THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE S.B.K. KAVUMA, JA.

CIVIL APPEAL NO.59 OF 2005

(ORIGINAL HIGH COURT OF UGANDA AT JINJA CIVIL SUIT NO. 122 OF 2002)

(Appeal from the decision of the Honorable Mr. Justice David K. Wangutusi delivered on 6" April, 2005 at Jinja in Civil Suit No. 122 of 2002)

BETWEEN

1. KITOSI CHARLES)

2. BUKUSUBA LUBANGA HASSAN)

3. WAISWA DENNIS) APPELLANTS

4. OLAPA JAMADA & 1,263 OTHERS)

AND

BUMERO ESTATES LIMITED…… RESPONDENT

JUDGMENT OF HON. L.E.M. MUKASA-KIKONYOGO, DCJ.

This appeal is against the judgment of the High Court sitting at Jinja in Civil Suit No. 122 of 2005 delivered on 6/04/05. It is seeking orders of this Court to set aside the judgment passed in favour of the respondent and to dismiss its counterclaim.

The background of the appeal is, that Bumero Estate Ltd, a Company, (hereinafter to be referred to as the respondent) instituted a suit against Kitosi Charles and originally 1266 others but later reduced to 3 (three) (to be referred to as the appellants) for trespass among other things, on the respondent's land (hereafter to be referred to as the suit property). The suit property is comprised in LRV 1289 Folio 14 measuring approximately 2400 hectares. It is situated at Bumero village in Iganga District. The
respondent was issued with a certificate of title in respect of the suit property on 4/01/84.

At the time of the application for the certificate of title, the suit properly was vacant and unoccupied. It is the respondent's case that the appellants unlawfully entered upon and occupied the suit property after the grant of the lease by the Uganda Land Commission (ULC). The trespass started in 1991 and continued up to the time the respondent filed this suit in the High Court.

The appellants denied any liability. They are not trespassers on the suit property. They were in occupation of the suit property prior to the grant of the leasehold in respect of the suit property. The claims of some of the appellants in the suit property date back to 1975. As far as they are concerned, they are lawfully on the suit property as customary tenants. They, therefore, filed a counterclaim seeking dismissal of the respondent's suit and cancellation of the title obtained fraudulently. In the alternative
the appellants prayed Court to declare them lawful and bonafide occupants, or customary tenants of the suit property. Further, they prayed for a permanent injunction to restrain the respondent from interfering with their occupation as the lawful owners of the suit property and costs of the suit.

Upon hearing the evidence adduced by both sides, the learned trial judge passed judgment in favour of the respondent. The appellants were ordered to give vacant possessions to the respondent as the rightful owner. A permanent injunction was issued by the court to restrain

the appellants from continuing with the unlawful occupation of the suit property. The respondent was also awarded general damages in the sum of Shs.l0, 000,000/= and costs of the suit.

Aggrieved by the judgment of the trial court, the appellants lodged this appeal to this Court, through their learned counsel, Mr. Mbabazi. The memorandum of appeal contains the following 7 grounds: -

1. **The learned trial judge erred in law and fact when he failed to properly evaluate the evidence thereby coming to a wrong conclusion.**
2. **The learned judge erred in law and fact when he found that the appellants could not be said to hold land under customary tenure.**
3. **The learned trial judge erred in law and in fact when he selectively evaluated the evidence and filled in gaps for the respondent, by way of speculation and conjecture.**
4. **The learned trial judge erred in law and fact when he held that the appellants were not bonafide occupants.**
5. **The learned trial judge erred in law and fact when he found that the suit land was available for leasing at the time when the respondent acquired title.**
6. **The learned trial judge erred in law and fact when he found that the respondent did not commit any act of fraud acquiring title to the suit land.**
7. **The learned trial judge erred in law and fact when he failed to consider the legal capacity of the respondent at the time of application for lease.**

The appellants prayed Court to allow the appeal and set aside the judgment of the High Court dated 6th April, 2005 passed in favour of the respondent and dismissing the appellants' counter-claim and enter judgment in favour of the appellants, as hereunder:

a) Dismissal of the respondent's claim;

b) Entry of judgment on the counter claim.

At the opening of his submissions, Mr. Mbabazi had intimated to court that he would start with grounds 1 and 3 together. However, at the end of his submissions he informed Court that as the grounds overlap, he found that he had covered all the issues raised in all the grounds, namely 1, 2. 3, 5, 6 and 7. Ground 4 was abandoned.

Both counsel, Mr. Sserwanga and Mr. Ojakol who represented the respondent followed the order set out in the memorandum of appeal.

In his submissions, Mr. Mbabazi criticized the learned trial judge for failing to properly evaluate the evidence on which he based his decisions. Starting with grounds 1 and 3, he submitted that the learned trial judge erred in law and fact because he failed to properly evaluate the evidence thereby coming to a wrong conclusion. To him, the learned judge acted upon speculation and conjecture based on selected pieces of evidence. The counsel in particular criticized the learned judge for failure to address the issue of capacity to obtain the lease.
If the learned trial judge had properly evaluated the evidence, he would have concluded that the respondent was non-existent. He should have found that it had no capacity to apply for a lease. To Mr.Mbabazi, to apply in the name of Bumero Estate Ltd which had not been incorporated was fraudulent. As far as he was concerned, it was wrong for the respondent to create the impression that Bumero Estate Ltd consisted of many people, which was not the case.

Both counsel for the respondent Mr. Sserwanga and Mr. Ojakol replied that the position had been explained by PW4, Masiga, who was authorized to apply for the lease. At the time the application was made, the process to incorporate the respondent was under way. These instructions had been given to their lawyers Kulubya and Company Advocates. On their advice, PW4 lodged the application subject to the reservation of the name with the Registrar of Companies. However, the irregularity was cured by subsequent ratification by the Board of

directors. Further, at the time the lease was granted the respondent had been incorporated.

On close perusal of the evidence adduced by each side, I concede that Mr. Mbabazi may have a point with regard to the capacity of the respondent at the time the application was made. However, PW4, Masiga who was authorized to make the application gave a cogent explanation as to how that happened. He acted on the advice of their counsel. As the irregularity was curable and indeed was subsequently cured by ratification, it would be unfair to visit it on the client. Clearly, this was more of a technicality than a fraudulent intent or evidence of dishonesty. In my view, this is a proper case in which to invoke Article 126 (2) (e) of the Constitution which enjoins courts of law to administer substantive justice without undue regard to technicality. The Omission by the learned judge to address the issue of non-existence of the
respondent in the circumstances of this case was not detrimental to the appellants' claim if any. Alternatively, as submitted by Mr. Ojakol, this was a case of a pre incorporation contract.

A further complaint by the counsel was the failure by the trial judge to properly consider the discrepancies and misinformation in the application form and inspection report, which facilitated the grant of a fraudulent lease to the respondent. It was argued for the appellants that, the recommendation by the District Land Committee of the allocation of the suit property was based on the fraudulent inspection report. On the evidence available the Inspection Committee did not carry out proper inspection of the entire suit property but only viewed it from the top of Mwema hill. That explains why the District Land Commission recommended allocation of 13000 hectares which were not available on the ground. It was argued that had the learned trial judge addressed his mind to those irregularities, he would have concluded that the transaction was tainted with fraud on part of the respondent.

In reply to Mr. Mbabazi's submissions, Mr. Sserwanga pointed out that the learned trial judge had carried out a detailed evaluation of both oral and documentary evidence adduced by the parties. The learned judge carefully examined the entries on the exhibits complained of. He read them together and then came to the decision that there were no customary tenants on the suit property at the time of the allocation. It was contended by Mr. Sserwanga that it was

wrong for counsel for the appellants to comment on each entry on the exhibit separately and submit on them out of context. The attack on the learned trial judge was misplaced.

For convenience my evaluation of the evidence on record will follow slightly a different order from that adopted by both counsel.
I will consider grounds 1, 2, 3, 5, 6 and 7 together and conclude with ground 2.

With regard to the failure to address the misinformation in the application form, PW4 Masiga, who was authorized to apply for the lease, in my view, satisfactorily explained the non compliance with the laid down procedure. It was not due to dishonesty but he was acting on information given to him by the Secretary to the Land Commission, namely that customary tenure was public land not leased to any one or inhabited. It was for that reason that he did not consider it necessary to mention customary tenants as was required in the application form. In any case there were no occupants on the land.

This case is distinguishable from that of **Katwiremu Vs William Katwiremu & Others 1977 HCB 187** where it was held that —

> **"If a person procures registration to defeat an existing unregistered interest on the part of another person of which he is proved to have knowledge then such a person is guilty of fraud."**

A similar finding was made in the case of **Marko Matovu Vs Mohammed Ssemu and another 1979 HCB 174** that: -

> "**Knowledge of other person's rights or claim over land and the deliberate acquisition of a registered title, in face of protests is fraud."**

In the instant case there is no proof to show that the respondent had 5 knowledge of the appellants' customary interest in the suit property.

On the discrepancies between the inspection report by the Inspection Committee and the certificate with regard to the area available for allocation, the position was clearly explained by PW4 Masiga. It is true, the Inspection Committee led by the Chairman, Afuna Adula, did not inspect each and every Part of the suit property as already seen. This is because the land was covered with hushes, forests and there were no roads and no activities. It was so vast that they decided to climb Mwema hill where they could get a good view of the land. Clearly, the figure of 13000 hectares recommended by the District Land Committee was a mere estimate. However, following the inspection, PW2, Roger Byaruhanga, was instructed to survey 13000 hectares by the District Land Committee. He surveyed only 2400 because that is what was available. The assignment took the surveyor two months. He said there were no roads, schools, or any infrastructure. The evidence of PW2 tallied with that of PW3, and clearly explains the discrepancy between 13000, and 2400 hectares. Finding the land impassable; the inspection team had no way of inspecting it all. That is apparently why they climbed the hill to view it. On the other hand, PW2, who could pass through the bush and forest, came out with the correct figure of 2400 hectares. Given the above circumstances and a close perusal of the evidence before Court, dishonesty or fraud on the part of the respondent is ruled out. The failure by the inspection committee to inspect every part of the suit property, in my view, was not detrimental to the application. The surveyor came out with the exact figures. His evidence, in fact, goes further to support the respondent that the land was not inhabited at the time of the application.

On my part, I am satisfied that the learned trial judge ably dealt with all the issues raised by counsel where it is contended he did not properly evaluate the evidence. The main issue in this case was whether the land allocated to the respondent was free of any encumbrances to which the answer is in the affirmative.

Failure to disclose in the reports whether the suit property is occupied by customary tenants was not prejudicial to the appellants in this case because there was nobody on the land. I do not accept the submission by counsel for the appellant, that, the application form should not have indicated the words “customary tenure” if the land was not occupied. I have no convincing reasons to disbelieve PW 4, Masiga’s explanation and understanding of the meaning of the terms ‘customary tenure”. This takes care of the fifth ground, too, where the

learned trial judge was criticized for holding that there was land available for leasing at the time the respondent acquired title.

On the second ground, the learned trial judge was criticized for overlooking the appellants' customary interest which they were deprived of by the allocation of the suit property to the respondent. Tue criticism is not justified. There was overwhelming evidence before Court to show that the appellants had no customary interest in the said land. All the respondents' witnesses testified that the land in question was all bush with no settlements. The most reliable evidence is that of the independent witness, PW2, the surveyor, Roger Byaruhanga who surveyed and cleared the boundaries on the land.
The appellants' evidence, too, supported the respondents' case. They conceded that they did not see any surveyors on the land yet he and his team stayed there for two months. Further, on examination of their evidence, the learned trial judge found it
contradictory, weak and most of it hearsay. He, therefore, rejected it as being unreliable.

I agree with the findings of the trial judge and I would also like to *5* add that it's difficult to believe that DW1, at the tender age of 5 years, would still remember the information of their interest in the suit property passed to him by his father.
Clearly, the appellants were not on the land at the time of the application, or surveying or the allocation of the suit property. They entered upon the said property in 1991. It is, therefore, not correct to say that the learned trial judge disregarded the appellants' interest in the land. It is worthy noting that he even considered the relevant provisions of the law applicable to their claim hut was not of assistance to them as there was no interest to protect.

This case is distinguishable from some of the recent cases decided by this Court and cited in this appeal which include **Civil Appeal No. 20 of 2002 Venansio Bamweyana & 5 Others Vs Kampala District Land Board and George Mitala** and which are almost on all fours. However, the claimants in those cases established their interest which is not the case in the present appeal. It is, also, worthwhile noting that the issue in the present case is not the nature of the interest but the existence of the claim, whereas in the aforesaid cases the question in issue was the nature of the interest.

The evidence from both sides clearly shows that the appellants were not on the suit property and hence were not customary tenants. As the appellants' interest in the suit land was rejected and here was no other encumbrances or rightful claimants, the learned trial judge rightly concluded that the land was available for allocation, as indicated earlier on.

Lastly, I will consider, the issue of fraud already touched on. Fraud must not be presumed. It must be clearly stated, pleaded and strictly proved. The learned trial judge stated the correct position of the law in the present case and he correctly applied it to each fraudulent act alleged by the appellant in this case.

In agreement with the learned judge, fraud was not proved. On the evidence from both sides, the appellants could not have been bonafide occupants or customary tenants because they were not on the disputed land at the material time as seen throughout the evaluation of the evidence.
The survey could not have shown what was not on the land surveyed. The respondent could not have reported the existence of people who were not there. The appellants had no interest to be protected. There was no evidence to prove that the allocation of the suit property was obtained through political influence. In contrast to the decision in the case of **Marko Matovu and Others vs. Sseviri and Another 1979 HCB 174,** the misinformation complained of was not intentional. It would be unfair in the circumstances of the present case to impute fraud on the respondent on the facts of this case.

On the counterclaim to cancel the certificate issued to the respondent and prayers for an injunction and compensation which were dismissed by the High Court, no evidence of underhand means of obtaining the documents or falsification of documents or the fraudulent acts complained of, were proved in this case. As it was held in the case of **Kampala Bottlers Ltd vs. Domanico Uganda Ltd C.A. No. 22 of 1992,** the burden of proof in fraud cases is heavier than on a balance of probabilities.
In the result, the learned trial judge was justified to dismiss the counter claim and the appellants' applications for orders for an injunction or compensation.

All in all, on the record before Court and for the aforesaid reasons, I find no merit in the appeal. All the grounds of the appeal must fail and I would accordingly dismiss the appeal and uphold the judgment and all the orders of the High Court.
As my learned sister Hon. Justice A.E.N. Bahigeine J.A and brother Hon Justice S.B.K. Kavuma J.A also agree, this appeal is dismissed by unanimous decision of the court.

The judgment and orders dismissing the counterclaim and the other orders of the High Court are hereby upheld. The respondent is awarded costs in this Court and in the High Court.
Dated at Kampala, this 23rd day of March 2007.

L.E.M. Mukasa-Kikonyogo
Hon. Deputy Chief Justice.

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CIVIL APPEAL NO. 59/2005

KITOSI CHARLES & 1266 OTHERS :::::::::::::::: APPELLANTS.

VERSUS

BUMERO ESTATE LTD :::::::::::::::::::::::::::::::: RESPONDENT

JUDGEMENT OF HON JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

I have read the judgement of my Lord Mukasa-Kikonyogo DCJ.

I entirely agree that the appeal is devoid of any merit and ought to be dismissed.
I have nothing useful to add.

Dated at Kampala this 23rd day of March 2007.

A.E..N. MPAGI-BAHIGEINE
JUST ICE OF APPEAL

THE REPUBLIC OF UGANDA
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BETWFEN

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BUMERO ESTATES LIMITED RESPONDENT

JUDGMENT OF HON. JUSTICE S.B.K. KAVUMA, JA.

I have had the advantage and benefit of reading in draft the judgment prepared by the Hon. Justice L.E.M. Mukasa Kikonyogo, DCJ. I totally agree with that judgment and the orders made therein and have nothing to add.

Dated at Kampala this 23rd day of March 2007

S. B.K. Kavuma