

1. REV. HERBERT PAUL KABANDA

2. HARRIET KABANDA :..... PLAINTIFFS

- 1. SULAIMAN MUBIRU**
- 2. FOUNDATION FOR INTERNATIONAL
COMMUNITY ASSISTANCE (FINCA)**
- 3. DOREEN KIRUNGI MAGERA**
- 4. STEPHEN MAGERA:..... DEFENDANTS**

JUDGMENT

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The Brief Facts of this Suit are that the Plaintiffs are and have at all material times been sitting tenants on a kibanja on the suit land having bought it from a one Koobi Samson, the owner of the Kibanja at the time. The plaintiffs also paid **UGX. 700,000/=** as Kanza to the administrators of the Late Sentongo Moses Ssebitengero Ganaya who were introduced to the Plaintiffs later. Sometime in 2009, the Plaintiffs expressed interest in perfecting their mailo interest in the Suit land and subsequently executed a Sale Agreement with the 1st defendant who showed up claiming to be the registered Proprietor and agreed to pay UGX 40,000,000/= for the mailo. The Plaintiffs paid the first installment of **UGX 5,000,000/=** leaving a balance of **UGX. 35,000,000/=** to be paid as agreed between the plaintiffs and the Defendants.

In 2010, the Plaintiffs found out that the 1st Defendant had mortgaged the Suit land to the 2nd defendant without their knowledge and consent and in total disregard of the sale agreement between the Plaintiffs and the 1st Defendant. The 2nd Defendant went ahead and lodged a caveat on the Title of the Suit land vide Instrument No. KLA 473235.

CHS sent 29/10/21

The 1st defendant went on to clear the mortgage and the mortgage release was granted to the 1st Defendant and the caveat was removed from the title. The 1st Defendant went on to sale the Suit land to the 3rd and 4th Defendants who are now registered on the Title of the Suit land.

The 1st defendant avers that he mortgaged the Suit land because of the economic hardships he was going through and the failure of the Plaintiff to settle the balance that was due for payment to them. The Plaintiffs in their defence stated that they

searched for the 1st defendant to make their last installment but the 1st defendant could not be traced.

During the scheduling conference, it was an agreed fact that the suit land was mortgaged and the following issues were framed for determination by this Court;

The following issues were raised by the parties for determination by this Court;

- 1. Whether the Plaintiff discloses a cause of action against the 2nd defendant.*
- 2. Whether the Plaintiffs have a valid claim on the suit property*
- 3. Whether the Defendant acted fraudulently in order to defeat the Plaintiffs claim?*
- 4. Whether the 1st Defendant acted lawfully in mortgaging the suit land to the 2nd Defendant*
- 5. Whether the 3rd and 4th Defendants are Bona fide purchasers for value.*

Representation

Plaintiff represented by M/s Ortus Advocates. The 2nd Defendant was represented by M/s M.A Kajubi & Co Advocates while the 1st, 3rd and 4th Defendants represented by M/s Kampala Tax Advisory Centre Legal Department.

Counsel for the plaintiffs submitted that the 3rd and 4th defendants departed from their pleadings. That in paragraph 5(i) and (m) of the Joint written statement of defence, the 3rd and 4th defendant pleaded that they are bona fide purchasers for value having purchased the suit land from the 2nd Defendant, who sold the suit land as security to recover the loan.

This was corroborated by the 1st Defendant's pleading in paragraph 5(k) and (i) of the 1st, 3rd, and 4th defendants' written statement of Defence in which he stated that due to financial hardship, he failed to pay the 2nd defendant who recalled the loan on the 18th September 2013 following which the 2nd defendant sold the security to the 3rd and 4th defendant. However, the 3rd defendant, DW2 in paragraph 5 of her witness statement departed from her pleadings and stated that she and her husband purchased the suit land from the 1st Defendant and not 2nd Defendant as pleaded.

Counsel cited the case of Kyamuddu Aggrey vs Nakwanga Mary, Civil Appeal No. 21 of 2010, while citing Mohan Musisi Kiwanuka Vs Asha Chand, SCCA No. 14 of 2002, wherein the court observed that: -

"a party's departure from his/ her pleadings is a good ground for rejecting the evidence and such a litigant maybe taken to be a liar ... a party who departs from his pleadings and gives evidence contrary thereto would be deemed to be lying...."

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In reply, Counsel for the 1st, 3rd and 4th Defendants submitted that the 2nd Defendant did not sell the 1st defendant's mortgaged property to the 3rd and the 4th Defendants and submitted that they were consistent.

Counsel for the Plaintiffs rejoined that during cross examination, DW3 while testifying on behalf of the 2nd defendant admitted that she didn't participate in the process of mortgaging the suit land and that she wasn't part of the team that went to do the field visit and had no proof of the due diligence and that this corroborates DW1's evidence that no one ever visited the suit land prior to the mortgage to the 2nd defendant or its later sale to the 3rd and 4th defendant.

Further, that the court record bears evidence that whereas in paragraph 5(i), (m), (k) and (i) of the joint Defence, the 3rd and 4th Defendants pleaded that they purchased the suit land from the 2nd defendant and during their testimony, they backtracked and stated that they purchased the suit land from the 1st and not the second defendant.

Counsel referred this Court to **Order 6 r.7 of the Civil Procedure Rules** which prohibits departure from pleadings by the parties and the court and further cited the authorities of *Jani Properties Ltd. vs. Dar es Salaam City Council [1966] EA 281; and Struggle Ltd vs. Pan African Insurance Co. Ltd. (1990) ALR 46 – 47,* wherein it was observed that parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record and moreover, the court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings.

Plaintiffs' counsel argued that, whereas the 3rd and 4th defendants pleaded that they purchased the suit land from the 2nd defendant and the 1st Defendant confirmed that the suit land, which formed security to his loan as sold by the 2nd defendant, they departed in their testimony that it is the 1st Defendant and not the 2nd defendant who sold the suit land to the 3rd and the 4th Defendant.

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Counsel also submitted that the 1st, 3rd and the 4th defendants filed the joint written statement of defence and that at the time of filling their defence, they had full knowledge of the facts surrounding their case and that being represented by the same counsel, who much have taken their brief on which their defence was based which is proof that the contradictions are not innocent departure from their pleadings.

That DW2 lied to this honorable court about who sold the suit land to her as the 1st Defendant maintained during the cross examination that it is the 2nd defendant and not the 1st Defendant who sold the suit land to the 3rd and 4th defendants.

In *Zekaria Onno vs Olando Difasi HCS No. 12 of 2012*, while citing *Alfred Tajar vs Uganda (EACA) No. 167/1967*, court held that major inconsistencies in their case that should lead to rejection of their defence and evidence.

The court finds that the 3rd and 4th Defendants departed from their pleadings which departure the court cannot treat as a mild inconsistency as it touches the core of the issues in contention of this case. Given that the 1st, 3rd and 4th Defendants were represented by the same counsel, they ought to have eliminated any such inconsistencies had they been mere mistakes. therefore, the contradictory evidence of the 3rd and 4th witnesses is expunged of the record of this case.

CVS 29/12/2012
The defendants also raised another concern to this honorable court as to the fact that this suit was brought out time. Counsel also relied on *Section 20 of the Limitation Act Cap 80* and the case of *Rosemary Kabataizibwa Lwemamu versus Francis Sembuya & Anor HCCS No.226 of 2005* that; the limitation period did not run against the Plaintiffs until they discovered the fraud of the Defendants. It was Counsel's submission with reliance on paragraph 6 of the 1st plaint that they discovered the Defendants' fraud upon receipt of the 1st Defendant's notice to vacate the suit land.

I find that the plea of Limitation as raised by the Defendants cannot be sustained. *Section 25 of the Limitation Act* is to the effect that in actions founded on fraud, as in the instant case, the period of limitation shall not begin to run until the plaintiff has discovered, or could with reasonable diligence have discovered the fraud. It is

also the settled position that in determining the period of limitation, court looks at the pleadings only, and no evidence is needed. In the present case the pleadings of the Plaintiff indicate that she discovered the fraud in 2010 and as such the the suit is not time barred.

RESOLUTION

I will start with Issue No.2 then will address the other issues chronologically.

Issue Two: Whether the Plaintiffs have a valid claim on the suit property

The Plaintiffs submitted that they first purchased the kibanja interest of the suit land from a one Koobi Samson and immediately took possession of the land in 2003 as evidenced by PEX1. That they purchased the Mailo interest in the suit land from the 1st defendant who was the registered proprietor of the land in 2009 as per Clauses 2 and 3 the sale agreement dated 19th May 2009, PEX 2. The Plaintiffs were in possession of the suit land and this was corroborated by PW2, Counsel Richard Kiboneka who was the 1st defendant's lawyer at the time of executing the land sale agreement who testified that the Plaintiff paid transfer fees of two million Uganda Shillings to the 1st Defendant in accordance with Clause 2(b) of the Sale agreement.

PW2 also led evidenced that the Plaintiff delivered another UGX 20,000,000/= to him for onward transmission to the 1st defendant who has already illegally mortgaged the land the 3rd and 4th Defendants which prompted him to lodge a caveat on behalf of the Plaintiffs as per PEX7 at page 14 of the Plaintiff's trial bundle.

The 1st defendant also admitted during cross examination that by the time he mortgaged the land in 2010 to the 2nd defendant, he had already sold it to the plaintiffs. The evidence that was adduced in this honourable court persuade this

court agree with the submission of the plaintiff as to the ownership of the suit. The plaintiffs ably proved that the suit land belongs to them. The 3rd and 4th defendants

Given the overwhelming evidence that points to the fact that the Plaintiffs first purchased the Kibanja interest and later entered into an agreement with the 1st defendant who was the registered proprietor and made part payment as admitted by the 1st defendant it is clear that the Plaintiffs had secured an equitable and legal interest in the suit land before it was mortgaged to the 2nd defendant.

Plaintiffs also go ahead to claim a declaration that they are bona fide occupants on the suit land. Section 29(2) of the Land Act Cap 227 defines a bona fide occupant as a person who before the coming into force of the Constitution- *had occupied and utilized or developed any land unchallenged by the registered owner [or...] for twelve years or more; or had been settled on land by the Government or an agent of the Government, which may include a local authority.*

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John Mugambwa in his book; Principles of Land Law in Uganda states that under Section 29(2) (a) as above, a bona fide occupant is one who entered the land without consent of the registered owner. The learned author adds that a bona fide occupant under the sub-section is essentially "*a trespasser or a squatter*". See *J.T. Mugambwa, Principles of Land Law in Uganda (Foundation Publishers, 2006) at page 11.*

In the circumstances of this case, the court is convinced by the submissions of the plaintiffs and the court therefore finds that the plaintiffs are the Lawful Occupants of the suit and thus have a valid claim in the property since they took possession of

the suit; and immediately after the execution of the first sale agreement in 2003 to present date.

Issue One: Whether the Plaintiff discloses a cause of action against the 2nd defendant

Having resolved the second issue in the affirmative, it is noteworthy that during the scheduling conference, it was agreed that the 1st defendant mortgaged the suit to the 2nd defendant and the 2nd defendant secured the suit property as security for the loan granted to the 1st defendant. The major issue to resolve hereunder is whether by the time the suit property the 2nd defendant carried out due diligence to ascertain whether the suit land was free from any incumbrances and any third party interest to render the mortgage legal. This is meant to establish whether or not the plaintiff discloses a cause of action against the 2nd defendant or not.

A cause of action has been defined by the *Supreme Court*, in *Attorney General Versus Major General David Tinyefuza Const. Appeal No 1 of 1997 Supra*, citing with approval the following statement from Mulla's Code of Civil Procedure, as;

"...every fact which if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a Judgment of the Court. In other words, it is a bundle of facts which, taken with the law applicable to them gives the Plaintiff a right to claim relief against the Defendants".

It is now a settled proposition of law as held in *Tororo Cement Co. Ltd versus Frokina International SCCA No. 02 of 2001* that; a plaintiff discloses a cause of action if it shows that the Plaintiff enjoyed a right; that that right was violated, and that the violation is by the Defendant(s).

The Supreme Court in Narottam Bhatia Hemantini Bhatia & Boutique Shazim Ltd SCCA No. 16 of 2009 held that; "in determining whether a plaint discloses a cause of action, Court must look at the plaint, and annexures thereto with an assumption that all facts as pleaded are true.

Both learned Counsel submitted agreeably with the above propositions of law. "

The Plaintiff's counsel relied on the case of Steven Semakula Vs Samuel Serunjogi, Civil Suit No. 187 of 2012 while citing Tororo Cement Co. Ltd Vs Frokina International Ltd, Civil Appeal No. 21 of 2001. Court held that the ingredients of a cause of action are that the Plaintiff enjoyed a right, the right has been violated and that the Defendant is liable and further cited Cooke Vs Gull LR 8E. P 116 and in Reed Vs Brown OBD P.31 and defined a cause of action to mean every fact which is material to be proved to enable the Plaintiff succeed or every fact which is denied, the Plaintiff must prove in order to obtain judgement.

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The defendants' Counsel relied on *Section 115 of the Registration of Titles Act* provides that the proprietor of any land under the operation of this Act may mortgage that land by signing a mortgage of the land and the fact that the plaintiffs had neither adduced any evidence to show that the 2nd defendant was not the registered proprietor of the suit land nor adduced any evidence that shows that the land was registered in the Plaintiff's name. Counsel also submitted that under Order 7 Rule 11(a) of the Civil Procedure Rules its provided that where a plaint discloses no cause of action, it shall be dismissed

In Auto Garage (supra) court stated that; a plaint may disclose a cause of action without containing all the facts constituting the cause of action provided that the violation by the Defendant of a right of the Plaintiff is shown. This position of law

was well settled by the Supreme Court in Tororo Cement Co. Ltd versus Frokina International (supra).

DW3, Asio Olive stated during cross-examination that the mortgage on the suit was executed on 12th October, 2010 vide KLA 473235 and the 1st Defendant fully paid off his loan with the 2nd defendant and on the 15th May 2014, a release of mortgage was issued to the 1st defendant together with his land title as per DExh.3 and DExh.4 respectively. That during cross-examination, the 1st plaintiff testified that there was no mortgage on the land by the time the plaintiff sold off the land to the 3rd and 4th Defendants and the 1st defendant also testified that he did sell the Suit land to the 3rd and 4th defendants and that there was no nexus between the Plaintiffs and the 2nd defendant as no evidence had been adduced to show that the 2nd Defendant transferred the suit land to the 3rd and 4th defendants.

Exhibit PExh.3, a transfer form in respect to the suit land which was executed on 19th May, 2014 was between the 1st Defendant as the vendor and the 3rd and 4th Defendants as Purchasers was adduced in court by the 2nd defendant as evidence in court.

Plaintiff's counsel submitted that the Plaintiff's cause of action against the 2nd defendant as deduced from the Plaintiff's Paragraph 5(f), (g), (h) is for fraudulently dealing in the suit land without carrying out due diligence to ascertain the ownership or possession of the suit land and the particulars of fraud under Paragraph 6 of the Plaintiff's.

Jumber Kiwe Ssebunya Vs Mukunye Isaac & 5 others, HCCS NO.63 of 2013 court stated that: - It is now settled that a purchaser has the duty to do proper and diligent search on the land the subject of the purchase, not only by searching the register but

to conduct a physical visit and inquire from the occupants as to what their interest in the land and any third party claims.

Plaintiffs' Counsel submitted that there is uncontroverted evidence on record that the plaintiffs took possession of the suit land in 2003 as confirmed by PEx1 executed in May 2009 in which the 1st defendant recognized that the plaintiffs were in physical possession of the suit land and also DW1, Mubiru Sulaiman admitted during cross examination that he had sold the land to the first plaintiff before he mortgaged the land to the 2nd defendant. She also submitted that while leading their evidence, PW1 and PW2 confirmed to this honorable court the same thing.

The 2nd defendant did not lead adduce any evidence in court to support its allegation that a search was carried out on the land before it was mortgaged because had they carried out a physical search they would have found about the presence of the plaintiffs on the land.

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PW1 and the 1st defendant admitted that the plaintiffs were in occupation of the land and it is also undisputed and evidenced by the sale agreement PEX2, that the 1st defendant sold the suit land to the Plaintiffs before he fraudulently mortgaged the Suit land to the 2nd defendant.

That the 1st Defendant testified during examination in chief that in 2010 he got a loan from the 2nd defendant using his certificate of title as security for the loan and the 1st plaintiff testified during examination in chief that the 1st defendant informed him that he had mortgaged the land to the 2nd defendant.

Therefore, since no evidence was led by the 2nd Defendant to prove that they undertook due diligence by visiting the Suit land before accepting it as security for the 1st Defendant's loan the 2nd defendant was negligent its duty and their lapse occasioned an injustice to the Plaintiffs. This Court finds therefore that the plaint discloses a cause of action against the 2nd defendant.

Issue 3: Whether the Defendant acted fraudulently in order to defeat the Plaintiffs claim?

The Plaintiffs' counsel submitted that the defendants jointly and severally acted fraudulently to defeat the Plaintiffs interest. As cited by the plaintiffs, in Katarikawe vs Katwiremu [1975] HCB 210 at 214, fraud, though not defined under the Registration of Titles Act, covers dishonest dealings in Land.

In Fredrick J.K Zaabwe Vs Orient Bank & Ors SCCA No. 04/2006, Katureebe J.S.C defining fraud referred to the Black's Law Dictionary 6th Edition, Pg. 600 and stated that;

"it is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable things belonging to him or to surrender a legal right. a false representation of a matter of fact, whether by word or by conduct, by false or misleading allegations, or by concealment of that which deceives another so that he shall act upon it to his legal injury. Anything calculated to deceive another so that he shall act upon it to his legal injury. anything calculated to deceive , whether by a single act or combination , or by suppression of truth , or suggestion of what is false , whether it is by direct falsehood or innuendo by speech or silence , word of mouth , or look or gesture... a generic term, embracing all multifarious means which human ingenuity can devise and which are sorted to by one individual to get an

advantage over another by false suggestions or by suppression of truth, and includes all surprise , trick , cunning , dissembling and any unfair way by which another is cheated , dissembling. “Bad faith” and “fraud” are synonymous and also synonymous of dishonesty, infidelity, faithfulness, perfidy, unfairness etc... ”

The plaintiffs’ counsel submitted that the pleaded fraud against the defendants and stated the particulars of the fraud as; -

- a) the first defendant deliberately refusing to accept payment of the purchase price
- b) the first defendant mortgaging the suit land with the second defendant in total disregard of the plaintiff’s kibanja interest and sale transaction
- c) the second defendant taking the suit land as security for a mortgage without verifying its ownership and/or possession
- d) the second defendant registering as both mortgagor and registered proprietors on the suit property together with the third and fourth defendant
- e) the second defendant purporting to foreclose a mortgage without verifying its authenticity
- f) The third and fourth defendants purchasing the suit land without carrying out proper due diligence

Section 10 of the Contracts Act provides that a contract whose subject matter is above twenty-five currency points (five hundred Thousands Uganda shillings) must be in writing.

In **HJK Trading Limited V Ahmed Zziwa Civil Suit No. 415 OF 2018** the court ruled that an oral contract above 500,000 Uganda shillings is not enforceable in law

a contract above UGX 500,000/= (Uganda shillings Five Hundred Thousand) must be in writing.

During trial, the 3rd Defendant, Doreen Magera (DW2) stated that in her witness statement that she and the 4th defendant bought the suit land at UGX. 100,000,000/= (one hundred million shillings). No sale agreement or a receipt was exhibited in court to prove the sale but when asked to produce it in court, she stated that she had left it at home. The court requested for its production which was never done and DW3 feigned ignorance and failed to produce it. Consequently, no evidence was adduced in court to corroborate the statements defendants in respect to the sale between the Plaintiffs and the 3rd and 4th Defendants.

That the 3rd and 4th defendant alleged to have bought the suit land at Uganda Shillings One Hundred Million Shillings which they paid partly through the bank but no bank statement was exhibited and similarly, the 1st Defendant whom they allege to have bought the land from him did not present any proof payment to him. The absence of the sale agreement may point to the absence of the same. Given the purported amounts of the consideration that was paid by the 3rd and 4th defendants, there ought to have been a formal agreement executed in respect to the purchase of the suit land.

During the hearing, there were gross inconsistencies in the defendants statements, pleadings and evidence and cations in this regard are on all four with justice Katureebe's elucidation of fraud in the case of **Fredrick J.K Zaabwe Vs Orient Bank & Ors , Supra** as anything calculated to deceive , whether by a single act or combination , or by suppression of truth, or suggestion of what is false, whether it is by direct falsehoods or innuendo by speech or silent , word of mouth , or look or gesture and thus the failure to produce a sale agreement and proof of payment of the

loan so as to facilitate release of the title coupled with the gross contradictions and misrepresentation highlighted throughout the course of the trial are proof that the defendants jointly and severally acted fraudulently to defeat the Plaintiff's interest in the suit land.

The plaintiff's counsel submitted that the transfer form (PE2) itself is a nullity/forgery and was not witnessed in accordance with the law therefor using it to transfer the suit land to the 3rd and 4th defendants' names amounted to fraud.

Section 147(1)(a) of the Registration of Titles Act Cap.230 provides that instruments signed by any person and attested by one witness shall be held to be duly executed when witnessed by any officer in the service of the government of Uganda or Kenya; a justice of peace; a notary public; a bank manager; a minister of religion authorized to celebrate marriages, a medical practitioner; any other person authorized by the minister by statutory instrument.

CHS sent 29/10/21
In respect to the above provision, counsel submitted that the person who witnessed on behalf of the 3rd defendant noted that he was a researcher while and the one that witnessed for the 1st defendant (vendor) was unknown. He added that the absence of a sales agreement in respect to the suit land and the non-compliance with the law in signing the transfer forms mars the defendants' title with fraud.

The Plaintiff's counsel submitted that the 1st defendant mortgaged and purportedly sold the suit land to the 3rd and 4th defendants well that he had already sold the suit land to the Plaintiffs. That PW1. Reverend Kabanda testified that in May, 2009, the Plaintiffs purchased the Mailo interest in the suit land from the 1st defendant as was

evidenced by a land sale agreement (PEX2) which also provided under clauses 2 and 3 that the plaintiffs were already in occupation of the suit land as lawful occupants.

1st Defendant Sulaiman Mubiru (DW1) admitted under paragraphs 9 and 11 of his witness statement that he sold the suit land to the plaintiffs in 2009 who took possession of the suit land and also admitted under paragraph 13 of his witness statement that he mortgaged the suit land to the 2nd defendant in 2010 without the Plaintiffs' knowledge and consent yet he had lost the right of ownership in the suit land and could not further deal with it. Counsel concluded on this issue by praying for the cancellation of the title of the defendants in accordance with sections 64 and 177 of the Registration of Titles Act.

The 2nd defendant submitted that DW3 (Asio Olive) during examination in chief testified that the 2nd defendants carried out due diligence of the security and in the absence of any encumbrance and third party claims approved his loan. That as the registered proprietor, he mortgaged the land and no evidence was led by the plaintiffs to prove that the 2nd defendant had knowledge of the plaintiffs' purported interest at the time of registration of the mortgage. no evidence was adduced by the plaintiffs to prove that the 2nd defendant was registered both as the proprietor and the mortgagor on the suit land title as the plaintiffs had alleged.

He also added that no evidence was adduced by the plaintiffs to prove that the 2nd defendant foreclosed on the mortgage as they had alleged in their submission. He further submitted that the 2nd defendants released the mortgage and never sold the suit land to the 3rd and the 4th defendants. That DW1 during cross examination state that he had notified the plaintiffs about the mortgage who did nothing to protect their interest in the land.

That they never lodged any caveat on the land to give notice to the whole world that the land had third party interest. Counsel submitted that the plaintiffs acquiesced their right to the suit land when they didn't object to the 1st defendant's idea of mortgaging the suit land to the 2nd defendant by not lodging a caveat as it is the best way to protect one's interest in land and no evidence was led to show that the plaintiffs lodged a caveat to protect their interest in the suit land.

In *Makula International Ltd (1982) HCB 11* it was held that; '*an illegality once brought to the attention of Court overrides all questions of pleading including admissions*'.

From the current facts, the defendants breached a statutory rule that all agreements/ contracts above UGX 500,000/= (Uganda shillings Five Hundred Thousand) must be in writing and cannot be enforceable unless if written. The also contravened the lawful requirements necessary for executing instruments as the law requires that that instruments signed by any person and attested by one witness shall be held to be dully executed when witnessed by any officer in the service of the government of Uganda or Kenya; a justice of peace; a notary public; a bank manager; a minister of religion authorized to celebrate marriages, a medical practitioner; any other person authorized by the minister by statutory instrument. the defendants used a researcher instead of any prescribe persons.

Thirdly, the 1st and the 2nd defendants executed the mortgage in respect to the suit land after the 1st defendant had sold the land to the plaintiffs and they were evening possession which the 2nd defendants would have noticed had the 2nd defendant carried due diligence.

In respect to the purchase by the 3rd and 4th defendants, during cross examination the 3rd defendant stated that she got to know about the mortgage offered to be bought through a friend who worked in a bank because the mortgage was never advertised by the bank before the purchase as required by the Regulation of the Mortgage Regulations.

The Regulation requires: A mortgagor to notify the mortgagee in writing of any change of address of the mortgagor. The regulation is mandatory. Under Regulation 7 (2) – an act or proceeding taken by the mortgagee shall not be affected by the mortgagor's claim of a subsequent change in address that was not notified to the mortgagee.

Under the Mortgage Act and Regulations, the mortgagee may upon fulfilling the foregoing conditions already referred to in this judgment, proceed to exercise its power to sell the mortgaged property at any time thereafter and at any price obtainable in the market by public auction which was done in the present case- Refer to *Section. 20 (1), section 28 (1) (a) and (d) and Section 13 of the Mortgage Act and Regulations 8(1) of the Mortgage Regulations.*

This court finds that there was no such advertisement for the sale of sale at the end of the 30 days after the advertisement for sale. The sale was conducted earlier than the 30 days from the date of the first advertisement and no single advertisement was conducted

This court also found that the defendants dealt in the suit property with intent to defraud the plaintiffs of their proprietary rights in the suit land who are the lawful occupants and owners of the suit land through the defendants' dishonest actions.

Issue 4: Whether the 1st Defendant acted lawfully in mortgaging the suit land to the 2nd Defendant

The fourth issue for determination before this court was whether the first defendant lawfully mortgaged the suit land to the second Defendant. Counsel for the plaintiffs submitted that the 1st defendant fraudulently mortgaged the suit land to the 2nd defendant who also fraudulently took the same a security without carrying out proper due diligence. she submitted that Asio Olive (DW3), during her cross-examination admitted to the fact that she did not participate in the process of mortgaging the land, she was not on the team that conducted the search and that she nether had a search report in respect to the land survey nor a boundary opening report to prove that any physical search was ever conducted on the suit land.

Counsel also submitted that DW3 never met the 1st defendant and never submitted any document in evidence to prove that the 2nd defendant carried due diligence before advancing the 1st defendant with the purported loan facility. I agree with the Plaintiffs' counsel in stating that DW3's evidence is not helpful to this court as most of the information she gave this court is hearsay which is inadmissible in Courts of law as per the rules of evidence and thus dispatch it off the record.

From the testimonies of PW1's and the 1st defendant, it is undisputed that the plaintiffs were in occupation of the suit land before it was mortgaged to the 2nd defendant. This fact is evidenced by the by sale agreement PEX2, in which the 1st

defendant sold the suit land to the Plaintiffs before he fraudulently mortgaged the Suitland to the 2nd defendant.

Section 4 of the Mortgage Act imposes a duty on the mortgagor and the mortgagee to act honestly and in good faith, and in particular disclose all relevant information relating to the mortgage. That the defendants relegated this duty and continued to deal in the land which extended to transferring it to the 3rd and 4th defendants without informing the Plaintiffs who were in possession since 2003. Counsel prayed that the court finds that the suit land was mortgaged unlawfully to the 2nd defendants.

Additionally, counsel submitted that no evidence was led by the 2nd Defendant to prove that they visited the Suit land before taking it as security for the 1st Defendant's loan because had they done so, then they would have established that the Plaintiffs were in possession of the suit land and not have taken it as security for the loan to the first Defendant.

He further submitted that **Section 115 of the Registration of Titles Act** provides that *the proprietor of any land under the operation of this Act may mortgage that land by signing a mortgage of the land*. The plaintiffs neither adduced any evidence to show that the 1st defendant was not the registered proprietor of the suit land nor adduced any evidence that shows that the land was registered in the Plaintiff's name.

Section 3 (1) of the Mortgage Act (supra) provides that a person may by any instrument in the prescribed form, mortgage his interest in land to secure a debt. Under the 2nd Schedule of the Mortgage Regulation, 2012,

In **Eco Bank Uganda Ltd v Kakooza (HCT-00-LD-OS-2015/) [2016] UGHCLD 3 (22 April, 2016)**; court stated that: -

*the prescribed form requires the signatures of both the mortgagor and the mortgagee and for their respective witnesses. The failure to sign is a fatal defect. This position was reaffirmed in the case of **Diana Nansikombi Bbosa vs. Stanbic Bank (U) Ltd., HCCS No. 406 of 2014** and also in the case of **Alice Okiror & A'nor vs. Global Capital Save, 2004 Ltd.***

In both cases the court held that where a mortgage deed doubles as a loan agreement, both parties to it need to properly executed it to make it valid, and that the signature of the mortgagee is necessary.

I find no reason to depart from the above principles and I do opine that the failure to sign by the defendants' legally recognized witnesses rendered the mortgage invalid. Therefore, the defendant bank cannot derive any powers from an invalid mortgage to sell the suit property or even register it on the title as an encumbrance.

Issue 5: Whether the 3rd and 4th Defendants are Bona fide purchasers for value

*Bona fide purchaser for valuable consideration of land derives protection under section 181 of the RTA. The term is defined in **Black's Law Dictionary 8th Edition at page 1271** to mean:*

"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."

Thus a *bona fide* purchaser for valuable consideration of land derives protection under **section 181 of the RTA**. 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).

According to Hajji Nasser Kitende vs Vithalidas Haridas & Co. Ltd Civil Appeal No. 84 of 2003, Mukasa Kikonyogo DCJ citing Hannington Njuki vs Nyanzi held that for a purchaser to rely on the bonafide doctrine he must prove that: -

- a) *He holds a certificate of title.*
- b) *He purchased the property in good faith.*
- c) *He had no knowledge of the fraud.*
- d) *He purchased for valuable consideration.*
- e) *He vendors had apparent valid title.*
- f) *He purchased without notice of any fraud.*
- g) *He was not party to the fraud*

After careful consideration of the law and the facts and ably resolving issues 3 and 4 to the effect that the defendants dealt in the suit land fraudulent to deprive the plaintiffs of their right in the land, the 3rd and 4th defendants are not bona fide purchasers for value with notice.

Issue 6: Remedies

The Plaintiffs prayed for order for cancellation of the 3rd and 4th Defendants from the Certificate of Title, an order releasing the Suit land from all encumbrances and an order to register the Plaintiffs as the Proprietors of the Suit land ,

As discussed earlier, the inconsistencies in the testimonies of the defendants are very grave and its pertinent that they should not be swept under the carpet. The Defendants did not produce evidence to the satisfaction of this court as to how the title was originally issued to them and proof of payment of valuable consideration or that they are and as a bona fide purchaser for value. One must come to equity with clean hands. Lack of documents of sale or transfer from the 1st defendant to the 3rd and 4th defendants shows that there was something fishy with regards to the purported purchase and transfer of the suit land.

In the premises, this court finds and hold that the 3rd and 4th Defendants obtained the title fraudulently and hereby orders the cancellation of their names from the title. As previous kibanja owners and having acquired an equitable interest in the suit land through part payment, I therefore do hereby decree that the plaintiffs are to remain in quiet possession and occupation of the suit land as bona fide occupants.

With regard to the other prayers by the plaintiffs for general damages, the position of the law in *James Fredrick Nsubuga vs. Attorney General, HCCS No. 13 of 1993*, 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. Further, the Supreme Court in *Robert Coussens vs. Attorney General, SCCA No. 08 of 1999*, held that; "*The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered....*"

In the instant case, the facts do not support the Plaintiffs prayer for punitive damages. However, given the evidence that the actions of the Defendants caused

inconvenience and suffering to the Plaintiffs defendants and in light of all the circumstances of this case, I would consider Ug. Shs.40,000,0000/= to be fair and adequate and award the same as general damages.

With regard to costs, these follow the event under Section 27(2) of the Civil Procedure Act and the costs of the suit are awarded to the Plaintiffs.

In summary and for avoidance of doubt, and in the exercise of this Court's powers under section 98 of the civil procedure Act and Section 33 of the Judicature Act, Judgment is made in favor of the plaintiffs with the following orders: -

- Consent
29/12/21*
- (a) The Commissioner Land Registration is ordered to cancel the names of the 3rd and 4th defendants from the certificate of title for the land comprised in Kyadondo Block 189 Plot 217 land at Seeta measuring approximately 0.479 Hectares to revert back to the names of the 1st Defendant and to hold the said certificate of title subject to the plaintiffs fulfilling the orders of this court.
 - (b) A declaration that the Plaintiffs are the bonafide occupants of the suit land. However, they are to complete the purchase price of the mailo interest by paying the agreed balance of Ug. Shs 35,000,000 to the 1st Defendant within 8 months from this order. It is only then that the Commissioner Land Registration is ordered to have the certificate of title registered into the names of the Plaintiffs.
 - (c) The 1st defendant is ordered to accept the balance of the purchase price from the Plaintiffs and to sign the transfer forms in favor for the plaintiffs once the balance of the payment of the purchase price is fully effected.
 - (d) The four defendants to jointly pay to the plaintiffs' general damages of UGX. 40,000,000/= (Uganda Shillings Forty Million Shillings Only.)
 - (e) Interest on the general damages at the 15% per annum from the date of Judgment until payment in full.

(f) Costs of the suit are awarded to the plaintiffs

It is so ordered.



CORNELIA KAKOOZA SABIITI
JUDGE

Date: 29th October 2021