THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM:

HON. MR. JUSTICE G.M.OKELLO, JA

HON. MR. JUSTICE A.TWINOMUJUNI, JA

HON. LADY JUSTICE C.K.BYAMUGISHA, JA

CIVIL APPEAL NO.25 OF 2002

BETWEEN

GODFREY OJWANG:::::::::::::::::::::::: APPELLANT

AND

WILSON BAGONZA:::::::::::::::::::::::: RESPONDENT

(Appeal from the judgment and orders of the High Court of Uganda at Kampala (*Mwondha Ag. J) *dated 16th August 2001 in H.C.C.S.No.1759 of 2000)

JUDGMENT OF BYAMUGISHA.JA

This is an appeal against the decision of the High Court of Uganda dated the 16th August 2001 in which the respondent's claim against the appellant was allowed with costs and the appellant's counter-claim was dismissed with costs.

The suit arose out of a claim for recovery of land. The respondent by his amended plaint filed on the 29th May 2001 sought an eviction order against the appellant for trespass,

special and general damages. The facts that gave rise to the institution of the proceedings in the court below were not seriously contested. On the 17th November 1992 the appellant acquired a piece of land from one Francis Ndaga. The land was a customary holding popularly known as *Kibanja*. It is situated at Nsambya West Zone, Makindye Division Kampala District. On the 12th April 1996 the appellant sold part of his customary holding to the respondent for a consideration of *shs* 1,200,000/=. Subsequent to the said purchase, the respondent wanted to acquire a registered interest and in the process of doing so he discovered that the land was registered in the names of the Registered Trustees of Kampala Archdiocese. The officials of the diocese in charge of managing the estates told the respondent that the appellant was a trespasser on the land and had settled there without its knowledge and consent. The respondent went ahead to acquire a lease for 49 years and a certificate of title (exhibit p.5) was issued in his names. The title he acquired included the piece of land, which the appellant had acquired from Francis Ndaga.

After the acquisition of the title the respondent requested the appellant to vacate the land and offered him compensation of *shs* 9,000,000/= which the latter rejected. Efforts to use auctioneers to evict him were futile and the respondent filed a suit in the High Court at Kampala claiming the reliefs I have stated earlier.

In his written statement of defence and counter-claim, the appellant averred that he had an equitable interest in the land and that the respondent was not a bona fide lessee as he acquired his interest with full knowledge of the defendant's interest. He alleged that the respondent's acquisition was tainted with fraud. The particulars of fraud were given as follows:

"Registering the lease with knowledge of the defendant's unregistered interest on the said land as evidenced by the structures erected on the land and the agreement of sale for a portion of the land between the plaintiff and the defendant."

In the counter-claim, the appellant averred that he had an interest in the land, which he purchased from Francis Ndaga, and in turn sold a portion of it to the plaintiff. It was averred that when the respondent registered himself, he did so with full knowledge of the

defendant's unregistered interest. In doing so, the appellant averred that the respondent was fraudulent. He therefore made the following prayers: -

a) Dismissal of the plaintiff's suit.

b) An order that the plaintiff is not a bona fide lessee as he fraudulently registered his interest without due consideration of the defendant's interest.

c) A declaration that the defendant has an equitable interest in the suit property.

d) A permanent injunction retraining the plaintiff, his servants and or agents from evicting the defendant from the suit property or otherwise interfering with his occupation of the same.

e) General damages.

f) Costs of the suit.

g) Any other relief that the court may deem fit.

In the reply to the written statement of defence and counter-claim, the respondent denied the allegations contained therein. He averred that the appellant's initial entry onto the suit land was illegal and a trespass and he never acquired any equitable interest in the suit land. It was averred that the plaintiff's knowledge of the defendant's illegal presence on the suit land before the acquisition of the lease did not derogate from the plaintiff being a bona fide lessee. He denied the particulars of fraud that were alleged in paragraph seven of the defence.

At the scheduling conference held on the 17th May 2001 the parties agreed on the following matters: -

1. That there was a purported sale.

2. That the defendant is in occupation of part of the suit land.

3. That the plaintiff is on part of the suit land.

4. That the plaintiff has a lease for the whole suit land including the part where the defendant is staying.

5. That Kampala Archdiocese has an overriding interest in terms of freehold on all the suit land.

Four issues were framed for court's determination namely:

1. Whether the defendant has ever had any interest recognised under the law in the suit land.
2. Whether the defendant was a trespasser on the suit land.
3. Whether the plaintiff is a bona fide lessee.
4. Remedies available to the parties if any.

The learned trial Judge answered the first issue in the negative; the second and third in the affirmative. She awarded the plaintiff the sum of Ug.*shs.* 8,596,500/= as special damages; *shs.*300, 000/= as general damages for trespass and costs of the suit. She found that the appellant was a trespasser on the suit land and was not entitled to any remedies.

Being dissatisfied with the outcome, the appellant filed the instant appeal. The memorandum of appeal filed on his behalf contains the following grounds namely: -

1. **The learned trial Judge erred in law and fact when she held that the appellant never acquired any interest recognised by law in the suit land.**
2. **The learned trial Judge erred in law and fact when she held that the respondent was not estopped from denying the propriety of the appellant's interest in the suit land.**
3. **The learned trial Judge erred in law and fact when she relied on a list of *bibanja* holders which was neither annexed to the pleadings, seen nor tendered in evidence as an exhibit.**
4. **The learned trial Judge erred in law and fact when she held that the appellant was a trespasser on the suit land.**
5. **The learned trial Judge erred in law and fact when she held that the respondent was a bona fide lessee of the suit land comprised in Leasehold Register Volume 2930, Folio 20, Kyadondo Block 15, Plot. No.1994.**
6. **The learned trial Judge erred in law and fact when she awarded special damages of Ug.*shs* 8,900,000/= which were not proved, were remote and unforeseeable.**

The appellant proposed the following orders

1. The setting aside of the judgement and decree of the lower court.
2. Entering the judgement for the appellant on the counter-claim.

3. Costs of the appeal and in the court below to be paid by the respondent.

At the hearing of the appeal, Mr Tadeo Asimwe counsel for the appellant argued grounds one and four of the appeal together. He submitted that unregistered interest is recognised under the provisions of **section 64** of the **Registration of Titles Act (Cap 230 Laws of Uganda).** He relied on the following decisions namely **Uganda Telecommunications Vs Abraham Kitumba & Another C.A.No.36/95(**S.C.) (unreported) and **Somali Democratic Republic Vs Annop Sunderali Treon C.A.No.4/88(**S.C.) (unreported) for the legal proposition that if a person purchases an estate which he knows to be in occupation of another other than the vendor, he is bound by all the equities which the parties in such occupation may have in the land.

In reply, Mr Tebyasa, counsel for the respondent submitted that the first ground of appeal was basically the first issues at the trial namely whether the appellant had acquired any interest in the land lawfully. He pointed out that the appellant never knew that Kampala Archdiocese were the owners of the land. It was his submission that the respondent was informed by Mr Makumbi that the portion of the land he bought from the appellant did not belong to him. He further testified that he had a list of *bibanja* holders dating back to 1966 and the names of those the appellant bought his interest from were not among them. It was counsel's submission that in order for the appellant to claim any interest in the land, his title ought to be derived from someone who had a recognised right and title on the land.

He pointed out that in 1992 when the appellant acquired his *kibanja* the law governing *bibanja* acquisition was the now repealed Land Reform Decree. He referred to the judgment of the court in which the learned trial Judge addressed her mind to the provisions of **sections 1 and 4(1)** of the Decree. He stated that the appellant had to show that he gave notice to the controlling authority and as such the transactions were null and void under section 4(2) of the Decree adduced no evidence. He cited to us the case of Paul **Kisekka Saku Vs Seventhday Adventist Church SCCA No.8/93**(unreported) in which the provisions of the above sections were judicially considered.

Learned counsel referred to a letter dated 5th August 1999(exhibit D.4) in which counsel for the appellant expressed ignorance about the authority of Kampala Archdiocese over the land and asserted that the denial of Kampala Archdiocese as the owner of the land was an act of trespass. He relied on the case of **Kibalama &Another Vs Margaret Kiwana C.A.No.5/82**(C.A.)(unreported) for his assertion.

It seems fairly obvious to me from the submissions made by both counsel that at the time of the transactions between the appellant, the respondent and one Francis Ndaga the law applicable was the now repealed Land Reform Decree. Under **section4 (1)** a holder of a customary tenure on public land had to give notice of not less than three months to the prescribed authority before selling or transferring his/her interest. The transfer would not vest any title to the transferee except the improvements or developments carried out on the land. **Subsection 2** made void any agreement or transfer by the holder of any customary tenure without the consent of the controlling authority.

In the instant appeal, there was no evidence adduced by the appellant to show that any notice as required by the law was given to the controlling authority before he acquired his interest from Francis Ndaga. In cross-examination he stated that he did not recognise anyone as having an overriding interest on his *kibanja.*

In the matter now before us, it was the appellant's contention that he acquired his interest from Francis Ndaga on the 17th November 1992. The said Ndaga was, according to the appellant's own testimony, the son of Nakku Musana who apparently acquired his *kibanja* from the white fathers. Nakku Musana and his son Francis Ndaga did not testify at the trial with regard to the acquisition of the land from the white fathers. However, the testimony of Ntambazi Edward (P.w.2) an accountant in the estate office of Kampala Archdiocese gave evidence to the effect that he had a list of all *bibanja* holders since 1966 and the list did not include Francis Ndaga Nakku Musana or the appellant. In dealing with the appellant's alleged acquisition the learned trial judge had the following to say: -

"This land was acquired in 1992 by the defendant just 3 years before the 1995 Constitution came into force, and the Land Act of 1998 which was 7 years before its enactment, consequently the law applicable to gives (sic) us clearly what ought to have been done was the Land Reform Decree No.3/75 which was the Law then and of course taking into consideration Interpretation Act Ss 13(2)(a)(b)(c)(d) and (e) there of section 1(1) of the Land Reform Decree having converted all land in Uganda to be Public Land under Uganda Land Commission and section 4(1) of the Decree having only allowed one to transfer a customary tenure on land after notice to the prescribed authority, the evidence reveal that there was no such notice. Section 4(2) of the Land Reform Decree made the agreement or transfer without such notice void and of no effect. It goes further to provide that even where notice is give the transfer (sic) didn't acquire title or interest in that save for only improvements and or developments on the land.

Because of the defendant's failure to obtain consent from the registered proprietor in accordance with section 4(1) of the decree which was either Kampala Archdiocese or the Uganda Land Commission when the land was converted in Public land by the Land Reform Decree he doesn't qualify by the specific provisions in section 30(1)(a) of the Land Act to be referred too (sic) as a bonafide occupant. For the reason that he never entered on the land under the Laws prescribed under Section 30(1)(a) of the Land Act. He entered the land in 1992 three years before coming into force of the Constitution of 1995. I was convinced by counsel for the plaintiff argument taking in consideration the evidence on record which section 4 of the Land Act the defendant couldn't be described as a lawful occupant either. Section 4(1) described what a customary tenure is. There was no consent from the registered owner and he was not settled on the land by owner and he was not settled on that land by Government. I was persuaded by the case cited by counsel for the plaintiff Paul* **Kisekka Saku v. Seventh Day Adventist** ***already cited and the decision therein to the effect the defendant had not acquired the land lawfully in accordance with land reform Decree 1975.

Consequently I find that the defendant didn't acquire any interest recognised by law".

I agree with the findings of the learned trial judge that the law governing the acquisition of land in 1992 was the now repealed Land Reform Decree. The provisions of the relevant section was judicially considered by the Supreme Court in the case of **Kisekka Saku v Seventh Day Adventist Church (**supra). The brief facts of the case were that the appellant purchased a *kibanja* in 1984 from one Nandawula who previously owned it. The *mailo* owner subsequently sold her leasehold interest to the respondent church in 1987. The appellant demanded the sum of *shs* 3,966,809/= as compensation from the respondent for his customary interest but the respondent was only willing to pay *shs* 1,500,000/=. The appellant sued the respondent for compensation. The suit was dismissed by the High Court on the ground that the appellant had not complied with the provisions of section 5(1) of the Land Reform Decree by failing to obtain permission from the prescribed authority. He appealed to the Supreme Court contending that he had lawfully acquired the *kibanja* by customary practice. In dismissing the appeal, the Supreme Court held that the transfer from Nandaula to the appellant was governed by section 4(1) of the Land Reform Decree which required the said transfer to be preceded by three months notice of the intended transfer to *the* prescribed authority. The court went on to state that since there was no such notice, the transfer was unlawful and void.

In the matter now before us, the appellant in his own testimony stated that he "had never recognised anyone having an overriding interest on his *kibanja*" to use his own words. He also testified that he did not inquire about the history ownership of the *kibanja.* The only information he obtained from Ndaga who sold him the land was that he (Ndaga) was the son of Naku Musana who had been given that land by the white fathers. The land had no developments on it. The appellant's own admissions are clear testimony that he had no direct or constructive knowledge about the ownership of the *kibanja* he purchased from Ndaga. The evidence of P.W.2 to the effect that Kampala Archdiocese had no knowledge of Ndaga or Naku Musana ought to be believed. I think the appellant was being naïve when he testified that he did not recognise anybody else who had a superior title than him. Under the now repealed Land Reform Decree, all land was vested in the Uganda Land Commission and therefore it was the controlling authority. Furthermore, his admission that he did not make any inquiries as to the status of the land he was

purchasing shows lack of prudence on his part. On the appraisal of the evidence on record, I would uphold the findings of the lower court that the appellant did not acquire his *kibanja* lawfully and therefore his acquisition was not protected by the provisions of **section 29(5)** of the Land Act (Cap 227 Laws of Uganda 2000) as learned counsel for the appellant submitted. The subsection provides as follows:

"***Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for purposes of this Act".***

The words "bona fide occupant" are defined in subsection 2 of the section to mean "***a person who before coming into force of the Constitution-***

(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more;

(b) had been settled on land by the Government or agent of the Government, which may include a local authority".

My understanding of the above provisions is that a person to qualify as a bona fide occupant of land he/she must have occupied and utilised or developed the same for twelve years or more without being challenged by the registered proprietor. The second instance is where the Government or a local authority settles the person on the land. The evidence before the lower court was that his son Francis Ndaga introduced the appellant to Nakku Musana before he purchased the land. He concluded a sale agreement with Nakku Musana. Francis Ndaga and Mary Nakate signed it as sellers and himself as the buyer. In cross-examination he stated that there were no developments on the land. He also stated that he did not inquire about the history of the land. Nakku Musana who is alleged to have obtained the land from the white fathers did not testify. Therefore the alleged occupation and utilisation of the land by Nakku Musana for a period of twelve years or more was not supported by the evidence on record. The respondent cannot be said to have purchased land in occupation of another in order for him to be bound by all equities that such person might have in the land. The provisions of **section 64(**supra) and

the decided cases on the subject do not support the appellant's claim. Iam therefore not persuaded that the provisions of **section 29(5)(**supra) protect the appellant. The first ground of appeal would inevitably fail.

I shall now turn to ground six. This ground was concerned with the award of special and general damages. The respondent in the amended plaint had claimed the sum of *shs* 8,265,000/=. This amount included the sum of *shs* 1,200,000/= being the purchase price paid by the respondent to the appellant for the piece of land. This transaction like the one between the appellant and Francis Ndaga did not comply with the relevant provisions of the Land Reform Decree. Therefore it was intrinsically and inevitably illegal in its inception. The question is whether the money paid by the respondent is recoverable. There are authorities such as **Singh v Kulubya [1963] EA 408;** and **Broadways Construction Ltd v Kasule and Others [1972] EA 76** which state that money paid pursuant to an illegal contract is irrecoverable.

The rule has long been established that no man or woman can claim any right or remedy under an illegal transaction in which he/she has taken part. A court of law cannot sanction what is illegal and an illegality once brought to the attention of court, overrides all questions of pleading and any admissions made thereon by the parties see: **Makura International Ltd v Cardinal Nsubuga &Another [1982] H.C.B 11**.

The attention of this court has been drawn to the fact that the respondent and the appellant never sought the consent of the controlling authority before carrying out the transaction of selling and buying the land in question. None of them can use the court of law to recover money paid through an illegal transaction. The respondent's case does not fall within the exceptions to the rule that losses and gains remain where they have fallen. The sum of *shs* 1,200,000/= is therefore irrecoverable. As for the rest of the monies claimed under special damages, the law is that special damages must be pleaded and strictly proved by the party claiming them as being a direct result of the wrongs committed by the defendant. The respondent claimed that he instructed the firm of M/s Kangwamu &Co Advocates who wrote to the appellant a letter requesting him to vacate

the land. He stated that he paid the sum of *shs* 2,900,000/=. He produced a receipt (exhibit P.3) as proof of payment. Counsel for the appellant in his submission before us stated that money paid to advocates is treated as costs. With respect, I think costs are recovered after court action. The respondent did not go to court. After being registered as proprietor he offered to compensate the appellant. The offer was rejected. He therefore proceeded to evict the appellant as a trespasser on his land. He engaged a lawyer to do some work for that purpose. The appellant resisted the eviction. But the respondent incurred expenses and he is entitled to the sum claimed. The amount of money paid to the lawyer was strictly proved, as the law requires. It would be awarded.

The other sum claimed was *shs* 3,000,000/= allegedly paid to M/s Ferry& Marks Auctioneers for evicting the appellant. The respondent tendered a receipt (exhibit P.2) showing that only *shs* 1,000,000/= was paid. The balance of *shs* 2,000,000/= was not proved and therefore it would be disallowed. In my considered opinion, a total sum of *shs* 3,900,000/= was strictly proved and it would be allowed. The sum of *shs* 8,596,500/= awarded by the learned trial judge would be set aside and substituted with a sum of *shs* 3,900,000/= as special damages.

As for general damages, counsel for the appellant submitted that the learned trial Judge in awarding general damages computed the period from 1996 yet the respondent acquired the lease in 1999. According to counsel, the amount of money awarded should be revised to *shs* 100,000/=. The certificate of title (exhibit P.5) shows that the term of the leasehold was to run from 1st September 1999. The learned trial Judge erred when she computed the period of trespass from 1996 when the appellant purported to sell his interest to the respondent. I therefore agree with the submissions of counsel for the appellant that the amount of general damages ought to have been *shs* 100,000/=. This ground would also succeed. These two grounds more or less disposes of the whole appeal and I do not think it necessary to deal with the rest of the grounds.

The appeal would partly fail and partly succeed with costs both here and in the court below. The respondent would be awarded 4/5 of the costs. The amount of damages would

be reduced and substituted with a sum of *shs* 3,900,000/= as special damages and *shs* 100,000/= as general damages.

Dated at Kampala this…18th …day of…February…….2004.

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C.K.Byamugisha

Justice of Appeal