

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**CIVIL APPEAL NO. 0041 OF 2012 (Arising from HCS (Land Division) No
93 Of 2009)**

APPELLANT

POPE PAUL IV SOCIAL CLUB

RESPONDENT

VS

JOHN SEMAKULA

CORAM:

**HON. JUSTICE ELDAD
MWANGUSYA, JA HON.
JUSTICE RICHARD
BUTEERA, JA HON. JUSTICE
F.M.S. EGONDA NTENDE, JA**

JUDGMENT OF COURT

This is an appeal against the judgment and orders of the High Court presided over by His Lordship Mr. Justice Rubby Aweri Opiyo delivered on 19.12.2011.

The brief background to this appeal is that the appellant, Pope Paul IV Social Club Ltd was operating from premises of Pope Paul Social Centre until the membership of the Club decided to acquire their own Land. They acquired Land described as Kibuga Block 16 Plot 9 (the suit land) through purchase from a person who introduced himself as **ERISA SEMAKULA MAKONA MAGOBA** the registered proprietor of the Land. The person was introduced to officials of the appellant by a Land agent well known to one of the officials of the Club and

an original title in the name of **ERISA SEMAKULA MAKONA MAGOBA** was availed for inspection. After inspection of the title and a search in the Land Registry which showed that the Land was unencumbered the appellant went ahead and purchased the land at a consideration of Shs300,000/ = . The purchase was

concluded on 22nd April 1983 and they got registered on the title as the new proprietors on 26th May, 1983. Following the transfer of the title the appellant went ahead to carry out some developments on the suit property until the respondent, a grandson of **ERISA SEMAKULA MAKONA MAGOBA** and

administrator of his estate filed a suit claiming that his grandfather could not have sold and transferred the suit land, in 1983 when he had died in 1979. He alleged that the appellant had fraudulently acquired the suit land an allegation the appellant denied. At the conclusion of the trial the High Court found in his favour and decreed as follows:-

1. That the defendant's transfer and certificate of Title for land comprised in Kibuga Block 16 Plot 42 situate at Rubaga is hereby cancelled.
2. That the plaintiff be registered on the Certificate of Title as the Administrator of the Estate of the Late **ERISA SEMAKULA MAKONA MAGOBA**.
3. That the defendants pays costs of the suit.

The appeal is against the above decree and orders. The following grounds are raised in the memorandum of appeal.

1. The learned trial Judge erred in Law and fact in his evaluation of the evidence adduced in Court and came to the wrong conclusions.
2. The learned trial Judge erred in Law and in fact when he failed to find that the plaintiff /respondent had not discharged the burden of providing fraud on the part of the appellant to the required standard.
3. The learned trial Judge erred in Law and in fact when he awarded costs against the defendant/appellant.

The appellant made the following prayers

1. That the appeal be allowed.
2. That the Judgment and orders of the lower Court be set aside, except as to general damages.
3. The appellant be allowed costs of this appeal and in the Court below.

A scheduling conference conducted by the Registrar of this Court framed two issues for resolution by this Court:-

1. Whether the trial Judge was right to cancel the appellants duplicate title.
2. Whether the trial Judge erred in law and fact in holding that the suit was not time barred

At the hearing of the appeal the appellant was represented by **MR. GODFREY LULE**, SC assisted by **MR. JOHN WAGABA** and **MR. JUDE MBABALI** while the respondent was represented by **MR. RICHARD OMONGOLE** who had also represented him at the trial at High Court.

In his submissions Mr. Godfrey Lule started with the issue of Limitation citing sections 5 and 6 of the Limitation Act to support his argument that the action was statute barred. We produce the two sections in order to appreciate his argument.

“5. Limitation of actions to recover Land

No action shall be brought by any person to recover any Land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person.

6. Accrual of right of action in case of present interests in Land

(1) where the person bringing an action to recover Land, or some person through whom he or she claims, has been in possession of the Land, and has while entitled to it been dispossessed or continued his or her possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

(2) Where any person brings an action to recovered any Land of a deceased person, whether under a will or on intestacy, and the deceased person was, on the date of his or her death, in possession of the Land or, in the case of a rent charge created by will or taking effect upon his or her death, in possession of the Land charged, and was the last person entitled to the land to be in possession of it, the right of action shall be deemed to have accrued on the date of his or her death.

(3) where any person brings an action to recover land, being an estate or interest in possession assure otherwise than by will to him or her, or some person through whom he or she claims by a person who, at the date when assurance took effect, was in possession of the land or in the case of rent charge created by the assurance, in possession of the and charged and person has been in possession of the land by virtue of the assurance, the right of action shall be deemed to have accrued when the assurance took place.”

According to senior Counsel when the Land was transferred to the appellant in the year 1983, the cause of action accrued to the beneficiaries of the estate of the deceased to whom he had bequeathed the Land and the time of twelve years allowed by the Limitation Act ran out for them and not the respondent who was not a direct beneficiary of the estate. The argument is that the beneficiaries rather than the respondent are the one who had a cause of action. The fact that he was a minor at the time the cause of action accrued was not relevant. The persons to whom the cause of action accrued were the eight beneficiaries named in the deceased’s will and the respondent was not one of them.

On fraud Senior Counsel’s submissions was that the trial Judge erroneously relied on the evidence of a handwriting expert when one of the documents he examined was incomplete and in the circumstances the evidence of the forgery

was not conclusive. Secondly there was no evidence of who forged the transfer documents. Thirdly even if it was to be conceded that there was a forgery there was no evidence that the appellant was involved in the forgery because they bought Land from someone who was introduced by a Land agent and the person had a genuine title and it was not established as to how it got into his hands. Although there was evidence that the title had got missing there was no way the appellant would have known about the missing title because it was never advertised as lost. He submitted that when Mr. Balikudembe inspected the register in the Land Office there was no way he could tell that the person in possession of the original title was not the owner of the Suit land. There was no evidence that Mr. Balikudembe was negligent in his investigations about the genuineness of the land title and the identity of the person who was in its possession because he identified himself when asked to do so. He cited holding No 1 and 3 of the case of **KAMPALA BOTTLERS LTD VERSUS DAMANICO (U) LTD FOR SUPREME COURT CIVIL APPEAL NO 22 OF 1999** for the principles now settled in our Courts that for a party to plead fraud in registration of Land, the party must prove that the fraud was attributed to the transferee either directly or by necessary implication. According to Counsel Mr. Balikudembe the Counsel who handled the transfer on behalf of the appellant could not have known that the vendor was a fraudster when he was in possession of an original title without any encumbrances. The fraud could not be attributed to the appellant because there was no way Mr. Balikudembe could have known that the Land title had been lost and landed in the hands of a fraudster.

In reply to the submissions of Mr. Godfrey Lule, Mr. Richard Omongole submitted that the trial judge had effectively dealt with the issue of Limitation before finding that the suit was filed within time. According to him the time started running in 1994 when the respondent was appointed to run the affairs of his grandfather's estate and he discovered that the suit property had been fraudulently sold to the appellant. He discovered the fraud when he was still a

As a first appellate Court we are mindful of our duty to re-evaluate the evidence on record and make our own finding on the facts and we shall proceed to do that.

On the issue of whether the suit is statute barred there are facts which are not in dispute that we

need to restate in order to appreciate the finding of the trial Court on this matter. There is no dispute that **ERISA SEMAKULA MAGOBA** the registered proprietor of the suit property died on 10th January 1979. It is also not in dispute that until the respondent was issued with letters of Administration by the High Court on the 8th day of October 2001 none of the children of the deceased had taken up the estate which would mean that until the 8th of October 2001 nobody had any authority to deal with the estate of the deceased but it is also not disputed that on 22nd of April 1983 a Transfer of the Land was effected by a person claiming to be the proprietor of the suit property and it was on the strength of this transfer that the appellant was registered on 26th May 1983. There was evidence adduced that at the time the appellant got the transfer the family of the deceased had abandoned the property because of the prevailing insecurity in the area during which the father of the respondent was killed. The abandonment of the property explains as to why when the appellant purchased the property and started preparing the site nobody stopped them. It was not until 1994 that the respondent a grandson of the deceased proprietor discovered that during the absence of the family someone had not only accessed the original land title but also sold the property and transferred it to the appellant.

In these circumstances the argument that the action accrued in 1983 when the estate of the deceased proprietor lost the suit property is not tenable. The action is founded on fraud which was discovered in 1994 by the respondent who pleaded that he could not bring the action because he could not obtain Letters of Administration because he was a minor. He obtained the Letters of Administration on 8th October 2001 and that is when he could legally sue on behalf of the estate of the deceased and therefore the suit which was filed on 8th July 2003 was well within time. It is the view of this Court that on the

minor which he pleaded as a disability in accordance with S. 25 of the Limitation Act.

He further submitted that this Court had resolved the issue of Limitation when the trial Court had originally dismissed the suit on a finding that it was res-judicata but was reinstated by this Court on a finding that it was not resjudicata and that the suit was not time barred. Counsel submitted that on the evidence that the original owner died in 1979, and that the title was transferred in 1983 by someone who was not an Administrator of his estate the time started running in 1994 when it was discovered that the estate of the deceased had lost the land to a fraudster who had sold it to the appellant. According to Counsel, ⁷Mr. Balikudembe did not do enough investigation

to establish whether the person who claimed ownership of the land was the actual owner and the investigation should have included consulting his partner **Mr. Paul Mpungu** (RIP) who was a neighbor and must have known the owner of the land who by the time of the transfer was deceased.

On forgery Counsel's argument was simply that if the proprietor of the Suit Property had died in 1979 the person who purportedly sold the property to the appellant must have forged the transfer form which was confirmed by the handwriting expert whose testimony was to the effect that the deceased proprietor was not the one who signed the transfer form.

On whether the fraud was attributable to the appellant Counsel submitted that the failure by the officials of the appellant to properly establish the identity of the seller as the owner of the suit property, failure to produce the agent who was allegedly well known to Mr. Balikuddembe an official of the club and Counsel who handled the purchase of the property on behalf of the appellant and failure to consult Mr. Mpungu who was a neighbor to the appellant club and the deceased proprietor to ascertain the proper owners was an indication of the failure by the appellant to do due diligence, the implication of which is that the fraud was squarely placed on the appellant.

consideration that the action was founded on fraud which was discovered in 1994 the suit was not statute barred. The trial judge cannot be faulted for having reached the conclusion that the cause of action arose when the fraud was discovered. The first ground of appeal fails and is dismissed.

On the second issue we wish to observe that the fact that the estate of the deceased remained unattended or unadministered did not leave it open for anyone including the beneficiaries to deal with it without Letters of Administration or Probate. It so happened that the father of the respondent was killed before obtaining Letters of Administration and evidence was adduced to the effect that the suit property was left deserted because of the insecurity that obtained in the area. It would seem that during this period the original land title was accessed by the person who sold the suit property to the appellant. In other words the Land title was stolen. Counsel for the appellant at first argued that no evidence was adduced as to how the fraudster obtained the title or as to who forged the transfer both of which we consider immaterial because once it was established that whoever transferred the title was not the proprietor or anybody acting under his authority, the

material question for this court to determine is whether the appellant got good title that this Court is required to protect. In this regard we wish to refer to an observation in the Judgment of His Lordship Professor George Wilson Kanyeyihamba in the case of **FREDRIC J. K. ZAABWE VS ORIENT BANK LTD AND FIVE OTHERS (SUPREME COURT OF UGANDA CIVIL APPEAL NO 04 OF 2006)** where he stated as under:-

“The laws which secure and sustain ownership and interests in land are much more elaborate and protective than those which cover personal chattels which may be sold in markets and subject only to market over rules of Commerce as exemplified by the evidence of Mr. Kabwende, Lands Officer. To hold otherwise would mean that even stolen land titles or those inadvertently lost could be registered by thieves and diverse finders and then enable them to pass titles in the same way.

injustices.” (Emphasis is added)

This court is faced with a situation where the respondent who lost land to a fraudster is seeking protection of his title against the appellant, who through its officers bought the land and still insists that they bought the land from its owners which is incredible given the overwhelming evidence that the owner had died in 1979. Andrew Ben Sengooba (DW1) who was chairman of the appellant at the time of acquisition of the land gave a testimony that the appellant was sold property by the owner which is not correct because the owner of the property did not exist at the time of transfer. DW1 also testified that the vendor was a prisons officer who was introduced to the appellant by a Land agent who was well known to **JOSEPH BIKOKWA MBAZIIRA BALIKUDEMBE** (DW2) but neither the vendor nor the Land agent known as **JJUNJU KAMURARI** testified at the trial. Throughout the trial there was no indication that the appellant intended to call any of the two witnesses and the failure to call them especially the land agent who

was well known to **BALIKUDEMBE** would lead this Court to draw an inference that the evidence of the two witnesses, if called, would have been or would have tended to be adverse to the appellants case. This principle is discussed in the case of **BUKENYA AND OTHERS V. UGANDA (1972) EA 549** a Criminal case but is equally applicable in a Civil Case like the one before this Court.

The purchase and transfer of the property was handled by DW2, an advocate. Apart from being an advocate he was Vice Chairman of the Club. He, like DWI testified that the owner of the Land was introduced by **JJUNJU KAMURARI** a Land Agent whom he knew from his legal practice. According to him the land had no encumbrances. On the instructions of the club he prepared a Transfer of the Land after payment had been effected. Our perusal of the Transfer shows that the signature of the vendor was witnessed by DW2 who did not know him at all. The other signatories were DWI and Yiga both directors of the club. Ordinarily an agreement of sale would have been adduced in evidence to confirm

the sale but none was produced. So the only evidence Court has to rely on to establish the sale is evidence of the officials without that of the person who sold the property to them or an independent witness who witnessed the sale. To use the words of Justice Kanyeihamba it would be absurd and unjust to protect the interest of the appellant who purchased the suit property from an imposter against the interest of the respondent who unlike the appellant could do nothing about the sale. The entire transaction lies squarely at the feet of the appellant and its officials and we cannot fault the trial judge for having found as he did that the appellant did not acquire a good title whose cancellation he ordered. We find no merit in the second round of appeal which is also dismissed.

In the result the two agreed issues having been resolved in favour of respondent the appeal fails. It is dismissed with costs to the respondent in this Court and the Court below.

Dated on this day. 22nd of October 2015

Hon. Mr . Justice Elidad Mwangusya

Justice Of Appeal

Hon. Mr. Justice Richard Buteera

Justice Of Appeal

Hon. Mr. Justice F.M.S. Egonda Ntende

Justice Of Appeal