

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

5 **CORAM: HON. JUSTICE C.K.BYAMUGISHA, JA.
HON. JUSTICE S.B.K.KAVUMA, JA.
HON. JUSTICE A.S.NSHIMYE, JA.**

CIVIL APPEAL NO.74/05

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BETWEEN

AIDA NAJJEMBA:.....APPELLANT

15

AND

ESTER MPAGI:.....RESPONDENT

20 *[Appeal from the ruling and orders of the High Court of Uganda at Kampala
(Maitum J) dated 13th June 2005 in Miscellaneous Application No.213/ 2004]*

JUDGEMNT OF BYAMUGISHA, JA.

This is a first appeal from the ruling of the High Court in Miscellaneous
25 Application No.213/2004.

The application was filed by the respondent seeking a vesting order under the
provisions of Sections 166, 167, 168 and 188 of the Registration of Titles Act.

The application was seeking two orders from court namely:

1. That 4.42 acres of the land comprised in Kyadondo Block 167 Plot 355 at
30 Kiwale be vested in the applicant; and
2. That costs of the application be provided for.

The respondent deponed an affidavit in support of the application. The appellant opposed the application by deponing an affidavit in reply.

The background to the dispute between the parties is as follows. The respondent
5 together with her late husband, Fred Mpagi, purchased an equitable interest on mailo land. This interest is popularly known as *kibanja* from one Tera Kiwoma and took possession of the same. Thereafter Tera Kiwoma passed away and one, Sepiranta Namusisi applied for and was granted letters of administration of the estate.

10 In her capacity as the administrator of the estate, Namusisi sold the mailo interest to the respondent and her husband. Several sale agreements were executed. The respondent and her husband become registered proprietors but in 2004 the said registration was cancelled by the land registry citing defects in the registration. The instrument that was used to register the respondent with her
15 husband was found to belong to another transaction altogether and the transfer forms could not be traced.

The respondent having lost her husband who knew the existence of the transfer forms and Namusisi the seller having also passed away the respondent through her Advocates M/s Katende Ssempebwa and Co Advocates wrote to the
20 Commissioner Land Registration requesting for the removal of the caveat from the suit property which had been lodged by the appellant. The Commissioner

declined to grant the request and advised the said advocates to seriously consider the option of obtaining a vesting order from court.

Consequently, the respondent as the administratrix to the estate of her late husband filed the application for a vesting order.

- 5 The appellant is the daughter of late Namusisi and she was granted letters of administration to the estate on 10th October 2003 vide Administration Cause No. 125/2003. She lodged a caveat on the property claiming it as part of her late mother's estate. She was dragged to court as a caveator.

The application was heard and allowed. The appellant was dissatisfied –hence
10 the instant appeal.

The memorandum of appeal filed on her behalf has the following grounds:

1. **The learned trial judge erred in law when she failed to correctly evaluate the evidence on record and thus arrived at a wrong decision.**
- 15 2. **The learned trial judge erred in law and in fact when she ordered the vesting of 4.42 acres of land comprised in Block Plot 335 in the respondent.**
3. **The learned trial judge erred in law and fact when she found that the appellant had not substantiated on the respondent's forgeries as**
20 **required by O.6 rule 2 of the Civil Procedure Rules.**
4. **The learned trial judge erred when she only relied on the respondent's evidence without considering that of the appellant.**

5. The trial judge erred when she failed to find the respondent guilty of fraud and thereby incompetent to make the application.

Both advocates filed written submissions.

In his submissions counsel for the appellant argued grounds one and four
5 together.

The gist in these grounds is that the learned trial judge did not evaluate all the evidence on record and relied more on the respondent's evidence. He pointed out that the appellant in her affidavit stated that the respondent's husband had never purchased the suit property from the late Namusisi and that the
10 agreements of sale that were filed in court were forgeries.

Learned counsel complained that the learned judge ignored these assertions and instead required the appellant to substantiate the allegations of forgeries. The allegations of forgeries, according to counsel could not properly be provided for given the nature of the application. He claimed that the learned trial judge did
15 not put into consideration the suggestion that the respondent's earlier registration was defective as there was no transfer and the instrument number related to a different land transaction.

He further pointed out that the learned judge ignored the suggestions made on behalf of the appellant to the effect that the best procedure to dispose of the
20 matter was an ordinary suit and that affidavit evidence was not enough.

In reply, counsel for the respondent supported the trial judge's decision and her evaluation of evidence. He pointed out that the application was for a vesting order in respect of land in which the respondent as the administratrix of the estate of her late husband, Fred Mpagi. He further stated quite rightly in my
5 view, that the appellant is requesting this court to subject the evidence which was before the lower court to thorough scrutiny and relate it to the law and the facts that were before the lower court.

It is the duty of a first appellate court to re-evaluate the evidence that was
10 before the lower court and determine for itself whether the decision of the trial judge should be upheld- see *Selle & another v Associated Motor Boat Company Ltd [1968] EA 123; Banco Arabe Espanol v Bank of Uganda Civil Appeal No.8/98(SC); Habre International Co. Ltd v Abraham Alayakha & others, Civil Appeal No.4/98(SC); Joseph Muluta v Katama Sylvano Civil*
15 *Appeal No.11/99(SC)* and *Rule 30(1)(a)* of the *Judicature(Court of Appeal Rules)Directions S.I.No.13-10.*

The judge in dealing with the evidence that was before her said:

***“I have carefully perused the affidavits and annexures attached. I have also carefully considered the submissions of counsel on both sides. The facts as
20 established by the affidavits and the various annexures show that the applicant's family lived on the land in question and agreed to purchase part of it and did buy 4.42 acres. The owner of the land acquiesced in their living***

on the land. There was in fact an executed contract of sale of the land to the applicant's husband.

The sale was completed as is shown by the affidavit of Kasujja and Wandyaka and Annexures "B" & "C". The vendor died without legally transferring the
5 *title in the names of the purchaser.*

I do not believe that the husband of the vendor, S. Kasujja could have sworn an affidavit which was untruthful. Moreover there was another witness, Wandyaka, who also witnessed the agreements of sale of the said land and the various payments which accompanied the agreements".

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I generally agree with the trial judge in her assessment of the evidence.

However I do not agree with her that the vendor died before transferring the property into the names of the purchaser.

There was a transfer of the property into the names of the purchaser. The
15 appellant in her affidavit sworn in support of the caveat stated that she searched the land registry and established that the land had been transferred into the names of Frederick Mpagi and Esther Mpagi. This affidavit was sworn on 4th February 2004.

She wanted the transfer cancelled claiming it was fraudulent. The transfer was
20 eventually cancelled not because of fraud but because the instrument that was used to register the Mpagis apparently belonged to a different land transaction and the transfer form could not be traced. The vendor having passed away at the

time of cancellation, the respondent's only alternative was to utilize the provisions of **Section 167** of the **Registration of titles Act** to seek a vesting order.

The evidence of the purchase of the suit property by the late Mpagi and the
5 respondent was given by other witnesses who included the husband of the vendor, Kasujja. I will take it that Kasujja being the husband of the appellant's late mother might have been her natural father or step father. He deponed an affidavit in support of the respondent's case and stated that he was one of the witnesses to about five out of the six sale agreements.

10 Like the trial judge observed, I do not think that Kasujja, who is a relative of the appellant could have lied about a transaction that was being contested by his own daughter or step- daughter what ever the case may be.

Two other witnesses namely Wandyaka and Philip Kamyia deponed affidavits as witnesses to the sale agreements. None of them was cross-examined by the
15 appellant or her counsel under **Order 19 rule 2(1)** of the **Civil Procedure Rules** which permits the cross-examination of any deponent at the instance of either party. Failure to cross-examine the deponents on their affidavits would mean that the contents of those affidavits are true unless it can be shown that they were inherently untrue.

20 The appellant had alleged in her affidavit deponed in opposition to the application that the sale agreements were forged. She did not give reasons or any particulars of the said forgeries. It is not difficult, in my view, for one to

give particulars or instances of forgeries in an affidavit. The trial judge considered all the affidavits and their annexures. It was not pointed out to us which evidence was ignored by the judge that would have affected her decision. On the evidence as a whole, the trial judge cannot be faulted in her evaluation of
5 evidence. Grounds one and four ought to fail.

Ground three complained that the trial judge was wrong to find that the appellant failed to substantiate on the forgeries that were allegedly committed by the respondent. This ground was covered when I was dealing with the first
10 grounds. The learned judge was right in her findings.

Ground two of the appeal was about the vesting order under **Section 167** of the Registration of the Titles Act.

The section states as follows:

***“If it is proved to the satisfaction of the registrar that the land under this Act
15 has been sold by the proprietor and the whole of the purchase money paid,
and that the purchaser has or those claiming under the purchaser have
entered and taken possession under the purchase, and that entry and
possession have been acquiesced in by the vendor or his or her
representatives, but that the vendor is dead or residing out of the jurisdiction
20 or cannot be found, the registrar may make a vesting order in the premises
and may include in the order a direction for the payment of such additional
fee in respect of the assurance of title as he or she may think fit, and the***

registrar upon such payment of that additional fee, if any, shall effect the registration directed to be made by section 166 in the case of the vesting orders mentioned there and effecting or omission to effect that registration shall be attended by the same results as declared by section 166 in respect of

5 *the vesting orders mentioned there.”*

There are 4 conditions provided for under the section in order for the registrar to exercise his powers.

1. The land must be registered under the provisions of the Registration of Titles Act and the purchaser must have paid the whole of the price to the
10 vendor.
2. The purchaser or those claiming under him or her have taken possession of the purchased land.
3. That the entry into possession by the purchaser has been acquiesced by the vendor or his or her representative.
- 15 4. The transfer of the property has not been executed because the vendor is dead or is residing out of jurisdiction or he/she cannot be found.

Counsel for the appellant submitted that the above stated conditions did not exist in the instant appeal because the respondent and her husband were once
20 registered on the title but she failed to prove how they became registered without a transfer.

He asserted that the unexplained circumstances point to their fraudulent way of dealing with the suit land.

Other complaints that learned counsel raised on this ground were that the application was misconceived and premature, that it should have been made
5 before the registrar in the first instance and therefore the trial judge ought not to have granted it.

In reply, counsel for the respondent cited two authorities both of them decisions of the High Court namely *Pontiano Ssali v Gerald Kibirango [1992-93] HCB*
10 *216* and *Re Ivan Mutaka [1980] HCB 27* that have judicially considered the provisions of section 167 of the Registration of Titles Act.

He submitted that we find that the late Mpagi lawfully and legally and without any trace of fraud on his part purchased the disputed land.

He claimed that the appellant had to allege and prove in the lower court that
15 there was fraud at the time of purchase and there was no such allegation or proof of it.

Learned counsel further challenged the appellant's claim to the suit property since her late mother was holding the same as the administrator of the estate of late Kiwoma and was holding the same by virtue of that office. He stated that
20 the appellant had no locus to claim the suit property since it did not belong to her late mother's personal estate.

He supported the decision to apply for a vesting order since the vendor was dead and could not transfer the land to the respondent.

I must state at once that the suit property did not belong to the personal estate of the appellant's mother. She was holding the property in her capacity as an administrator and she sold the same to the late Fred Mpagi and the respondent as such.

Another issue which I can dispose of here is the allegation that the respondent and her late husband committed fraud in the transaction. There was no evidence of fraud and the appellant was not deprived of any land since the vendor had title and power to sale.

The issue to resolve is whether the application before the High Court for a vesting order was properly filed under the provisions of section 167(supra). I agree with counsel for the appellant that an application for a vesting order must be made to the registrar of titles.

However, the High Court has unlimited jurisdiction in all matters. The Commissioner for Land Registration on 16th August 2004 wrote to counsel for the appellant suggesting to them the option of obtaining a vesting order from court. The counsel seems to have accepted this advice when he filed the application in the High Court.

In the same letter the Commissioner for Land Registration informed counsel that no transfer in favour of the respondent and her late husband could be traced

and the instrument number under which their registration was purportedly effected related to a different land transaction.

The loss of the transfer instrument and the use of an instrument of a different land transaction to register the respondent and her late husband raise some
5 suspicion but it cannot be evidence of fraud on her part. In any case the respondent was not responsible for safe-keeping of documents in the land registry and cannot be blamed for the loss of the transfer instrument.

I consider this to have been a unique case in which the vendor had sold the property and received the whole of the purchase price and the purchaser was in
10 possession with the full knowledge and consent of the vendor.

The vendor was dead and no representative was available to sign fresh transfer forms.

The learned judge was right to grant a vesting order under section 167(supra).

In the result, I would dismiss the appeal with costs to the respondent both here
15 and in the lower court.

Since both Kavuma JA and Nshimye JA agree, the appeal is dismissed in the above terms.

Dated at Kampala this...22nd ...day of...January... 2009.

20 **C.K.Byamugisha**
Justice of Appeal.

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

I have read in the draft the judgment prepared by Lady Justice C.K.Byamugisha, JA. I agree with her reasoning, her conclusions and the orders she makes.

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Dated at Kampala this 22nd day of **January, 2009**

S.B.K.KAVUMA

Justice of Appeal

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JUDGMENT OF A.S. NSHIMYE, JA.

The back ground of this appeal, has been very ably set out in the lead judgment of my sister, Lady Justice C.K. Byamugisha JA, of which, I have had the benefit of reading, while in draft.

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After re-evaluating the evidence which was before the lower Court, I am satisfied that the trial Judge, was sufficiently fortified in granting the vesting Order, appealed against.

The respondent in the Court below, by unshaken affidavit evidence, proved on the balance of probabilities, the existence of the 4 condition precedents set out in Section 167 of the Registration of Titles Act, to qualify for grant of a vesting Order.

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I agree with the reasoning of Lady Justice C.K. Byamugisha in disposing of all the grounds of appeal and that the appeal should fail with costs.

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Dated at Kampala this ...22nd ... day ofJanuary..... 2009.

A.S. NSHIMYE

JUSTICE OF APPEAL

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