

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
HIGH COURT CIVIL SUIT NO. 673 OF 2018

SHEM MUKASA:.....PLAINTIFF

**(Administrator of the Estate
of Christopher Mukasa)**


VERSUS

RAPID ADVISORY LIMITED:.....RESPONDENT

BEFORE: HON: JUSTICE TADEO ASIIMWE

JUDGMENT

The plaintiff and 2 other co- administrators who have since passed on instituted this suit against the defendant for an order for cancellation of the defendants' names on the certificate of title for land comprised in Kyadodndo Block 237 Plot 2585 LRV 2357 folio 1 land at Busabala Kaazi valued at over 100,000,000/= (one hundred million shillings) and surrender the duplicate to the plaintiff, a permanent injunction, general damages and costs of the suit.



The plaintiffs case is that prior to the death of the late Christopher Kisitu, a one Lydia Kisitu Mukasa applied and was granted a management order for the estate of Christopher Mukasa and attempted to sell the suit land to treat her father. That attempted transaction was between Lydia Kisitu and the defendant. That it was discovered that the plaintiff's father had dealt with the suit land and therefore the transaction was to be rescinded and it was agreed that monies paid be refunded. That the plaintiff paid 100 million and was to pay the balance of 75,000,000/= later. That the said balance was paid but was rejected by the defendant. That the defendant acted through a one Mutesasira, a shareholder in the defendant company refused to accept the refund, took possession of the suit land and fraudulently transferred the suit land.

They listed the particulars of fraud as follows;-

1. Transferring the certificate of title of the suit land in to the names of the defendant yet there was no purchase of lands by the defendant.
2. Transferring the suit land in to the defendant's name yet it is not a beneficiary of the estate of Christopher Kisitu Mukasa.
3. Transferring the suit lands upon fraudulent removal of caveats on the land.

On the other hand, the defendant denied the allegations of the plaintiff and stated that the defendant lawfully purchased the suit land from a one late Lydia Kisitu who was managing the estate of her late father Christopher

Kisitu Mukasa during his life time. That the defendant subsequently signed a land sale agreement with the late Lydia Kisitu and subsequently transferred the suit land in to the defendant's names. That when the matter was pending before court, the defendants to the counter claim applied for a substitute page in the ministry of lands claiming that the quite page was lost. The defendant raised a counter claim for an order that the plaintiffs' processes for obtaining a substitute title in respect of the suit land is fraudulent, null and void, an order for cancellation of the substitute certificate of title obtained by the defendants to the counter claim, an order for cancellation of a special certificate of title issued over the suit land, an order for cancellation of any subdivisions created over the suit land, an order for payment of general damages for inconvenience, interest and costs of the counter claim.

The particulars of fraud were listed as follows;-

1. Applying for a substitute title by the defendants well aware that another title was in possession of the counter claimant.
2. Failure to notify the registered proprietor of the process of applying for substitute well aware that it is the registered owner.
3. Failure by the defendants to counterclaim to respect court orders and proceedings.
4. Attempting to register themselves as administrators on the property not belonging to the estate they were administering well aware that the matter is still in court.

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5. Acting dishonestly in their dealings in land office on the suit land
6. Falsely claiming that the white page was lost whereas not.

At scheduling the parties agreed on the following issues to be resolved.

1. Whether the transfer of the Suitland to the defendant was fraudulent and illegal
2. Whether the defendant lawfully purchased the property from Lydia Kisitu and obtained a transfer in to its name.
3. Whether the suit land constitutes the estate of the late Christopher Kisitu
4. Whether the plaintiff is entitled to the remedies sought.

At trial the plaintiffs were represented by Counsel Kavuma Kabenge while defendant was represented by Counsel Opio Moses and Mujulizi Jamil.

Both Counsel filed written submissions which I will consider in this judgement.

THE LAW

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

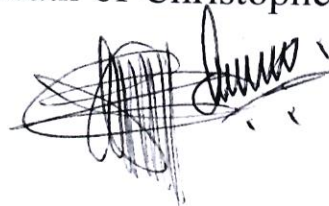
In Miller V Minister of Pensions [1947]2 ALL E R 372 Lord Denning stated:

“That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not.”

It is also the position of the Law that the evidential burden does not shift to the defendant unless there is cogent and credible evidence produced on the issue for determination.

In a bid to proof their case, the plaintiffs led evidence of one 1 witness while the defendant called one witnesses and court called one witness.

PW1 SHEM Mukasa in his witness statement testified that he is one of the administrators of the late Christopher Mukasa Kisitu. That the suit land formed part of the late Mukasa’s estate. That his sister Lydia Mukasa attempted to sell the suit property to the defendant after obtaining a management order. That however the transaction was impossible and the late Lydia promised to refund the 100,000,000/= that was paid by the defendant. That however after payment of 25m, the defendant declined to accept the balance of 75. That upon the death of Christopher Kisitu, the

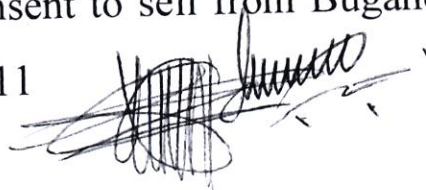
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management order had lapsed and therefor it was fraudulent for the defendant to go ahead and caused registration of the suit land in its names.

In cross-examination he confirmed that he was granted letters of Administration in the estate of Late Christopher Mukasa. That before death of his father, he had been declared a person of unsound mind and Lydia Kisitu got authority to manage the estate. That when the said Lydia Kisitu attempted to sale the suit land, he was not around but he managed to see the sale agreement but couldn't challenge her dealing with the defendant, rapid advisory because he came to know about the sale after her death. And that he never gave Lydia permission to sale the land.

On the other hand, DW1 LEONARD K MUTESAIRA, testified that he one of the directors in the defendant company and that a one Lydia Kisitu Byefura a sister the plaintiffs, and a then manager of the estate of the late Christopher Kisutu Mukasa who had been declared by the court as a person of sound mind approached the defendant that she needed to sell the suit land to treat his father. That she obtained a management order from court and a purchase agreement of the suit land was entered for a consideration of 344,000,000/=. That the court order of sale was obtained on the 25 of March 2010 where on they processed transfer forms in favour of the defendant.

That the said Lydia also applied for consent to sell from Buganda land board which was granted on 21st July 2011

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That after obtaining all the necessary documents, from Lydia Kisitu, they eventually transferred the suit land in to the defendant's names on 12th march 2012.

In cross examination the defendant confirmed that he is a shareholder in the Defendant Company and a Managing Director holding 60% of the shares. That Lydia Kisitu came to him selling the family land to get money to carter for a mentally sick father.

She needed money to fight for her father's property as well as pay his medical bills. That his company bought the land from Christopher Mukasa, managed by the daughter with a Court order with the assistance of the lawyers. He confirmed that the sale order came after the sale agreement and by 13th May 2009, when she signed the agreement she was not registered on the title.

To prove a counter claim. DW1 stated that he is one of the directors of the counter claimant and the counter claimant is the registered proprietor of the suit land having been registered as a proprietor following a purchase from a one Lydia Byefula Mukasa Kisitu who had both a management order and a specific order to sale the property. That the counter claimant developed the suit land and the counter defendant fraudulently applied to substitute the white page in their names claiming that the white page was lost and yet was available. That they consequently were registered on title as administrators fraudulently. That the process and decision to apply for



a substitute certificate of title by the defendant to this counter claim was fraudulent.

In cross-examination he confirmed to this court that he participated in the creation of the substitute title by the land office. He further stated that he had no idea of what the land office did. That he does not know who moved the office to create a sub title.

RESOLUTION

Although the parties argued issues 1, 2, 3 & 4 separately, I shall resolve issue 1 alone, issue 2 & 3 together and issue 4 independently. However, it is important to first resolve the question of legality of the sale of a suit property before we can proceed to resolve issue of fraud.

I shall therefore resolve issues 2 and 3 first.

Issue 2: Whether the defendant lawfully purchased the property from Lydia Kisitu and obtained a transfer in to its name.

Issue 3: Whether the suit land constitutes the estate of the late Christopher Kisitu.

In this case, from the evidence on record it is clear that the suit land belonged to the estate of late Christopher Kisitu Mukasa originally. However, the late Christopher Kisitu Mukasa was adjudged a person of unsound mind vide a court order dated 22 August 2007. On the basis of

that court order, a one Lydia Kisitu was appointed manager of the estate of Christopher Kisitu Mukasa on the 17th day of October 2007 as per DE2. The sale transaction, DEX2 between the said Lydia Kisitu Mukasa and the defendant took place on the 16th of May 2009.

Section 2 of Administration of Estates of Persons of Unsound Mind Act, 1951 Chapter 155 The court may appoint a manager of the estate of a person of unsound mind on the application of a superintendent or other person in charge of a mental hospital, the commissioner of prisons or a relative of any such person of unsound mind

Section 4 of Administration of Estates of Persons of Unsound Mind Act, 1951 Chapter 155 states as follows;

(1) Where a manager has been appointed under section 3, the court may direct by the order of appointment, or by any subsequent order, that the manager shall have such general or special powers for the management of the estate as to the court may seem necessary and proper, regard being had to the nature of the property, whether movable or immovable, of which the estate may consist; except that—

(a) A manager so appointed shall not, without the special permission of the court—

(i) Mortgage, charge or transfer by sale, gift, surrender, exchange or otherwise, any immovable property of which the estate may consist;

(ii) Lease any such property for a term exceeding five years; or

(iii) Invest in any securities other than those authorised by the Trustees Act; and

(b) No manager may invest any funds belonging to the estate of which he or she is manager, in any company or undertaking in which he or she himself or herself has an interest nor shall he or she invest any such funds on the purchase of immovable property, without the prior consent of the court.

From the above law it is very clear that a manager of the estate of a person of unsound mind cannot sale any property of the estate without special permission from court. Therefore, management order does not function as special permission from court to sale. Such permission is the only basis that creates authority to sale.

In this case, the said Lydia Kisitu Mukasa as a manager of the estate of late Christopher Kisitu Mukasa obtained special permission/order from court to sale on the 25 of March 2010 as per DE5. Ideally, this court order was obtained after the sale had taken place in 2009 and the same cannot be said to function in retrospective.

When the suit land was sold, the seller, Lydia Kisitu on the 16th of May 2009 when she did not have power whatsoever to sale the suit land as she did not possess a court order to do so as the Law requires.

It is not surprising that Lydia Kisitu was registered as a manager over the estate of the late Christopher Kisitu Mukasa on the 13th of August 2009

and the order obtained subsequently giving her power to sale was never registered on title.

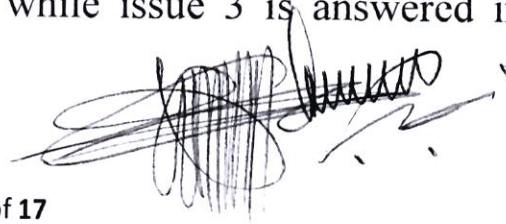
Suffice to say, by the time the sale took place the said Lydia Kisitu was not even registered on land title as a person authorized to sale. This the defendant ought to have known through a search as part of his due diligence. It was not enough to rely on a management order to purchase land from the estate of a person of unsound mind without following the law.

Worse still, the said Lydia Kisitu required authority from Buganda Land Board to sale. The said authority was granted on the 21st of July 2011 as per DEX7 about 2 years after the purported sale had taken place. This authority too cannot be said to function in retrospective.

The power of Lydia as a manager had lapsed on the death of her father and she could not continue to process or aid any transfers on the suit property as a manager but rather as an administrator after she had been registered on title.

In my view for all intents and purposes, the purported sale agreement between the said Lydia Kisitu and the defendant company cannot be said to have been lawful. In effect, the suit property definitely belongs to the estate of the late Christopher Kisitu Mukasa.

Issue 2 is answered in the negative while issue 3 is answered in the affirmative.

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Issue 1. Whether the transfer of the suit land to the defendant was fraudulent and illegal.

The plaintiffs pleaded particulars of fraud as follows; -

1. Transferring the certificate of title of the suit land in to the defendant yet there was no purchase of lands by the defendant.
2. Transferring the suit land in to the defendant's name yet it is not a beneficiary of the estate of Christopher Kisitu Mukasa.
3. Transferring the suit lands upon fraudulent removal of caveats on the land.

The Court in the case of **Fredrick Zaabwe Vs Orient Bank & Others** SCCA No, 4of 2006, defined *fraud to mean the intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right. It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury.*

In **Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No.22 of 1992**, it was held that; *“fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters, it was further held that; ‘The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary*

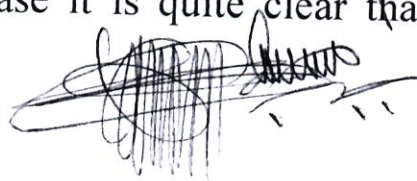
implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."

In this case I have already found that the vendor of the suit property did not have power to sale the suit property at the time she performed the transaction with the defendant. It is very evident that at the time of purchase, the vendor did not appear on title as a manager with authority to sale. All these were known or ought to have been known by the defendant as the authority to sale both from court and Buganda land board were obtained after the sale.

Be that as it may, the defendant with all that information proceeded to deal with the vendor to execute the sale which they very well knew was illegal.

Worse still, the defendant proceeded to execute transfers on the suit land with the aid of the said Lydia and transferred it on the 9th of November 2012 as per DEX4 well knowing that the late Christopher Kisitu Mukasa had passed on 12th/10/2010 as per PE1. By operation of the Law, the management order that had been acquired by Lydia Kisitu had expired at the demise of Christopher Kisitu Mukasa. The property and all transfers thereon were vested in the administrators and not the manager of the estate of the late Christopher Kisitu Mukasa.

It is a long established principle that registering land to defeat the interest of another is nothing but fraud. In this case it is quite clear that the



reactions of the defendant intended to defeat the interest of the estate of the late Christopher Kisitu Mukasa in a suit land.

It is therefore the finding of this court that the defendant's registration on title was fraudulent. Issue 4 is determined in the positive.

Issue 5: What remedies are available to the parties.

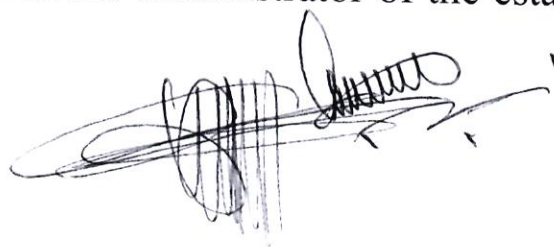
The plaintiff sought for the following remedies;

- 1. Cancellation of the defendants' names on the certificate of title for land comprised in kyadondo block 237 plot 2585 LRV 2357 folio 1 land at Busabala kaazi valued at over 100,000,000/= (one hundred million shillings).**

Section 177 of the RTA emphasises indefeasibility of title except for fraud. I have already found that the registration of the defendant's name on the certificate of title on the suit land comprised in **kyadondo block 237 plot 2585 LRV 2357 folio 1 land at Busabala kaazi** were fraudulent.

I therefore order the registrar of titles to cancel the defendant's name from title and replace it with the plaintiff as the administrator of the estate of Christopher Kisitu Mukasa.

- 2. A permanent injunction.**



Having earlier found that the suit land belongs to the estate of late Christopher Kisitu Mukasa, a permanent injunction doth issue against the defendant and his agents from interfering with the suit land.

3. General damages.

The law relating to the general damages has been discussed in a number of cases to include **Moses Ssali a.k.a. Bebe Cool & Others Vs Attorney General & Others HCCS 86/2010** where the case of **Southern Engineering Company Vs Mutia [1985] KLR 730** was considered.

This Court is also aware that “in 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 Vs Kigozi [2002] 1 EA 305**. And that “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 Vs Myaana Engola, HCCS 143/1993, Kibimba Rice Ltd Vs Umar Salim, SCCA 17/1992 and Hardley Vs Baxendale (1894) 9 Exch 341**.

In the present case, the plaintiff has not proved having suffered any loss instead the defendant has improved the value of the land. Accordingly no general damages granted.

4. Costs of the suit.

Costs follow the event as per S.27 of the CPA the plaintiff having been the successful party is entitled to the costs the suit and are hereby granted.

In conclusion, the plaintiff's case succeeds with costs.

COUNTERCLAIM:

From the parties' pleadings and evidence on record, the Counter claimant alleged acts of fraud against the Counter defendant where new land titles were created by the Counter defendant in the suit land.

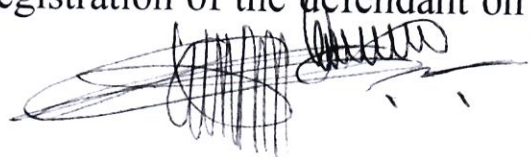
The Counter defendant having been found to be the lawful owner of the suit land, he cannot be said to have committed fraud against himself. The transactions effected by the plaintiff on the suit land will only affect the plaintiff who will be at liberty to resolve them.

Therefore, the Counterclaim fails for lack of evidence of fraud

No orders as to costs on the Counterclaim.

In conclusion, the plaintiff's case succeeds, the counterclaim fails and the following orders are issued;

1. A declaration that the suit land belongs to the estate of late Christopher Kisitu Mukasa.
2. A declaration that the registration of the defendant on the suit land was fraudulent.



3. An order directing cancellation of the defendant's name on title of the suit land comprised in **Kyadondo block 237 plot 2585 LRV 2357 folio 1 land at Busabala Kaazi** and replacing it with the plaintiff's name as an administrator of the estate of late Christopher Kisitu Mukasa.
4. Permanent injunction is hereby issued against the defendant and its agents from interfering with the suit property.
5. No general damages awarded.
6. Costs of the suit are awarded to the plaintiff.
7. No costs awarded for the counter claim.

I so order.

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TADEO ASIIMWE.

JUDGE.

22/6/2023.