

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 224 OF 2013

(Arising from High Court Miscellaneous Application No. 488 of 2010 arising from Miscellaneous Application No. 408 of 2010 and from High Court Civil Suit No. 103 of 2006)

BON HOLDINGS LTD::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

BUSOGA GROWERS CO-OP UNION LTD:::::::::::::::::::::::::::::::::RESPONDENT

(An Appeal from the ruling and order of the High Court by Hon. Justice G. Kiryabwire dated 12th July 2011)

Coram: Hon. Mr. Justice Richard Buteera, JA

Hon. Lady Justice Solomy Balungi Bossa, JA

Hon. Mr. Justice Kenneth Kakuru, JA

JUDGMENT OF COURT

Background to the appeal

This appeal has a somewhat checkered history. Sometime in 2004, Busoga Growers Cooperative Union Ltd. (the Respondent), who was the registered proprietor of land comprised in LRV 2925 Folio 12 Plot No. 2 Bulamogi, Block 13 at Bulumba Village Kamuli, subleased this piece of land to Bon Holdings Ltd. (the Appellant). The sublease was to expire in 2014 but before its expiry, the Appellant acquired the lease of the property by purchase in 2009 from one Yatin Chauhan, who succeeded the Respondent as registered proprietor (R/ P). As a sub-lessee holding pre-emptive rights under the sub-lease agreement, the Appellant was entitled to purchase the lease. This followed the Respondent becoming indebted to various people and thus becoming a judgment debtor in execution proceedings vide HCT-OO-CC-CS-0103-2006 between the Respondent and one Dharmesh Vara.

Four years after the execution process was completed, the Respondent applied to set aside the execution of the Decree in HCT- 5 OO-CC-CS-0103-2006 and to declare the execution and the sale null and void vide **Busoga Co-operative Union Limited v. Dharmesh Vara High Court Miscellaneous Application No. 408 of 2010**. During the hearing of the said application, the Respondent tried through Miscellaneous Application No. 454 of 2010, to join as parties to the **Miscellaneous Application No. 408 of 2010**, the Respondent and the Auctioneers in High Court Civil Suit No. 103 of 2006. The Appellant objected to being a party to the proceedings

when it was not a party to High Court Civil Suit No. 103 of 2006 out of which the execution arose. The Learned trial Judge decided that is the appellant and the auctioneer had been wrongly joined to the proceedings in M.A No. 408 of 2010. However, he granted the application to set aside the execution and made a number of orders. The most pertinent were that the execution, sale and transfer of the Respondent's property comprised in LRV 2925 Folio 12 Plot 2 Bulamogi Block 13 at Bulumba Village, Kamuli District was set aside. The learned Judge also ordered that the Respondent, M/s Busoga Growers Co-operative Union Limited, be restored on the Register as the registered proprietor of the property comprised in LRV 2925 Folio 12 Plot 2 Bulamogi Block 13 at Bulumba Village, Kamuli District.

The appellant applied vide High Court Miscellaneous Application

No. 488 of 2010 for review and setting aside of the Ruling and orders of the learned Judge in **Miscellaneous Application No. 408 of 2010** in so far as they affect the appellant. In the alternative, he prayed that without prejudice, the applicant's sublease and caveat which were subsisting at the time of the auction/purchase and ceased to have effect upon the registration of the appellant as Lessor but which, are still existing to date, be restored.

The Appellant's grounds were based on several alleged errors on the face of record as well as the interest of justice and equity. The alleged errors may be summarized as follows; that the applicant is a *bonafide* purchaser for value without notice of the alleged irregularity in the sale but was not given a hearing before the order canceling its registration was made; that apart from affidavit evidence on record, there was no full hearing to determine ownership of the said land; that the applicant's constitutional right as to ownership of its property has been violated by the said Court Order; and that it was just and fitting that the application be allowed. In his ruling in **High Court Miscellaneous Application No. 488 of 2010**, the learned Trial Judge observed that the whole execution process in High Court Civil Suit No. 103 of 2006 needed investigation as irregularities had been brought to the attention of the Court. He, however, denied the application for review. Instead, he restored the applicant's sublease and caveat which were subsisting at the time of the auction on the title "in the interests of justice and equity."

The Appellant sought for leave to appeal in the High Court immediately after the ruling but the learned Judge refused to grant the leave to appeal.

The appellant then sought and obtained leave to appeal to this Court vide Civil Application No. 165 of 2011.

The appellant's grounds of appeal are the following;

1. The learned trial Judge erred in law in failing to review the order made in High Court Miscellaneous Application No. 408 of 2010 ordering restitution of the Appellant's title into the names of the Respondent when the Appellant was not a party to the proceedings in question, an order which was an error on the face of the record.
2. Having found that there were several irregularities in the execution process which required investigation, the learned Judge² erred in making a final order affecting the Appellant's title, a non-party to the suit, before any such investigation had been

taken formally or at all.

3. Having ruled that the Applicant was not a proper party to High Court Miscellaneous Application No. 408 of 2010, the learned trial Judge erred in treating acquisition of title to LRV 2925 Folio 12 Plot No. 2 Bulamogi by the Appellant as an issue between parties to **High Court Civil Suit No. 103 of 2006** when the Appellant was not a party to the said suit which constituted an error on the face of the record.
4. The Learned trial judge erred in law in making an order which in effect cancelled the appellant's registration as transferee to the suit property without addressing his mind to principles governing impeachment of title.
5. The learned trial Judge descended into the arena by unnecessarily interrupting the flow of arguments for the Appellant and hence erred in not addressing the real issue before him.

Mr. James Nangwala appeared for the appellant while the respondent was unrepresented.

At the hearing of the appeal, Counsel for the appellant argued issues 1, 2 and 3 concurrently. The gist of the three issues is that the learned trial Judge erred in refusing to set aside his order in Miscellaneous Application No.408 of 2010, where he ordered restitution of the appellant's property into the names of the Respondent when the appellant was not a party to those proceedings.

We consider this to be the crux of the matter in this appeal.

Counsel for the appellant referred to the case of **Caroline Turyatamba and 5 others versus Attorney General Constitutional Petition No.0015 of 2006** and **Article 28 of the Constitution** on a right to be heard and submitted that a decision cancelling the appellant's title without being heard affected its proprietary interest and it was a manifest error on the face of the record amenable to a review. He also relied on the cases of **Edison Kanyabwera v. Pasteri Tumwebaze Civil Appeal No. 6 of 2004** and **Mohammed Alibhai v. Bukenya Mukasa SCCA No. 56 of**

1996 as establishing the principle that once a person suffers a legal grievance in a judgment given affecting his or her interest, that person is an aggrieved person for purposes of an application for review. He submitted that had the learned judge properly evaluated these principles, the facts of the application and the nature of the remedy sought, he would have come to the conclusion that he had made an error on the face of the record.

Resolution of Issues

We have carefully examined the submissions of Counsel for the appellant on the three issues.

This being a first appeal, we have a duty to reappraise the evidence and draw inferences of fact under **Rule 30 of the Judicature (Court of Appeal Rules) Directions. See also the cases of Pandya v. R [1957] EA 336 and Kifamunte Henry v. Uganda SCCA No. 10 of 1997** on the duty of a first appellate Court to reappraise the evidence and come to an independent conclusion.

We have also considered the provisions of **Article 28 of the Constitution** on the right to a fair

hearing. It provides;

(1) In the determination of civil rights and obligations or any criminal charge,, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

The Constitution further provides in **Article 44** that it is prohibited 30 to derogate from the right to a fair hearing.

44. Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

(a)

(b)

(c) The right to fair hearing;

We observe that the orders made consequent to granting **High Court Miscellaneous Application No.408 of 2010** in effect took away the appellant's registered interest as owner of LRV 2925 Folio 12 Plot No. 2 Bulamogi, when the appellant was not a party to the said application or proceedings from which the application arose, namely HCCS No. 103 of 2006. We recall that this Court has decided in the case of **Caroline Turyatamba & 5 others versus Attorney General Constitutional Petition No.0015 of 2006**, that;

“The right to be heard is a fundamental basic right. It is one of the cornerstones of the whole concept of a fair and impartial trial. The principle of “hear the other side” or “Audi Alteram Partem” is fundamental and far reaching. It encompasses every aspect of fair procedure and the whole area of the due process of the law.”

See also the decision of this Court in the case of **Haji Mubiakulamusa v. Friends Estate Limited Civil Appeal No. 209 of 2013** where a similar issue was discussed.

In essence, the learned Judge did not give the appellant a hearing before the decision was made. This in our view violated the appellant's right to a fair hearing contrary to **Article 28 of the Constitution**. This was an error apparent on the record, which should have prompted the learned Judge to review his decision as requested in **High Court Miscellaneous Application No. 488 of 2010**. Instead, the learned Judge found that the procedure for auctioning the property following judgment in **High Court Civil Suit No. 103 of 2006** had various irregularities that rendered it void. We consider that this is a matter that can only be determined by a trial court through judicial inquiry in appropriate proceedings. Our judgment is that the contravention of the right to a fair hearing vitiates the orders made by the learned trial Judge in both **High Court Miscellaneous Application No. 408 of 2010** and **High Court Miscellaneous Application No. 488 of 2010**.

The appeal is therefore allowed. We make the following orders;

1. The Ruling and orders in **High Court Miscellaneous Application No. 408 of 2010 Busoga Co-operative Union Limited v. Dhamesh Vara** are hereby set aside.

2. The Ruling and orders in **High Court Miscellaneous Application No. No. 488 of 2010 Busoga Co-operative Union Limited v. Dhamesh Vara** are hereby set aside.

3. *We direct that High Court Miscellaneous Application No. 408 of 2010 Busoga Co-operative Union Limited v. Dhamesh Vara should be fixed for hearing before another judge pursuant to Rule 32(1) of the Rules of this Court.*

4. The status quo is that LRV 2925 Folio 12 Plot No. 2 Bulamogi is registered in the Respondent's name but with the Appellant's sublease and caveat on it as per Ruling and orders in **High Court Miscellaneous Application No. No. 488 of 2010 Busoga Co-operative Union Limited v. Dhamesh Vara**. As we have set aside the Ruling and Orders in the said application as well as the Ruling and Orders in **High Court Miscellaneous Application No. 408 of 2010 Busoga Cooperative Union Limited v. Dhamesh Vara**, and for avoidance of doubt, we direct the Registrar of Titles to reinstate the Appellant's name on LRV 2925 Folio 12 Plot No.2 Bulamogi and to cancel the Respondent's name therefrom so that the title reads as it did before the two matters were heard. This should be done before the hearing of **High Court Miscellaneous Application No. 408 of 2010 Busoga Co-operative Union Limited v. Dhamesh Vara**.

Costs of the appeal go to the Appellant in any event.

We so order.

Dated this 7th day of October 2015 Signed by:

Hon. Justice Richard Buteera, JA

Hon. Lady Justice Solomy Balungi Bossa, JA

Hon. Justice Kenneth Kakuru, JA