

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 432 OF 2008

1. DAN SSEMWANGA

2. JOHN KAJOBA

3. EDWARD BALUNGA

4. STEVEN NAKIBINGE..... PLAINTIFFS

(Joint administrators of the estate of the late Evelyn (Evairini) Nachwa and referred to as the 1st, 2nd, 3rd and 4th Plaintiffs respectively in the order they appear on the plaint.)

VERSUS

1. LUCY NSUBUGA

(Administratrix of the estate of Bishop D.Nsubuga)

2. CONSTANCE NALONGO KIZITO

(Administratrix of the estate of Esau K.Kizito)


3. ARMSTRONG KITEESA

(Administrator of the estate of Yuda Kitaka and attorney of the 2nd defendant) K.Kizito)

4. COMMISSIONER LAND REGISTRATION

5. THE REGISTERED TRUSTEES OF CHURCH OF UGANDA..... DEFENDANTS

(Referred to as the 1st, 2nd, 3rd, 4th and 5th defendants respectively in the order they appear).


06/08/2019

BEFORE: HONOURABLE JUSTICE JOHN EUDES KEITIRIMA

JUDGMENT

The subject matter of this suit is mailo land comprised in **Kibuga Block 7 Plot 749 and 750 formerly Plot 39 at Mengo**. The suit land is currently registered in the name of **Bishop Dunstan D.Nsubuga, Y.S.Kitaka and E.K Kizito** (all deceased).

The 1st, 2nd and 3rd defendants are administrators of the respective estates. The owner's copy showing that the three deceased are the registered proprietors is a special certificate of title that was issued by the 4th defendant on ground that the duplicate certificate of title got lost.

The plaintiffs who are joint administrators of the estate of the late **Evelyn (Evairini) Nachwa** sued the currently registered proprietors of the suit land through the administrators of their estates for fraudulently being registered on the title. The plaintiffs contend that the suit property constitutes part of the estate of the late **Evelyn Nachwa**. That the subdivisions into the current plots was done fraudulently and so was the issuance of the special certificate of title.

The first defendant in her capacity as an administratrix denied having any interest in the suit land and stated that it never formed the estate of the land she was administering. The second and third defendants also denied having any interests in the suit land and even wondered how the deceased people got registered onto the title of the suit land.

The 4th defendant, the Commissioner Land Registration never filed a defence.

The 5th defendant in their written statement of defence admitted that the said Evelyn Nachwa was the registered proprietor of the suit land until 3rd March 1981


John Eudes Keitirima
11/02/2019

when she transferred the suit land to the first three defendants and thereafter ceased to have any interest in the suit land.

It is the Plaintiffs joint case that **Bishop Dunstan Nsubuga, Reverend Y.S. Kitaka** and **E.K.Kizito (all deceased)** whose respective estates the 1st 2nd

and the 3rd defendants are administering, got registered as proprietors of the suit land fraudulently.

It is the contention of the 1st to 3rd defendants that the suit land is not comprised in the respective estates they are administering and hence they are not administering it.

The Plaintiffs called three witnesses to prove their case, the 1st defendant adduced evidence by way of a witness statement while the 2nd and 3rd defendants gave their evidence through the third defendant.

The 5th defendant called **Canon Ernest Luzinde Kibuuka(DW3)** as their witness.

The issues that were framed for determination were:

1. **Whether the special certificate of title to the suit land was procured through fraud.**
2. **Whether Bishop D. Nsubuga, Reverend Y.S Kitaka and E.K Kizito were registered on the suit land through fraud.**
3. **Whether Bishop D.Nsubuga, Reverend Y.S Kitaka and E.K Kizito were registered on the suit land as trustees.**
4. **Whether the Plaintiffs are entitled to the remedies sought.**

ISSUE 1: Whether the Special Certificate of Title to the suit land was procured through fraud.




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Counsel for the Plaintiffs submitted that evidence was adduced through the Plaintiffs witnesses that the special certificate of title of the land in dispute was procured through fraud. That PW1 Edward Balunga who is the son of the deceased testified that he and the other administrators to the estate of the said deceased were appointed administrators to the said estate. They then came across exhibit P.3. It was a letter dated 25th January 1980 written by the deceased to the Barclays bank of Uganda limited requesting the bank to receive for safe custody the certificates of title specified herein. The duplicate certificate of title to the suit land is one of the titles specified in the said letter as number 5. That the exhibit clearly shows that the bank acknowledged receipt of the titles. That exhibit P.5 was a letter from Barclays Bank calling on Nachwa to appear at the bank on issues of her deposited titles. The letter was dated 5th June 1980. The Plaintiffs duly retrieved the Duplicate Certificate of Title from the bank.

Counsel for the plaintiffs further submitted that when the Plaintiffs attempted to have their names registered on the title to the suit land as administrators, they found that it was registered in the names of **Bishop D Nsubuga, Reverend Y.S Kitaka and E.K Kizito**. That the chronology of events was important to analyze the fraud. This was borne out in the detailed testimony of PW1 and PW2.

On the 25th January 1980, **Evelyn (Evarini) Nachwa** deposited the Certificate of Title with Barclays Bank. On the 16th January 1980 there was an entry endorsed on the title that a Special Certificate of Title was issued since the Duplicate was lost. That this was a space of 10 days before the Special Certificate of Title was issued. That there must be an application for the issuance and the intention to issue and the same should have been advertised for at least 30 days. That by inference Nachwa is said to have applied for a Special Certificate of Title earlier than the date on which the entry was recorded on the title and yet she was in possession of the Duplicate certificate of title which was deposited in the bank on the 25th January 1980! Counsel for the Plaintiffs cited **Section 70 of the Registration of Titles Act** for the procedure involved in the issuance of a special certificate of title.

It was further submitted for the Plaintiffs that the instrument, the application for a Special Certificate of Title and the declaration in support of such application were not available in the office of the Commissioner Land Registration and none was


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produced in evidence. That their non-availability and or disappearance was clear evidence that the deceased Evelyn Nachwa did not make them and they were clearly forged. That inference should be made that as soon as the purpose for creating a fake title had been achieved, the perpetrators of the forgery caused their disappearance.

It was further submitted by counsel for the Plaintiffs that the evidence of Detective Corporal Bwanika was quite revealing on the creation of the 2nd Special Certificate of Title in 1987. The 2nd Special Certificate of Title was created pursuant to the application drawn in the firm of Advocate Ntege Mayambala. That in his statement found in exhibit P15, the said Advocate disowned the documents. That inference should also be drawn that the Special Certificate of Title were fraudulently created for purposes of defrauding Evelyn Nachwa of the suit land.

Counsel for the Plaintiffs cited **Section 77 of the RTA Cap 230**, and the case of *Yakobo M.N Senkungu and 4 others versus Cresensio Mukasa-S.C.C. A No. 17 of 2014* on the law of fraud.

The Plaintiff further submitted that the Special Certificate of Title that was marked as exhibit P.7 whose creation is reflected as having been made by virtue of Instrument No. KLA93048 on the 16th January 1980 was made pursuant to a forgery and was therefore void. That similarly the Special Certificate of Title whose creation was made pursuant to Instrument No. KLA 124244 on the 26th March 1987 was equally void.

In reply, counsel for the 1st to 3rd defendants submitted that the 1st defendant had stated that as the administrator of the estate of the late Bishop D Nsubuga she has never held the suit land or any interest in the whole or part thereof and the suit land was not among the properties that came into her possession as the administrator of her husband's estate.

Counsel for the 1st to 3rd defendants further submitted that the 1st defendant distanced the deceased's estate from all transactions that led to the impugned registration of the suit land into the names of Bishop D. Nsubuga as a joint owner and stated that the signatures attributable to the deceased through the documents


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relied on by the plaintiffs as having been used to register the same property into his joint names were forged.

Counsel for the said defendants further submitted that in **Miscellaneous Application No. 269 of 2009** arising from the instant suit wherein the Plaintiff sought an order of a temporary injunction, the 1st defendant in her affidavit deposed on the 6th May 2009 maintained that she had no knowledge and or interest in the suit land and that neither herself nor the deceased or any other member of the deceased family had ever occupied the suit land, done any activity thereon and or laid any claim of right over the same.

Counsel for the defendants further submitted that the 1st defendant signed a witness statement on the 29th January 2010 and filed the same in court on the 2nd February 2010 and the case against her was dropped on 1st December 2015 when she turned up for cross examination but it was later reinstated against her. That the 1st defendant chose not to adduce any evidence after the suit against her was reinstated but her written statement of defence and witness statement remained on record.

Counsel for the defendants further submitted that as for the 2nd and 3rd defendants, **Kiteesa Armstrong** in his witness statement dated and filed in Court on the 21st November 2012 and the supplementary witness statement dated 14th November 2013 and filed in court on the 15th November 2013 which were admitted as his evidence in chief, he explained in detail the innocence of the 2nd and 3rd defendant's respective estates about the alleged fraud in respect of the suit land. That the said Kiteesa Armstrong as DW1 testified that the two estates he represents have never held and or claimed any interest in the suit land and that signatures attributed to them while registering the suit land into their names as joint owners of the same land were forged.

Counsel for the defendants further submitted that the Administrators of the respective estates of the three deceased persons who were allegedly and purportedly registered on the Special Certificate of Title to the suit land, denied any form of interest or claim of right over the suit land. That the defendant's evidence on record does not place any of them or their respective families as occupying any part of the suit land.


Kiteesa Armstrong
21/11/2012

Counsel for the defendants contended that from the evidence of DW1, some unscrupulous people may have used the names of the 1st, 2nd and 3rd defendants to defraud the suit land but that the defendants were not part of the said fraudulent scheme. That this can be ascertained from the following:

- i. None of the purported registered proprietors has a certificate of title to the suit land.
- ii. The signatures of all the documents as produced by the plaintiffs and which led to the impugned registration of the suit land into the names of the 1st, 2nd and 3rd defendants are neither known nor genuine signatures of any of them.
- iii. None of the defendants or their family members was or has at any material time ever occupied and or conducted any activities on the suit land.
- iv. The suit land never vested in any of the legal representatives of any of the deceased estates and none has ever attempted to deal with it.
- v. Other than the purported impugned Special Certificate of Title in the names of the 1st, 2nd, and 3rd defendants, there is no record attributable to any of the defendants laying any claim of right or interest to the suit land.

The said defendants further contended that the registration of the suit land in the names of the said defendants and the existence of the certificate of title to the said suit land in their names under the circumstances alleged by the Plaintiffs raises suspicions of fraud and indeed is a fraudulent act since the said defendants themselves are not aware as to when and how the suit land was registered in the names of the deceased persons yet the respective family members and legal representatives have no knowledge of the same and their respective estates have no claim of title or ownership to the suit land. That since the defendants had from the onset insisted that they were not a party to the said fraud, the Plaintiffs had to insist on prosecuting this case against them to -date. That unfortunately none of the Plaintiffs ever issued any notice of intention to sue to the legal representatives of the 1st to 3rd defendants as this case could have been avoided by a concession to have the impugned entries on the Special Certificate of Title cancelled.

The said defendants concede that the said Special Certificates of Title and the entries thereon in respect of the suit land should be cancelled and the suit


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land should be given back to the estate of **Evarini Nachwa** since the defendants do not claim any interest in the same land.


The said defendants pray that they should not be condemned in costs as their names were used by unscrupulous people for their selfish interests. The defendants however prayed that the conduct of the Plaintiffs in subjecting them to proceedings which could have been avoided should be condemned to costs.

It is evident both from the evidence of the Plaintiffs and the said defendants that the special certificate of title to the suit land was procured through fraud. The said defendants denied having participated in the fraud and that this could be ascertained from them not being in possession of the Certificate of Title, denying that they signed on the impugned registration of the suit land, not being in occupation or conducted any activities on the suit land, the suit land never having been vested in any of the legal representatives of any of the deceased estates or even dealing with the suit land or having at any one time laying any claim of right or interest to the suit land.

It was held in the case of *Kampala Bottlers versus Damanico (U) Limited – S.C.C. A No. 27 of 2012* that fraud vitiates a land title of the registered proprietor and must be attributable to the transferee. It was also held that fraud must not only be pleaded but must be proved and the standard of proof is higher than on the balance of probabilities.

The onus was on the Plaintiffs to prove that the fraud was attributable to the defendants. According to the evidence of PW2 Bwanika Eddy a retired police officer who had investigated this matter, he found out that the signatures of Bishop Nsubuga were forged and that the lawyer who had executed the transfer forms never met the late Nachwa and that he had never met Bishop Nsubuga!

The Evidence of PW3 Appollo Mutashwera Ntarirwa a government analyst was also to the effect that the signature of the said Nachwa was forged as well as the signatures of the current registered proprietors. These findings are reflected in exhibits P.18 and P.19.


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I agree with counsel for the said defendants' submission that the fraud could have been perpetuated by some unscrupulous people who may have used the defendants' names especially in light of the fact that apart from the defendants' names appearing on the special certificate of title there was no other evidence to show that they were responsible. The 4th defendant should have been better placed to explain under what circumstances he or she issued the Special Certificate of Title. However, the Commissioner Land Registration never filed a defence. It was held in the case of *Fredrick J.K. Zaabwe versus Orient Bank Limited and 5 others-S.C.C. A No. 4 of 2006* that failure to defend a suit imputes admissibility. In absence of any explanation by the 4th defendant imputes that he/she was responsible for this mess.

I therefore find that the Special Certificate of Title to the suit land was procured through fraud. This disposes of issues 2 as well as they were related.

ISSUE 3: Whether the 1st 2nd and 3rd Defendants were registered on the suit land as trustees of the 5th Defendant.

Counsel for the Plaintiffs submitted that the way the said defendants were registered on the certificate of title of the land in dispute did not show that they were registered as trustees. That on the contrary it showed that the three defendants were registered as joint tenants pursuant to **Section 56 of the Registration of Titles Act**. Counsel for the Plaintiffs contended that there was nothing to indicate that the trust envisaged under **Section 50 of the RTA** was ever contemplated in this fraudulent registration.

The Plaintiffs further contended that the evidence of DW3 Canon Ernest Luzinda Kibuuka, the 1st three defendants were elected to hold the land on behalf of the 5th defendant.

The Plaintiffs further submitted that the defendants never complied with **The Trustees Incorporation Act Cap 165** and the 1st, 2nd and 3rd defendants were registered individually as proprietors and not as trustees of the suit land. That as such their respective estates are bound to make good the loss to the rightful owner.



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Counsel for the 1st, 2nd and 3rd defendants submitted that the insinuation that the said defendants might have held the suit land in trust of the 5th defendant were totally denied as there was no evidence to suggest and support the same. That had they been registered as trustees of the same land, the certificate of title should have expressly stated so.

Counsel for the 1st, 2nd and 3rd defendants further submitted that it was inconceivable that the late **Evarini Nachwa** donated the same land and kept to herself the duplicate certificate of title and even secured its custody in the bank.

In their written statement of defence the 5th defendant alleged that Evelyn Nachwa was the registered proprietor of the suit land until 3rd March 1981 when she transferred it to the 1st, 2nd and 3rd defendants and ceased to have an interest in the suit land.

The 5th defendant contended that it was the late Evelyn Nachwa who applied for the issue of a special certificate of title to the suit land and the same was issued to her as the registered proprietor and that if there was any fraud, the same was committed by her.

The 5th defendant further contended that it was the Plaintiff's predecessor in title who applied for the issuance of a certificate of title in January, 1980 which she passed over to the 1st and 2nd defendants' predecessors in title in March 1981 as agents or nominees of the 5th defendant for purposes of transfer.

The 5th defendant denied forging any signature of the late Evelyn Nachwa and were not aware of any transaction between the said Nachwa of the one part and Stanley Kigere and Dan Mbowa of the other part.

The 5th defendant further contended that any sub-division carried out subsequent to the transfer of the land from Evelyn Nachwa to the 5th defendant's trustees /agents was not a matter of concern to the plaintiffs who had no known interest in the said land at the time of sub-division.

The 5th defendant had contended that the suit land was registered in the names of the 1st, 2nd and 3rd defendants not in their personal capacities but as


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constructive trustees of the 5th defendant in accordance with the resolution of the Diocesan Synod of Namirembe Diocese sitting at Namirembe on the 10th October 1971. A copy of the resolution was attached to the 5th defendant written statement of defence.

The 5th defendant contended that at the material time and after the said resolution, it became the practice of the Anglican Church of Uganda to register its land in the names of the named persons to hold the same in trust of the Christians.

The 5th defendant further contended that through the Christians of St. Peter's church Ndeeba, it has been in possession of the suit land since 1981 and it has carried out several developments on the land which include a church building, several houses for the clergy, a washing bay and motor vehicle garages with the full knowledge of the said **Evelyn Nachwa**. That the said Evelyn Nachwa during her lifetime never denied having given the land to the 5th defendant nor challenged its occupation.

The 5th defendant further contended that it was after the death of their mother, the late Evelyn Nachwa that the Plaintiffs started claiming the suit land and threatening the 5th defendant with eviction.

The 5th defendant further contended that the Plaintiffs action was time barred and cannot be maintained against the 5th defendant.

The 5th defendant further contended that the investigations that were carried out were biased and conducted with the sole intention of recommending the cancellation of the certificate of title without giving the 5th defendant who is the beneficiary of the land and in occupation a fair hearing.

The 5th defendant further contended that the said report relates to transactions after the agents of the 5th defendant had registered themselves on the certificate of title but not on the documents leading to the registration of the 5th defendants' agents as registered proprietors.

The 5th defendant also contended that the suit land does not form part of the estate of the late Evelyn Nachwa as at the time of her death as the same was already registered in the names of the 1st, 2nd and 3rd defendants.

The 5th defendant further contended that although the plaintiffs were at all times aware that the 5th defendant was in occupation and use of the suit land



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but they avoided bringing an action against it but opted to bring an action against the other defendants.

The entry as it appears on the certificate of title to the suit land shows that the 1st three defendants were registered as follows: 1. **Bishop D. Nsubuga** 2. **Reverend Y.S.Kitaka** 3. **E.K Kizito (joint tenants) Namirembe Diocese P.O Box 14297, Kampala.**

There is nothing on the entry that shows the registration of the three defendants as trustees. That is why the Plaintiffs never initially sued the 5th defendant but sued the other defendants because there was nothing to show on the certificate of title that it belonged to the 5th defendant. It was actually the court that ordered the 5th defendant to be joined on the suit when they indicated interest in the suit land.

Secondly, Trustees can only be appointed by complying with the "**Trustees Incorporation Act Cap 165**" **Section 1 (1)** of the said Act provides that *"Trustees or a trustee may be appointed by anybody or association of persons established for any religious, educational, literary, scientific, social or charitable purpose, and such trustees or trustee may apply, in the manner hereinafter mentioned, to the Minister for a certificate of registration of the trustees or trustee of such body or association of persons as a corporate body"*.

Subsection (2) of the said Act provides for the considerations the Minister takes into account in granting such a certificate.

Subsection (3) provides that upon issuance of the certificate the trustees shall become a body corporate by name described in the certificate to hold and acquire and demise any land...for the benefit of such body or association of persons...

The Synod of the 5th defendant could therefore not appoint the 1st three defendants as trustees without complying with the said Act. Their appointment even if it was true was illegal.

Therefore, in the absence of evidence of compliance with the said Act, no person(s) can be registered as proprietors of land and claim to be trustees of a community. The said three defendants were therefore registered individually as proprietors and not as trustees of the suit land since they had not complied with the **The Trustees Incorporation Act Cap 165.**



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It is equally strange that the deceased Evelyn Nachwa who had allegedly gifted the 5th defendant with the suit land, could retain the duplicate certificate of title and apply for a special certificate of title which she allegedly then gave to the trustees of the 5th defendant! According to the evidence of PW1 the deceased's son, the title had been taken to the bank for safe custody. title to the administrators of the late Evelyn Nachwa as per the evidence of PW1.

It created further suspicion when the documents that allegedly transferred the suit land to the "trustees" of the 5th defendant went missing from the office of the 4th defendant! The special certificate of title had been issued when the duplicate certificate was in existence and in the custody of the said bank. This was a fact within the knowledge of the said deceased Evelyn Nachwa. It is therefore inconceivable that she would have applied for a special certificate of title when she knew where the duplicate was. If it was her intention to do so then that intention was fraudulent and this court cannot condone any fraud once detected.

In any case there was evidence adduced by police under what circumstances the said special certificate was issued and they found out that it was fraudulently issued. See exhibit P.12. The Advocate who purportedly prepared the transfer forms is said not to have met the Evelyn Nachwa.

It is also interesting to note that the 4th defendant by her letter dated 9th September 2008, acknowledged that she had the duplicate certificate of title to the suit land but the application which had purportedly been made by the late Evelyn Nachwa had gone missing. The 4th defendant never filed a defence to prove these facts, one wonders why the 4th defendant chose not to file a defence when there was evidence that she had investigated the matter as per exhibit 14. She in fact stated in that letter that the duplicate certificate of title to the suit land would be retained until the matter was decided by court!

The transfer forms and a statutory declaration for the suit land purportedly signed by the late Evelyn and the first three defendants were found to be suspect as per the evidence of the government analyst as can be seen from


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his report which was marked as exhibit P.18. Government analyst testified as PW3 in this case.

Section 176 of the Registration of Titles Act Cap 230 provides that:

“No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases-

(a)...

(b)...

(c) the case of a person deprived any 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;

(d)...


(e)...

It was held in the case of *Fam International Limited and Ahmad Farah versus Mohamed El Faith- [1994] KALR 307* that fraud is such grotesque monster that the courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation. Fraud unravels everything and vitiates all transactions. The purported transfer of the suit land to the 1st three defendants and the purported allegation by the 5th defendant that it was done on their behalf is clearly tainted with fraud which this court cannot condone.

I find that **Bishop Nsubuga, Reverend Kitaka and E.K Kizito** were not legally registered on the suit land as trustees.

ISSUE 4: REMEDIES

1. The suit land is still vested in the estate of the late **Evelyn Nachwa**.
2. A declaration the land comprised in **Kibuga Block 7 Plot No. 749 and 750 formerly Plot 39** was fraudulently registered in the names of **Bishop D.Nsubuga, Rev.Y.S Kitaka and E.Kizito**.


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3. I hereby direct the 4th defendant to cancel the registration of the 1st three defendants from the register of the suit land and register the name of **Evairini Nachwa**.
4. The 4th defendant is to return the duplicate certificate of title in respect of the suit land to the plaintiffs after effecting the said changes.
5. An order of vacant possession of the suit land in favour of the plaintiffs.
6. A permanent injunction restraining the defendants or anybody claiming through them from carrying out any activity on the suit land, transferring or alienating the same.
7. The 4th defendant and 5th defendants will pay the costs of the suit.



Hon. Justice John Eudes Keitirima

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