

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

HCCS NO. 531 OF 2018

5 LULE ISRAEL KYAZZE ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. MUKALAZI MUHAMMADI
2. ALIS MASEMBE
3. KALIBALA JAMES KANYEREZI
- 10 4. RUTH NAKILIBA
5. KALANZI GODFREY
6. THE COMMISSIONER, LAND REGISTRATION ::::::::::::::: DEFENDANTS.

JUDGMENT (EXPARTE)

Introduction:

15 The plaintiff, Mr. Israel Lule Kyazze is a son and customary heir of the late late Yelemiya Kyazze. He instituted this suit against the defendants for among others, declaratory orders that the suit land is part of the estate of his father's estate and that he was a beneficiary of the said estate.

It is also the plaintiff's case that late Yelemiya Kyazze was the owner of the suit land comprised in **Bulemezi Block 402** originally **Plot 28 now plots 635, 634 and 606 at Besaniya and**
20 **Kamuli**, having acquired the same as a gift *intervivos* from the late Samwiri Mukasa, who was the registered proprietor. That the plaintiff's father died before the said land was transferred into his names although he was in the process of doing the same.

That the 1st defendant was subsequently illegally registered as the owner of the suit land, illegally subdivided it and accordingly he sought an order of damages, interest and costs of the suit.

25 The 2nd- 5th defendants who are the administrators of the estate of the late Samwiri Mukasa transferred the suit land to the 1st defendant who subdivided it into three different plots, thus creating certificates of titles on the disputed land, without consent of the plaintiff/beneficiary.

The defendants were duly served with court process but never filed any defence, hence the matter proceeded *exparte*.

Issues:

- 1) *Whether the suit property belongs to the late YELEMIYA KYAZZE.*
- 2) *Whether the defendants fraudulently dealt in the estate of the late YELEMIYA KYAZZE?*
- 5 3) *What are the remedies available to the parties?*

Issue one.

Whether the suit property belongs to the estate of the late Yelemiya Kyazze?

Analysis of the law:

10 By virtue of **section 101 (1) of Evidence Act, Cap. 6**, whoever desires court to give judgment to any legal right or liability depending on the existence of any facts he/she asserts must prove that those facts exist. **(George William Kakoma v Attorney General [2010] HCB 1 at page 78).**

15 The burden of proof lies therefore with the plaintiff who has the duty to furnish evidence whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. **(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.**

In this instance, the plaintiff had the burden to prove not only how him and his family had acquired the suit land but also that the transactions between the defendants on the suit land were tainted with fraud, committed directly or indirectly by them or with their full knowledge.

20 The plaintiff was required to prove on a balance of probabilities that indeed the suit land belonged to his father, the late Yelemiya Kyazze, having acquired it by way of a gift *intervivos* from the late Samwiri Mukasa who was at the time the registered proprietor of the same.

25 At common law the essential requisites of a valid gift are capacity of donor, intention of donor to make gift, absence of consideration; completed delivery to or for the donee, and acceptance of gift by the donee.

Oral words coupled with delivery and gift by deed are the only modes available at common law for an *intervivos* grant of a gift. **(Ovoya Poli vs Wakunga, Civil Appeal No. 0013 of 2014).**

30 In aligning the principles with the present case however, there was nothing from the record to prove that the late Kyazze had acquired the land as a gift or to prove how it had been transferred to him from his late father.

Be that as it may, a person in possession or occupation of land who remains unchallenged for more than 12 years acquires equitable interest protectable under **section 29(2)(a) of the Land Act, Cap.227.**

5 Under **section 29 (5)** of the same Act, any person who acquires interest of the person qualified to be a *bonafide* occupant is herself taken to be a *bonafide* occupant. The protection of the law therefore equally applied to him or her. The plaintiff therefore needed to satisfy court that by virtue of those provisions, he had rights in equity which entitled him to protection.

Analysis of the plaintiff's evidence:

10 **PW1**, Lule Israel Kyazze, the 1st plaintiff told court that he was son and customary heir to Yelemiya Kyazze owner of 50 acres of land comprised in **Bulemezi Block 402, plots 634, 635 and 605** at Besaniya and Kamuli, having acquired the same as a gift *intervivos* from the late Samwiri Mukasa, the registered proprietor, whose land he was caretaking.

That however the late Yelemiya Kyazze died before the suit land was transferred into his names.

15 **PW3** Kalyesubula Yekosofati, the LC Chairperson in support of the plaintiff's contention stated that he had grown up in the area, Kyetume village, Nakaseta Parish Nakaseke District from around the 1975..

20 Having been chairman of Kyetume village since 1983 therefore knew the family of the late Yelemiya Kyazze; and that the deceased and his late wife Nabatanzi had been the owners of the suit land, who had resided and cultivated different crops thereon and were also buried on that land.

That the late Yelemiya Kyazze prior to his death had given away 2 acres of the suit land to the Kyetume church, situated on that land. In addition, another 3 acres of the said land were also given away by the late Yelemiya Kyazze to Kyetume Tokyika Primary School. **PW3** was member of the School Management committee.

25 He further testified that the 1st defendant, Mukalazi Muhammadi who had fraudulently transferred the land in his names, had brought surveyors on the suit land to open boundaries but dismissed them as he knew the land belonged to the plaintiff, whose family had always been in occupation.

30 **PExh 4** was the letter dated 13th April, 2015 by **PW3**. He testified that he got to know about the dispute concerning **plot 28, block 402**, covering an area of 50 acres.

The plaintiff had reported to him as the LC1 Chairperson of the area, the fraudulent dealings on the suit land which had been committed by the defendants, and which he had also forwarded to Nakaseke District Police Headquarters.

- 5 **PW2** James Sewanyana, a grandson to Samwiri Mukasa confirmed the occupation, possession and ownership of the suit land by the plaintiff's family and the fact that the said land had been part of the estate of his late grandfather.

During the *locus* visit conducted by this court it was clear that the plaintiff and his family had been in occupation of the land for several years. But the size of the land which they occupied was not known, since no survey report was availed to court.

- 10 What could be readily established was that the suit land had a house which the plaintiff claimed he had constructed in 1988. This was the house where he and his family were residing.

Next to it was a grave yard, where his late father Yelemiya Kyazze and his wife had been buried. Court also confirmed that indeed there was a church as well as a school on the land donated by the deceased.

- 15 That evidence was not challenged. It was enough to prove possession and occupation and that therefore the plaintiff's family had equitable interest in the suit land, which was protectable under the law.

Bearing that in mind, any third party accordingly lacked authority to deal with the estate of the Yelemiya Kyazze or make any transfer the ownership of the suit land into his names and transfer
20 the land as he did into his names or those of the 2nd and 5th defendants.

Issue 2 and 3:

Whether the defendants fraudulently dealt with the estate of the late YELEMIYA KYAZZE thereby subdividing the suit land

- 25 In ***Nabanoba Desiranta and Another Vs Kayiwa Joseph and Another supra*** court relied on the case of ***Fredrick Zabwe Vs Orient Bank Ltd & Others, SCCA No, 4 of 2006 Hon Bart Jatureebe JSC*** which cited Black's Law Dictionary to define fraud.

This refers to acting with intent to defraud, to act lawfully and with the specific intent to deliver or cheat, ordinarily for the purpose of either causing some financial loss to another or bringing about some final gain to oneself"

Fraud must be attributed to the transferor, attributed either directly or by necessary implication. The transferor must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.

5 It is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. **KAMPALA BOTTLERS LTD VS DAMANICO (U) LTD SCCA NO. 22 OF 1992.**

A cause of action in fraud must be specifically pleaded, particulars thereof provided and the claim proved at a higher balance of probabilities. (See: **Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC).**)

10 Thus the party faced with pleadings founded in fraud would then know the specific elements of fraud that it needs to rebut or disprove in its defence. (See: **Fam International Ltd & Another vs. Mohamed Hamird El-Fatih Civil Appeal No. 16 of 1993 (SC).**)

The particulars of fraud as pleaded in this case were:

- 15 a) *Refusal and or failure by the administrators of the estate of the late Samwiri to transfer the certificate of title to the beneficiaries of the estate of the late Yelemiya Kyazze;*
- b) *The 1st defendant's action of sub dividing the land into three different plots and creating certificates of title illegally without consent of the plaintiff/beneficiary;*
- 20 c) *The 1st defendant's registration of his names onto the 3 different certificates of title illegally and without any claim of right;*
- d) *The 2nd-5th defendants transfer of the suit land to the 1st defendant yet the same belongs to estate of the late Yelemiya Kyazze.*

25

It was the plaintiff's contention that the administrators of the estate of the late Samwiri refused to transfer the certificate of title to the beneficiaries of the estate of the late Yelemiya Kyazze.

Furthermore, that the 1st defendant had constructive or actual notice of the plaintiff's interest and therefore the 1st defendant's title was affected by the said interest and as such that knowledge ought to be imputed as fraud. That all the defendants were aware or ought to know that the plaintiff was at all time in occupation of the suit land.

30

The plaintiff testifying as **PW1** claimed that it was around 2014 that he had looked for the administrators of the estate of the late Samwiri Mukasa to effect the transfer into his names.

That it was not until 2018 that the plaintiff learnt about the 1st defendant's registration on the title and that the defendants had failed and/or refused to hand over the certificate that he had resorted to seeking legal redress.

5 Counsel submitted correctly so, that **section 25 of the Succession Act Cap 162** states that all property in an intestate devolves upon the personal representative of the deceased upon trust for those persons entitled to such property.

10 The import of the above section is that upon one's death, all the estate is vested in the administrator to ensure that all beneficiaries acquire their interests. That no evidence was adduced to prove that the 1st defendant first obtained letters of administration to transfer the land into his names, which amounted to intermeddling with the estate of the late Yelemiya Kyazze.

Generally, the law as it stands is that a person who purchase an estate which he knows to be in occupation of another person other than the vendor is not a *bonafide* purchaser without notice. (**See UPTC Vs Abraham Katumba (1997) IV KARL 103.**)

15 A prospective buyer for him or her to qualify as bonafide fide purchaser for value without notice ought to make reasonable inquires of the persons in possession as such his ignorance or negligence formed particulars of fraud. (**See Taylor Vs Stibbert (1803-13) AIER 432.**)

20 A court would not therefore be inclined to uphold any transaction intended to deprive the beneficiaries of the estate of their rightful interest in the land. As duly confirmed by **PW3**, none of the defendants was a resident in the area and none had filed any defence against the allegations of fraud.

25 A party who does not enter appearance and file WSD is deemed to have admitted the allegations in the plaint (**Smith vs Auto Electric Services Ltd (1951) 24 KLR22 K**). Such admission is constructive. **See: Asuman B Kiwala versus Chief Registrar of Titles HC MA NO. 106/2004 (2004) KALR – pages 518 – 519.**

30 Thus where an interlocutory judgment is entered in favour of the plaintiff, the question of liability of the defendant ceases to be in issue. What remains would be the assessment of the quantum of damages. (**Haji Asuman Mutekanga vs Equator Growers (U) Ltd SCCA No. 07/1995**).

Given the above circumstances, did the suit therefore merit the reliefs sought?

The plaintiff in the present case sought the following reliefs:

5 a) A declaration that the land comprised in **Bulemezi Block 402 plots 635, 634, and 605** land at Besaniya and Kamuli of approximately 50 acres is part of the estate of the late Yeremiya Kyazze;

b) A declaration that the plaintiff is a beneficiary of the estate of late Yeremiya Kyazze;

10 c) A declaration that the 1st defendant illegally registered the certificate of title of the suit land into his names;

d) A declaration that the 1st defendant illegally mutated into 3 different **plots 635, 634, and 605**;

15 e) A permanent injunction restraining the 1st defendant from effecting any transfers or any further transactions in respect of any portion of the suit land;

f) An order for cancellation of certificates of title issued out of illegal and fraudulent transactions effected by the defendants;

20 g) General damages;

h) Costs of the suit; and

25 i) Interest on (g) and (h)

Resolution by court:

30 I have carefully perused the evidence on record, the pleadings and submissions by counsel. As stated earlier, it is not in doubt that the plaintiff has some equitable interest in the suit land as one of the children and beneficiaries under the estate, having enjoyed uninterrupted occupation and utilization by his family and without any evidence of adverse possession.

The land had been surveyed according **PW3** however no survey report was presented to court. The plaintiff could not even recall when the survey had been conducted. The evidence therefore as earlier noted, fell short of giving an indication of the actual size of the area claimed by him as a beneficiary or for the entire estate for that matter.

35 Furthermore, no area schedule or copies of certificates had been secured from the land office to prove the assertion that the three subdivisions had been made out of what originally constituted

plot 28, leading to the creation of the certificates titles for **plots 635, 634 and 605**, which he wishes this court to cancel. The evidence fails to show who actually caused the subdivisions or created the three titles to the suit land, if at all it happened.

5 Court also noted some contradictions between the evidence of **PW2 and PW3**. The evidence by **PW3**, the LC Chairperson on the one hand during the locus visit was that **PW2** was a grand child of the MereKizaddeki, the original owner of the land.

On the other hand however **PW2** during trial had informed court that he was a son of MereKizaddeki, a son of the late Samwiri Mukasa, who, from the plaintiff's evidence, had been the actual former registered owner of the land.

10 What redeemed the plaintiff's claim of interest was however contained in *paragraph 6* of his statement. This is what **PW2** had to say:

15 *It is true that my grandfather gave the plaintiff's father 50 acres of land comprised in Bulemeezi Block 402 originally plot 28 and now plots 634,635, and 605 at Besaniya and Kamuli because he was the caretaker of the mailoland on behalf of my late grandfather.*

The above helped to support the plaintiff's assertion that the family of Kyazze had been in occupation the land for years, as indeed court was able to confirm from its visit.

Nonetheless other serious issues came up, which duly affected some of the prayers which the sought from court.

20 **PW1** stated that around 2014 he had looked for the administrators of the estate of the late Samwiri Mukasa to effect the transfer into his names. One Ashe Masembe Sendawula, whom he got to learn was the customary heir of Samwiri Mukasa indeed acknowledged the interest of Yelemiya Kyazze, and assured **PW1** that the suit land had no encumbrances.

25 **PW1** thereupon agreed to part with **Ugx 3,000,000/=** to facilitate the process of the transfer of title into his names. He presented transfer documents as his proof that Ashe Masembe had even signed the transfer form, which transfer however was never effected.

PEXh 2(a) was a transfer form signed by A.S Masembe the purported heir to the registered owner. The rest of the information on that form, other than the block number and plot number and signatures of both parties, were all missing.

30 Equally, **PEXh 2(b) to 2 (d) (application for consent to transfer)** had only the signatures of A.S Masembe and the plaintiff (**PW1**). It lacked the rest of the details supporting the transfer.

Contradictions in the plaintiff's evidence:

This court identified a number of inconsistencies and contradictions some of which the plaintiff could not explain. These touched mainly on his request to court to direct the cancellation the certificates of title and have the same transferred in the estate of the late Yelemiya Kyazze.

- 5 Court in the first place failed to establish whether or not the person who signed the transfer documents indeed had any biological or other relationship with the late Samwiri Mukasa, the original owner of the land.

A.S Masembe had not even been made party to this suit. But more importantly, in the unlikely event that he was indeed heir to Samwiri Mukasa then that alone would not have been enough
10 for him to commit the entire estate to effect the transfer, as A.S Masembe was evidently not one of the administrators of that estate.

Court also found that during the visit at *locus* when asked about the name of the person who had signed his transfer form, the plaintiff mentioned another name, one Muganzi Awongerere, who according to him was conversant with the affairs of the suit land, and had signed the transfer
15 form, in his capacity as the heir of the former owner. (*Refer to page 4 of the record of proceedings for the locus visit*).

These could not be reconciled with the rest of the plaintiff's assertions, as indeed that name never featured in his pleadings, or among those he had listed as the actual administrators of the estate of Samwiri Mukasa.

- 20 Secondly, although **PW2** confirmed that the plaintiff had paid the said sum of **Ugx 3,000,000/=** in both his presence and that of his brother David Masembe, no documentary evidence was presented to prove that such payments were made, and in their presence. **Annexure A** attached to the plaintiff's statement was a search report issued by the Luwero District Local Government, as at 25th November 2014. It was admitted as **PExh1**.

- 25 It shows that **Bulemeezi Block 402, plot 28** was registered in the names of the Administrator General, as the administrator of the estate under *Instrument No. BUK 80123* on 7th August, 2007. The office of Administrator General was not however made party to this suit nor was any witness from that office invited by the plaintiff to testify in court.

Such evidence would have helped to clarify on some critical issues which arose during the trial,
30 to fill in the gaps found in the plaintiff's evidence.

Court noted further that the 2nd-5th defendants had been sued as administrators of the late Samwiri Mukasa's estate. The plaintiff did not explain at what point in time the defendants had

taken over that role from the office of the Administrator General if at all they did. No letters of administration were availed to court to prove that the defendants had been duly appointed by this court to administer the estate.

5 Thirdly, and in addition to the above, it is not clear how and by whom the original **plot 28** as claimed had been subdivided to create the **plots 635, 634 and 605** as alleged, which plots the plaintiff claimed as his. This could have been addressed effectively if an area schedule had been provided as part of his evidence, to reflect any such changes.

10 Without any such information to substantiate his assertions, the connection between on the one hand what he claims was the original **plot 28** and **plots 635, 634 and 605**, on the other hand became unclear.

Fourthly, PW1 argued that he had also earlier paid **Ugx 1,000,000/=** to one of the administrators of the estate of the late Samwiri Mukasa by the names of Ellis Masembe who happens to be the 2nd defendant, who had also promised that he would have the title transferred in the plaintiffs' names..

15 **Annexure C** to the written statement was the handwritten acknowledgment in Luganda, of receipt of the said sum. It was admitted as **PExh 3**. The relevant details of the plot and block numbers were however missing. The persons who appended their signatures on that document were not called in as witnesses.

20 Also noted was the fact that the year appearing on the document had obliterations, creating uncertainty about the authenticity of the document and its authorship.

In light of the above factors therefore this court had no clear basis on which to determine whether or not the plaintiff could also support the assertion that he had attained legal interest in the suit land.

25 It was not proved that any subdivisions had been made and titles created on plots carved out on the suit land and registered in the names of the 1st defendant through the purported administrators; and if issued, whether or not therefore they were all defective. It could not, without any survey report, ascertain the actual size of the area claimed under his father's estate.

In the premises there was also doubt that the defendants had been the proper parties for him to sue.

30 From his evidence, it was the office of the Administrator General, which was administering the estate. It was not made party to the proceedings, and therefore was not given a fair chance to be

heard on matters relating to the management of the estate of the late Samwiri Mukasa, and in whose names the suit land had been registered.

Accordingly, the suit can only succeed in part.

In such circumstances as determined above, this court has inherent powers under **section 98 of the Civil Procedure Act, Cap. 71**, to grant, as I now hereby do, the following orders:

1) *the estate of the late Yelemiya Kyazze has an equitable interest in the estate of the Samwiri Mukasa for the land formerly comprised in plot 28, Block 402 Bulemeezi land at Besaniya and Kamuli (suit land);*

2) *the plaintiff is one of the beneficiaries of the estate of late Yelemiya Kyazze;*

3) *the office of the Administrator General, as the public trustee and in whose names the suit land had been registered as at 25th November, 2014 is directed by this court to present as required by law, an inventory of the estate of the late Samwiri Mukasa within thirty days after the delivery of this judgment, with particular reference to the land that constituted the original plot 28, Block 402 Bulemeezi, land at Besaniya and Kamuli which originally belonged to Samwiri Mukasa; and provide details of any subdivisions or subsequent transfers made thereon by that office;*

The plaintiff's claim is accordingly referred to the office of the Administrator General for the necessary actions.

No costs awarded.



Alexandra Nkonge Rugadya

Judge

22nd February, 2021