

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
HCT-03-CV-CS-045-2019

HAJJI
EDHIRUMA:.....PLAINTIFF

SAID

VERSUS

- 1. THE REGISTERED TRUSTEES OF LOHANA
(EAST AFRICA) EDUCATION TRUST**
- 2. KANAN LAXMIDAS RAJA**
- 3. KANCHANBEN LALJI**
- 4. ASHVIN AMRITLAL PATNI (*acting through*
MOSHIN KASSAM of M. KASSAM PRFOPERTY
*MANAGEMENT KAMPALA***
- 5. THE COMMISSIONER
REGISTRATION:.....DEFENDANTS**

LAND

Land Case-

Held: *Judgement entered for the Plaintiff against the Defendants with Orders set forth in this Judgment.*

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE

JUDGMENT

The Plaintiff brought this suit against the Defendants individually and severally on the 13th of August 2019 against the 2nd, 3rd and 4th Defendants as nominal Defendants and the 4th Defendant who is the registered proprietor of the suit property acting through his lawful attorney and agent Moshin Kassam of M. Kassa Property Management Kampala for a declaration that the Plaintiff is the equitable owner of the property comprised in Plot No.67 and 69, Main Street, Jinja and is entitled to legal ownership of the same .

They were seeking the following reliefs:-

1. A Declaration that the Plaintiff is the equitable owner of the property comprised in LRV 636 Folio 23 Plot No. 67 and 69, Main Street, Jinja and is entitled to legal ownership of the same.
2. A Declaration that the mortgage/mortgage interest of the 1st Defendant registered on 4th December 1967 on the land comprised in Plot No. 67 and 69, Main Street, Jinja, is extinguished and invalid.
3. A Declaration that the mortgage/mortgage interest of the 2nd and 3rd Defendant registered on 4th June 1968 as a second mortgage on the land comprised in Plot No. 67 and 69, Main Street, Jinja, is extinguished and invalid.
4. An order directing the 5th Defendant to cancel and or remove the mortgage of the 1st Defendant entered on the suit land on 4th December 1967 vide Instrument No.171206 as an encumbrance on the subject title.
5. An order directing the 4th Defendant to cancel and or remove them mortgage of the 2nd and 3rd Defendant entered on the suit land on 4th June 1968 as a 2nd mortgage vide instrument No. 173128 as an encumbrance on the subject title.
6. An order directing the 4th Defendant to transfer the suit property comprised in LRV 636 Folio 8, Plot 67 and 69, Jinja to the names of the Plaintiff.
7. Costs of the suit.
8. A permanent injunction preventing the Defendants from claiming any interest in the suit land
9. General damages

BRIEF FACTS

The brief facts according to the Plaintiff is that sometime in 2004, the Plaintiff purchased the land comprised in LRV 636 folio 8 land comprised on plot 67 and 69, main street, Jinja (herein referred to as the suit land) from one MOSHIN Kassam of Mumtaz Kassam Management, the lawful attorney of Ashvin Amritlal Patni, the Administrator of the estate of Amritlal Ramjibhai Pattni and registered proprietor of the afore-said land for UGX.160,000,000/= (Uganda Shillings One Hundred and Sixty Million). That pursuant thereto, the Plaintiff fully paid the purchase price for the suit land. **(Copies of the receipts of payment are hereto attached and marked annexures 'B', 'B1', 'B2', 'B3', 'B4', 'B5', 'B6', 'B7', 'B8', & B9').**

That the Plaintiff further contended that his purchase of the suit property from the 4th Defendant is not in dispute but that he has sued the 4th

Defendant as a nominal Defendant for purposes of legally obtaining a transfer of the said property to the Plaintiff. That upon payment of a substantial portion of the purchase price, the Plaintiff was sometime around end November/early December 2004 given possession of the suit land and has been in possession to- date.

That sometime in 2017 the Plaintiff demolished the original old structure on the Plot and is currently erecting a multi storied structure on the said Plot which structure is in advanced stages. That sometime in 2009, upon receipt of duly signed transfers and a Special Certificate of title for the suit property from Mumtaz Kassam Management, the Plaintiff lodged the title plus transfers for transfer and paid the relevant duty but was surprised to learn that the process had been halted by the Registrar of Titles Jinja on grounds that it was allegedly entered in error since there were 2 (two) mortgages registered on the title which had not been removed as encumbrances.

That the Plaintiff subsequently established from the Registrar of Titles and from Mumtaz Kassam Management that one of the mortgages was entered in favour of the 1st Defendant on 4th December 1967, vide instrument No. 171 206 and that a second mortgage was entered unto the title in favour of the 2nd and 3rd Defendants on 4th June 1968 vide Instrument No. 173128. **A photocopy of the said title showing the said encumbrance is attached and marked "C".**

That the Plaintiff further established that the mortgage vide Instrument No. 173128 was released by the Minister of Finance, Planning and Economic Development under the **Expropriated Properties Act Cap 87** in accordance with **Section 15 of the Mortgage Act (2009) on the 19th of January 2005** upon payment of all monies due under the mortgage to the Departed Asian's Property Custodian Board. **(A photocopy of the Release of Mortgage is attached and marked "D").**

That further the Plaintiff established and shall Contend that neither the 1st Defendant nor the 2nd or 3rd Defendant have for over 36(thirty six) years taken any action or brought any action or claim to recover any monies, if at all, under the mortgage and that the said mortgage is consequently time barred. That similarly the 4th Defendant has since 2004 not challenged and is to-date not challenging the Plaintiff's title to the suit property. That the Plaintiff shall contend that at the time of purchase, he established that the proprietor of the suit land Ashvin Amritlal Patni held a lease for the land granted by the Registered Trustees of the Native Anglican Church of Uganda

for 99 years from the 1st day of April 1966. **(A copy of the Lease agreement is hereto attached and marked Annexure E').**

That the Plaintiff further conducted a search at the Land's Registry and established the following:

- i. That the registered proprietor is Ashvin Amritlal Pattni (Holder of probate in respect to the will of the late Amritlal Ramjibhai Pattni) registered on the 24th of April 2009 under Instrument No. 412326.
- ii. That there was a first mortgage registered in the name of the Registered Trustees of Lohana (East Africa) Education Trust on the 24th December 1967 under Instrument No. 171206.

That upon effecting the Purchase of the suit land, the 4th Defendant took the following steps in order to facilitate the transfer of title to the Plaintiff; that there was a second mortgage registered in the name of Kanan Laxmidas Raja and Kanchanben Lalji Raja on the 4th June 1968 under Instrument No. 173128. **(A copy of the search report is hereto attached and marked annexure "F")**

The 4th Defendant signed transfer forms in favor of the Plaintiff. **A copy of the transfer form is hereto attached and marked annexure "G1")** The 4th Defendant applied to the Commissioner of Lands and Survey for consent to the transfer of the suit land, which consent was granted. **(A copy of the said consent form is hereto attached and marked annexure "G2").**

The 4th Defendant further sought the consent of the Lessor, which consent was also granted. **(A copy of the consent form is hereto attached and marked Annexure "G3").**

The 4th Defendant availed the Plaintiff with the duplicate certificate of title to facilitate the transfer of title. **(A copy of the certificate of title is hereto attached and marked annexure "G4")**

The 4th Defendant also availed the Plaintiff with a Copy of a release of the second Mortgage issued by the Minister of Finance, Planning and Economic Development on the 19th of January 2005 under the Expropriated Properties Act cap. 87 and in accordance with the Mortgage Act (2009). **(A copy of the Release of Mortgage is hereto attached and marked annexure "G5").**

That the Plaintiff lodged the said documents with the Lands Registry at Jinja with the aim of effecting the transfer and was informed by the 5th Defendant that the transfer could not be effected owing to the two pre-existing

mortgages registered as encumbrances on the Certificate of Title. That despite several efforts and verbal requests by the Plaintiff to have the mortgages cancelled on account of limitation and or further with respect to the 2nd and 3rd Defendant on account of a release of mortgage mentioned above the 5th Defendant has refused and or declined to effect the transfer of the above referred Title to the Plaintiff's names.

As a result of the 5th Defendant's refusal to transfer title to the Plaintiff's names, the Plaintiff has suffered loss, for which he holds the 1st Defendant and 5th Defendants jointly and severally liable. The Plaintiff avers that the mortgage by the 2nd and 3rd Defendant was fully satisfied/settled and should on that encumbrance from the subject title.

The Plaintiff shall further contend that both mortgages of the 1st, 2nd and 3rd law Defendants are in any event extinguished and invalid by operation of the.....

The Plaintiff prayed for that this Honorable Court enters Judgment against the Defendants for:

- a) A declaration that the Plaintiff is the equitable owner of the property the subject of this suit.
- b) A declaration that the Plaintiff lawfully purchased the suit land free from any encumbrances from the 3rd Defendant.
- c) A declaration that the Plaintiff is entitled to be entered on the title as legal owner of the suit/subject property.
- d) A declaration that the Mortgage vide Instrument No. 171206 expired and or was extinguished by limitation.
- e) A declaration that the Mortgage vide Instrument No. 173128 was fully satisfied by operation of a release.
- f) In the alternative but without prejudice to the above, a declaration that the mortgage vide Instrument No. 173128 is similarly as the mortgage vide Instrument No. 171206 extinguished by limitation.
- g) An Order directing the 5th Defendant to cancel the Mortgages vide Instrument Nos. 171206 and 1731 28 from the Certificate of Title of LRV 636 Folio 8 land comprised on plot 67 and 69, main street, Jinja.
- h) An Order directing the 5th Defendant to effect transfer of Title of the suit land to the Plaintiff.
- i) A permanent injunction against the 1st and 2nd Defendants baring them or anyone acting under them from claiming title or an interest in the suit land.

- j) General damages.
- k) Costs of the suit.
- l) Any other relief as Court deems fit.

I have examined the above facts and I agree with them.

ISSUES

The following are the issues that were agreed upon during the Scheduling of this case:-

1. Whether the Plaintiff is the lawful owner of the suit land?
2. Whether the Mortgage Reflected on the suit title are valid and subsisting?
3. What remedies are available to the Plaintiffs?

REPRESENTATION

When this case came up for hearing before me, the plaintiff was represented by learned counsel Mr. Bernard Mugenyi of M/S. Ojambo & Ojambo Advocates. All the Defendants failed to appear and defend the suit despite all efforts to serve them, hence it proceeded exparte against them.

THE LAW

The position of the law and the burden of proof in Civil Cases; it is well settled per **Sections 101**, which provides that;

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

Section 102 provides that;

“The burden of proof in a suit or proceeding lies on that person who would fail if at all were given on either side.”

Section 103 further provides that;

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The above was solidly reinforced in the case of **Dr. Vincent Karuhanga t/a Friends Polyclinic vs. National Insurance Corporation & Uganda Revenue Authority, HCCS No.617 Of 2002 (2008)ULR 660 at 665,**

cited with approval by the Court of Appeal in **Takiya Kaswahili & A' nor vs. Kajungu Denis, CACA No.85 of 2011**, it was held, inter alia, that;

"...The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof that is, his allegation is presumed to be true unless his opponent adduces evidence to rebut the presumption."

On the other hand, the balance of probabilities is discharged/satisfied if there is greater than 50 per cent that the proposition is true and not 100 percent. Lord Denning, in **Miller v Minister of Pension [1947] All E R 373** described it simply as *"more probable than not"*. For the above reason, errors omissions and irregularities that are too minor and do not go to the root of the matter and occasion a miscarriage of justice may be disregarded. See **Dr. Vincent Karuhanga vs National Insurance Corporation & Anor H.C.C.S No. 617/2002 and Sebuliba v Co-Operative bank (1982) HCB 129**.

Further, in the proof of cases, unless it is required by law, no particular form of evidence (documentary or oral) is required and no particular number of witnesses is required to prove a fact or evidence as per **Section 58 Evidence Act** and **Section 133 Evidence Act**.

The **Evidence Act** defines a fact to mean and include:-

(1) Anything, state of thing, or relation of thing capable of being perceived by senses as per Section 2 1 (e) (i) Evidence Act.

Having stated the position of the law and rules of evidence, I will now turn to the substantive issues raised in this case as captured above and proceed to evaluate against the evidence on record.

RESOLUTION OF THE ISSUES

I have found it prudent and more coherent to handle the first two issues in this case concurrently.

ISSUES 1: Whether the Plaintiff is the lawful owner of the suit land?

It was submitted that I will address issue one and two jointly. That **PW1** testified that in 2004 he purchased the suit property at Ug. Shs. 160,000,000/= (One hundred and sixty million) from Moshin Kassamn of Mumtaz Kassam Management, the lawful Attorney of Ashvin Amritlal Patni the Administrator of the Estate of Amritlal Ramjibhai Patni and the registered

proprietor of the suit property and that he fully paid for the property. In support of this the Plaintiff relied on **PEX1 at page 1** of his trial bundle, **PEX2 at pages 2 to 11** of his trial bundle and **PEX3** at pages 12 to 15 of his trial bundle. All this evidence was never rebutted.

The Plaintiff further submitted that the Plaintiff further testified that he was given vacant possession of the suit property in 2004 and that sometime in 2009 he was availed a duly signed transfer, consent to transfer from the lessor which is the Registered Trustees of the Church of Uganda and the duplicate certificate of title which he upon paying stamp duty lodged with the 5th Defendant so that the title could be transferred in his names. In proof of this the Plaintiff relied on **PEX5 at pages 17 to 28** of his trial bundle, **PEX7** at page 31 of his trial bundle **PEX8** and **PEX9** at pages 32 and 33 of the Plaintiffs trial bundle.

The Plaintiff testified that sometime in 2017 he demolished the original old structure on the suit land and embarked on construction and is in advanced stages of completion of a multistoried building.

Court visited the locus and at the locus, the Plaintiff took the court around showing the ongoing construction, showed his various tenants in the basement and ground floor of the building and emphasized the various boundaries of the plot and indeed it was evident that the Plaintiff is in physical possession of the suit property and is in indeed carrying out the said development. At the locus, the LC 1 Nyende David, the LC1 V/ Betty Addok and Rev. Aggrey Mutele the Registered Trustees of the Church of Uganda who are the Lessors of the property where all representing present and indeed were fully aware of the Plaintiffs ownership/interest in the suit property.

Court then directed the Plaintiff to avail an approved plan for the building that is under construction which building plan is herein attached to the submissions. The Plaintiff has been able to carry on this massive development with absolutely no interruption or challenge from anyone whatsoever.

They further contended that all this unrebutted evidence proves that the Plaintiff who paid for the suit property, was availed vacant possession, a signed transfer and the duplicate title, is in possession to-date, demolished the old structure and is in advanced stages of construction of a multistoried building proves that the Plaintiff acquired a lawful interest in the suit property.

They further argued that with respect to the mortgages reflected on the title, **PW1** testified that upon paying stamp duty and lodging the signed transfer and title with the 5th Defendant, he learnt from the Registrar of Titles Jinja that the transfer process had been halted on grounds that his name was allegedly entered in error since there were 2 (Two) mortgages registered on the title which had not been removed as encumbrances.

That he subsequently established from the Registrar of title and from Mumtaz Kassam Management that one of the mortgages was entered in favor of the 1 Defendant on the 4th December 1976 vide instrument number 171206 and that the second mortgage was entered in favor of the 2nd and 3rd Defendants on the 4th June 1968 vide Instrument Number 173128 and referred to the title which is **PEX3** at pages 12 to 15 of the Plaintiffs trial bundle.

PW1 further testified that he established that the mortgage vide Instrument Number 173128 was released by the Minister of Finance Planning and Economic Development on the 19th of January 2005. **Refer to last page of the title PEX3 and the same is hereto attached and marked A**" which proves that there was a release of mortgage. He prayed that the same is admitted as **PEX10** as it was erroneously not admitted.

The Plaintiff further testified that he established that neither the 1st Defendant nor the 2nd and 3rd Defendants have for over 36 (Thirty-six) years taken any action or brought any action to recover any monies and that similarly the 4th Defendant has since 2004 not challenged and is to-date not challenging the Plaintiffs title or ownership of this suit land. Indeed, the Plaintiff testified that he carried out a search on the suit land sought consent of the Lessor and indeed the 5th Defendant had initially effected the transfer though turned around claiming it was in error.

It is the Plaintiffs contention that the 2nd and 3rd Defendants mortgage entered on the title was fully settled and should be removed on that account while the mortgage by the 1st Defendant is statute barred by the doctrine of limitation.

They submitted that as proved above that no action has been brought in respect to the above 2 (Two) mortgages for over 36 (thirty-six) years and as such the said mortgages expired by operation of the law and ought to be cancelled from the title.

They invited court to refer to **Section 18 (1) of the Limitation Act Cap 80** which provides that *“no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued”*.

They submitted that these mortgages are over 36 (Thirty- six) years old and as such are barred by limitation and as such ought to be cancelled from the title; and relied on the case of **Vincent Kawunde t/a Oscar Associates vs Damiano Kato HCT-00-CCOOS-0004-2007**.

They argued that having proved that the said mortgages expired by operation of the law which was the basis for halting the transfer of the title into the Plaintiffs names, it follows that in addition to the purchase that was proved and the fact that title was availed, a duly signed transfer form was availed, the Plaintiff has been in possession since 2004 and has constructed on the suit land without any challenge from anyone, it only goes to further prove that the Plaintiff is the lawful owner:.

They therefore submitted that the Plaintiff has proved that he is the lawful owner of the suit and that the mortgages reflected on the suit title are invalid, lapsed by operation of the law and are no longer subsisting in law.

What remedies are available to the parties?

On this issue, the Plaintiff sought for an order directing the 5th Defendant to cancel the 2 (Two) mortgages vide Instrument Number 171206 and 173128. That having proved that the mortgage vide Instrument 173128 was released and that the said mortgage as well as mortgage vide instrument number 171206 expired by operation of the law of limitation, they prayed that court be pleased to grant an Order directing the 5th Defendant to cancel the 2 (Two) mortgages vide Instrument Number 171206 registered in the names of the 1st Defendant and mortgage Instrument Number 173128 registered in the names of the 2nd and 3rd Defendants.,

Further to the above, that having equally proved that the Plaintiff purchased the suit property and was availed a duly signed transfer and the duplicate title which he duly availed to the 5th Defendant with stamp duty paid, the Plaintiff is entitled to have the title transferred into his names. They therefore prayed that court be pleased to issue an order directing the 5th Defendant to transfer the title to the suit land into the Plaintiffs names.

In addition, that the Plaintiff further claimed for general damages and in support of this, **PW1** testified that he had initially be entered on the title but the process was halted by the 5th Defendant on account of an error since the 2 (Two) mortgages are still entered on the title. That he made several verbal requests to the 5th Defendant to have the mortgages cancelled since the mortgages had lapsed by operation of the law and further because there was a release of mortgage of the 2nd and 3rd Defendants mortgage, but the 5th Defendant declined to effect the transfer.

That as a result of this the Plaintiff has suffered serious loss, serious inconvenience, mental torture and embarrassment which entitles him to general damages. That in addition, the Plaintiff who is a business man cannot access funding using his property because the title is not in his names which is hurting his businesses. They therefore prayed that court be pleased to award general damages to the Plaintiff.

They added that having successfully proved his case, the Plaintiff is entitled to costs pursuant to **Section 27 (2) of the Civil Procedure Act Cap 71** which provides that the costs of any action or cause of other matter shall follow the event.

In resolving all the issues in this case this case, I have carefully examined the Plaintiff and the evidence in chief led by the Plaintiff in this case. I have also taken into account the law and the submissions of learned counsel for the Plaintiff in this matter. As already stated earlier in this case, all the Defendants failed to appear and defend the suit was heard *ex parte*.

The only witness in this case was **Hajji Said Edhiruma, a male adult aged 58 years old, business man of Iganga Kasokos Central zone in Iganga Municipality, Iganga District (hereinafter referred to as PW1)**. His evidence in Chief IS recorded on his Witness Statement in detail; but briefly, he testified that Sometime in 2004, he purchased the suit land comprised in LRV 636 Folio 8 land comprised on plot 67 and 69 Main Street, Jinja from one Moshin Kassam of Mumtaz Kassam Management, the lawful Attorney of Ashvin Amritlal Patni, the Administrator of the Estate of Amritlal Ramjibhai Pattni and the registered proprietor of the aforesaid land for Ug. Shs. 160,000,000/= (One Hundred Sixty million). **He referred to Power of Attorney in his trial bundle.**

That he accordingly fully paid the purchase price for the suit land. **He referred to the copies of receipts of payments in his trial bundle.**

Further, that Sometime around end November/early December 2004, he was given vacant possession of the suit land have been in possession since then to-date. Sometime in 2017, he demolished the original old structure on the Plot and is currently in advanced stages of constructing thereon a multi storied structure.

In addition, that sometime in 2009, upon receipt of duly signed transfers and a special Certificate of title for the suit property from Mumtaz Kassam Management, he lodged the title plus transfers for transfer and paid the relevant duty but was surprised to learn that the process had been halted by the Registrar of Titles Jinja on grounds that it was allegedly entered in error since there were 2 (Two) mortgages registered on the title which had not been removed as encumbrances.

That **PW1** subsequently established from the Registrar of Titles and from Mumtaz Kassam Management that one of the mortgages was entered in favor of the 1st Defendant on 4th December 1967 vide Instrument No. 171206 and that the second mortgage was entered unto the title in favor of the 2nd and 3rd Defendants on the 4th of June 1968 vide Instrument No. 173128. Refer to title reflecting the said encumbrance in my trial bundle.

That I further established that the mortgage vide Instrument No. 173128 was released by the Minister of Finance Planning and Economic Development on the 19th of January 2005 upon payment of all monies due under the mortgage to the Departed Asians Property Custodian Board. **He referred to the release of Mortgage in his trial bundle.**

That he also established that neither the 1st Defendant nor the 2nd or 3rd Defendants have for over 36 (Thirty-six) years taken any action or brought any action or claim to recover any monies.

Similarly, that the 4th Defendant has since 2004 not challenged and is to-date not challenging my title and or ownership of the suit land. At the time of purchase, he established that the proprietor of the suit land Ashvin Amritlal Patni held a lease for the land granted by the Registered Trustees of the Native Anglican Church of Uganda for 99 years from the 1st of April 1966. **He referred to the lease agreement in his trial bundle.**

Further, that he conducted a search at the Lands Registry and established the following:

- a) That the registered proprietor is Ashvin Amritlal Pattni (Holder of probate in respect to the will of the late Amritlal Ramjibhai Pattni) registered on the 24th of April 2009 under Instrument No. 412326.
- b) That there was a first mortgage registered in the name of the Registered Trustees of Loaner (East Africa) Education Trust on the 24th December 1967 under Instrument No. 171206.
- c) That there was a second mortgage registered in the name of Kanan Laxmidas Raja and Kanchanben Lalji Raja on the 4th of June 1968 under Instrument No. 1731 28. **He referred to the search report in his trial bundle.**
- d) Upon effecting the purchase of the suit land, the 4th Defendant took the following steps in order to facilitate the transfer of title to me;
- e) The 4th Defendant signed transfer forms in my favor. **He referred to the transfer form in his trial bundle.**
- f) The 4th Defendant applied to the Commissioner of Lands and Surveys for consent to the transfer of the suit land, which consent was given. **He referred to the consent in his trial bundle.**
- g) The 4th Defendant further sought the consent of the Lessor, which consent was also granted. Refer to Lessor's consent to transfer in my trial bundle.
- h) The 4th Defendant availed me with the duplicate certificate of title to facilitate the transfer of title. **He referred to the certificate of title in his trial bundle.**
- i) The 4th Defendant also availed him with a copy of a release of the second Mortgage issued by the Minister of Finance, Planning and Economic Development on the 19th of January 2005. **He referred to the release of mortgage in his trial bundle.**

That pursuant thereto lodged the aforesaid documents with the Lands Registry Jinja with the aim of effecting the transfer and he was informed by the 5th Defendant that the transfer could not be effected owing to the two existing mortgages registered as encumbrances on the Certificate of Title.

Further, that the 5th Defendant initially effected the transfer of the title into his names but he was shocked to later be informed that the process had been halted by the 5th Defendant allegedly on account of the 2 (Two) mortgages registered as encumbrances and that he had been entered on the title in error.

That he then made several verbal requests to the 5th Defendant to have the mortgages cancelled since the mortgages had lapsed by operation of the law

on limitation and further because there was a release of mortgage with regards the 2nd and 3rd Defendants but the 5th Defendant declined to effect the transfer into his names.

That the Mortgage by the 2nd and 3rd Defendants was fully settled and should be removed on that account while the mortgage by the 1st Defendant is statute bared by the doctrine of limitation.

PW1 added as a result of the 5th Defendant's failure to transfer title to my names suffered loss, serious inconvenience, mental torture and embarrassment for which he holds the 1st and 5th Defendants liable jointly and severally. As a businessman, he cannot access funds using his property because the title is not in his names which is seriously hurting his businesses.

He therefore prayed that court finds in his favor and grants him all the declarations and orders that he prayed for in his Plaint, general damages for the inconvenience, mental torture and embarrassment he has have faced as a result thereof and costs of the suit.

RESOLUTION OF THE ISSUES RAISED IN THIS CASE

The right to own property is guaranteed **under Article 26 of the 1995 Constitution** which provides that;-

“Every person has a right to own property either individually or in association with others”.

Land ownership in Uganda is spelt out in **Article 237 (3) of the Constitution of the Republic of Uganda. Article 237 (3) (b)** specifically mentions Freehold Land Ownership and a form of land tenure system in Uganda; reinforced in **section 4 of the Land Act 1998 (as amended)**.

Further, **Order 9 rule 20 (1) (a) of the Civil Procedure Rules, S1-71-1 (as amended)** provides that;

“Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the notice of hearing was duly served, it may proceed ex parte”

On the other hand, **Section 101(1) of the Evidence Act** places the onus to prove his interest in the suit land on the Plaintiffs. In the first place, after critically examining the Plaint and the evidence of **PW1** and the exhibits he relied upon in this case and in the absence of any evidence to the contrary, I

have therefore arrived at this finding that a close scrutiny of the events that led to the acquisition of the Certificate of Title by the Plaintiff reveals that he followed all due process and that the process of acquisition of title by the Plaintiff was above board.

Further, **Section 59 of the Registration of Titles Act Cap 230** provides that;

“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.”

Further, **the Registration of Titles Act (supra)**, provides under **S.64 (1)** provides that the estate of registered proprietor is paramount. It reads that:-

“Notwithstanding the existence in any other person of any estate or interest, whether derived by grant or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in the case of fraud, hold the land or estate or interest in land subject to such encumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other encumbrances, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser” .

In addition, the **Powers of the Commissioner Land Registration (supra)** are provided for under **Section 91 of the Land Act (as amended by the Land Amendment Act, 2004)** which provides as follows:

(1) Subject to the Registration of Titles Act, the Commissioner shall, without referring a matter to a Court or a district land tribunal, have

power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise.

(2) The Registrar shall, where a certificate of title or Instrument -

- a. is issued in error;*
- b. contains a mis- description of land or boundaries;*
- c. contains an entry or endorsement made in error;*
- d. contains an illegal endorsement;*
- e. is illegally or wrongfully obtained; or*
- f. is illegally or wrongfully retained,*

call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to proper party.

(2a) The Commissioner Land Registration shall conduct a hearing, giving the interested party under subsection (2) an opportunity to be heard in accordance with the rules of natural justice, but subject to that duty shall not be bound to comply with the rules of evidence applicable in a Court of law.

(2) Upon making a finding on the matter, the Commissioner shall communicate his or her decision in writing to the parties, giving the reasons for the decision made, and may call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party”.

(3) if a person holding a certificate of title or instrument referred to a subsection (2) fails or refuses to produce it to the registrar within a reasonable time, the registrar shall dispense with the production of it and amend the registry copy and where necessary issue a certificate of title to the lawful owner.

(4) The registrar may:

- (a) correct errors in the register Book or in entries made in it.*
- (b) correct errors in duplicate certificate or instruments; and*
- (c) Supply entries omitted under this Act.*

(5) The registrar may make amendments consequent upon alterations in names or boundaries but in the correction of any such

error or making of any such amendment shall not erase or render illegible the original words.

(6) Upon the exercise of the powers conferred on the registrar under subsection (5), the registrar shall affix the date on which the correction or amendment was made or entry supplied and shall initial it;

(7) Any error or an entry corrected or supplied under this Section shall have the same validity and effect as if the error had not been made or entry not omitted.

(8) In exercise of any powers under this Section, the Registrar shall:-

- a. give not less than twenty one day's notice, of the intention to take the appropriate action, in the prescribed form to any party likely to be affected by any decision made under this section;*
- b. provide an opportunity to be heard to any such party to whom a notice under paragraph (a) has been given;*
- c. conduct any such hearing in accordance with the rules of natural justice but subject to that duty, shall not be bound to comply with the rules of evidence applicable in a Court of law;*
- d. give reasons for any decision that he or she may make.*

(9) The Registrar shall communicate his or her decision in writing to the parties and the committee.

(10) Any party aggrieved by a decision or action of the registrar under this Section may appeal to the district land tribunal within sixty days after the decision was communicated to that party.

(11) Where the registrar has cancelled a certificate of title or an entry in the Register Book, a party in whose favour the cancellation is made shall not transfer the title until the expiry of the time within which an appeal may be lodged; and where an appeal is lodged against the cancellation, he or she shall not transfer the title until the determination of the appeal.

(12) The party who lodges an appeal under this Section shall take steps to ensure that the registrar and other parties are served with the notice of appeal.

(13) Where the person who appealed under the section fails to prosecute the appeal, the tribunal shall, on application by other party to the appeal, strike out the appeal"

The cumulative effect of all the above cited laws in relation to the current case is that the uncontested evidence presented during the hearing of this case is that there is conclusive evidence of ownership of registered land. The law also provides that a title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in **sections 64, 77, 136 and 176 of the Registration of Titles Act**, which essentially relate to fraud or illegality committed in procuring the registration.

In this particular case, I have ruled out any fraud or fraudulent dealings on the part of a transferee; and I have not found any other statutory ground of exception, which would bar a registered owner of land from holding an indefeasible title on the part of the Plaintiff.

Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claims to the land or interest in respect of which he or she is registered (**see Frazer v. Walker [1967] AC 569**).

Furthermore, although the Registrar is enjoined to cancel Certificates of Titles issued in error/illegally and wrongfully obtained, the cancellation can only be effected in strict observance of the law as stipulated in the **Land Act Cap 227 (as amended)**.

The evidence I have received in this case reveals that this wasn't the case in the present matter; instead what comes out of the evidence of the Plaintiff is that the Registrar acted *ultra vires* his powers when he violated the enabling law as set out in **S.91 (8) of the Land Act Cap 227 (as amended)** which is to the effect that in the exercise of any powers under this section, the Registrar shall;

- a) *Give not less than twenty-one days' notice in the prescribed form to any party likely to be affected by any decision made under this section*
- b) *provide an opportunity to be heard to any such party to whom a notice under paragraph (a) has been given;*
- c) *conduct any such hearing in accordance with the rules of natural justice*
- d) *Give reasons for any decision that he or she may make".*

The above is beefed up with **Section 91(9) of the Land Act (as amended)** which is to the effect that the Registrar of Titles shall communicate the reasons/decision for cancellation to the affected party which provision of the law was grossly violated in the instant situation.

The evidence led in this case also confirms that the Registrar of Titles grossly violated/circumvented the law by negating to accord the mandatory Notice and a fair hearing to the then Registered Proprietor (Hajji Said Edhiruma) and from the evidence led before this Court, the Plaintiff surprisingly learnt that the 5th Defendant failed to complete the transfer into the **PW1**'s name as he was first registered on the Title on 15/10/2009 under Instrument No.419417, but canceled and it was indicated thereunder that his name had been entered on the Title in error as proved by **PEX-3**.

This was further confirmed after conducting a land search on 28th September, 2012 **as proved by PEX-6** which revealed that the Plaintiff's had never been registered on the certificate of Title by the 5th Defendant .

It is also pertinent to note that **Section 177 of the Registration of Titles Act (supra)** enjoins the Registrar of Titles to cancel or effect changes in the Register but only on the directions of the High Court, but this wasn't the case in this matter.

In this case from the evidence led before me, it is clear that no suit has ever been filed in this Honorable Court or any other court with competent jurisdiction to challenge the Plaintiff's ownership of the suit land nor any of the Defendants come out to challenge his ownership of the suit land.

The only conclusion I can draw after carefully analyzing the evidence led in this case is that there were some illegalities that were undertaken to cancel the name of the Plaintiff from the Certificate of Title which had already been granted to the Plaintiff in this case.

In the absence of any other evidence to the contrary, these can be attributed to the actions of the Registrar of Titles Jinja Zonal Office without any legal basis. I therefore find that the Plaintiff is the lawful owner of the suit land.

ISSUE 2: Whether the Mortgages reflected on the suit title are Valid and subsisting?

In resolving this issue, I have carefully examined **PEX-3** exhibited for the Plaintiff. It is not in dispute that the 5th Defendant executed and created over the suit property from Mumtaz Kassam Management, which was entered in favour of the 1st Defendant on 4th December 1967, vide Instrument No.171206 and that a second mortgage was entered unto the Title in favour of the 2nd and 3rd Defendants on 4th June 1968 vide Instrument No.173128.

The first loan was for Uganda shillings 75,000/= and the second loan for Uganda shillings 50,000/=. These encumbrances were registered on the title deed and registry for land titles and admitted in evidence as exhibit **PEX-3**. These instruments created a legal mortgage duly notified to the world as prescribed by the **Registration of Titles Act Cap 230 Laws of Uganda (RTA)**.

From the facts, it is apparent that the 5th Defendant purported to cancel the Plaintiff's ownership of the suit land by cancelling his name from the Title Deed on grounds of the existence of an encumbrance of the aforesaid mortgages.

I agree with the Plaintiff's Counsel that the mortgages are time barred by the Statute of Limitation and cannot be a bar to register the Plaintiff's equitable interest; after all there was consent to transfer and a transfer forms signed in favour of the Plaintiff by the Lessor as Per evidence in **PEX-8 & PEX9** respectively

Secondly, none of the creditors who are said to have interest in the suit property filed /made any subsequent demands on the title deed as is required under **section 19 and 24 of the Mortgage Act, 2009** in support of their equitable mortgages. This section provides that:-

Section 19 of the Mortgage Act, 2009 provides for;-

“Notice on default

(1) Where money secured by a mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment.

(2) Where the mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage, the mortgagee may serve on the mortgagor a notice in writing of the default and require the mortgagor to rectify the default within forty five working days”.

Section 24 of the Mortgage Act, 2009 provides for;-

“Power of mortgagee to take possession of mortgaged land

(1) A mortgagee may, after the end of the period specified in section 19, and after serving a notice of not less than five working days of his or her

intention to do so, enter into possession of the whole or a part of the mortgaged land”.

From the foregoing, there is no evidence that the 1st and 2nd Defendants, complied with the law as stated above. I therefore find that there was no justification by the 5th Defendant to cancel the Plaintiff as owner of the suit property from the certificate of Title as the mortgages weren't subsisting.

In the result, I agree with the submissions of learned counsel for the Plaintiff and find that Issue No.2 is resolved in favour of the Plaintiff in this case.

ISSUE 3 What Remedies are available to the parties?

In resolving this issue, I have carefully examined the Plaintiff and the reliefs sought by the Plaintiff. He sought for a declaration that he is the equitable owner of the property comprised in Plot No.67 and 69, Main Street, Jinja and is entitled to legal ownership of the same.

On the basis of the evidence led before and in view of my findings and decision in the preceding issues, I grant the Plaintiff the above reliefs as sought; and I so hold.

Turning to the 2nd and 3rd Defendants who have been found not to have legal mortgage on the certificate of Title, their interests thereon are extinguished, invalid and are time barred and their interest should be cancelled from the certificate of Title by the 5th Defendant.

Following up on that, it is my finding and decision that the Plaintiff has proved his case against the Defendants to the standard required by law and is entitled to the reliefs sought.

Section 33 of the Judicature Act Cap 13 empowers this court to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy are finally determined and all multiplicities of legal proceedings concerning any of those matters avoided. **See HC CA No. 07 of 2011 Kaahwa Stephen & another vs Kalema Hannington** per Hon. Lady Justice Monica K. Mugenyi.

The uncontroverted evidence adduced before this Court proves that the Plaintiff was legally registered on the suit land and the mortgages by the 2nd and 3rd Defendants were invalid and extinguished and as such, the

cancellation of his Certificate of Title by the 5th Defendant was erroneous and did not follow the prescribed legal procedures.

The Plaintiff also prayed for a permanent injunction to restrain the 1st and 2nd Defendants, their agents and/or servants from claiming title or an interest in the suit property, harassing, intimidating and/or in any other way of interrupting the Plaintiff's use and enjoyment of the suit land.

The settled position is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the defendant's act or omission. See: **James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993; Erukan Kuwe v. Isaac Patrick Matovu & A'nor H.C.C.S. No. 177 of 2003 per Tuhaise J.**

Also, in the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered. See: **Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305.**

A plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong. See: **Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.**

The party claiming general damages is expected to lead evidence to give an indication of what damages should be awarded on inquiry as the quantum. See: **Robert Cuossens v. Attorney General, S.C.C.A No. 8 of 1999; Ongom v. Attorney General. [1979] HCB 267.**

In the instant case, the plaintiff has satisfactorily demonstrated that they suffered great inconvenience at the instance of the defendants. I therefore agree with learned counsel for the plaintiff and find that they are entitled to general damages.

It is therefore my considered decision that an amount of Ug. Shs. 20,000,000/= (Uganda Shillings Twenty Million Only) only has been found sufficient in this case.

On the other hand, **section 27 (2) of the CPA** makes provision for interest on claims for monetary payment. In that light, I also award him interest on the general damages from the time of this judgment until full payment. A just and reasonable interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. In that regard I would consider interest at court rate to be just and fair. It shall be applicable to the general damages.

Further, it is now well established law that costs generally follow the event. See **Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989 (SC)** and **Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35**. Indeed, in the case of **Sutherland vs. Canada (Attorney General) 2008 BCCA 27** it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a 'reasonable expectation' of obtaining an order for costs.

In the instant case, the Plaintiffs has succeeded in his claim, and I find no compelling and or justifiable reason to deny them costs of the suit.

Applying the decisions arrived at in the above cases, and for the reasons I have given in this Judgment, it is the final decision of this court that Judgment is entered for the Plaintiff against the Defendants with the following Orders:-

1. A Declaration that the Plaintiff is the equitable owner of the property comprised in LRV 636 Folio 23 Plot No. 67 and 69, Main Street, Jinja and is entitled to legal ownership of the same.
2. A Declaration that the mortgage/mortgage interest of the 1st Defendant registered on 4th December 1967 on the land comprised in Plot No. 67 and 69, Main Street, Jinja, is extinguished and invalid.
3. A Declaration that the mortgage/mortgage interest of the 2nd and 3rd Defendant registered on 4th June 1968 as a second mortgage on the land comprised in Plot No. 67 and 69, Main Street, Jinja, is extinguished and invalid.
4. An Order directing the 5th Defendant to cancel and or remove the mortgage of the 1st Defendant entered on the suit land on 4th December 1967 vide Instrument No.171206 as an encumbrance on the subject title.
5. An Order directing the 5th Defendant to cancel and or remove them mortgage of the 2nd and 3rd Defendant entered on the suit land on 4th June 1968 as a 2nd mortgage vide instrument No. 173128 as an encumbrance on the subject title.
6. An Order directing the 5th Defendant to transfer the suit property comprised in LRV 636 Folio 8, Plot 67 and 69, Jinja to the names of the Plaintiff.
7. A permanent injunction is hereby issued preventing the 1st, 2nd, 3rd and 4th Defendants from claiming any interest in the suit land.
8. The Plaintiff being the successful party is awarded General Damages of Ug. Shs. 20,000,000/= (Twenty Million Shillings Only).

9. The court also awards the Plaintiff interest on the General Damages above at a court rate from the time of Judgment till payment in full.
10. The Plaintiff is awarded full costs of the suit from the time of filing till Judgment.
11. A consequential order doth issue for the rectification of the Certificate of Title comprised in LRV 636 Folio 8 Plots 67 and 69 Main Street Jinja and to reinstate the Plaintiff's names thereon as the lawful owner of the same.

I SO ORDER

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
07/03/2024

This Judgment shall be delivered by the Honorable Magistrate Grade 1 of the High Court Jinja attached to the Chambers of **Justice Dr. Winifred N Nabisinde** who shall also explain the right of appeal against this Judgment to the Court of Appeal of Uganda.

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
07/03/2024