 4 of her statement testified that her husband had not effected a transfer into the plaintiffs names. This therefore left court wondering as to which documents the surveyor had taken to the land registry to cause the transfer, as alleged by the plaintiff. 30

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The plaintiff instead presented PExh 6, the transfer form dated 15th July, 2006, signed by the 1st defendant Samuel Nsubuga, in the names of the 2nd defendant. PExh 5 was the application for consent to transfer.

This was sufficient evidence that Samuel Nsubuga had sold the land comprised in plot 448, 5 which the plaintiff claimed as his. From the evidence of Pw2 and Pw3 as noted earlier, this had happened some months before the family meeting had been held and in which he was purportedly given some titles.

Given the above as jointly put together, the plaintiff failed to convince this court that the elements of a valid and binding contract between him and his friend had been fulfilled.

10 b). Whether there was a valid and binding contract between the defendants:

The defendants on their part relied on evidence of 5 witnesses to prove the 2nd defendant's interest in the suit land. The 1st defendant Samuel Nsubuga testified as Dur 4. The 2nd defendant testifying as Durs presented DExh7, a copy of the sale agreement and memorandum of understanding, dated 116 February, 2006.

- ¹⁵ It was signed by both him as the purchaser and the 1st defendant as the vendor for land comprised in plots 448. Under that agreement he also claimed to be an equitable owner of Block 374 plots 340 and 447, Bwalo at Kasero -Buloba, which in total added up to ¹⁰ acres, acquired at a consideration of Ugx 45,000,000/=,
- 20 In paragraph 20 of Dur 5's statement, he stated that since the documents showed only plot 448 was owned by the vendor the two defendants had agreed that the 1st defendant hands over the title for plot 448 to the 2nd defendant and that he regularizes his ownership of plot 340.

Counsel for the plaintiff however argued that this together with PExh 8 (statement made at Police) amounted to an admission. In that record (portions of which were difficult to read), the 1st defendant is said to have admitted that he had told the 2nd defendant about the plaintiff's interest on the land. He did not however specify the actual area.

made to court.

With all due respect however, an admission has to be clear and unambiguous. It must state precisely what is being admitted and must not be open to doubt. Once an admission of facts is made it then that court upon application may make such order or file such admission. (Ref Jc,ml Sengonjo vs. Jonathan Bunjo Cvtl Sult iVo, luo of 2072). Because the statements alluded to in this case did not qualify to be admissions by law, the application was therefore not

Dw2, Mr. Lule Joseph was a resident and former LC in that area who knew all the parties and the area in dispute. He knew the 1st defendant's family rather well since they were all residents in his area.

In corroboration of Dur4's evidence, he told court that he had moved around with the defendants, inspected the area and found that it was surrounded by a bush with an abandoned house which had neither roof nor windows,

The issue of the access route was raised during the inspection and this was to be resolved by the 1st defendant. The agreement between the defendants for the purchase of the land as confirmed by Dur2 himself, had been made in the said LC's presence as he himself confirmed.

This also draws the attention of this court to the fact that the plaintiff himself was not able to show that he had introduced himself to the LCs when he was purchasing the land. That conclusion is reinforced by the fact that none of the agreements which were signed between him and the deceased/family had been witnessed by any LC official. 10

Since the deceased had no capacity to contract with him at that time, he had entered on that land without the valid consent of the registered owner at that time. As such, section 29(7Xb) of the land Act, Cap.227 which guarantees protection to bona fide lawful occupants did not apply. 15

From the evidence of Dto2 on the other hand, the 2nd defendant had registered the 2nd defendant as one of his residents in that area and from that point he had settled onto the land, worked on the abandoned house and for about one and half years no one ever came up to complain about the 2nd defendant's presence on that land.

With particular reference to plot 448, a certificate of title was presented to court, DExh 2 for the land comprised in Block 374, plot 448., This proved that the 1st defendant got registered on the said title on 1st July, 2005 and the 2nd defendant on 27th July, 2006, almost a year later,

in execution of the sale agreement, DExh 7. The 2nd defendant did not require the consent or approval of the family to effect the transfer in that respect. 25

A certificate of title is conclusive evidence of title and takes priority over any adverse claims. By virtue of section 776 of the Registration of Titles Act, Cap 230 Bf, save for fraud, it is also an absolute bar and stopper to an action of ejectment or recovery of any land. IReJer also

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Regarding Plot 340 however, the circumstances were different. In the agreement between the defendants, the 2nd defendant claimed to hold an equitable interest in that land. Counsel for the 71 Ust bst A

plaintiff citing the case of Drina Lam Oto Ontgom Vs Opoka and Anor (Civil Appeal 97 of 2019) [2020] VoHC 185, pointed out that it is trite that the right to sell un-registered land is vested only in the person who holds valid title to that land.

That he or she who has no title cannot sell (see Mortgage Business Plc Vs O'shaughnessy [2012] IWL7521]. The common law principle of *memo dat quod non habet* has long held that a person cannot convey a superior title to the one already held,

Accordingly, one can sell only what one owns or is authorised to sell and the buyer can acquire no more than what the seller can legally transfer. Counsel in reply however argued that the principle was only applicable to tangible goods.

In the view of court however, similar principles would be applicable to land. However as duly noted by court, in paragraph 4 of the plaint the claim made against the defendants was in respect of registered land. His contention was that he had obtained a duplicate certificate of title from the deceased as well as signed transfer forms, copies of which he could not produce. 10

There was no certificate of title to prove the existence of plot 340, to show the origins and genesis

of ownership and status of this land. The land as described by the plaintiff neighbours Kamira, Robinah Nalukenge (Pw2) and Muwumuza Yosia. 15

Yet according to the widow Robinah Nalukenge (Put 21), the land is located near Hajji Malagala Bisaso. The question whether or not this was the same land and whether or not they bought registered land remained unanswered.

Parties are bound by their pleadings and this is still good law. The plaintiff's claim oscillated from being a lawful owner of registered land as pleaded, to owning unregistered interests in land as reflected in his testimony and his counsel's submissions. 20

The boundaries of the area he claimed could not be ascertained as there was no record of survey. Since therefore his pleadings and prayers relate to registered interest he cannot bring evidence instead to support his unregistered interest, all within the same breath.

For the 2nd defendant, another certificate of title, DExh 3 was presented to court for plot 7490, measuring 0.830 acres. It indicates 4th April, 2007 as the date when the 2nd defendant became registered onto that title. The title for plot 447 as listed in the agreement however was also not availed to court. The original ownership of these two plots of land could not be ascertained.

30 The burden was still on the plaintiff to prove that some equitable interest in each of these plots 7490 and 447, had been created out of plot 340, part of or all of which he claimed as his. It was him who wanted to acquire a legal interest, upon handing over all the instruments of transfer

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to the surveyor, as he claimed. He had to show that he had bona fide interests in respect to which he would derive protection under section 29 of the Land Act, Cap. 227, which he however failed to achieve.

5 As noted earlier there was no signed transfer form as alluded to, or copy of certificate of title for Plot No. 340 out of which the plaintiff claimed to have acquired an acre; and out of which the 2nd defendant was claiming four acres.

There was also no search certificate and no area schedule to show what the actual original plot was, how and when plot 340 had been created in the first place, by whom, its subdivisions if any; size or ownership. There was no sketch map to indicate the area boundaries of the equitable interests which each party claimed.

Even the actual size of plot 340 was based on mere speculation. As deduced from the oral evidence by either side the size of that plot was estimated to be 5 acres. Du4 in paragraph 13 of his statement told court that the 5 acres under plot 340 were shared among his family members: Lutalo Israel and Mutubi Apollo had taken an acre. Muwumuza Yosia and Daniel Kaate Gaango also took an acre and Namondo and Nakazzi also took an acre, making a total of 3 acres. He also informed court that his brothers with whom they shared plot 340 had since sold their shares to third parties who now occupy the land. 15

That he (1st defendant) remained with the two acres which he transferred to the 2nd defendant, and was yet to hand over 2 acres to him, to make the 10 acres as per their agreement. The circumstances under which that property had been distributed however remained unclear. It was therefore also difficult to establish the nexus between plot No. 340 on the one hand and plots 447 and 7490, on the other hand. 20

But even more critical for the 2nd defendant's claim of equitable interest, the 1st defendant could not explain why he had given to him a total of 4 acres out of plot 340 when all he claimed as his share as a beneficiary was only 2 acres. The remaining part of that land as he himself stated had been distributed among the beneficiaries and some even sold off to third parties. 25

Without a survey report, it therefore becomes difficult to understand what equitable interest the 2nd defendant had actually bought. It created both doubt and uncertainty about the authenticity of his claims of plot 340.

Section 780 of the Succession Act, Cap. 162 states that an administrator of the estate is his/her legal representative for all purposes and all the property of the deceased person vests in him or her as such. 30

In section 792 of the same Act, the letters would entitle the administrator to all rights belonging to an estate as effectually as if the administration has been granted at the moment after his or her death.

It is not clearly established whether or not plot 340 was part of the estate of the deceased at the time of his death. If it was, then the role of the administrators of the estate would come in to settle any debts or claims by or against the estate.

That would also encompass tracing and salvaging the estate properties, distributing it to among the beneficiaries, taking into account the portions occupied by each beneficiaries prior to the death of the property owner.

Plot 340 in this case could not therefore be disposed of without the consent of the beneficiaries since at that time the administrators of the estate had not yet been appointed. 10

If indeed the 1st defendant was given custody of plot 340 as alleged by the plaintiff witnesses, then the law would presume that he was holding the same merely as the trustee, pending the appointment of the administrators of that estate. But without the consent and authority of the rest of the beneficiaries, any transfers made by him could not have been valid.

The 1st defendant to that extent therefore intermeddled with the estate of his father, in contravention of section 268 of the Succession Act. As an executor in his own wrong he was answerable to the administrators or any creditor of the deceased to the extent of the assets which may have come to his hands. Section 269, r.

The administrators were not parties to this suit but by law as provided under section 278 of the Succession Act they ought to have filed an inventory to show the distribution; and account for the estate property, which would have guided court in this matter. 20

In the case of *Impalo District Land Board & Another v. National Housing and Construction Corporation Ltd* Appeal No. 2 of 2004, it was also held that the respondent who had been in possession of the suit land for a long time and utilized it was entitled to have its interest recognized and protected and in the instant case, there was proof of how the plaintiff acquired the land and utilized it. 25

The authority above with all due respect was not applicable to the present case since neither party was able to satisfy court that he had been legally in possession and utilizing the land for a long time.

All in all, the 2nd defendant just like the plaintiff, lacked credible evidence to show that any interest claimed in respect of plot 340 had ceased to be part of the estate of the deceased and therefore duly acquired.

Issue No. 3: Whether the 2nd defendant was a bona fide purchaser for value without any notice of fraud.

"Fraud" was defined in the case of *FJK Zaabwe vs. Orient Bank & Others* SCCA No. 4 of 2006 (at page 28). In the lead judgment, *Katurebe JSC* (as he then was) relying on the definition of "fraud" in *Black's Law Dictionary (6th Edition)* at page 660 defined it to mean 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 bona fide purchaser is defined in *Black's Law Dictionary 8th Edition* at page 1271 as:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has good faith paid valuable consideration without notice of prior adverse claims."

Halsbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977, at page 27 provides:

- 20 "Prior equitable interest in land can only be defeated by a bonafide purchaser for value without prior notice. Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation."
- 25 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 for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

Thus in *Uganda Posts and Telecommunications vs Abraham Kitumba* SCCA No. 36 of 1995), such failure to make reasonable inquiries or ignorance or negligence was held to form particulars of the offence of fraud.

Fraud that vitiates a land title of a registered proprietor therefore must be attributable to the transferee and that fraud of a transferor not known to the transferee cannot vitiate the title. See: *Wambuzi C. J, Kampala Bottlers vs Damanico (U) LTD*, SCCA No. 27 of 2012.

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It is such grotesque monster that courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all transactions. (*Fam International Ltd and Ahmad Farah vs Mohamed El Fith* [1994]KARL 307).

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On the issue as to whether or not there was fraud and whether or not a party was a bonafide purchaser for value without notice the question that a court would pose is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. (*David Sejjaka Nalima vs Rebecca Musoke* SCCA No. 12 of 1985).

Allegations of fraud against the 1st defendant:

It is trite law that allegations of fraud must be specifically pleaded and proved.

- 10 The particulars of fraud raised against the 1st defendant were that he forged the signature of the deceased; registered the transfer in his names and intermeddled with the estate. The plaintiff however did not lead any evidence to prove that the 1st defendant had forged the signature of his father. The allegation of such forgery was never raised by any of the family members who testified in court.
- 15 Counsel for the plaintiff referred to the case of **Kampala District Land Board & George Mitata** versus Venansio Babureyaka & 3 others Supreme Court Civil Appeal No. 2 of 2007, where it was held that a person was deliberately dishonest when he proceeded to get a title without consulting with the occupants and authorities of the area. This also applies to the 1st defendant in respect of any equitable interests he had dishd out and purportedly sold to the 2nd defendant.
- 20 In that regard, the plaintiff succeeded in proving that the 1st defendant never secured the authority and consent of his family when he dealt with **plot 340**.

Allegations of fraud against the 2nd defendant:

As against the 2nd defendant, the plaintiff claimed that the 2nd defendant had failed to visit the land before purchase; failed to make inquiries from the LCs, widow/beneficiaries; and that he caused the transfer into his names without due diligence and that he never bought the land in question in good faith since he was part of the fraud.

That according to the physical search on the land, the plaintiff had already settled thereon after he made the purchase, he had also tried to have the land registered but he was no successful because the person entrusted by the family of the late Erinesti Nsubuga was doing all it takes to fraudulently deprive the plaintiff of the land.

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The defendants were full aware of all the developments but went ahead to make the transfer and register the suit land into their names illegally. That the registering of the defendants' interest was done with the intention of defeating the plaintiffs' earlier equitable interest in the suit land.

As noted earlier, the evidence of Joseph Lule, the former LC of that area who knew the family well was sufficient to prove that the defendants had visited the land before the purchase was made.

The agreement which conferred ownership of plot 448 to the 2nd defendant may not have been signed by him as the LC but he admitted to have been the chairman at the time; he was around both at the time when the inspection took place and at the time when the agreement was concluded.

His evidence which was not discredited by the plaintiff was corroborated by that of Irurr, Dungu Eldadi Nsubuga and that of 1)ur3 James Musisi Kawafu who was the broker. The 2nd defendant thus depended on the broker and LC's knowledge of the facts and history of that area before entering into the commitment, also after establishing that the land comprised in plot 448 had.

15 no encumbrances.

The family never raised any issue in relation to the possession of the 2nd defendant and in relation to any of the activities undertaken by him on any part of plot 448 land. He entered on the said land with the knowledge and consent of the 1st defendant who had been the registered owner of that land at the time. As for the land described as adjacent to plot 448, he had to go an extra

20 mile which he never did.

> Counsel for the plaintiff referred to the statement in paragraph 20 by the 2nd defendant which suggested that the 1st defendant had been requested by him to regularize ownership of the plot 340.

25 He also cited the case of Koompolo District Land. Board. & Another Vs Nqtlono. Housing & Constructioa Corporation in which the Supreme Court held that knowledge of equitable interest cannot be imputed as fraud under the Act. However where such knowledge is accompanied by wrongful intention to defeat existing interest this amounts to fraud.

Counsel also referred to PE rh 8 the Police statement by the 1st defendant suggesting that the 2nd defendant was aware of the plaintiffs interest although in that record there was no specific 30 description of land.

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\$\cdot_{\{\star\}}\$ \$\cdot\$, The above findings lead to the conclusion that any equitable interest purchased by the 2nd defendant from the 1st defendant originally constituting part of the estate of the late Nsubuga was a transaction which cannot be sanctioned by this court.

A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full ownership of the property.

Thus a stranger who receives property in the circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will however also be a constructive trustee of that property. (Stanbic U Ltd vs Joseph Alne & Others Civil Suit Ivo. 314 of 2005; 48 Hq. Isbury's LatDs Ol Englnqnd, 4ch Edlton, para 587).

The 2nd defendant was fully aware that the 1st defendant had no authority to handle any dealings relating to the estate of the deceased, without the knowledge and consent of the administrators or the beneficiaries and property received by him without proper authority was fraudulently received.

- On the assertion made in submissions by the plaintiffs counsel that the 2nd defendant by paying less stamp duty than what he was required to had committed fraud, counsel cited the case of the Supreme Court case of Bettg 1st Ctvl Appeal No, 7a7 of 2012) in which the court defined fraud to include land transactions where the purchaser tries to get away with paying less transfer tax, or even none, than what is due to the Government. The said authority was however not available to court by counsel. 20

The response by the defence counsel which this court would subscribe to is that non-disclosure of the contract sum in the transfer documents and paying less stamp duty on the sale agreement is a matter that ought to have been reported and investigated by the tax Authority. On its own this would not vitiate the contract. Counsel referred to Shluabh.ri Patel Ltd and Anor vs Wan buga & Anor CACA 57 OF 2010),

In the premises, this suit would only succeed in part

This court has inherent powers under section 98 of the Civil Procedure Act, Cap. 77, to make orders as the justice of the case may require. This court also has powers to direct the cancellation of titles illegally created.

¹. The distribution and disposal of property constituting part of the estate of the late Erine Nsubuga by the 1st defendant to the 2nd defendant claimed as equitable interest, without the authority of the beneficiaries or administrators of that estate, was fraudulent and unless and until validated by the administrators of the estate, it shall revert to the estate of the late Erine Nsubuga.

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2. The 2nd defendant rightfully acquired Busiro Block 314, plot 448 Kasero Buloba; and is hereby ordered to pay all the outstanding monies owed to Government as stamp duty.
- 3. Any sums of money paid by the plaintiff in respect of the botched contract for purchase of the land formerly constituting part of the estate shall constitute a debt against the estate of the late Erine Nsubuga.
- 4. 70% of the costs of this suit shall be met by the defendants.

Alexandra Nkonge ug

15 Judge

31st May, 2022

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