

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 446 OF 2011

5 **BARUGA MUSTAPHA**

***Alias* BARUGA ALI:.....: PLAINTIFF**

Versus

ALICE NORAH NASSOZI:.....:DEFENDANT

10

Before: Justice Alexandra Nkonge Rugadya.

JUDGEMENT.

15 **Introduction:**

The plaintiff sued the defendant seeking a declaration that he is the owner of part of land comprised in **Busiro Block 323, Plot 3 at Nkonya measuring approximately 5 acres** (hereinafter referred to as the 'suit land'); an order for the registration of the plaintiff as the registered proprietor of the suit land; an order for the mutation and transfer of the suit land to the plaintiff; a permanent injunction, an award of general damages, interest and costs of the suit.

Background to the case:

25 The plaintiff's case was that by an agreement dated 30th June, 2006, he acquired the land in dispute by purchase from five of the beneficiaries of the estate of the late Daudi Ndiibwa and that the defendant's family, namely, Najjombwa Aida, Nabijjogo

Christine (*co-administratrix* of the estate of the late Daudi Ndiibwa), Nakayiki Victo, Nankayi Sarah and Nakazibwe Rovincer (*hereinafter referred to as vendors*) also being beneficiaries of the estate late Daudi Ndiibwa.

5 The family later held a meeting on *28th June, 2009*, appointed Nabijjogo Christine and Alice Norah Nassozi as trustees of the estate and ratified the sale of the suit land as being a sale of the share of the five beneficiaries.

10 Thereafter, letters of administration were issued on *28th August, 2009* and a certificate of title entered in the names of the co-administrators of the estate of Daudi Ndiibwa, their late father.

15 However that although Nabijjogo Christine recognised the plaintiff as the rightful owner of the suit land, the defendant, being the co-administrator of the estate has since not only declined to execute the transfer of the suit property to the plaintiff, but also interfered with his occupation and use of the same.

20 In her written statement of defence, the defendant contended that the purported sale of the five (5) acres had been null and void because those who sold never sought approval of the the rest of the beneficiaries.

25 That the letters of administration to the estate of the late Daudi Ndiibwa had not yet been obtained nor had the estate of the late Daudi been divided among the beneficiaries at the time.

Further that at the family meeting held on *30th March, 2008*, it was agreed that the total purchase price be returned to the plaintiff and four people namely, David

Kitumba, Nalongo Nasozi, Nambi Mary and Najombwe Babra were appointed to see to it that the said money was refunded, but that the plaintiff had refused to collect the money. The defendant also denied ever disrupting the plaintiff's occupation of the suit land, maintaining that the plaintiff has never been in possession of the same.

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Issues for determination:

The parties filed a joint scheduling memorandum but when the suit came-up for hearing on 9th April, 2019, the defendant did not appear. This court upon being
10 satisfied that proof of service had been duly effected on 18th March, 2019 through the firm of **M/S Lukwago & Co. Advocates**, (as per the affidavit of service sworn by Mr. Golden Orikiriza filed on 8th April, 2019,) ordered that the matter proceeds *exparte* under **Order 9, rule 20 of the Civil Procedure Rules**.

15 A joint scheduling memorandum was filed by **M/S Wagabaza & Co. Advocates** from whom **M/S Tishekwa A. Rukundo & Co. Advocates** later took over as counsel for the plaintiff. **M/S Lukwago & Company Advocates** represented the defendant and the following issues were identified as issues for resolution by this court:

1. **Whether the plaintiff acquired an interest in the suit land.**
- 20 2. **What remedies are available to the parties.**

Agreed facts:

The following were the agree facts:

- 25 1) *that the defendant and Christine Nabijogo were co-administrators of the estate of the late Ndiibwa Daudi;*

2) that on 30th June, 2006 the plaintiff executed a sale agreement with five children of the deceased, for the purchase of the five acres which constituted part of the land comprised in **Block 323, plot 3, land at Nkonya Busiro county , Mengo district**, which formerly belonged to the late Ndiibwa;

3) that the late Ndiibwa left behind seven beneficiaries, namely, Najjombwe Aida, Nabijogo Christine, Nakayiki Victo, Nambi Mary, Nakayi Sarah, Nakazibwe Erivania and Nasozi Alice Norah;

4) that the deceased left behind 10 acres of land;

5) that the five beneficiaries executed a sale agreement with the plaintiff selling 5 acres of land at **Ugx 13,000,000/=** (thirteen million shillings only) which represented their shares.

6) that the plaintiff took up possession of the suit land for cultivation upon the execution of the sale agreement.

Section 57 of the Evidence Act, Cap. 6 provides as a general rule that facts once admitted not be proved.

Resolution of issues.

Issue No.1: Whether the plaintiff acquired an interest in the suit land.

Section 101 of the Evidence Act provides that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and the burden of proof lies on that person.

The position does not change in *ex parte* proceedings as the burden still lies with the party who affirms, to prove its case on the balance of probabilities. (**Joseph Constantine Steamship Line Ltd vs. Imperial Smelting Corporation [1942] AC 154, P.174.**)

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To prove his assertions, the plaintiff testifying as **PW4** had four other witnesses to wit: - Nakazibwe Rovincer as **PW1**, Nakayiki Victo as **PW2**, Nabijjogo Christine as **PW3** and Kasule Adam as **PW5**.

10 The matter proceeded by way of witness statements. In his testimony, **PW4** presented **PExh 2**, a title for the land comprised in **Block 323, plot 3, land at Nkonya Busiro county, Mengo district**, measuring 10 hectares.

15 It was registered in the names of the defendant and Christine Nabijjogo (**PW3**), both appointed as co- administrators of the estate of their late father, vide: **AC No. 629 of 2009.**, The letters of administration were admitted in court as **PExh 1**.

20 **PW4** alleged that the defendant had refused to sign and execute mutation and transfer forms in his favour to allow him to carve out the five acres that he had purchased from the five beneficiaries under the estate of the late Daudi Ndiibwa. The sale agreement was dated 30th June, 2006, and admitted as **PExh 4 A and PExh 4B (translated version.)**

25 He confirmed to court that he was aware that three of the late Daudi Ndiibwa had objected to the sale of the land and a meeting held by which the family agreed to refund his money.

The defendant in *paragraph 5* of the written statement of defence referred to a family meeting held on 30th March, 2008 (**Annexure 'A'**), where it had been resolved that the plaintiff would be refunded his money, contending that the sale of the five acres of the suit land had been null and void, as it was effected before the letters of
5 administration had been issued and without consent of the rest of the beneficiaries.

The plaintiff adduced in evidence all the documents, in their original form, which include the land sales agreement.

10 Under **section 10 of the Contracts Act, No. 7 of 2010** a contract is defined as:

***“An agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound and that it may be oral or written or partly oral and partly written or may be implied from the conduct of the
15 parties.”***

Further, under **Section 11(1) (supra)** a person has capacity to contract if he/she is of eighteen years or above; of sound mind; and not disqualified from contracting by any law to which he or she is subject.

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In the instant case, It was not in dispute that on 30th June, 2006 some of the beneficiaries of the late Daudi Ndiibwa had agreed to sale to the plaintiff five acres out of the suit land and even so confirmed in their testimonies.

25 Valuable consideration of **Ugx. 13,000,000/= (thirteen million shillings only)** had been made; and an agreement duly signed and attested between the plaintiff and the

five children of the late deceased, all of them above the age of eighteen years, and beneficiaries under the estate.

The question would therefore remain whether or not the contract was legally enforceable against the defendant and/or binding to the estate.

In the case of ***Osuman Vs. Hajji Haruna Mulangwa SCCA No. 38 of 1995*** the term a valid contract was defined to mean in every case, a contract sufficient in form and substance so that there is no ground whatever for setting it aside between the vendor and the purchaser.

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The general position while dealing with property of a deceased person under the law as per ***Section 191 of Succession Act*** is that:

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“Except as hereafter provided, but subject to section 4 of the Administrator General’s Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.”

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The above provision renders null and void any act committed on the deceased’s estate by any person(s) without letters of administration or authority as granted by court (***See: Nviri v Olwoc & 2 Ors (Civil Suit No. 926 OF 1998)***).

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Section 192 (supra) however provides a safety net for acts of a person who in relation to the estate carries out any transaction without letters of administration, but subsequently obtains them.

It stipulates:

“Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death.”

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This section which has a retrospective effect, however has to be read together with **section 134 of the RTA, Cap. 230** which provides for the registration of probate or letters of administration to the estate of a deceased person.

10 **Section 134 (2)** specifically provides that the title of every administrator becoming a transferee under this section shall upon such entry being made relate back to and be deemed to have arisen upon the death of the proprietor of any land as if there had been no interval of time between such death and entry. The administrators no doubt take up the title subject to the existing equities against the estate.

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In **sub section (3)** thereof, if the grant is made to more persons than one, all are required to join and concur in every instrument or discharge relating to the land.

20 There are two crucial elements that are disclosed in this section which were discussed by the Court of Appeal decision: ***Maria Nanteza & 3 others vs Nasani Rwamunono Civil Appeal No. 28 of 2013.*** (Refer to the judgment by Christopher Madrama. (JA).) it was stated that the administrator by virtue of a grant of court being registered under **section 134 (1)** is deemed to be the proprietor of the registered land.

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Secondly, as a transferee by virtue of the grant of letters of administration or probate, the title relates back to the date of death of the proprietor of the land. The grantee

as proprietor of the legal estate after the registration may transfer the title to the property to the beneficiaries to the purchaser for value. But even more importantly for the purposes of **sub section (3)**, there must be consensus between the administrators on the decision taken.

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In the present case, there were two administrators nominated by the family and appointed by court in 2009 to manage the estate. The sale made before the grant had been issued had initially been made without consent of the rest of the beneficiaries.

10 The defendant's claim was that on 30th March, 2008 the family had agreed to refund the money that the plaintiff had paid as the purchase amount for the five acres, an offer which he had rejected.

15 Indeed a copy of a resolution of the family of the late Daudi Ndiibwa was attached to the written statement of defence of the defendant and marked **Annexure 'A'**. It showed that the family had agreed to have the plaintiff compensated, as some of the beneficiaries and family at large had been opposed to the sale of the suit land.

20 However, in *paragraph 4* of the plaint, the plaintiff contended that the family of the late Daudi Ndiibwa later held a meeting on the 28th June, 2009 by which the said sale was ratified and by which it was agreed that the five acres sold to him would be the share of the five beneficiaries who had executed the sale agreement.

25 It was also agreed in that meeting that the plaintiff who had bought the suit land would meet the expenses of obtaining the grant of the letters of administration; and the transfer of the suit land, to be made in the names of the administrators of the late Daudi Ndiibwa.

This was also corroborated by the evidence of **PW3**, Nabijjogo Christine, one of the administrators of the estate of the estate **PW3**, one of those who attended the meeting. (See: **P. Exh.3A.**)

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It was a consensus meeting attended by the defendant herself and other beneficiaries under the estate. The defendant accepted the appointment by the family as one of the trustees of the estate. From the minutes, no objection was registered against her name in relation to the transaction. Subsequent to that, she had gone ahead to
10 obtain the letters of administration; and had the certificate title transferred into her names and those of the co-administrator.

The plaintiff following on that even took possession of the land in dispute and started cultivating thereon. This was all corroborated through the testimony of **PW1, PW2**
15 **and PW3**, facts which the defendant did not deny.

She is therefore deemed by this court to have admitted that the letters of administration had been secured with the help of the plaintiff relying on that commitment; and more likely than not, from the proceeds of the sale of part of the
20 suit land by the five beneficiaries, a transaction that had been validated through the consensus family meeting. The role played by the plaintiff in facilitating the process not only benefitted the defendant but also served the interests of the estate.

It is trite law that the story of the plaintiff given in the absence of a defence to
25 contradict it, ought to be accepted as the truth. (**See: Samwiri Massa versus Rose Achieng (1978) HCB 297, Makerere University versus St. Mark Education**

Institute & Ors (1994) KALR 26, Eridadi Ahimbisibwe versus World Food Programme (1998) KALR 32).

True to form, equity comes in to mitigate the rigours of strict law. It will prevent a
5 person from insisting on his/her strict rights, whether arising out under a contract
or on his title deeds or by statute, when it would be inequitable to do so having regard
to the dealings which have taken place between the parties. (***Ibaga vs Tarakpe Civil
Appeal No. 0004 of 2017***).

The defendant in this case could not turn around to say that at the time of sale,
10 letters of administration had not been obtained yet with her acquiescence the estate
at wide had derived benefit from the proceeds of the sale of part of the estate, when
she herself later became one of the administrators.

The doctrine of estoppel under **section 114 of the Evidence Act**, in that case would
15 operate as a bar against an owner of the legal right who directly or indirectly
acquiesced to a transaction.

The defendant must in those circumstances have known, quietly acknowledged
encouraged the plaintiff's expenditure and refrained from asserting his or her legal
20 right.

The principle requires an approach which is directed at ascertaining whether, in
particular individual circumstances, it would be unconscionable for such a party to
deny that which, knowingly or unknowingly, he or she has allowed or encouraged
25 another to assume to his or her detriment (***see Willmott v. Barber (1880) 15 Ch D
96***).

Thus where a party enters into an agreement with another for sale of immovable property, makes part payment and takes possession of the land acting on the basis of the contract, the property passes onto the purchaser as an equitable owner.

(Ismael Jaffer Allibhai and others vs Nandalar Harvijan Karia & another
5 **SCCA N. 53 of 1995).**

The doctrine of estoppel operates where the true owner by his or her words or conduct, so behaves as to lead another to believe that he or she will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and that other does so act.

10 The end result is the purchaser after concluding the sale immediately becomes the owner of the land, and the vendor becomes a trustee in title. **(See: Semakula & another vs Sentiba, Civil Appeal No. 5 of 2013).**

I am therefore inclined to agree with counsel for the plaintiff's submissions that the plaintiff acquired an equitable interest in the suit land. In the final result, **issue No.**
15 **1** is determined in the affirmative.

Issue No: 2: What remedies are available to the parties.

The plaintiff prayed for **Ugx. 60,000,000/= (sixty million shillings)** as general
20 damages. Counsel in his attempt to justify this amount submitted that the plaintiff had suffered anger, annoyance, inconvenience and psychological torture due to the wrongful actions of the defendant.

General damages are presumed to be the natural consequences of the defendant's
25 act or omission. **(See: James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993).**

The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. Thus a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong. (**See: Robert Cuossens v. Attorney General, S.C.C.A. No. 08 of 1999 that Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992).**

10 In assessing the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party, and the nature and extent of the breach. **See: Uganda Commercial Band v. Kigozi [2002] 1 EA. 305.**

15 The party claiming general damages is expected to lead evidence to give an indication of what damages should be awarded on inquiry as the quantum. **See: Robert Cuossens v. Attorney General, S.C.C.A No. 8 of 1999; Ongom v. Attorney General. [1979] HCB 267.**

20 In the instant case, the plaintiff has satisfactorily demonstrated that he suffered great inconvenience at the instance of the defendant. Although I find that the plaintiff therefore entitled to general damages, a sum of **Ugx. 60,000,000/= (sixty million shillings only)** as proposed had no clear basis, leaving the final decision to the discretion of this court.

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Taking all the above factors together as highlighted, I would consider **Ugx. 30,000,000/= (thirty million shillings only)** to be a fair award to the plaintiff against the defendant.

Costs:

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Section 27(2) Civil Procedure Act (Cap 71) provides that costs follow the event unless for good reason court directs otherwise. **See: Jennifer Behange, Rwanyindo Aurelia, Paulo Bagenze v. School Outfitters (U) Ltd., C.A.C.A No.53 of 1999(UR).**

The plaintiff is also accordingly awarded costs of the suit.

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In summary, it is ordered and declared as follows:

1. ***The plaintiff lawfully acquired an equitable interest in the land in dispute and accordingly, the rightful owner of five acres of the land to be carved out of the land comprised in Block 323, plot 3, land at Nkonya.***
2. ***A consequential order issues directing the Commissioner and the administrators of the estate of the late Ndiibwa David to effect the mutation by the administrators and transfer of the five acres of land into the names of the plaintiff.***
3. ***An order issues for a permanent injunction to restrain the defendant, her agents and servants from undertaking any further dealing with the suit land;***

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4. The defendant shall pay general of Ugx. 30,000,000/= (thirty million shillings only) to the plaintiff, with interest at court rate, from the date of judgment till payment in full.

5 **5. The plaintiff is awarded costs of the suit against the defendant.**

I so order.

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Alexandra Nkonge Rugadya

Judge

29th September, 2020.