

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[LAND DIVISION]  
HCCS. NO. 0798 OF 2017

HADIJA MUTYABA

[As Administratrix of the Estate of the late Sewalu Ahamada]

PLAINTIFF

V

1. SEMWOGERERE BASHIR

2. KASIDA LTD

3. MARIAM NDIWO.....

.....

DEFENDANTS

BEFORE: - HON. LADY JUSTICE P. BASAZA - WASSWA

J U D G M E N T

Representation:

Mr. Ahabwe Joshua for the Plaintiff.

Mr. Ndahiriwe George and Mr. Kamoga Richard for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

None for the 1<sup>st</sup> Defendant against whom the suit proceeded *ex parte*.

Introduction:

[1] This Judgment is in respect of a suit brought by **Ms. Mutyaba** (the Plaintiff) by which she sued **Mr. Semwogerere, M/s Kasida Ltd and Ms. Ndiwo** (the Defendants) jointly and severally, for recovery of land with developments

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thereon constituting of about sixteen (16) small rental units, comprised in **leasehold Register, Volume 987, folio 10, Block 273, Plot 363 at Najjanunkumbi**, measuring approx. **0.114 Hectares (0. 28 Acres)**. (Hereinafter referred to as '**the suit property**'). Her suit is founded on alleged fraud against the defendants.

[2] The gist of this case is an interrogation of a complaint by **Ms. Mutyaba**; the administrator of the estate of **the late Haji Ssewalu Ahamada**, on how the suit property was conveyed from the name of its original owner: Haji Ssewalu Ahamada (deceased), through to the name of the current registered proprietor: **Ms. Ndiwo**; the 3<sup>rd</sup> Defendant.

[3] Ms. Mutyaba contends that the Mortgage of the suit property was done by Mr. Semwogerere whom she claims impersonated the late Haji Ssewalu Ahamada, and that, that transaction, and its subsequent sale and conveyance by M/s Kasida Ltd as mortgagee, to Ms. Ndiwo, was done through fraud. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants deny the said allegations, and contend that the Mortgage and the said subsequent conveyance to Ms. Ndiwo were *bona fide*.

Background:

[4] It is common ground in this case, that the suit property which is comprised in a forty –nine (49) year lease with effect from November 1, 1977 was originally registered in the name of a one **Haji Ssewalu Ahamada (now deceased)**. It is also common ground that letters of Administration to the estate of the late Haji

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Ssewalu Ahamada (the deceased), are held by Ms. Mutyaba (the Plaintiff) vide a grant in **HCT Misc. Applic. No. 006 of 2022 at Mpigi.**

- [5] It is further common ground, that the Suit property was pledged as security by Mr. Semwogerere (the 1<sup>st</sup> Defendant) to M/s Kasida Ltd (the 2<sup>nd</sup> Defendant) in respect of a loan lent to him by the latter. And that the suit property is currently registered in the name of **Ms. Mariam Ndiwo**, the 3<sup>rd</sup> Defendant, with effect from April 14, 2009.
- [6] At the trial of the suit; four (4) witnesses testified for the Plaintiff. To wit: **Ms. Mutyaba**; (Plaintiff) as PW1, her sister: **Ms. Hasifah Nabakiibi** as PW2, a one **Ms. Maria Damulira** as PW3, and a Police Officer attached to the Directorate of Criminal Investigation: **a one D/ASP Ojinga Joseph, as PW4.**
- [7] Likewise, four (4) witnesses testified for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. To wit: **Mr. Soren Opstrup**; a Director in M/s Kasida Ltd (the 2<sup>nd</sup> Defendant); as DW1, **Ms. Mariam Ndiwo**; (3<sup>rd</sup> Defendant); as DW2, a one **Mr. Lubega Mustafa Kiwanuka**; the LC 1 Vice Chair of Namasuba PWD Zone; as DW3, and a one **Mr. Hatanga Eric**, the transaction Lawyer, as DW4.
- [8] The full testimonies of all these witnesses are on the court record, and only the relevant portions of their testimonies will be referred to in this judgment, where necessary.

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[9] Similarly, for brevity, the written submissions filed by learned Counsel will not be repeated here. Reference will be made to them, only where, and when necessary.

Ms. Mutyaba's (Plaintiff's) case:

[10] In her Plaint; Ms. Mutyaba contends (the gist):

- i) That she discovered that her brother; Mr. Semwogerere (the 1<sup>st</sup> Defendant) impersonated their late father; the late Hajji Ssewalu Ahamada and fraudulently obtained a mortgage on August 31, 2007 using the suit property as security.
- ii) That Mr. Semwogerere forged or caused to be forged the signature of the deceased in favor of M/s Kasida Ltd, yet the deceased had long passed on in 2003.
- iii) That M/s Kasida Ltd (the 2<sup>nd</sup> Defendant), with the knowledge that Mr. Semwogerere was not the registered proprietor, fraudulently transacted with him and deceitfully discharged the mortgage by way of a sale to Ms. Ndiwo (the 3<sup>rd</sup> Defendant), on April 14, 2009. That both M/s Kasida Ltd and Ms. Ndiwo; the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, are not *bona fide*.
- (iv) That Ms. Ndiwo knowing that M/s Kasida did not possess title, deceitfully applied for and obtained a special certificate of title.

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[11] She (Mutya) seeks for orders; *inter alia* for the recovery of the suit property, for cancellation of the name on the certificate of title to the suit property, and for the substitution thereon with her own name as Administratrix of the estate of the late Haji Ssewalu Ahamada.

Mr. Semwogerere's (1<sup>st</sup> Defendants') case:

[12] Although duly served, Mr. Semwogerere did not file a defence. The suit thus proceeded *ex parte* against him.

M/s Kasidha Ltd and Ms. Ndiwo's (2<sup>nd</sup> and 3<sup>rd</sup> Defendants') case:

[13] In their joint written statement of defence, M/s Kasida Ltd and Ms. Ndiwo; the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, denied the allegations against them, and contend:

- i) That they are *bona fide* without notice of any fraud,
- ii) That Ms. Mutya has at all material times, been aware of all the transactions leading up to the acquisition of the suit property by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and of their physical occupancy thereof, and has never raised any complaint with them, nor challenged them.
- iii) That at the time the suit property was Mortgaged to M/s Kasida Ltd, due diligence was undertaken.
- iv) That the death certificate and the letters of administration submitted by Ms. Mutya lack authenticity and were obtained fraudulently.

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Agreed issues:

[14] The following issues were framed at the scheduling conference in Court:

1. Whether the Mortgage transaction between Mr. Semwogerere and M/s Kasida Ltd (1<sup>st</sup> and 2<sup>nd</sup> Defendants), in respect of the suit property, was entered into through fraud?
2. Whether Ms. Ndiwo; 3<sup>rd</sup> Defendant is a *bona fide* purchaser for value without notice?
3. Whether there are any remedies available to the parties?

Determination of issues:

Issue No. 1:

**Whether the Mortgage transaction between Mr. Semwogerere and M/s Kasida Ltd (1<sup>st</sup> and 2<sup>nd</sup> Defendants), in respect of the suit property, was entered into through fraud?**

[15] In a wealth of authorities, it has been restated that to prove fraud, one must prove **actual fraud or some act of dishonesty on the part of the person against whom the allegation is made.** And that the burden of proof is heavier than on a balance of probabilities that is applied in ordinary civil cases.

See the Judgment of Wambuzi, C.J. (as he then was), in Kampala Bottlers Ltd v Domanico (U) Ltd<sup>1</sup> applied in Frederick Zaabwe v Orient Bank Ltd & 5 Ors<sup>2</sup>

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<sup>1</sup> SCCA No. 22/92

<sup>2</sup> SCCA No. 4 of 2006

[16] 'Fraud' and 'acts of fraud' connote:

'...a knowing misrepresentation of the truth or concealment of a material fact', an intentional perversion of the truth', 'a false statement', unconscientious dealing, 'conduct involving bad faith, 'dishonesty', and so on, all purposed to defraud others, and or to deceive others and or to induce another to surrender their right'.

See Black's Law Dictionary<sup>3</sup> and the Judgment of Katureebe, JSC. in Frederick Zaabwe v Orient Bank Ltd & 5 Ors (Supra).

[17] In support of her case, **PW1: Ms. Mutyaba** stated that her late father; Haji Sewalu Ahamada died intestate on April 18, 2003. She produced a death certificate (**PE 13**) to that effect.

[18] Both PW1 and **PW2: Ms. Nabakiibi Hasifah**, stated that at one family meeting held between 2014 and 2015, with elders of their clan, their brother; Mr. Semwogerere, admitted that he used the title of the suit property to acquire a loan from M/s Kasida Ltd, in the name of their late father. That he promised to repay the loan in a short period and return the title, but failed to pay the money, and disappeared. That the persons in occupation of the suit property are unknown to them.

[19] A Police officer; **PW4: D/ASP Ojinga Joseph**, stated that he received a complaint from the Administrators of the estate of the late Haji Sewalu Ahmada that their brother; Mr. Semwogerere, had disposed of the suit property without their knowledge. That on that basis, he registered their complaint, and requested Wakiso Lands Office for information about the suit property vide a letter dated

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<sup>3</sup> 9<sup>th</sup> ed. at pages 731 & 733

March 1, 2018 (PE.11). And, that he obtained several documents from that office, which documents included **certified copies of the certificate of title to the suit property, a caveat by the Administrator General, a letter from M/s Bitangaro and Co. Advocates, a transfer deed between Ms. Ndiwo and Tito Investments Ltd, an application for a special certificate of title by Ms. Ndiwo (without the accompanying affidavit), and an application for consent to transfer.** That there was no document in the land Registry file in Wakiso that gave Mr. Semwogerere authority to deal with the suit property.

[20] The above evidence by PW1, PW2 and PW4 was not rebutted. Rather, in his testimony during cross-examination, **Mr. Soren Opstrup (DW1)**, a director in M/s Kasida Ltd, told court that he lodged a complaint with the Police **vide Katwe CRB: 601/2022** against Mr. Semwogerere Bashir (1<sup>st</sup> Defendant), that Mr. Semwogerere impersonated Haji Ahamada Sewalu at the time the loan agreement (**DE. 3**) with M/s Kasida Ltd was entered into on August 27, 2007.

Referring to the identity of Mr. Semwogerere at the time of the loan (**DE. 3**), DW1 told court that, I quote: *'apparently there was wrong information we got'*.

[21] On his part, **DW3: Mr. Lubega Kiwanuka Mustafa**, stated that he last saw Bashir Semwogerere (the 1<sup>st</sup> Defendant) in May, when he (Semwogerere) was arrested, a time that DW3 said was a month before he (DW3) testified<sup>4</sup>. That it is then, that DW3 found out that Mr. Semwogerere was not **Haji Ahamada Sewalu**.

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<sup>4</sup> DW3 rendered his testimony in court on June 8, 2022.



Analysis by Court:

[22] The evidence on record shows, as is stated earlier in this Ruling, that it is common ground **that at the time of the loan transaction on August 27, 2007 (DE. 3), the late Haji Ahamada Sewalu, had long since been deceased.** The late Haji Ahamada Sewalu passed on in 2003, four (4) years prior to the signing of said loan transaction (DE. 3).

[23] It is therefore satisfactorily proved that Mr. Semwogerere, who signed that loan agreement (DE. 3) in the name of the late Haji Ahamada Sewalu, impersonated him.

[24] That established; the question to be determined is:

**'What is the legal implication of the use of the suit title, by Mr. Semwogerere, as security for the said loan, in the stated manner of impersonating the registered proprietor: Haji Sewalu Ahamada?**

[25] Learned Counsel for the Plaintiff; Mr. Ahabwe submitted that both Mr. Semwogerere and M/s Kasida Ltd acted with fraud in the transaction, and that the transaction between them was an illegality, and that M/s Kasida Ltd could not therefore take benefit from it. He further argued that M/s Kasida and or its agents did not carry out due diligence prior to the mortgage, and that such failure to do so showed lack of good faith.

For those propositions, learned Counsel cited, *inter alia*;

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- i) Section 2 (4) b of the Money Lender's Act<sup>5</sup> (currently section 84 of the Tier 4 Microfinance Institutions Act and Money Lender's Act, 2016)
- ii) James Balintuma v Dr. Handle Leslie<sup>6</sup>, Active Automobile Spares Ltd v Crane Bank Ltd & Anor<sup>7</sup>
- iii) Frederick Zaabwe v Orient Bank and 5 Ors' (supra).

[26] On his part, Mr. Ndihiriwe; learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that there was no direct and tangible evidence of fraud attributed to Mr. Semwogerere (the 1<sup>st</sup> Defendant) and M/s Kasida Ltd (the 2<sup>nd</sup> Defendant).

[27] In my own view, the conduct and acts of Mr. Semwogerere (the 1<sup>st</sup> Defendant), of impersonating the late Haji Sewalu Ahamada, amounted to deceit and to forgery of the signature and authority of the late Haji Sewalu Ahamada, and tantamount to fraud and illegality.

[28] It is trite law (see sec. 115 and 129 of the Registration of Titles Act<sup>8</sup> (the RTA)); that a valid mortgage can only be created by the registered proprietor of land under the RTA, or by a donee of a power to appoint or dispose of that land or lease or mortgage. (Also see the interpretation of proprietor under sec. 1 (l) of the RTA).

[29] In the Frederick Zaabwe v Orient Bank case (supra), the 2<sup>nd</sup> Defendant therein: **Mars Trading Company Ltd**, purported to create a mortgage in favour of the 1<sup>st</sup> Defendant: **Orient Bank Ltd**. It so happened that **Mars Trading Company Ltd**

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<sup>5</sup> Cap 273

<sup>6</sup> HCCS No. 193-2013

<sup>7</sup> SCCA No. 21 of 2001

<sup>8</sup> Cap 230 of the Laws of Uganda

used the title deed of **Mr. Zaabwe** and a Powers of Attorney which, although signed by Mr. Zaabwe, was not signed by him for the purpose for which it was fraudulently used by **Mars Trading Company Ltd** to the detriment of Mr. Zaabwe. The Powers of Attorney was used, without Mr. Zaabwe's knowledge nor authority, to secure an overdraft of **UGX. 30 Million** in favour of **Mars Trading Company Ltd**. That overdraft had no connection with, nor benefit to Mr. Zaabwe, and was intended to deprive him of his residential property at Makerere.

**Kanyeihamba, JSC.**, held in that case, that such registration of the Powers of Attorney and the possession of the title deeds of the suit property, had no legal or proprietary effect. That neither the grant of the powers of attorney nor the possession of the title deeds could pass the title in the suit property to anyone else whether *bona fide* or otherwise. That the legal and beneficial ownership of the suit property did not shift from the appellant.

- [30] Like in the Zaabwe case (supra), in the present case, Mr. Semwogerere (the 1<sup>st</sup> Defendant) who signed the loan agreement (DE. 3) that purported to mortgage the suit property, was neither the registered proprietor thereof, nor was he a donee of powers of attorney over the suit property. He therefore had no authority known in law to create a valid mortgage over the suit property. As such, the transaction was incapable of passing title or any rights to anyone, whether *bona fide* or otherwise.

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- [31] A similar position was taken in the old case: Jenabai Sachoo and Anor v. Shamsa Binti Humud Bin Shamis and Anor<sup>9</sup> in which Law, J., found that the registered proprietor was never a party to the transaction that purported to create a mortgage. That the mortgage deed that was executed by the grandson of the registered proprietor, was executed by fraud, and was of no effect.
- [32] In addition, I further find, as correctly pointed out by learned Counsel: Mr. Ahabwe, that M/s Kasida Ltd, which purported to lend money vide the said loan transaction (DE. 3), did so without a licence to lend money in contravention of section 2 (1) & (4) b of the Moneylender's Act, Cap. 273<sup>10</sup>. I refer to the testimony of DW1: Mr. Opstrup, who admitted during cross-examination, that M/s Kasida Ltd, which was incorporated on July 16, 2007 lent **UGX. 57.5 Million** to Mr. Semwogerere on August 27 2007, a month after its incorporation, and did so, without a licence to lend money. That loan transaction (DE. 3) was thus an illegality on that account also.
- [33] Related to that, I also find that the said loan agreement (DE.3) did not disclose what constituted the principal amount of the loan, and what constituted the interest charged on the loan. **That flaw was also in contravention of section 6 (2) of the Moneylender's Act, Cap. 273** and was an illegality.

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<sup>9</sup> [1957] E.A at page 227

<sup>10</sup> The Moneylender's Act, Cap 273 prevailed at the time material to this suit, and was later repealed by the Tier 4 Microfinance Institutions and MoneyLender's Act, 2016 that commenced on July 1, 2017

[34] It is a well settled principle of law that: **'a Court of law cannot condone, sanction or enforce an illegality once the illegality is brought to its notice'**.

**Obligations arising out of illegal contracts or transactions are unenforceable, and it matters not if the illegality was pleaded or not.** These principles have been applied in a wealth of authorities including; **Kisugu Quarries Ltd v Administrator General<sup>11</sup> and Active Automobile Spares Ltd v Crane Bank Ltd & Anor<sup>12</sup>**.

[35] In the **Kisugu Quarries case (supra)**, the lease that was the subject of that case was held by the Supreme court to be **invalid, prohibited, and void *ab initio*, on the basis that it lacked the mandatory Ministerial Consent required under sec. 2 of the Land Transfer Act, Cap. 202 (now repealed)**. The Court consequently held that there was no property owned by the alleged former owner in accordance with the law. That nothing subsequently done could convert what was void *ab initio* into an enforceable contract.

[36] Guided by the **Kisugu Quarries case (supra)**, in the present case, since it has been established that the mortgage transaction: vide the loan agreement (**DE. 3**) was entered into through fraud, and in contravention of the law, **the mortgage transaction in this case was invalid and void *ab initio*, and could not therefore confer any legal / mortgagee rights to or from M/s Kasida Ltd (the 2<sup>nd</sup> Defendant)**. It was dead wood, and nothing subsequently done could convert what was void *ab initio*, into an enforceable mortgage.

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<sup>11</sup> [1999] 1 E.A at page 162-174

<sup>12</sup> SCCA No. 21 of 2001

Decision of this Court on issue No. 1:

[37] In the result, issue No. 1 is answered in the affirmative. The Mortgage transaction between Mr. Semwogerere and M/s Kasida Ltd (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants), in respect of the suit property, was entered into through fraud.

Issue 2:

Whether Ms. Ndiwo; the 3<sup>rd</sup> Defendant is a *bona fide* purchaser for value without notice?

[38] Sec. 181 of the Registration of Titles Act<sup>13</sup> protects a purchaser *bona fide* for valuable consideration of land under the operation of the Act, against an action of ejectment, or for recovery of damages, or for deprivation of the estate or interest in respect to which he / she is registered as proprietor, on the ground that the proprietor through or under whom he / she claims, was registered through fraud or error or has derived from or through a person registered as proprietor through fraud or error.

[39] The words '*bona fide*' and '*Bona fide Purchaser*' are respectively defined in Black's Law Dictionary<sup>14</sup> as;

"Made in good faith; without fraud or deceit"

And as;

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims...a *bona fide* purchaser for value is not affected by the transferor's

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<sup>13</sup> Cap 230 of the Laws of Uganda

<sup>14</sup> 9<sup>th</sup> edn. at page 199 and 1355 respectively.

fraud against a third party and has a superior right to the transferred property as against the transferor's creditor to the extent of the consideration that the purchaser has paid" (Underlining mine).

[40] In a wealth of authorities, notable among which is David Sajjaaka Nalima v. Rebecca Musoke<sup>15</sup>, the common law doctrine of "**a bona fide Purchaser for valuable consideration without notice**" was explained.

**Odoki, J.A (as he then was)**, stated in that case, that this doctrine though provided for in our law in section 189 (now section 181) of the Registration of Titles Act, is not defined therein, but gives protection to the Purchaser. He stated that; the effect of the section is that;

"...once a registered proprietor has purchased the property in good faith his title cannot be impeached on account of fraud of the previous registered proprietor. A *bona fide* purchaser therefore obtains a good title even if he purchases from a proprietor who previously obtained title by fraud. However, before a purchaser can claim the protection of section 189 (now section 181), he must act in good faith. If he is guilty of fraud...he will lose protection". [Underlining added].

Also see: Ipolito Semwanga vs. Kwizera Buchana Paul & Ors<sup>16</sup>.

[41] It is the Defendants' evidence (see the testimonies of **DW1: Mr. Soren Opstrup**, and **DW2: Ms. Ndiwo**), that Ms. Ndiwo (the 3<sup>rd</sup> Defendant) bought the suit property from M/s Kasida Ltd after foreclosure, at **UGX. 80,000,000/=**, under private treaty vide a sale agreement dated December 12, 2008 (**PE. 6**).

[42] For clarity and completeness, I will lay out, verbatim, the contents of **PE 6**.

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<sup>15</sup> SCCA No. 12 of 1985

<sup>16</sup> HCCS No. 61 of 2005

PE. 6 reads as follows:

THE REPUBLIC OF UGANDA  
IN THE MATTER OF THE REGISTRATION OF TITLES ACT  
IN THE MATTER OF SALE OF PROPERTY BY FORECLOSURE  
UNDER SALE BY PRIVATE TREATY

LEASEHOLD REGISTER VOL 987

FOLIO 10 PLOT 363 BLOCK 273

LAND AT NAJJANANKUMBI

TRANSFER DEED

I, **KASIDA LIMITED (transferor)** of c/o P.O. Box 7898, Kampala Uganda being the Mortgagee of the land comprised in the above Title in consideration of the sum of Uganda Shillings Eighty Million only (U. Shs. 80,000,000=) paid to me by the Transferee on or before the execution of these presents receipt thereof I hereby acknowledge, I **DO HEREBY TRANSFER AND CONVEY** all that piece of land as comprised above to **MARIAM NDIWO (Transferee)** of P.O. Box 14163 Kampala to HOLD and Acquire hereby all my rights, interest and Estate herein.

Dated this 12<sup>th</sup> day of December, 2008.

**SIGNED on behalf of the said**

**KASIDA LIMITED** by: SOREN OPSTRUP / DIRECTOR

**TRANSFEROR**

In the presence of

KIIZA OLIVIA

SIGNED and DELIVERED at KAMPALA by: NDIWO MARIAM

**TRANSFEEE**

In the presence of

KIIZA OLIVIA

*Mariam Ndiwo*



[43] **DW1: Mr. Opstrup**, a Director of M/s Kasida Ltd, stated that when the borrower (Mr. Semwogerere) failed to pay the debt, numerous attempts were made by M/s Kasida Ltd to collect the money including a notice dated August 26, 2008 (**DE 1**). That it took fourteen (14) months before M/s Kasida Ltd acted, and was forced to foreclose on the suit property to recover their money with interest and costs.

[44] **DW2: Ms. Ndiwo** told court that she paid **UGX. 80,000,000/=** to M/s Kasida Ltd in cash for the suit property. That she learnt of the sale of the suit property from **Mr. Opstrup (DW1)**, who is the father of two (2) of her Children, and who works with M/s Kasida Ltd.

[45] Both witnesses: **DW1 and DW2**, asserted that they had no notice of Mr. Semwogerere's impersonation of Haji Sewalu Ahamada. That it is not until this case was instituted, that they learnt of the fraud. **DW2** stated that she never interacted with Mr. Semwogerere, and does not even know him.

[46] In his written submissions, learned Counsel for the Plaintiff: Mr. Ahabwe, argued that Ms. Ndiwo (the 3<sup>rd</sup> Defendant) was not a *bona fide* purchaser for value. That she had notice of all the fraudulent transactions on the suit property, and did not purchase the suit property for a consideration.

[47] Mr. Ahabwe further argued that:

- i) In her testimony **DW2: Ms. Ndiwo** stated that she did not concern herself with knowing or searching about the registered proprietor, nor did she

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know the interest she purchased, nor the years that remained for the lease, and that clearly Ms. Ndiwo had an ill intention aimed at perpetrating fraud.

- ii) That Ms. Ndiwo had constructive notice that M/s Kasida Ltd, the 2<sup>nd</sup> Defendant, did not have lawful title to the suit property. That had she inquired, she would have discovered that the true registered proprietor had long since died in April 2003, and that the mortgage was unlawfully entered into. Counsel relied, *inter alia* on: **Haji Abdu Nasser Katende v Vijjaalidas Haridas & Co. Ltd**<sup>17</sup> and **Sir John Bageire v Ausi Matovu**<sup>18</sup>, cited in the latter **Katende case (supra)**.
- iii) That on the consent form 6 (**PE.10**), the consideration declared was **UGX. 65,000,000/=**, a figure less than the consideration in the sale agreement (**PE.6**). That a buyer is not a *bona fide* purchaser when he / she inserts a lesser figure for valuation purposes, intended to defraud the government of revenue. That such conduct is tantamount to concealment of the true consideration and amounts to a fraudulent act. Counsel relied for this proposition on **Betty Kizito v David Kanonya**<sup>19</sup>.
- iv) That Ms. Ndiwo did not purchase the suit property. That she contradicted herself on the amount she paid, and stated that she paid in two installments of **UGX. 73,000,000/=** and **UGX. 13,000,000/=**, which

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<sup>17</sup> CACA No. 84 of 2003

<sup>18</sup> CACA No. 07 of 1996

<sup>19</sup> SCCA No. 8 of 2018

amounted to **UGX. 86,000,000/=**, and not the **UGX. 80,000,000/=** stated in her witness statement. That also, while DW2 stated that she was never issued with a receipt for the purchase price, DW1 stated that Ms. Ndiwo was issued with a receipt.

- v) That DW1 transferred the suit property to himself disguising and fronting Ms. Ndiwo (DW2) as a purchaser, whereas not. That DW2 the mother of DW1's children was a conduit, a sham and a mask of DW1. That DW1 stated that he assigned a one Hannington Seruyange to collect rent from the suit property and that the said Seruyange had given him accountability of the rent collected from the suit property 8-10 days before he (DW1) testified in court.

For this proposition, learned Counsel cited **Macdowel Food And Beverages Ltd v Stanbic Bank (U) Ltd and Anor**<sup>20</sup>.

- vi) That the sale of the suit property was marred by illegalities and irregularities. That there was disregard of the law pertaining to public auction. That the suit property was purchased by private treaty without being advertised, after DW2 learnt about the property from DW1, a Director in Kasida Ltd, who was an immediate family member of DW2, a father of her children. A manifestation of influence and insider dealing, and a contravention of **section 9 (1) of the Mortgage Act, Cap. 229,**

*Macdowel Food And Beverages Ltd v Stanbic Bank (U) Ltd and Anor 1575*

<sup>20</sup> HCMA No.568 of 2020 (Comm. Crt)

currently section 28 (1) (d) of the Mortgage Act, 2009 that require that a sale of mortgage property shall be by public auction. For this proposition, learned Counsel cited: **Julius Okwi v. Moses Kirunda**<sup>21</sup>

- vii) That to further perpetuate fraud, DW2 attempted to transfer the suit property to **M/s Tito investment Holdings Ltd** as per transfer instrument **(PE. 14)**, in which DW1 is a Director as shown in the Form **(PE. 8)**. That the transaction was queried by the Registrar of lands at Wakiso on the basis of the deferring signature of Ms. Ndiwo as shown by the rejection notice at the back of **(PE. 14)**.
- viii) That the mortgage on the title **(PE. 2)** was released on April 14, 2009 at 12.22pm and Ms. Ndiwo (DW2) was registered on the title on the same date and at the exact time at 12:22pm. That foreclosure as a transaction under a mortgage requires a release, an instrument of transfer, sale agreement, lodging the instrument of transfer before the Chief Government valuer for assessment of fees, payment of stamp duty, and registration fees at the bank. That these cannot be done instantly in one day and at the same time. Citing, *inter alia*, **Uganda Broadcasting Corporation v Sinba (K) Limited & Ors**<sup>22</sup>, Counsel argued that such actions are indicators and budges of fraud, and are illegalities.

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<sup>21</sup> CACA No. 35 of 2008

<sup>22</sup> CA Civil Application No. 12 of 2014

[48] For the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, learned Counsel: Mr. Ndahiriwe, in his written submissions, argued that no evidence was adduced that connected M/s Kasida and Ms. Ndiwo to the fraud of Mr. Semwogerere. That their actions were in good faith, and that Ms. Ndiwo is a *bona fide* purchaser for value without notice, and enjoys protection as such. For his proposition, Counsel cited *inter alia*: **Re An Application by G. N. Mallo**<sup>23</sup>

[49] Learned Counsel Mr. Ndahiriwe further argued that Ms. Ndiwo showed that she is not fraudulent in her nature (*sic*), and that she did not make any attempt to have the property sold, transferred or even mortgaged, and that the suit property is not in any way encumbered.

Analysis by Court:

[50] **I very carefully listened to, and observed the witnesses in this case, and very carefully scrutinized all the documents and exhibits of the parties, and on the basis of that, I make the following findings:**

First:

[51] **M/s Kasida Ltd** (the 2<sup>nd</sup> Defendant) and **Ms. Ndiwo** (the 3<sup>rd</sup> Defendant) executed the transfer deed dated December 12, 2008 (**PE. 6**)<sup>24</sup>, **as transferor and transferee** respectively, yet in the very same transaction, in the consent land Form 6 (**PE 10**),

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<sup>23</sup> [1964] E.A at page 731

<sup>24</sup> See the contents of PE. 6 in para [42] above.

the name of the **transferor / Mortgagee**, was switched to another company: **'SIKADA Ltd'**.

[52] Notably, the said consent land Form 6 (**PE 10**), was a form, used for purposes of assessment of the value of the suit property by the Chief Government Valuer, for purposes of Stamp Duty.

[53] The entry of **'SIKADA Ltd'** on that land Form 6 (**PE. 10**) could perhaps have been taken to be a typographical error, or an inadvertent attempt to write **'KASIDA LTD**. No, that was not the case, far from it. DW1: Mr. Opstrup admitted during cross-examination, that besides **M/S KASIDA LTD**, he was also a director in **M/S TITO INVESTMENT HOLDINGS LTD** (refer to Company Form No. 7: (**PE. 8**), and in **M/s SIKADA Ltd**, and also in Blue Ocean Developers Ltd, and in Danish Land Owner's Company Ltd.

[54] Still in that same land Form 6 (**PE. 10**), as pointed out by Mr. Ahabwe, a lesser figure of **UGX. 65 Million** was inserted as the purchase price, instead of the purported **UGX. 80 Million** that was stated in the transfer form (**PE. 6**) as the alleged purchase price. On both **documents: (PE. 6)** and (**PE. 10**) **Ms. Ndiwo** appended her signature.

[55] It was settled by the Supreme Court in **Betty Kizito v David Kanonya (supra)**, that inserting a lesser figure in the transfer form than what was actually paid, and by making false declarations contrary to section 92 (1) of the RTA, was a breach of

*M/S SIKADA LTD*

duty that was tantamount to concealment of the true consideration, in order to evade taxes, and therefore constituted fraud.

[56] It is imperative to point out that in the Betty Kizito case (supra), not only had the Respondents made a false declaration that the suit land was a gift, whereas not, but they had also falsely stated that there were no developments on the land, whereas there were developments. On that basis, the Supreme Court concluded that the transfer of the land into the Respondents' names was void for fraud.

[57] Similarly, in the present case, not only did the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants declare a lesser figure of **UGX. 65 Million** than the figure of **UGX. 80 Million** that they had stated in the transfer deed (**PE. 6**), but they also introduced into the transaction; an alien transferor: M/s Sikada Ltd, a totally different company from what **PE.6** had suggested was the transferor / Mortgagee.

[58] Clearly the said actions of both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants amounted to concealment of the true identity of the transferor, and to concealment of the amount that had earlier been stated in the transfer deed (**PE. 6**). Both false declarations were done to evade taxes and constituted fraud.

[59] Guided by the decision in the Betty Kizito case (supra), I find that the transfer of the suit property into the names of Ms. Ndiwo was therefore NOT *bona fide*, and was void for fraud.

Masabuni 15/5

[60] It was stated more plainly in the decision in Samuel Kizito Mubiru & Anor v G.W Byensiba & Anor<sup>25</sup> cited with approval in the Betty Kizito case (supra), that a buyer is not *bona fide* where he inserts a lesser figure than that inserted on the transfer form in order to defraud Government of Revenue.

[61] I carefully looked at the case: Re An Application by G. N. Mallo (supra), that was cited by Mr. Ndahiriwe, and found that the decision in that case has nothing to do with the issue under consideration. I therefore respectfully disregarded Mr. Ndahiriwe's reliance on that case.

Second:

[62] I was not persuaded at all, that Ms. Ndiwo in fact purchased the suit property. No. She did not. Ms. Ndiwo was simply used as a pawn in a series of illegal transactions that were engineered by Mr. Soren Opstrup (DW1) and or M/s Kasida Ltd.

[63] No cogent evidence was produced by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to show that any monetary, or other valuable consideration was exchanged between Ms. Ndiwo and M/s Kasida Ltd. Although DW2: Ms. Ndiwo told court that she paid UGX. 80 Million in cash to M/s Kasida Ltd, and there was a purported acknowledgment of that payment in the transfer deed (PE.6), the factors listed below, warrant that this court can safely draw the inference that no consideration of value was in fact paid.

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<sup>25</sup> HCCS No. 513 of 1982



i) Just over a month after her registration on the suit title deed (**PE. 2**) as proprietor on April 14 2009, Ms. Ndiwo attempted, on July 1, 2009 to transfer the suit property to **M/s Tito Investment Holdings Ltd.** The latter Company is a company in which Mr. Opstrup is a Director as shown in Company Form 7 (**PE 8**)<sup>26</sup>, and in the transfer form (**PE 14**) on which he signed, on behalf of M/s Tito Investment Holdings Ltd, as purchaser, and Ms. Ndiwo, as vendor.

According to the evidence of **PW4: Ojinga Joseph**, the Police Officer, and as shown in the notes overleaf the said transfer form (**PE 14**), that attempt to transfer the suit property by Ms. Ndiwo to M/s Tito Investment Holdings Ltd failed because; the signature of the vendor; Ms. Ndiwo, differed.

However, when asked during cross-examination, why she immediately wanted to transfer the suit property to **M/s Tito Investment Holdings Ltd**, Ms. Ndiwo told court that she simply wanted the suit property to go into the name of **M/s Tito Investment Holdings Ltd**, because Tito, who was then one (1) year old, and is now 13 years, is their son and that they (**Mr. Opstrup and Ms. Ndiwo**) were opening a Company for 'their son'.

That answer sharply contradicted her earlier statement in para. 9 of her witness statement; where she stated that she was offered a job in France

*Handwritten signature/initials*

<sup>26</sup> Company form 7 (PE. 8) in respect of M/s Tito Investment Holdings Ltd shows the particulars of its Directors and secretaries.

and decided to transfer her interests in the suit property to **M/s Tito Investment Holdings Ltd**, but that the job did not materialize, and that she then abandoned that attempt.

**One wonders, why Ms. Ndiwo had to tell Court lies? Also, as will be shown later in this judgment, Ms. Ndiwo's testimony was further riddled with contradictions and inconsistencies, and was most unreliable.**

- ii) **Although registered as proprietor of the suit property, it came to the fore that Ms. Ndiwo, does not, in fact, have control over the suit property.**

I agreed with the submissions of Mr. Ahabwe, that **DW1: Mr. Opstrup** is the one who receives the rent from all the tenants currently occupying the suit property. **DW1: Mr. Opstrup** told court that he engaged a one Hannington Seruyange to collect the rent, and that Seruyange had given him (Opstrup) a report 8 - 10 days ago, to wit; before DW1 rendered his testimony in court. DW1 also admitted that he has not paid tax on the suit property, and that *'he is willing to pay property tax whenever property tax is agreed on (sic)'*.

**DW3: Mr. Lubega Mustafa Kiwanuka**, the LC Chairman also stated, at the locus in quo, that he saw Mr. Opstrup building the perimeter wall of the suit property and up-grading it.

However, in contradiction to the above evidence of **DW1: Mr. Opstrup**,

**DW2: Ms. Ndiwo**, who admitted that she lives in Jinja with a one **Mr.**

*Handwritten signature*

**Sunday Sam**, whom she said is the father of her five (5) year old twin (last – born) boys, told court that she is the one who collects the same rent from the suit property.

I rejected that evidence of DW2 for dishonesty. I adopted the rationale in Connell, J in Khatijabai Jiwa Hasham v Zenab d/o Chandu Nansi<sup>27</sup>, that was applied by Kanyeihamba, JSC (as he then was), in his judgment in Aziz Kalungi Kasujja v Naune Tebekanya Nakakande<sup>28</sup>, to the effect that were falsehoods and contradictions are so glaring, they utterly destroy the veracity and confidence in a witness altogether.

- iii) Pertinent to the above, I observed that Ms. Ndiwo, who attempted to, but failed to express herself in English, and was later asked by court to use Luganda, a language she understands well, knew very little about the transaction for the suit property that she purportedly purchased.

She told court that; she did not look at the documents of ownership before purchasing the suit property, because she bought from a company. That when she bought the suit property, from M/s Kasida Ltd, she did not know whether M/s Kasida Ltd was the registered proprietor. That she does not remember how many years the lease had left.

[64] **On the basis of all the above, I find that Ms. Ndiwo is not a *bona fide* purchaser for valuable consideration. Even if she were, which is not the case, the sale**

Ms. Ndiwo 15/5

<sup>27</sup> [1957] E.A page 38 at page 54

<sup>28</sup> SCCA No. 63 of 1995

transaction vide PE. 6 and PE. 10, that led up to her registration as proprietor, were void for being founded on fraud and illegalities.

[65] Sections 8 & 9 of the Mortgage Act, Cap 229 (now repealed)<sup>29</sup>, required that as a prerequisite for the foreclosure and sale of any mortgaged property, the leave and approval of court had to first be obtained. No such leave nor approval of court was obtained in this case.

[66] Similarly, the same Mortgage Act (supra), (See section 10), also required that where the mortgage gives the mortgagee express power to sell the mortgaged property without applying to court for an Order of foreclosure, such sale had to be by public auction, and not by private treaty, unless the Mortgagor consented to a sale by Private treaty. Again, no such express power to sell, nor such consent to sell the suit property by private treaty is disclosed in the said loan agreement (DE. 3). **The sale of the suit property to Ms. Ndiwo, by private treaty, was therefore illegal on this basis also.**

Decision of this Court on issue No. 2:

[67] **By reason of the fraud and illegalities pointed out above, I hold that Ms. Ndiwo was not a *bona fide* purchaser for valuable consideration, and the purported sale and transfer of the suit property to her, and her registration as proprietor**

*Dasakulwanna 12/5*

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<sup>29</sup> The Mortgage Act, Cap 229 was repealed under the Mortgage Act No. 8 of 2009, which came into force on September 2, 2011.

thereof, was invalid and void *ab initio*. Issue No. 2 is accordingly answered in the negative.

Issue No. 3:

**Whether there are any remedies available to the parties?**

[68] Having found and held as I have for issues Nos. 1 & 2 above, it follows that the Plaintiff: Ms. Mutyaba's suit succeeds in its entirety.

'Courts of law can order cancellation, registration and transfer of titles, on account of illegalities, without the parties necessarily having to first plead and prove fraud'. As per Kakuru, JA., in Uganda Broadcasting Corporation v. Sinba (K) Ltd & 3 Ors (Supra), in which he applied the decision of Wambuzi, C.J., (as he then was) in Edward Rurangaranga v. Mbarara Municipal Council & 2 Ors<sup>30</sup>.

(Also see section 177 of the RTA).

[69] In the final result, Judgment is hereby entered for the Plaintiff: Ms. Mutyaba against all the Defendants, in the following terms:

1. A Declaration is hereby made that the loan / mortgage transaction between the 1<sup>st</sup> Defendant: Mr. Semwogerere, holding out as Haji Sewalu Ahamada, and the 2<sup>nd</sup> Defendant: M/s Kasida Ltd, over the suit property comprised in **LRV 987 Folio 10, Block 273 Plot 363 at Najjanunkumbi**, was invalid and void *ab initio*, for fraud and illegality.

*M. Samwel Mwangi*

<sup>30</sup> SCCA No. 10 of 1996 reported in KALR [1997] 1 at 139

2. A Declaration is hereby made that the sale and transfer of the suit property by the 2<sup>nd</sup> Defendant: M/s Kasida Ltd to the 3<sup>rd</sup> Defendant: Ms. Ndiwo under a purported foreclosure and sale, was invalid and void *ab initio*, for fraud and illegality.
3. A Declaration is hereby made that the 3<sup>rd</sup> Defendant: Ms. Ndiwo is NOT a *bona fide* purchaser of the suit property, for valuable consideration without notice.
4. The invalid transactions and conveyance referred to under clauses 1 & 2 above are accordingly, hereby set aside.
5. I direct the Commissioner Land Registration to cancel, the name of the **3<sup>rd</sup> Defendant: Ms. Mariam Ndiwo** as the registered proprietor of the suit property, and reinstate therein the name of **Haji Sewalu Ahamada** as the registered proprietor. I further Direct that a subsequent entry be made therein, registering the name of the **Plaintiff: Ms. Hadija Mutyaba as proprietor of the suit property in her capacity as the Administratrix of the estate of the late Haji Sewalu Ahamada. Section 177 of the RTA, applied.**
6. An Order of a permanent injunction is hereby issued against all the Defendants, their assignees, workers, servants and all who claim under them, preventing and restraining them from entering upon and dealing with / in the suit property in any manner whatsoever.

*M/s Kasida Ltd*

7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall jointly and or severally pay to the **Plaintiff: Ms. Mutyaba**, as Administratrix of the estate of the late **Haji Sewalu Ahamada**, general damages of **UGX. 92,000,000/= (Ninety -Two Million)**, on account of their acts of fraud and illegality that resulted into loss of revenue to the said estate.

[This figure is approximately 1/5 of the estimated revenue of UGX. 457,920,000/= from the suit property, calculated at UGX. 2,400,000/= collected as rent per month (see the testimony of DW1), multiplied by twelve (12) months, and by the period of 15.9 years from August 2007 up until today, that the property has wrongfully and illegally remained in the hands of the Defendants].

8. Interest is awarded to the Plaintiff on the amount awarded in clause 7 above, at the rate of 12% per annum, calculated from the date of this Judgment, until the date that payment is made in full.
9. Costs of the suit are awarded to the Plaintiff against all the Defendants jointly and or severally.

I so order,

*P. Basaza Wasswa 15/5*

**P. BASAZA - WASSWA**

**JUDGE**

May 15, 2023

Judgment is delivered electronically on the Judiciary ECCMIS portal and via email to the parties.