

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**CORAM: THE HON. MR. JUSTICE S. T. MANYINDO, DCJ.
THE HON. MR. JUSTICE C.M. KATO, JA.
THE HON. MR. JUSTICE S.G. ENGWAU, JA.**

CIVIL APPEAL NO.10/97

FRANCIS RUTAGARAMA BANTARIZA:..... APPELLANT

-VERSUS –

HABRE INTERNATIONAL TRADING CO. LTD. :RESPONDENT

(Appeal from the decision of the High Court at Kampala (Hon. Justice I. Mukanza) dated 3/11/95 in Civil Suit No.499 of 1992)

JUDGMENT OF C.M. KATO, J.A.

This is an appeal against the judgment of the High Court dated 3/11/95. The appellant, Francis Rutagarama Bantariza, was the plaintiff in the court below while the respondent Habre International Trading Co. Ltd. was the defendant. For the sake of convenience, I shall hereinafter refer to the parties as appellant and respondent respectively.

The summary of facts of this appeal is as follows. There is a piece of land known as Kyadondo Block 244 Plot 4805 situated at Muyenga in Kampala District measuring 0.309 hectares. The land was at one time vested in the National Water and Sewerage Corporation but when the appellant approached the Corporation he was told that the Corporation had no interest in it. The appellant then applied for it and made the necessary payments stipulated in the offer on 9/8/89. The appellant was however, informed that the land was too big to be leased to one person alone; it had to be divided into 3 portions out of which the appellant would get part. In the end the plot was divided into two plots out of which the appellant got one which is the subject of this case.

The appellant was eventually issued with a certificate of title on 31/12/91 for a period of 5 years starting from 1/8/89. Later on the appellant discovered that the respondent was trespassing on part of his land. He filed this suit requesting the court to order the respondent to remove his illegal structures from the appellant's land and to pay damages for trespass.

At the trial, Mr. Hussein Abdala, who testified on behalf of the respondent company denied ever having committed acts of trespass on appellant's land. According to him the land belongs to the respondent as it got the lease in 1985 for a period of 5 years.

The learned trial judge believed the story as told by the defendant/respondent and rejected that of the appellant. He dismissed the suit. Hence this appeal, on two grounds, namely;

1. In holding that the plaintiff had failed to prove his claim on a balance of probabilities, the learned trial judge erred in law and in fact in his evaluation of the evidence.
2. On the basis of the evidence, the learned trial judge erred in law and in fact in not holding that:

a) the plaintiff owns the suit land, and

b) the suit land claimed is part of that referred to in the defence.

Dr. Byamugisha who appeared for the appellant, argued the two grounds together. I will deal with them in the same manner.

The substance of Dr. Byamugisha's submission was that the learned trial judge was wrong to dismiss the suit on the ground that the land belonged to the respondent. He submitted that the minute under which the lease was granted to the respondent showed that the land leased to the respondent in fact had been granted to M/s. Mukalazi Technical Services. He further submitted that by the time the appellant got the lease it had been discovered by the Land Office that the respondent had got its title by fraud and it had been called for cancellation. Dr. Byamugisha also contended that it was necessary to obtain the consent of the Minister in respect of the suit land, which consent the respondent had not obtained so that the lease was invalid. At any rate, Dr. Byamugisha argued, by the time the land was leased to the appellant the respondent's purported lease had long expired so the respondent had no claim over the land.

On his part Professor Kakooza who appeared for the respondent, submitted that the learned trial judge reached a correct decision after properly evaluating and assessing the evidence as

presented before him. He, however, conceded that there were some irregularities concerning the granting of the lease to the respondent, but he argued that those irregularities were of administrative nature within the land office and his client should not be blamed for them since he was not even aware of their existence. As for the absence of consent from the Minister he contended that the Uganda Land Commission had power to grant a lease without such consent. He further submitted that the respondent was unable to obtain an extension of the lease because the appellant had applied for the same piece of land and that made it difficult for the respondent to proceed with the process of renewing his lease for a further period.

I shall first deal with the question of the minute under which the lease was granted to the respondent. According to the evidence of Mr. Paul Bukashabaruhanga (PW1) the minute under which the land was leased to the respondent referred to a different piece of land and a different applicant known as M/s. Mukalazi Technical Services. This piece of evidence was not seriously challenged. Hussein Abdullah (DW1) who testified on behalf of the respondent denied¹ under cross-examination, knowledge of the minute under which the respondent got the lease. He however, admitted that the minute referred to M/s. Mukalazi Technical Services.

It can safely be said that the respondent's agent was all along aware of the true position concerning the lease but never took steps to rectify the situation. With due respect I do not agree with Professor Kakooza's contention that this was a mere internal administrative irregularity. In my view the irregularity was the crux of the matter as it rendered the respondent's title void ab initio. It was definitely wrong for the learned trial

judge to have ignored such an important matter. At page 4 of his judgment the learned trial judge made the following finding:

“It was submitted that the minute awarding the lease to the defendant belong to a different person a certain technical organization but no evidence was led to the effect that the original minute granting the lease to the defendant was faulty.”

With due respect to the learned trial judge, the above statement seems to have been made totally in contradiction to the evidence of Bakashabaruhanga (PW1) and what Hussein Abdala (DW1) said when under cross-examination. To appreciate the position on this point, it is necessary to reproduce part of Bakashabaruhanga's evidence at page 10 of the proceedings which states as

follows:

“Basically this certificate was wrong. One the minute under which Uganda Land Commission allocated the land refers to entirely different plot this registration for Technical Services Ltd.”
(sic)

In view of this piece of evidence it is difficult to see why the trial judge found that no evidence was led to show that the minute under which the land was leased to the respondent referred to a different person. Evidence was certainly led to prove that fact.

Regarding consent by the Minister, there is a letter dated 13/4/89 (Exh.P2) permitting the appellant to develop the plot in question. I have not come across any document directly giving consent to the respondent as it is being said by Professor Kakooza from the bar. In my view this point was validly raised by the appellant’s counsel.

In his last submission Dr. Byamugisha maintained that by the time his client got the lease the respondent’s lease had expired and had been cancelled for fraud. On the other hand Professor Kakooza argued that although the respondent’s lease had expired in 1990 he had in fact applied for extension as could be seen in Ex, P8. (Ex.P8 is a letter from Ministry of Land Housing and Urban Development). He however conceded that there was no copy of the application for extension.

The respondent’s lease would have ordinarily expired on 1/2/90 according to Ex.D1. The appellant got his lease on 1/8/89 as per Ex.P3. It follows that had the respondent’s certificate not been cancelled the appellant would not have got a valid certificate. What happened however is that the respondent’s certificate was cancelled on 5/12/88 according to the evidence of Paul Bakashabaruhanga (PW1) and Ex.P1. It follows that on 1/8/89 when the appellant got his title the respondent’s lease was no longer in existence. Although the learned trial judge in his judgment alluded to the cancellation of the respondent’s title he did not make any definite finding as to the effect of that cancellation. In my view this was a serious omission. The law is clear; once a certificate of title is cancelled it ceases to have any legal effect as per section 76 of the Registration of titles Act which states as follows:

”Any certificate of title, the entry, removal of in cumbrance, or cancellation in the Register Book, procured or made by fraud, shall be void as against all parties or privies to such fraud.”

In the instant case, PW1 in his testimony told the court that the respondent’s certificate had been

cancelled because it had been obtained by fraud. That piece of evidence was never challenged. It was therefore improper for the learned trial judge to hold that such certificate was valid. It may be pointed out that there was no evidence to show that the respondent ever challenged cancellation of its title in any way apart from its refusal to present it for cancellation. Had the learned judge addressed his mind properly to the provisions of section 76 and to the evidence of PW1 he would most likely have come to a different conclusion. It is trite law that once an illegality is brought to the notice of the court it should not be condoned (see: **Makula International Ltd v Cardinal Nsubuga & Another [1982] HCB 11**)

The learned trial judge unnecessarily put much emphasis on Ex.P8, which he said favored the respondent's case. Professor Kakooza in his submission shared the same view as that of the judge.

Ex.P8 which seems to have been supplied by the appellant reads as follows:

“Ref :83 .13.

16th June, 1992.

The Secretary,
Uganda Land Commission,
P.O. Box 7096,
KAMPALA.

Re: PLOT 3779 BLOCK 244 MUYENGA, LVR 1380/14

Please refer to your letter of even reference ULC/122 dated the June, 1992 concerning the above property.

This office has made investigations and confirms that the layout does not contradict the approved layout for the area and is not affected by any other planning proposals.

It is therefore recommended on purely planning grounds that Mess Hebre International Trading Co. Ltd., be considered for extension as the commission may decide.

Deo K. Kajugira,

Ag. CHIEF PLANNER.

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The letter is silent about the validity of the respondent's certificate of title. In it the Ag. Chief Planner only recommends the respondent for extension of his certificate of title. This letter is dated 16/6/92 which was about four and a half years after the respondent's certificate had been cancelled on 5/12/88. I cannot see how that letter could be said to favor the respondent's case. Considering the fact that the minute offering the lease to the respondent referred to a different person and plot, that the respondent did not obtain consent from the relevant authorities and that respondent's title was cancelled by the Registrar of Titles long before the appellant was issued with his title, I find that the learned trial judge came to the wrong conclusion when he dismissed the appellant's suit. This appeal must succeed.

Accordingly I would allow the appeal, set aside the judgment and orders of the high court and grant the appellant with an order that the respondent removes his illegal structures from the appellant's land forthwith.

Dated at Kampala this 24th day November 1998

C.M KATO

JUSTICE OF APPEAL

JUDGEMENT OF MANYINDO, DCJ.

I agree with Kato, JA. whose Judgment I read in draft that this appeal ought to succeed for reasons stated in that judgment just delivered. As Engwau JA. also agrees, the appeal is allowed and the judgment and orders of the lower court are set aside. Judgment is entered for the appellant with an order that the respondent removes his illegal structures from the appellant's land forthwith. The claim for general damages was not pursued by the appellant.

There will be an order for costs in terms proposed by Kato, JA

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Dated at Kampala this 24th day of November, 1998.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

JUDGEMENT OF ENGWAU.J.A

I had the benefit of reading the judgment of Kato,J.A in draft and I entirely agree with it. In the premises I would allow this appeal with the terms made by Kato,J,A

Dated at Kampala this 24th day of November 1998

S.G.ENGWAU

JUSTICE OF APPEAL

