

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA, AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 256 OF 2018

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SWATT SECURITY LIMITED.....PLAINTIFF

VERSUS

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- 1. GENAGRI PLANTATIONS**
- 2. ATTORNEY GENERAL**
- 3. COMMISSIONER LAND REGISTRATION.....DEFENDANTS**

Before: Lady Justice Alexandra Nkonge Rugadya

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Judgment:

Introduction:

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The plaintiff company is the registered proprietor of the land comprised in **LRV 1297 Folio 15 plot 8 Bulemeezi block 917 at Kisalizi village Nakaseke district** measuring approximately 805 hectares, having obtaining registration from a history spanning from 8th March, 1984.

It was the plaintiff's claim that there was tampering with the suit land record documentation with a view to defeating the plaintiff's legal interest in the suit land; and purportedly creating interests over the plaintiff's land to diminish proprietary and legal interests in land.

It also further claimed that the 1st defendant company had no interest legal or equitable in the suit land in which the plaintiff company has been in occupation and possession since 2016, and whose history traces back through several registered proprietors to wit: Denis Kakembo who was the first registered
5 proprietor as on 8th March, 1984 to *Kasulu Enterprises Ltd* which company eventually sold the same to the plaintiff company.

That the purchase was preceded by an official search at the land registry through the plaintiff's lawyers, confirming that the land was registered at that time in the names of the vendor, *Kasulu Enterprises Ltd*.

10 The search also revealed the size of the land as 805 hectares and following a survey commissioned by the plaintiff company to open the boundaries, the location, existence, size of the land were confirmed.

That a meeting held on 2nd March, 2018 convened by the 2nd defendant advised that the two plots were situate in different areas and that there was no evidence
15 that the suit land overlaps the 1st defendant's land.

According to the plaintiff, the cadastral sheet, job record jacket and instructions to survey were fraudulently tampered with, obliterated and/or lost.

The plaintiff company therefore filed this suit seeking a declaration that it is the rightful owner of the suit land; a declaration that part of the 1st defendant's land
20 comprised in **LRV 1698, Folio 2 plot 4 Bulemeezi Block 917 at Kibaja, Kyambogo** (suit land) is illegal, irregular and fraudulently created; an order that the 3rd defendant rectifies the register; an order that the defendant committed fraud; a permanent injunction; general damages and costs of the suit.

The 1st defendant's defence:

25 The 1st defendant filed a defence and counterclaim in which objections were raised, that the plaintiff company had no cause of against the 1st defendant company; and that the suit was vexatious as the prayers sought were untenable and cannot be maintained in law.



In the counterclaim, the 1st defendant therefore sought for the following reliefs:

- 1) *A declaration that the counterclaimant is the owner and registered proprietor of all land measuring 1290 hectares, comprised in **LRV 1698 Folio 2, plot 4 Bulemeezi, Block 917, land at Kibaja, Kyambogo, Kisagya** and entitled to uninterrupted possession thereof;*
- 2) *An order compelling the parties to carry out a boundary opening and site location of both **plots 4 and 8** to ascertain and find out the acreage and location of each of the plots;*
- 3) *An order for a permanent injunction restraining the 1st counter defendant from any continued acts of trespass on the counterclaimants land comprised in **LRV 1698 Folio 2, plot 4, Bulemeezi Block 917, land at Kibaja, Kyambogo, Kisagya** or any part thereof;*

That furthermore in the event that the 1st counter defendant's land is found to be seated on the part of the counterclaimant's land:

- a) *a declaration that the 2nd and 3rd defendants illegally and unlawfully created **plot 8** out of **plot 4** without any subdivision and consent of the counter claimant;*
- b) *an order compelling the 2nd counter defendant to cancel the 1st counter defendant's title on grounds of illegality and fraud;*
- c) *a declaration that the 1st counter defendant's forceful occupation of part of the counterclaimant's land amounts to trespass;*
- d) *an eviction order against the 1st counter defendant;*
- e) *a permanent injunction restraining the 1st counter defendant from utilizing and/or disrupting the counter claimant's use, possession and utilization of its land;*
- f) *general damages;*



- g) *mesne profits;*
- h) *costs of the suit.*

Background to the suit:

By way of a brief background to this dispute, the land which was the subject of
5 the dispute was leased by the Uganda Land Commission in two separate lease
agreements, each for a lease term of 49 years, on separate dates.

The land comprised in ***Bulemeezi LRV 1608 Folio 2, plot 4 Bulemeezi Block
917, Land at Kibaja Kyambogo, Kisagya Kasalizi***, measuring approximately
1290 hectares (5 square miles) (*herein after referred to as plot 4*) is registered
10 under the names of the 1st defendant company. It was leased to the 1st defendant
on 28th November, 1997.

The original owner of the lease interest was *M/s Ngoma Galyawamu Farmers Ltd*
who got registered on the title on 29th August, 1988. According to the 1st
defendant, the company got into possession from 1997 without any
15 encumbrances. The land was subsequently divided to create other plots, with
plot 65 as the residue.

The plaintiff company on the other hand has been the registered owner of ***LRV
1297 Folio 15 plot 8, Bulemeezi Block 917 at Kisalizi Village Nakaseke
district***, (*herein after referred to as plot 8*), since 14th March, 2016. The first
20 registered owner on the title was Dennis Kakembo, as at March, 1984.

The plaintiff's interest is derived from *Kasulu Enterprises Ltd* who became title
owner on 26th May, 2011, for the land measuring approximately 805 hectares,
which the 1st defendant company however claimed as ***plot 65***, which was part
of the entire ***plot 4*** acquired from *M/s Ngoma Galyawamu Farmers Ltd*, the 1st
25 defendant's predecessor in title.

In his counterclaim the 1st defendant alleged that fraud was committed by the
defendants who purported to create ***plot 8*** out of ***plot 4***.



That the Commissioner, Mapping and Surveys illegally and fraudulently forged and sanctioned cadastral maps and deed prints for **plot 8** which is indicated as land subdivided off as **plot 4**; and that a title had subsequently issued for **plot 8**, whereas there was no subdivision.

5 The plaintiff filed a rejoinder, though belatedly but on account of the reasons that he gave in the covering letter which court considered as plausible, the submissions in the rejoinder were considered.

3rd defendant's defence:

10 I did not find and defence from the office of the Attorney General. However the 3rd defendant filed a defence, with no reply to the counterclaim. The gist of its response was that the two parties were claiming different portions of land.

That efforts to address the lacuna were opposed by the plaintiff. Neither of the titles was to be cancelled until after a site location and boundary opening survey was conducted to ascertain the nature of the problem.

15 The 3rd defendant (without prejudice) admitted that both titles had been issued by it, based on information and minutes from the district land boards and Uganda Land Commission.

Agreed facts:

During the scheduling, the agreed facts were:

- 20 **1. The plaintiff is the registered proprietor of LRV 1297 Folio 15 plot 8, Bulemeezi Block 917 at Kisalizi Village Nakaseke district, measuring 805 hectares;**
- 25 **2. The 1st defendant is the registered proprietor of LRV 1698 Folio 2, plot 4, Bulemeezi Block 917 at Kibaja, Kyambogo, Kisagya measuring approximately 1290 hectares;**



3. According to the available records the instructions to survey both properties is I.S No. M856.

It is also not in dispute that upon being granted an offer for a lease 5th March, 1974, an instruction to survey the land was issued under **I.S No. M.856**, dated
5 4th November 1975.

It is furthermore not disputed that in 1988, a certificate of title for the land described as **LRV 1698, Folio 2 plot 4, Bulemeezi block 917, Land at Kibaja Kyambogo, Kisaja Kasalizi** measuring approximately 1290 hectares (5 square miles) (**plot 4**) was issued in favour of the 1st defendant's predecessor in title,
10 **DExh 3.**

For **plot 8**, however, the first title had been issued on 8th March, 1984 under the names of Dennis Kakembo. Just like for **plot 4**, it was also issued by the Uganda Land Commission for a lease term of 49 years.

The 1st defendant acquired the land in 1993 as per the agreement of sale **DExh**
15 **4** and got registered on the title on 28th November, 1997, under *Instr. No. 290911*.

It is the 1st defendant's claim that upon such acquisition the 1st defendant and its agents utilized the land for farming and remained unchallenged until 2011 when a company called *LINDA- K Ltd* illegally and fraudulently obtained a special certificate of title for the land comprised in **plot 4** and forcefully took possession
20 thereof, thus dispossessing the 1st defendant.

In 2012, the 1st defendant sued both the said company and the Chief registrar of Titles, vide **HCMC No. 57/ 2012** for illegally and unlawfully issuing a special certificate of title for the land comprised in land **plot 4**.

In its ruling **DExh 5**, dated 10th October, 2014, this court declared the 1st
25 defendant as the lawful and recognized registered owner of **plot 4**, which was later subdivided into several plots.

Court ordered cancellation of the title in the names of *Linda-K Ltd* and recognized the duplicate title of the 1st defendant as the valid title (**DExh 6**).

This court noted however that after the ruling the 1st defendant had sold off 2 square miles, retaining 3 square miles which became **plot 65** (residue), claimed by the plaintiff as **plot 8**.

The 3rd defendant maintained that the two were separate plots of land. Indeed, since by description on the titles **plots 4 and 8**, respectively as **LRV 1698 Folio 2 plot 4 Bulemeezi block 917, Kibaja Kyambogo, Kisaja, Kasalizi (now plot 65 by residue) and LRV 1297 Folio 15 plot 8 block 917, land situate at Bulemeezi**, appeared to be independent and in different locations, this court was under an obligation to investigate and make a response to the questions:

- 10 a) *whether or not the land in the present suit was also the subject of the dispute in the concluded suit, **HCMC No. 57/ 2012**;*
- b) *relatedly, whether or not **plot 65 and plot 8** were the same or separate pieces of land;*
- 15 c) *whether or not there was an overlap of **plot 8** over **plot 4** and if so, to establish the circumstances under which the two titles in contention were issued by the 3rd defendant over the same land, bearing different plot numbers, and seemingly different locations;*
- 20 d) *generally, whether or not there was fraud in the creation of either of the titles, as alluded to by either side.*

Court thus went into a full trial at which the staff from the office of Commissioner Surveys and Mappings were summoned as court witnesses.

25 A *locus* visit was also conducted to establish the truth on actual possession and ownership of the suit land.

Representation:

The plaintiff was represented by **M/s Gitta & Co. Advocates**. The 1st defendant was represented by **M/s Magna Advocates**.



Issues:

At the scheduling the following issues (as re-numbered by this court) were agreed upon:

5 1. ***Whether the cadastral sheet No. BLK- 917 01-D-N was illegally tampered with by the 2nd and 3rd defendants to create an overlap of land comprised in LRV 1297 Folio 15 plot 8, block 917, land situate at Bulemeezi and land comprised in LRV 1698 Folio 2, plot 4 Bulemeezi block 917, land at Kibaja Kyambogo, Kisaja.***

10 2. ***As between the certificates of title for land originally comprised in LRV 1698 Folio 2 plot 4 Bulemeezi block 917, Kibaja Kyambogo, Kisaja, Kasalizi (now plot 65 by residue) and LRV 1297 Folio 15 plot 8 block 917, land situate at Bulemeezi, which is the valid title.***

15 3. ***Between the plaintiff and the 1st defendant who is entitled to possession of the suit land.***

20 4. ***Whether the plaintiff is a bona fide purchaser for value without notice of land comprised in LRV 1297 Folio 15 plot 8 block 917, land situate at Bulemeezi.***

5. ***What remedies available.***

25 **Analysis of the law and evidence:**

Issue No. 1: Whether the cadastral sheet No. BLK- 917 01-D-N was illegally tampered with by the 2nd and 3rd defendants to create an overlap of land comprised in LRV 1297 Folio 15 plot 8, block 917, land situate at Bulemeezi and land comprised in LRV 1698 Folio 2, plot 4 Bulemeezi block 917, land at Kibaja Kyambogo, Kisaja.



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**).

5 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 contends, on a balance of probabilities. (**Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004**).

10 Where a party adduces evidence sufficient to raise a presumption that what he asserts is true, he/she is said to shift that burden to his opponent who must adduce evidence in rebuttal of the presumption. (**Takiya Kaswahiri & Anor vs Kajungu Dennis CACA No. 55 of 2011.**)

15 It was incumbent upon the plaintiff in the instant case to prove that there was tampering with the cadastral sheet *No. BLK. – 917- 01-D-N* by the 1st defendant in connivance with the 2nd and 3rd defendants, intended to defeat the plaintiff's interests.

In his rejoinder counsel for the plaintiff argued correctly so, that where **issue No. 1** was to be resolved in the affirmative, the natural implication would be that
20 the 1st defendant's title would be cancelled.

The plaintiff in short, had to discharge the burden to prove that irregular acts amounting to fraud had been committed by the said defendants with the knowledge of the 1st defendant so as to justify the orders sought.

25 By virtue of **section 59** of the **Registration of Titles Act. (RTA)**, the general principle is that a title is conclusive evidence of ownership, except where it is established that fraud was been committed.



It is also trite that no action of ejectment or other action for the recovery of any land shall lie or be sustained against a person registered as proprietor under the **RTA. (ref: section 176 (c)).**

Among the exceptions to that rule however is where a person is deprived of any
5 land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud.

The term *fraud* has been defined to imply an act of dishonesty. (**Kampala Bottlers Ltd. vs. Damaniaco (U) Ltd SCCA No. 2 of 1992.**); an intentional
10 perversion of truth 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 by concealment of that which deceives and is intended to deceive another so that he/she shall act upon it to his legal injury.
15 (Ref: **F.I. K Zaabwe vs Orient Bank and 5 others SCCA No. 4 of 2002**)

Where an allegation of such gravity is made, the person who seeks reliance on it must be specifically pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in civil matters. (**Kampala Bottlers Ltd. Vs Damaniaco (U) Ltd (supra).**)

20 Fraud is such grotesque monster that courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation. It unravels everything and vitiates all transactions. (**Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994] KARL 307.**)

In alignment with the above authorities, it was submitted by counsel for the
25 plaintiff in this suit that the 1st defendant had no interest in the suit land.

It was averred that the record documentation (which included cadastral sheet (**PEXh 3**); instructions to survey; the topographical maps (respectively, **CE11(a) and CE12**) had been tampered with by the defendants to fraudulently create an



overlap of **plot 4 and 8**, which two plots existed side by side in their form and shape, before the cadastral sheet was altered.

A copy of the search report was tendered in as **PEXh 4** to prove that as at 8th October, 2014 *Kasulu Enterprises Ltd* who sold to the plaintiff as the rightful and registered owner of **plot 8**.

Relying on the testimonies of **Pw1**, Mr. David Kyazze and Mr. John Barozi as **Pw2** and several documents as contained in the trial bundle, counsel further argued that the deed print for **plot 8** had been signed on 16th February, 1980, while that for **plot 4** was signed on 22nd September, 1986, over 6 years later, and this was confirmed by the survey report produced by the survey firm of *Synergy & Mapping Ltd*.

He also referred to certification from the district staff surveyor about the accuracy of the survey for **plot 8**. That similar remarks were also made for the deed print for the neighbouring **plot 7 (PEXh 2)**.

However, that there was no such certification and confirmation of delineation /demarcation for **plot 4** by the district staff surveyor and that the defendants did not offer any explanation for this.

That the copies of the cadastral sheets **PEXh 3 and PEXh 7** show a clear line demarcating the respective boundaries for both **plots 8 and 4**, without any overlapping.

Counsel referring to **CE II(a) and CE12** (topographic/boundary maps) submitted that the said maps are prepared before the cadastral sheets and deed prints. Unlike however the cadastral sheets which are transparent films that can be altered, topographical maps are printed on paper which cannot be altered.

That maps which were presented by **Cw1** reflect the suit land as **plot 8** in its shape and in the shape captured by the deed plan, unlike the cadastral sheet which had been altered.



He referred to **section 82 of the Evidence Act, Cap. 6** which provides that court shall presume that maps purporting to be made by the authority of Government were so made and are accurate.

5 That in case of any conflict between the deed print attached to the title and the cadastral sheet, the maps assist in eliminating the issues of overlaps because whatever is on the deed print should match with what is on the cadastral sheet; and that the same should have been plotted on the topographic block map.

10 However unlike **plot 8, plot 4** which had not been plotted onto the topographic map was never surveyed. It was therefore a fraudulent creation on the cadastral sheet. The obliteration removed the dividing line in order to create an overlap of the two plots, whereas not.

Response by the 3rd defendant:

15 The 3rd defendant's belated submission refuted the allegation of tampering with the records relating to *Cadastral sheet No. BLK 917 -01-D-N*, in respect of the plaintiff's land.

The 3rd defendant being the office mandated to issue land titles issued both certificates of titles for the land comprised in **LRV 1698 Folio 2 plot 4 Bulemezi in favour of the 1st defendant and Land comprised in LRV 1297 Folio 15 plot 8 Block 917**, in favour of the plaintiff. That both the plaintiff and the 20 1st defendant were owners of different certificates of title.

25 That the unrebutted evidence by **Cw1 and Cw3** on record however draws an inference that Cadastral sheet *No. BLK 917-01-D-N*, the basis of which the plaintiff makes a claim has no root and no records to support the contents therein and therefore the same ought to be cancelled under **section 91 of the Land Act**.

The 3rd defendant therefore concluded that a finding should be made by court that the cadastral sheet which the plaintiff claimed was illegally tampered with by the 3rd defendant did not illegally exist as it had no roots, the same having



merely been created by the plaintiff or its predecessors in title basing on falsified information.

Response by the 1st defendant:

5 Counsel for the 1st defendant/counterclaimant at the commencement of this submissions noted a reference to the fresh documents presented to court by the opposite counsel, together with the final submissions, highlighting parts of the documents.

As submitted, a court ought to rely on evidence properly admitted and value it alongside other evidence on record. **(Ref: Court of Appeal, in Civil Appeal No. 10 26/2009 Brian Kagwa Vs Peter Muramira.)**

In the rejoinder, the clarification was made by counsel for the plaintiff was that the documents referred to were those marked as **PExh 1, CE II (a) and CE12** which were all in the possession of the 1st defendant, which therefore puts that objection to rest.

15 During trial, the 1st defendant company on its part relied on the evidence of Mr. Hanif Moledina Mohamed the 1st defendant's company's Managing Director who was the sole witness for the defence. **(Pw1).**

The 2nd and 3rd defendants did not present witnesses as the court witnesses came directly from their respective offices.

20 Mr. John Vianney Lutaaya, a Principal Staff Surveyor with the office of the Commissioner Surveys and Mapping testified as court witness **Cw1.**

Mr. Musoke Gideon from *Synergy Surveys and Mapping*, a court appointed Survey firm testified as **Cw2** and Mr. Joseph Kibande, a Senior Registrar of Titles, as **Cw3.**

25 **Consideration of the issue:**



The submissions filed by each party on every issue were lengthy. Though not reproduced them in detail I have carefully perused and taken the arguments raised in each of those submissions when writing this judgment.

5 As noted earlier, the 1st defendant in its defence raised several objections. That there was no cause of action against it, and that the suit was vexatious and not maintainable in law.

In the submissions, it was further claimed that the plaintiff did not specifically plead fraud. That parties are bound by their pleadings and it is not open to court to base its decision on an unpleaded issue.

10 In his rejoinder the plaintiff referred to *paragraph 8* of the plaint contents which however upon perusal by this court were not particularized as against the 1st defendant.

The standard of proof required to prove fraud is higher than that which is required in any ordinary suit. Fraud must therefore not only be strictly pleaded,
15 it must also be proved up to the required standard.

In the present case, and as duly noted, no specific act of fraud was pleaded as against the 1st defendant company and indeed as submitted by its counsel, no issue was framed on fraud specifically against the 1st defendant or its agents.

Counsel cited the decision of the Supreme Court in ***Hannington Wasswa & Anor vs Maria Onyango Ochola SCCA No. 22/93***, the gist of which is that a
20 party cannot seek to rely on allegations of fraud, unless the same were pleaded and particularized in their pleadings.

The same court in ***Fangmin vs Belex Tours and Travels Ltd SCCA No. 66 of 2013*** has however ruled that the current position is that court may accord
25 parties an opportunity to address it on the unpleaded ground of illegality or fraud.



Furthermore, in **Simba (K) Ltd & others vs UBC SCCA No. 3 of 2014** it held that in such instance the parties have to lead evidence or address it to enable it to arrive at a correct decision and finally determine the controversy between the parties.

- 5 This may be done at any stage, even after the hearing but court must satisfy itself that the alleged illegality is sufficiently proved. This principle is based on the right to a hearing as stipulated under **article 28 of the Constitution**.

Whereas therefore the particulars of fraud as raised in the plaint were not directed specifically at the 1st defendant, there were certain area and aspects on
10 the illegalities implied from the issues as framed, which this court could not afford to ignore. Some of these were raised through the counterclaim, with direct bearing on the plaintiff's claim of ownership of land currently comprised **plot 65**.

The plaintiff company on its part relied on **PExh 1** a certificate of title for **plot 8**.
15 It was issued on 8th March, 1984 under the names of Dennis Kakembo, for a lease term of 49 years, w.e.f 1st March, 1980. The ownership went through other registered proprietors from 1985 up to 14th March, 2016 when *Kasulu Enterprises* transferred the lease to the plaintiff.

Attached was the lease dated 31st March, 1984 between the Uganda Land
20 Commission and Dennis Kakembo. **PExh 4** was the search certificate, dated 8th October, 2014, which showed that *Kasulu Enterprises Ltd* (plaintiff's predecessors in title) had a lease of 49 years that is dated from 1st March, 1980.

The survey report by *Geo-Earth Consultants Surveyors* dated 1st June, 2017
25 (**PExh 5**) indicated the existence of the **plot 8** for an area of 808. 713 hectares. It was however only conducted after the plaintiff had purchased **plot 8**.

With the specific reference to the tampering with the documentation concerning the suit land, a concern raised by counsel for the plaintiff, this court had to pick



a few elements and aspects of evidence from the plaintiff's own document, **PEXh 12.**

This was internal correspondence dated 16th September, 2020 from the office of the Commissioner Surveys and Mapping, Entebbe. Below were its contents:

5 *Reference is made to yours dated 14th September, 2020 requesting for the above information. Here attached is an area schedule from Luwero MZO for your perusal:*

In addition to that, allow me to inform you that since 2017 there have been several issues and conflicts in connection to that block between mainly three groups, ie GENAGRI Plantations Ltd, SWATT Security Ltd and LINDA-K Ltd.

10 *The main contention being between GENAGRI Plantations Ltd, the current owners of plot 4 block 917 registered under LRV 1698 FOLIO 2 and SWATT Security registered under LRV 1297 Folio 15 on plot 8 block 917. A perusal of the available information revealed that plot 4 was created as a result of a survey under IS No. M856 which was issued on the 4th November 1975 in favour of Ms Ngoma Galyawamu Farmers and Family for a survey of approximately 1295 Hectares of land at kibaja, Kyambogo, Kiwogo villages Bulemeezi and accordingly the survey process was completed and signed off on the 18th May, 1977.*

15 *The origin of plot 8 block 917 cannot be ascertained apart from it appearing in the Kalamazoo without indicating its parent plot, as much as a copy of a print that was*
20 *at one time presented by one party showed plot 8 sitting on part of plot 4.*

Please note that plot 8 as shown on the area schedule has never been a derivative of plot 4. There is no record of any 1S in favor of plot 8. (emphasis added).

Serwambala Ivan (RSU, FISU)

Senior Staff Surveyor

25 *Luwero MZO.*

To corroborate those findings was **PEXh 6A**, the area schedule which indicated that the **plot 8** exists but its mother plot was not indicated anywhere. According to the surveyors, it was not derived from **plot 4**.



Plot 4 on the other hand measuring 1290 hectares had (at the instance of the 1st defendant) been subdivided into several other plots, leaving a residue of **plot 65** measuring 807.05 hectares, bearing nearly the same measurements as those for **plot 8**.

- 5 Going by an inscription on the second page of the area schedule at the bottom thereof, it becomes clear that indeed **plot 8** did not arise out of the mutation of **plot 4**.

DExh 2 on the other hand and by way of comparison was the *IS M.856*, instructions to survey an area of 1290 hectares for *M/s Ngoma Galyawamu*
10 *Farmers & Family*, bearing the date of 4th November, 1975.

As submitted by counsel for the 1st defendant, the exercise was embarked on in 1977. As per **DExh 3** a certificate of title was issued for **plot 4**, for the area of 1290 hectares.

DExh 4, is the sale agreement, dated 4th October, 1993 between the 1st
15 defendant and the owner/vendor *M/s Ngoma Galyawamu Farmers & Family* which became the first registered owner of that plot on 29th August, 1988. The transfer of the title to the 1st defendant was made on 28th November, 1997.

The record also shows that on 5th October, 2011, *LINDA-K Ltd* acquired proprietorship over that same plot. The 1st defendant who claimed to have been
20 in possession of **plot 4** since 28th November, 1997 instituted a **Miscellaneous Cause No. 57 of 2012** against both the Registrar of Titles and *LINDA-K Ltd*.

In that application the applicant sought for verification and correction of the error of transfer of the said plot to *LINDA-K Ltd*, the 2nd respondent in that application.

25 The ruling of this court was delivered on 10th October, 2014. Court indicated clearly that the survey observations had confirmed the existence of **plot 4 on block 917** on the ground; and that the said plot was intact.



It is at that point that the 3rd defendant or the plaintiff and all others affected by the decision would have sought a review, instead of filing a fresh suit. As it were, the review was never sought and the said orders of court remained undischarged.

5 A copy of the consent withdrawal of the intended appeal was also attached as **DExh 7**. The court and indeed the Registrar of title in that application duly recognized the ownership of that land by the applicant/1st defendant.

10 Two years after this court had confirmed the ownership of **plot 4** the plaintiff had gone ahead to purchase **plot 8** measuring 805 hectares; while the 1st defendant subdivided and later sold part of the land, retaining **plot 65** as residue.

15 Contrary to the assertions made by the 3rd defendant the location on ground for both **plots 65 and 8** was the same, as also established from the court *locus* visit. As correctly pointed out by counsel for the 1st defendant in their submissions, there was nothing from the record or such evidence by the plaintiff to prove that before the suit land was purchased in 2016, a survey had been conducted to ascertain the boundaries and location of **plot 8**, as an act of due diligence.

20 The various surveys referred to were all conducted only after the sale and transfer of **plot 8** to the plaintiff. The first two were respectively done on 1st June, 2017 and 18th June, 2017 and since they were not conclusive, the third survey was ordered by this court for the opening of the boundaries of the two plots. A report **DExh 16** on the findings was presented to court.

25 In their report dated 7th May, 2019, the firm of *Synergy Surveys and Mapping* appointed by this court (as per letter dated 15th January, 2019) confirmed that indeed both parties had lease titles issued by ULC under two different files, each with a running lease.

But that while **plot 8** the lease was from 1st March, 1980, for **plot 4** was to run from 1st March, 1986. That both titles had copies of deed prints, certified by the Commissioner of the department of Surveys and Mapping.



The surveyor who filed the report gave two logical explanations to the anomalies: That either **plot 8** was a creation out of the subdivision of **plot 4**; or **plot 8** was fraudulently created as an extension from **plot 4**.

5 The report also ruled out any possibility that the same instructions to survey had been issued and used for both plots as indicated in both sets of deed prints. Also evident from the report, **plot 8** could have been recorded at the district in the Kalamazoo but the survey if any, was never processed to completion at the department of mapping and surveys.

10 The above findings also received credible support through the evidence of **Cw1, Cw2 and Cw3**. The three court witnesses gave a clear background to the said such ownership which corroborated the credible documentary evidence of the court witnesses.

All this led to the acknowledgment of the following findings and conclusions that:

- 15 1. *Where a surveyor is given instructions to survey an area and finds that it is less or more than what is contained in the IS he or she cannot proceed with the survey. He/she must seek fresh instructions indicating the land which is available;*
- 20 2. *The same IS cannot be used to survey two separate areas; therefore it is inconceivable that IS No. 856 initially issued in 1975 in favour Ngoma Galyawamu Farmers Ltd for survey of Land at Kibaja, Kyambogo, Kisagye, Kisalizi all measuring approx. 1290 hectares (Approx. 5 sq miles) could subsequently be used to survey land measuring approx. 805 hectares (Approx. 3 sq miles) in favour of the plaintiff's predecessors in title.*
- 25 3. *Plot 8 featured only in the area schedule form, had a deed print and appeared on the kalamazoo but with no origin and indeed no other information regarding its roots and no records to show how the plot came into being;*
- 30 4. *Plot 4 had been duly surveyed and it is out of that plot that plot 65 had been created, which the plaintiff claimed as plot 8;*



5. Plot 4-7 were entered on 18th November 1976 and approved on 23rd March 1977, however, for Plot 8-9 which were not seen anywhere on the cadastral map, the entries are on 14th June 1979, with a faint signature purportedly approving them on 2nd August 1978. It was impossible that the plots could have been approved before they were surveyed. It was also inconceivable that the same could have been lawfully approved on 2nd August 1978 before the entries were even made.

6. The survey leading to creation of Plot 4 was done, concluded and approved before the one alleged to have been done that led to the creation of plot 8.

Conclusion on the issue:

From the findings above, the conclusion is inevitable therefore that **plot 4** out of which **plot 65** had been created was charted and surveyed before **plot 8**, and as such therefore took precedence over **plot 8**.

Without verification, the Commissioner, Mapping and Surveys had illegally sanctioned cadastral maps and deed prints for **plot 8** which is wrongly indicated as land subdivided off as **plot 4**.

The cadastral sheet from the office of Commissioner Surveys and Mapping (which according to the plaintiff had been altered) did not have **plot 8**; and as such, **plot 8** was engulfed in **plot 4**.

The inference is also drawn through the un rebutted evidence by **Cw1 and Cw3** that Cadastral sheet No. BLK 917-01-D-N, the basis of which the plaintiff makes a claim has no root and no records to support the contents therein.

Cw1 (and indeed all other court witnesses) struck this court as credible witnesses. Based on their evidence, it is therefore also the conclusion by this court that fraud was committed in the creation of **plot 8** over an already existing and duly surveyed original **plot 4**, which was rightfully owned by the plaintiff.

It is therefore surprising that the Registrar of titles having been a party to the case filed by the 1st defendant in 2012 and even made to take corrective action



by court, being the custodian of the register where all information is supposedly securely and properly kept had gone ahead, first to create a special certificate of title for *LINDA-K Ltd*; and then after the court order, cancel the said title in recognition of the 1st defendant 's title.

5 The very same office two years later made entries in the register recognizing the plaintiff over the same portion of land, without first verifying, ascertaining or obtaining confirmation on the ground the existence of the plaintiff's land or subsistence (or otherwise) of the said orders of court.

In response to **issue No. 1** therefore, the plaintiff could not satisfy this court that
10 there was tampering of the *cadastral sheet No. BLK- 917 01-D-N* or supporting documents attributable to the 1st defendant. In effect **plot 8** did not exist on the ground.

On the other hand however, there was such manipulation of the survey documentation in the office of the Commissioner of Surveys & Mapping that
15 occasioned the creation of two titles over the same piece of land.

The illegalities committed twice against the 1st defendant over the suit land were all orchestrated to defeat the interests of the rightful owners of the land comprised in **plot 4**.

Issue No. 2: As between the certificates of title for land originally
20 **comprised in LRV 1698 Folio 2 plot 4 Bulemeezi block 917, Kibaja Kyambogo, Kisaja, Kasalizi (now plot 65 by residue) and LRV 1297 Folio 15 plot 8 block 917, land situate at Bulemeezi, which is the valid title.**

AND

Issue No. 3: Who between the plaintiff and the 1st defendant is entitled to
25 **possession of the suit land.**

Counsel for the plaintiff in his submissions claimed that the plaintiff company but not the 1st defendant which was entitled to possession of the suit land. In

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his rejoinder, he stated that an offer of a lease relied on by the 1st defendant as having been granted earlier did not confer legal rights to the bearer.

That it is after a lease agreement is signed and a certificate of title created in the names of the bearer that legal rights are conferred to the bearer of the offer.

- 5 For the 1st defendant however it was argued rightly so, that in absence of any lease offer in favour of the plaintiff's predecessor from the Controlling Authority, no title can validly be issued in respect a leasehold interest. (**Ref: Livingstone Sewanyana vs Martin Alikor SCCA No. 4**).

10 A reference was also made by the plaintiff to **sections 5, 16, of the Limitation Act** and **section 78 of the RTA**. That based on those provisions the plaintiff and its predecessors in it title, having occupied the suit land undisturbed for over 12 years, the plaintiff was entitled to claim a legal interest in the suit land as an adverse possessor. (**Ref: Okullo Makmoi Thomas vs Apiyo Civil Appeal No. 26 of 2016**).

- 15 The plaintiff's argument was that **Pw1**, John Barozi, the MD of the plaintiff company testified that the company acquired the land in 2016. At that time, there was already a barbed wire and wooden pole fence constructed by the previous owners around most of the land.

20 That as per the survey report dated June, 2017 (**PExh 5**), confirmed by the locus visit there were homesteads and farming activities by squatters and herdsman, plus a valley dam. That there was quiet, uninterrupted enjoyment and therefore factual possession of the land since 1984, far beyond the statutory period of 12 years.

25 In any case, **section 16** (which is subject to **sections 8 and 29 of the Limitation Act**), at the expiration of the period prescribed for a person to bring an action to recover land, the title of that person to the land shall be extinguished.


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Counsel referred to the authority of **Kaggwa vs Apire Civil Appeal No. 126 of 2019** where it has been held that ownership is awarded to the first person who performs those actions deemed to demonstrate the degree of control over the land to qualify possession, which, is a good title against all but the owner who cannot show a prior and therefore better right to possession.

That the 1st defendant did not discharge the burden to prove that the plaintiff was not owner of the suit land. That the testimony of **Dw1**, Moledina the MD of the 1st defendant company on the other hand showed that the company purchased the suit land in 1993 but only discovered the alleged trespass by the plaintiff in 2017/2018, over 25 years later. **Dw1** did not offer any explanation for the 1st defendant's failure to challenge the alleged trespass by the plaintiff.

He therefore invited this court to decide that the plaintiff was an adverse possessor thereof.

Reply by the 1st defendant:

In his response counsel for the 1st defendant referred to the ruling dated 10th October, 2014 (**DExh 6**), **HCMA NO. 57 OF 2012**, by which this court declared the 1st defendant as the rightful owner; LINDA -K Ltd had fraudulently transferred the said **plot 4** in its names.

Court ordered for cancellation of the special certificate of title that had been created in its favour and further ordered the duplicate certificate of title in the names of the 1st defendant to be recognized as the valid title and the 1st defendant/applicant as the owner.

That as a judgment in rem this decision binds all persons including the third parties. (**Saroji Gandesha vs Transroad Ltd SCCA No. 13 of 2009**).

Reply by the 3rd defendant:

The 3rd defendant counsel in agreement with the 1st defendant's submissions argued that the plaintiff's title which was illegally created although issued before

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that of the 1st defendant cannot be ranked with one which was created legally and therefore the principle that the plaintiff's title enjoys priority of interest because it was issued first does not apply in the circumstances of this case.

5 An illegality once brought to the attention of court overrides all questions of pleadings including any admissions made. (***See Makula International Vs His Eminence Cardinal Nsubuga Wamala & Anor (1982) HCB 11.***)

Decision of court:

10 A claim against trespass to land can only succeed where the claimant proves that the disputed land belongs to him/her; that the defendant had entered upon it and that the entry was unlawful in that it was made without permission; or that the defendant had no claim or right or interest in the disputed land. (***Justine EMN Lutaaya vs Sterling Civil Engineering Co. SCCA No. 11/ 2002; Sheikh Muhammed Lubowa vs Kitara Enterprises Ltd CACA No. 4/1987.***)

15 In determining which title is valid, the court is not required merely to look at the dates of creation of the two titles. It must as of necessity investigate the circumstances under which both titles were issued and make a finding as to which of the two titles was created in accordance with the law before determining which of the two should to be cancelled.

20 In ***Suleiman Adrisi v Rashida Abul Karim Halani & Anor Civil Suit No. 008 of 2017*** court observed that land is only available for leasing when it is:

- i) ***vacant and there are no conflicting claims to it;***
- ii) ***occupied by the applicant and there are no adverse claims to that occupation;***
- iii) ***where the applicant is not in occupation but has a superior equitable claim to that of the occupant; or***

25 ***where the applicant is not in occupation but the occupant has no objection to the application.***


24

The offer of a lease by ULC to the 1st defendant's predecessors in title in 1974 signified that the land had been available to the 1st defendant for leasing. The absence of an offer to the plaintiff's predecessor in title on the other hand could only mean there was nothing to offer them.

5 The said land comprised in **plot 4** having already been surveyed and the survey approved by 1977 as pointed out by counsel, there was no longer any land on the same 1295 hectares that could be allocated to the plaintiff's predecessor in title for which another valid title could be issued. (**Ref: Butamanya vs Rwamatsibuza & others Civil Suit No. 103 of 1992**).

10 In the submissions in rejoinder counsel for the plaintiff argued also that an instruction to survey was an internal administrative arrangement used by the Commissioner Surveys and Mapping to carry out its work. It was not a legal requirement under the RTA for issuance of a title.

15 However as duly pointed out by the 1st defendant counsel, the evidence by **Cw3** on the value and weight of an IS was clear. Where a lease is to be issued, the primary document is the lease offer which in this case was **DExh 1**, dated 5th March, 1974, by the Uganda Land Commission, granted to *Ngoma Galyawamu Farmers & Family Ltd.*

20 **Cw1** to the satisfaction of this court explained the entire process from grant of a lease to issuance of an instruction to survey, execution of the instruction, processing of the job after conclusion of the survey, the drawing, plotting, issuance of deed prints, to the recording information in the Cadastral sheet and title processing.

25 Going by that evidence, the survey for the land to be leased can only be carried out after instructions (IS) have been duly issued, with each portion surveyed bearing its own unique and identifying number. The instruction permits a surveyor to enter and survey the land. It is on the basis of that survey that land is identified, plotted and a title subsequently issued.



The effect of a title not having a valid IS means that such land was never surveyed and does not have a root. That if the root does not exist, it means that the title was not rightly created.

5 It was **Cw 3's** testimony that, at the time **plot 8** was allegedly created, it was possible to provide the land office with a forged title however, with the computerization of the system now, a title cannot be created where there is no instruction to survey. The same instruction cannot be used to survey another area.

10 With all due respect to the plaintiff's arguments, these survey procedures do not have to be specifically codified in the RTA for court to regard them as binding or enforceable.

15 From the evidence led by both sides therefore, it is more likely than not that *SI No. M856* was intended only for **plot 4**. It could not be duplicated and or used for surveying any other plot. It goes without saying that **plot 8** was created after depletion of that instruction.

20 This court in any case has already hinted at the issue as to whether or not the duplicate certificate in possession by the 1st defendant was obtained fraudulently. This had already been addressed by court in an earlier action: **HCMA NO. 57 OF 2012, GENAGRI Plantations Ltd vs The Chief Registrar of Titles Kampala & Anor.**

On *page 30* of the judgment court referring to the evidence of two witnesses from the office of the Registrar of Titles stated as follows:

25 *The confirmation of the validity of the duplicate certificate of title in possession of the applicant by Cw1 and Bigiira Johnson has not been controverted. In the premises I am fully satisfied that the duplicate certificate of title .. is a valid document issued by the 1st respondent.*

Thus the applicant's predecessors in title – Ngoma Agali Awamu Farmers Ltdobtained it without any fraud.



In conclusion:

From the above ruling, the issue of the validity of the title comprised in **plot 4** was therefore *res judicata*.

5 Under those circumstances, the plaintiff's claim on adverse possession based on the provisions of **section 78 of the RTA** or the reliance on the application of the statute of limitation for that matter as against the counterclaimant did not arise.

In any case, neither Kakembo nor *Kasulu Enterprises Ltd* (through whom the cause of action would have first arisen) ever questioned the plaintiff's acquisition, utilisation, possession and/or occupation of **plot 4. (Ref. section 5 of the**
10 **Limitation Act).**

Furthermore, in response to counsel's concern as to whether or not the plaintiff's action is maintainable in law and whether the plaintiff had a cause of action against it, the position of the law as spelt out in **Cottar v Attorney General for Kenya 193 AC P. 18**, by **Sir Joseph Sheridan CJ** as he then was, who had this
15 to say:

.....the plaintiff must appear as a person aggrieved by the violation of his right and the defendant as a person who is liable, then in my opinion a cause of action has been disclosed If on the other hand any of those essentials is missing no cause of action has been shown....."

20 In the first place, the pleadings as observed earlier did not particularize any act of fraud against the counterclaimant.

But secondly as already noted, the findings have shown that **plot 8** did not exist as it was superimposed onto an existing **plot 4**; and as the said land belonged to the 1st defendant/counter defendant already declared by court as the rightful
25 owner..

Ultimately, whatever errors in the survey or other illegal or fraudulent acts committed prior to 2016 were not attributed to the 1st defendant in this suit.



Not only therefore did the plaintiff fail to prove that **LRV 1698 Folio 2 plot 4 Bulemeezi block 917, Kibaja Kyambogo, Kisaja, Kasalizi** (currently **plot 65** by residue) was not validly issued, but it also failed to prove that it had no cause of action against the 1st defendant/counterclaimant. It also goes without saying
5 therefore that the 1st defendant/counterclaimant is entitled to possession of the **plot 65**.

The above therefore resolve the **2nd and 3rd issues**).

10

Did the plaintiff have a cause of action against the 2nd and 3rd defendants?

It was the plaintiff's argument that any mistake, fraud or illegality that was committed to procure the certificate of title for **Plot 8** cannot be attributed to the
15 plaintiff/counter defendant.

Counsel submitted that a meeting held on 2nd March, 2018 convened by the 3rd defendant after hearing the two sides, had advised that the two plots were situate in different areas and that there was no evidence that the suit land overlaps the 1st defendant's land.

20 Relying on **PEXh 13 and PEXh 14**, argued further that the officials from the office of Commissioner Surveys and Mapping had refused to avail the plaintiff with land record documentation and files despite repeated requests to them.

That the court witnesses in court stopped short of saying that the illegalities if any, were orchestrated by the Commissioner's office and that of the 3rd
25 defendant, since they were the ones in charge of the survey.



Counsel also faulted the Survey department for its failure to issue an instruction to survey the plaintiff's land, which failure could not be the basis for rendering the plaintiff's title illegal.

The Court of Appeal in AG vs HENLEY Property Developers Ltd Civil Appeal No. 421 of 2021 held that the Land Registrar guarantees the accuracy of the register. That the register being conclusive evidence of ownership there was no need to search beyond the certificate of title to ensure proven ownership.

That the alleged fraud that the 1st defendant as a counter claimant seeks to prove to this court against the plaintiff could only have occurred prior to the issuance of the certificate of title for **plot 8** in 1984 to the first registered proprietor of the suit land, Denis Kakembo.

The same certificate of title went through a series of other owners to wit; Crammer Ddiro Kintu in 1984, and Kasulu Enterprises Ltd in 2011 before it was transferred to the plaintiff in 2016. Furthermore, that the counter claimant did not produce any evidence to prove that the plaintiff participated in any fraud prior to the creation of the title.

As per the authority of **Adrabo Stanley vs Madira Jimmy (supra)**, a purchaser under the Torrens System does not need to search back through each previous transfer.

Instead, the purchaser can rely on whatever name shown on the land title at the Land Registry. If the title deed shows a person as the owner, the purchaser can by virtue of **section 59 of the Registration of Titles Act** buy the property from that owner without worrying about how that person became the owner.

The plaintiff counsel further submitted that any omission to issue a separate instruction to survey for **plot 8** was an administrative issue in the office of the Commissioner Mapping and Surveys and 3rd defendant.

In response, for the counterclaimant it was claimed that the plaintiff had opposed the proposal by the Commissioner Surveys and Mapping and staff from



Luwero and district Local Government, and officials from the commandant Land Protection unit to verify the documents and conduct site location and boundary opening exercise.

He cited **Civil Application 12 of 2016 (SC) Commissioner Land Registration & Anor vs Lukwajju**, where the Supreme Court held that the land registry is a public office charged with administration of land in Uganda.

It is an authority as to the ownership and history of registered land. Its evidence would generally be the most credible and capable of belief on issues of land and ownership.

10 The net effect of the evidence adduced by the court witnesses, mainly from the office 3rd defendant is that the Cadastral sheet sought to be relied upon by the plaintiff had been illegally created, and tainted with material falsehoods.

Cw3, a Senior Registrar of titles testified in defence of the 3rd defendant that attempts were made to rectify the issue between the two titles for **plot 4 and plot 8** but that the plaintiff was not comfortable with the process.

The same witness however in his statement went on to deny liability stating that the office of the 3rd defendant does not handle issues of survey as the same are handled by the office of Commissioner for Surveys and Mapping, which office guides that of the 3rd defendant.

20 The 3rd defendant in the WSD claimed that the parties were in occupation of two separate plots but through the evidence its officials contradicted its own pleadings by admitting that there was an overlap.

That the documents obtained from the office of the Commissioner, surveys and mapping had revealed that at the time of creation of **plot 8**, the instruction to survey which was presented was forged and non-existent.

That such issues were common in Bulemezi where many overlaps occur, arising from dishonest people from the public; and that is why under **section 91 of the**



Land Act, Cap. 227 such documents are liable to cancellation. No rectification was however done.

Consideration by court:

Section 91 gives special powers to the commissioner to correct its own errors, where for instance a certificate of title is issued in error; contains a wrong description of land or boundaries; or is illegally or wrongfully obtained.

The duty of the Registrar of Titles Commissioner Land Registration has also been described further as follows:

10 *“The delineations property boundaries by field surveys must be approved by a public office. Any parcel-identifier system can only work if one agency has the sole authority for assigning identifiers. ... preferably that agency has the sole authority for assigning identifiers.responsible for land registration (for example section 152 of the Registration of Titles Act requires depositing with the registrar, a plan of registered land that has been subdivided for the purpose of selling it in allotments). The role of the public office is to enforce standards for cadastral surveys formulated with respect to identifiers for all boundary points, documentation (materials, dimension, reference points), information required on monuments (surveyors’ name, monument number, dates), investigation of survey errors and their*
15 *correction, monitoring of surveyors’ work performance, verifying the topographic works done in the field, check the spatial accuracy of location data, ascertainment of data required in the record of each boundary segment (identifies of end points and identities of parcels bounded), plans or plats of survey (seats, details, cartography, approvals, materials), field*
20 *books and so on. {...} A valid title deed should therefore on the face of it be shown to have been based on a reliable survey. (emphasis mine): (**Adrabo Stanley vs Madira Jimmy (supra)**).*
25



The 3rd defendant from the above findings therefore admitted having failed to apply or exercise those powers when brought to its attention. This was sheer neglect of duty and inefficiency on their part.

It was through the negligence and fraud attributed to the office of the 3rd defendant, that **plot 8** was super imposed on land comprised in **LRV 1698 Folio 2 Plot 4 Bulemezi Block 917**.

The two titles invariably issued to the two parties bore different details on size, and location and other entries; and therefore a prospective buyer who failed to conduct a survey, physical search/visit and proper inquiries would wrongly assume that the two were different.

Part of the blame was attributed to the Uganda Land Commission, though not party to this suit, whose role under **section 49 of the Land Act, Cap. 227** is to manage land in Uganda and procure certificates over land vested in or acquired by Government. The ULC issued two leases around the same time to two different parties. ULC is an agent of Government. Where an agent makes a contract on behalf of the principal, the contract is that of a principal. At Common law, it is only the principal who can sue or be sued. (**Ref: Phenehas Agaba vs Swift Freight International Ltd HCCS No. 143 of 2000**).

In this case all the above would explain why the Attorney General, (the 2nd defendant) was added as a party as the ULC; department of surveys and Mapping; and the 3rd defendant were all instrumental in creating the confusion which culminated into the granting of separate titles over the same land.

Issue No. 4: Whether the plaintiff is a bona fide purchaser for value without notice of land comprised in LRV 1297 Folio 15 plot 8 block 917, land situate at Bulemeezi.

This is addressed in part. It is trite law that that fraud that vitiates a land title of a registered proprietor must be attributable to the transferee and that fraud


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of a transferor not known to the transferee cannot vitiate the title. **See: Wambuzi C.J, Kampala Bottlers vs Damanico (U) LTD, SCCA No. 27 of 2012.**

One of the conditions precedent that must be satisfied by the plaintiff who relies on the doctrine of *bonafide* purchaser for value without notice is that it has a
5 valid certificate of title from a person registered as proprietor through fraud or otherwise. It is not enough to merely plead that there is a certificate. **(Ipolito Semwanga vs Kwizera & Others Civil Suit No. 61 of [2012]UGHC 184).**

In absence of proof that the plaintiff possesses a valid title the plaintiff can hardly rely on the defence of a *bonafide* purchaser for value without notice.
10 **(Livingstone Ssewanyana vs Martin Alier SCCA No. 4 of 1990.)**

Whether or not a party was a *bonafide* purchaser for value without notice, the question that a court would pose is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. **(David Sejjaka Nalima vs Rebecca Musoke SCCA No. 12 of 1985).**

15 It is also trite that a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser for value without notice of the fraud if he/she fails to make inquiries before such purchase is made.

The term is defined in **Black's Law Dictionary 8th Edition at page 1271** to
20 mean:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has good faith paid valuable consideration without notice of prior adverse claims.”

25

Halsbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977, at page 27 further provides:



5 “Prior equitable interest in land can only be defeated by a bonafide purchaser for value without prior notice. Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation.”

Thus also where a party fails to satisfy court that there is a valid title from the registered proprietor from whom the interest was purportedly acquired; where no proof is provided that valuable consideration was paid; or that there was good
10 faith in the transaction, the defence of *bonafide* purchaser for value without notice cannot be upheld. (**See: David Sejjaka v Rebecca Musoke Supreme Court, Civil Appeal No.12 (1985).**)

In ***Vivo Energy Uganda Ltd vs Lydia Kisitu CACA NO. 193 of 2013*** court rejected the argument that a certificate of title was enough to establish
15 ownership where there was circumstantial evidence (as demonstrated in this case) that should have put the defendant on notice requiring him to go beyond the certificate of title.

Such failure to make reasonable inquiries or ignorance or negligence is considered so grave that it has in previous cases been held to form particulars
20 of the offence of fraud. (***Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995.***)

As noted earlier, by the time the plaintiff purchased the land this court had already made a declaration that **plot 4** out of which **plot 65** was created belonged to the 1st defendant.

25 On the issue of prior inquiries with the local leaders where the land is located, court in ***Jennifer Nsubuga vs Michael Mukundane and Anor CACA No. 208 of 2018*** made it clear that though not in statute law consultations with the leadership of the area is very key in establishing that due diligence was carried out.


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During the *locus* visit conducted by this court, there were several occupants including the plaintiff's agents, squatters and animal grazing on that land. An injunctive order had been issued by this court vide **MA No. 520 of 2018**, to maintain the *status quo* at the time.

- 5 There was no local leader or elder who was called in to testify and from the plaintiff's evidence it was clear that none of them was consulted in 2016 when the plaintiff purchased the land.

Dr. Kyazze David, (**Pw1**), claimed, (without availing any proof however), that he was director of *Ms. Kasulu Enterprises Ltd*. This is the company which had
10 allegedly sold **plot 8** to the plaintiff.

He admitted that no boundary opening exercise was conducted by the plaintiff prior to the purchase in 2016 or its predecessors in title prior to that, in order to establish the actual location or ascertain the area or the boundaries of **plot 8**. He never visited the area before buying the land in 2011.

- 15 **Pw1** confirmed that at the time of the acquisition of the land, there were some people on the land but that he did not know who these people were; and whether or not they were from *Genagri Plantations Ltd*, the 1st defendant/counter claimant.

He stated clearly that he and his co-directors never ascertained the interests of
20 those found on the land. Even worse for the plaintiff's case, that he did not know the boundaries of the land comprised in **Plot 8**.

Had prior inquiries been done, the plaintiff would have discovered that its predecessor in title were never occupants on that land. They never acquired any valid interest thereon; and that **plot 8** as a matter of fact did existed on the
25 ground.

Pw2 Mr. John Barozi during his oral testimony in contradiction of **Pw1's** evidence indeed lied on oath that a survey had been conducted before the plaintiff acquired the land.


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He relied on a survey report marked as **PEXh 5** dated June 2017 yet as submitted by counsel for the 1st defendant, the plaintiff was allegedly registered on the certificate of title on 14th March, 2016, prior to that survey.

5 As correctly noted further by him, where no boundary opening exercise was conducted, the plaintiff could not on its own identify or ascertain the actual area since the vendor himself was not sure of the area he had passed over to him.

The land it purports to relate to was land that had already been allocated and surveyed in favour of the 1st defendant under **plot 4**.

10 In response to **issue No. 4** therefore, the plaintiff could not under those circumstances have been a *bona fide* purchaser for value without notice of the fraud. His acquisition, occupation and possession of **plot 8** amounted to trespass on **plot 65** which rightfully belonged to the 1st defendant.

15 It is not enough for the party wishing to buy the land to search in the Land Office only for the names of the previous owners and leave it at that; or for the 3rd defendant to take an armchair decision and issue a title of land without verification of its background and authenticity.

A substantial part of the blame therefore goes to the plaintiff, on account of its failure to have prior opening of the boundaries and failure to conduct sufficient inquiries on the huge expanse of land in dispute, before purchasing it in 2016.

20 **Issue No. 5: What are the available reliefs:**

The reliefs sought by the counterclaimant in this case were:

- 25 a) *declaration that the counterclaimant is the owner and registered proprietor of all land measuring 1290 hectares, comprised in **LRV 1698 Folio 2, plot 4 Bulemeezi, Block 917**, land at Kibaja, Kyambogo, Kisagya and entitled to uninterrupted possession thereof;*
- b) *An order for a permanent injunction restraining the 1st counter defendant from any continued acts of trespass on the counterclaimants land comprised in LRV 1698*


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Folio 2, plot 4, Bulemeezi Block 917, land at Kibaja, Kyambogo, Kisagya or any part thereof;

That furthermore in the event that the 1st counter defendant's land is found to be seated on the part of the counterclaimant's land:

- 5 i) a declaration that the 2nd and 3rd defendants illegally and unlawfully created **plot 8 out of plot 4** without any subdivision and consent of the counter claimant;
- j) an order compelling the 2nd counter defendant to cancel the 1st counter defendant's title on grounds of illegality and fraud;
- 10 k) a declaration that the 1st counter defendant's forceful occupation of part of the counterclaimant's land amounts to trespass;
- l) an eviction order against the 1st counter defendant;
- m) a permanent injunction restraining the 1st counter defendant from utilizing and/or disrupting the counter claimant's use, possession and utilization of
- 15 its land;
- n) general damages;
- o) mesne profits;
- p) costs of the suit.

Mesne profits:

20 **Section 2 (m) of the Civil Procedure Act Cap.71** defines mesne profits as;

'..... those profits which the person in wrongful possession of the property actually received or might, with ordinary diligence have received from it, together with the interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession'.

25 Counsel submitted that the 1st defendant's plan was to utilise its land for commercial farming yet the same has been illegally occupied by the plaintiff


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which has made the 1st defendant lose a lot of economic benefit and farms thereon.

He cited the case of **Busiro Coffee Farmers & Dealers Ltd vs Tom Kagongo & 2 others HCCS No. 532 of 1992** to support the view proposition that where
5 a party is in wrongful possession *mesne profits* are payable against him.

Courts in that respect often adopt the open market value approach. (**See: Vivo Energy U LTD vs Shire Petroleum Co. Ltd & 2 others. (Civil Suit No. 0008/2016).**

This court therefore in exercise of its discretion awards a sum of **Ugx**
10 **100,000,000/=** as *mesne profits* for land measuring 805 hectares, money that would have been earned by the 1st defendant each year, from 2016 in respect of the suit land, had it been put to good commercial farming.

General damages.

General damages are compensatory. (**Johnson & Anor vs Agnew [1979]1 All**
15 **E.R)** They are awarded at the discretion of court depending in the peculiar circumstances of each case.

In **Uganda Commercial Bank Vs Kigozi (2002)1 EA 305**, the consideration for an award of damages was based mainly on the value of the subject matter, the economic inconvenience that a party has been put through and the nature and
20 extent of the breach or injury.

In the case of **Luzinda Vs Ssekamate & 3 Ors (Civil Suit -2017/366 [2020] UGHCCD 20**, it was held that general damages are awarded in the discretion of court, to compensate the aggrieved party for the inconveniences accrued as a result of the actions of the defendant.

25 The record in this case does not give any clear indication of the value of the suit land, leaving all to the discretion of court.


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Given the period the matter has been in court, and the inconvenience suffered by the 1st defendant/counterclaimant a sum of **Ugx 50,000,000/=** is a fair amount awarded as general damages.

As stated in **HCCS No. 0024/2013 Adrabo Versus Madira Jimmy**, since actions for recovery of land are premised on proof of a better title than that of the person from whom the land is sought to be recovered, it was critical for the plaintiff to prove the validity of his title which however in the present circumstances the company had failed to do.

Section 177 of the RTA provides that:

10 ***“upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order”.***
15

In the premises the following declarations/orders are made:

1. ***Whereas it is true that the plaintiffs’ impugned title was issued by the 3rd defendant on 8th August, 1984 and that of the 1st defendant was issued later on 29th August 1988, the one issued earlier was erroneously issued basing on falsified data and is thus illegal;***
20
2. ***The land surveyed and instructions to survey was issued in favour of the 1st defendant’s predecessor in title. By the time of the purported survey in favour of the plaintiff, upon which the title for the plaintiff was issued, there was no longer any land available for lease and grant of title;***
25
3. ***. The plaintiff’s title plot 8 was super imposed on land already acquired under plot 4 belonging to the 1st defendant.***
30



4. *The validity of the certificate of title for plot 4 was concluded by this court and therefore res judicata.*

5. *The plaintiff's title comprised in plot 8 is liable to cancellation;*

6. *Accordingly, the 1st defendant/ counterclaimant is the owner and registered proprietor of all land measuring 1290 hectares, comprised in LRV 1698 Folio 2, formerly plot 4 Bulemeezi, Block 917, land at Kibaja, Kyambogo, Kisagya and entitled to uninterrupted possession thereof;*

7. *An order for a permanent injunction issues, restraining the plaintiff/1st counter defendant from any continued acts of trespass on the counterclaimants land comprised in LRV 1698 Folio 2, plot 4, Bulemeezi Block 917, land at Kibaja, Kyambogo, Kisagya or any part thereof;*

8. *a declaration issues that the 2nd counter defendant fraudulently illegally and unlawfully created plot 8 out of plot 4 without any subdivision and consent of the 1st defendant/ counter claimant;*

9. *an order is granted compelling the 2nd counter defendant to cancel the 1st counter defendant's title on grounds of illegality and fraud;*

10. *a declaration that the plaintiff's 1st counter defendant's forceful occupation of part of the counterclaimant's land amounts to trespass; an eviction order against the 1st counter defendant;*

11. *mesne profits of Ugx 700,000,000/= shall be payable by the 2nd and 3rd defendants to the 1st defendant/counterclaimant as mesne profits that the said company would have earned in profits from 2016, but for the actions of the defendants;*

12. *costs of the 1st defendant shall be met jointly between the plaintiff and the 2nd and 3rd defendants;*

13. *general damages of Ugx 50,000,000/=;*



14. interest of 15% per annum in respect of orders 11 and 13 above,
payable from the date of receipt of this judgment to date whe

15. costs of the suit.

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Alexandra Nkonge Rugadya

Judge

12th June, 2023

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Delivered by mail.
Alexandra
J
13/6/2023.