

THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NUMBER 76 OF 2010

*(Arising from the judgment and decree of the High Court of Uganda in H.C.C.S No. 108 of 1999 dated 11<sup>th</sup> April 2005 delivered by the Honorable Gideon Tinyinondi, J)*

*And*

CIVIL APPEAL NUMBER 37 OF 2010

*(Arising from the judgment and decree of the High Court of Uganda in H.C.C.S No. 211 of 2001 dated 10<sup>th</sup> March 2009 delivered by the Honorable Moses Mukiibi, J)*

FRANCIS KIYAGA ======APPELLANT

VERSUS

1. JOSEPHINE SEGUJJA

2. WILBROD BIRABWA===== RESPONDENTS

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

The Facts

This is a consolidated appeal. The appellant in the first case sued the second respondent in the High Court in H.C.C.S No. 108 of 1999 dated 11<sup>th</sup> April 2005 for cancellation of the respondent's certificate of title, and a declaration that the appellant is the rightful owner of land comprised in Block 232 Plot 608 at Kireka, general damages, interest and costs of the suit. The High Court dismissed his claim hence this appeal.

In the second suit H.C.C.S No. 217 of 2001, the first respondent brought an action in trespass against the appellant regarding the suit property. The appellant's written statement of defence was struck out and subsequently the suit was dismissed leading to this appeal. Therefore, this Court consolidated the two appeals for their more efficient determination.

Each of the two appeals had a memorandum of appeal. However, the following consolidated grounds of appeal were formulated for consideration by this Court. They are as follows:

1. Whether the rate of interest charged was harsh and unconscionable and ought not to be enforced by legal process.
2. Whether the appellant is entitled to the equity of redemption.
3. Whether the second respondent validly and without fraud transferred the suit land into her names.
4. Whether the first respondent is a bonafide purchaser for value without notice of the suit land

#### Representations

The appellant was represented by Mr. Mbogo Charles from M/s Mbogo & Co. Advocates while the respondent was represented by Mr. Sserunkuma Bruno from M/s Ssewankambo & Co. Advocates.

#### Duty of Court

This is a first appeal and this Court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for under *Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions SI 13-10*. This Court also has the duty to caution itself that it has not seen the witnesses who gave testimony firsthand. On the basis of its evaluation, this court must decide whether to support the decision of the High Court or not as illustrated in *Pandya v R* [1957] E.A 336 and *Kifamunte Henry v Uganda*, Supreme Court Criminal Appeal No 10

of 1997.

## LEGAL ARGUMENTS

### GROUND ONE:

Whether the rate of interest charged was harsh and unconscionable and ought not to be enforced by legal process

#### Arguments for the Appellant

Counsel referred to the amended plaint and submitted that the issue of interest was pleaded. Counsel pointed out that in C.S No. 108 of 1999 there was an agreed interest of Ug. Shs. 2,400,000/= to be paid on top of the principal sum of Ug. Shs. 6,000,000/= and when the borrower failed to pay according to the contract terms, the second respondent extended the loan repayment period for another two months. That, the appellant was therefore under a new contractual obligation to pay interest of Ug shs. 4,800,000/= for a total of four months on top of the principal sum.

Counsel for the appellant submitted that according to the decision of the High Court of HCCS No. 595 of 2003 Surgipham Uganda Ltd vs Noble Health Ltd & 2 Ors (unreported) relying on the case of Juma vs Habib [1975] E.A 103 (T), Yorokamu Bamwine, J was of the view that interest at 36% p.a. was excessive and that Court has the discretion to award interest at less than the contractual rate when the rate is manifestly excessive and unconscionable. In the instant case, counsel submitted therefore that interest of 240% p.a. is highly and abnormally exaggerated. Counsel cited Section 26(1) of the Civil Procedure Act to support that position of the law on court discretion. He prayed that this ground be allowed.

#### Arguments for the Respondent

Counsel submitted that the Court should disregard appellant counsel's submission that the appellant was under a new contractual obligation to pay interest of Ug. Shs. 4,800,000/= for four months on top of the principal of Ug. shs. 6,000,000/= because it was neither pleaded nor formed part of the appellant's testimony. Counsel relied on the case of Ms. Fang Min vs Belex Tours and Travel Limited,

SCCA No. 06 of 2013 in which the Supreme Court cited and relied on Attorney General vs Paul Ssemogerere & Zachary Olum, Constitutional Appeal No. 3 of 2004 (SC). It was held that *“foundinga court decision or relief on (an) unpleaded matter or issue not pleaded before it for determination is an error of law.*

Counsel instead submitted that by exhibit Px. 2 the appellant was granted two months within which to pay the sums of money he was lent and that by exhibit Px3, a further agreement was executed by the appellant and the second respondent extended time within which to pay by two more months. However there was no change in the terms of the agreement in exhibit Px2 as counsel for the appellant would like this honorable Court to believe that interest changed by being increased from Ug. Shs. 2,400,000/= to Ug. Shs. 4,800,000/=. Counsel emphasized that exhibit Px3 only provided the time within which to pay the money but there was no change in the actual contractual terms and that appellant’s counsel is just creating facts for his client which have never taken place or formed part of the record.

Counsel further submitted that once the terms of an agreement are reduced into writing, then the said agreement cannot later be varied as counsel for the appellant is doing as this would be contrary to the provisions of Sections 90 and 91 of the Evidence Act, Cap 6.

Another matter considered by the respondents not pleaded is that the appellant did not invoke section 26 of the Civil Procedure Act, Cap 71 to have the transaction reopened. That at all material times, the appellant based his claim on the Money Lenders Act, Cap 273 to challenge the transaction between him and the second respondent therefore the Court should reject this submission.

It was also submitted for the respondent that the contract entered into between 5 the appellant and the second respondent was valid and the appellant agreed to the terms of the contract he now complains about. That the contractual interest was therefore not harsh and unconscionable as argued for the appellant. Counsel for the respondent in this regard relied on the case of Dr. Kaijuka Mutabaazi vs Fang Min, SCCA No. 23 of 2007, which held that if there was 10 an offer, acceptance and consideration, there was nothing wrong with a transaction like in the instant case.

Counsel for the respondent submitted that the loan interest was not even calculated

per annum but rather for two months only and argued that for Court to interfere with that agreement, it would be outside the jurisdiction of this 15 Court to rewrite the agreement for the parties. He prayed that this ground be dismissed having been based on wrong evidence.

#### RESOLUTION OF COURT

The question for resolution under this ground is whether the interest charged **20** on the principal sum was harsh and unconscionable.

*Black's Law Dictionary, 8<sup>th</sup> Edition at page 4736* defines unconscionability to mean extreme unfairness and unconscionable as having no conscience, unscrupulous; affronting the sense of justice, decency or reasonableness. Traditionally, a bargain was said to be unconscionable in an action at law if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other'.

In the instant appeal, the record shows that the appellant and second respondent entered into an agreement (Exhibit B) where the second respondent being the lender advanced Ug shs. 6,000,000/= with a fixed interest of Ug shs.2,400,000/= (a total of Ug Shs 8,400,00/=) payable after two months. However, the appellant defaulted and the two entered into another agreement (Exhibits C & D) where the repayment period was extended by two more months. However, it would appear that the appellant was now required to pay another lump sum of Ug shs. 2,400,000/= as interest for the extension over and above the loan total of Ug shs. 8,400,000/=.

During the hearing of this appeal, counsel for the respondent was uncertain as to the kind of contract the second respondent and the appellant had entered into. In the Court below, counsel for the respondent referred to the loan as a "*friendly loan*" and not one to which the Money Lenders Act, Cap 273 would apply. The trial Judge held that the second respondent was not a money lender according to the definition of moneylender in Section 1(h) of the said Act, Cap 273 since at the time (10^064997) of advancing the loan, she was not in the business of money lending.

The appellant was obliged to pay Ug shs. 2,400,000/= as interest which translates into an interest rate of 240% per annum although we are cognizant that the loan was for a short period of time (2 months). Section 26 of the Civil Procedure Act Cap. 71 (CPA) provides that where an agreement for the payment of interest is sought to be enforced and the Court is of the opinion that the rate of interest agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the Court may give judgment for the payment of interest as it may think just. This in our considered opinion is a position of the law which should have been given closer scrutiny by the trial Court. It is incredible, as Counsel for the respondent would wish it, that this loan could by any description be referred to as a friendly loan with an interest rate of 240% per annum. This was an usury loan by all accounts.

It is thus unjustifiable for counsel for the Respondent to argue that the parties agreed to those unlawful terms by way of contract. We therefore exercise the discretion under S. 26 of the CPA and re-open the transaction. We think the rate of 20% p.a. on the principal amount is fair in the circumstances. This interest should be applied taking into account payments that were already made by the appellant as found by the Trial Judge in HCCS No. 108 of 1999. In that decision the Trial Judge found that:

*“...Under exhibit “P3” he (appellant) managed to pay only Shs. 600,000/= (six hundred thousand shillings only) on 03'1M997, receipt whereof the defendant (second respondent) acknowledged in exhibit “P4”. Subsequently, he paid Shs. 800,000/= (Eight hundred thousand shillings only on 15'11-1997 (exhibit “P5”). On 19'12'1997 he paid Shs 500,000/= (Five hundred thousand shillings only) (exhibit “P6”). On 23/12/1997 he paid Shs.700,000 /= (seven hundred thousand shillings only)(exhibit “P7”). Through his wife he delivered plumbing materials to the defendant valued at Shs. 1,146,500/= (One million and one hundred, forty six thousand and five hundred shillings only). On 13'03'1998 he paid Shs. 200,000/= (two hundred thousand shillings only) (exhibit “P8”). On 18-03'1998 he paid Shs. 150,000/= (one hundred and fifty thousand shillings only) (exhibit “P8”). This totaled to Shs. 6,496,500/=, liquidating the principal loan.”*

The drafting of the three loan agreements dated 10<sup>th</sup> June, 1997; 11<sup>th</sup> August, 1997

and its extension dated 3<sup>rd</sup> January, 1998 leave a lot to be desired and can cause a myriad of interpretation issues. However the totality of the three agreements suggest that the original payment period of the loan was extended from 10<sup>th</sup> August, 1997 to 11<sup>th</sup> October, 1997. The third agreement dated 3<sup>rd</sup> January, 1998 seems to be nothing more than a record of payments that had been made and how those payments should be applied to the loan. Interest should therefore run from the 11<sup>th</sup> October, 1997.

We uphold the finding of the Trial Judge that the appellant as at the 18<sup>th</sup> March, 1998 had discharged the principal amount of the loan. So interest should run from the extended period of 11<sup>th</sup> October, 1997 until 18<sup>th</sup> March, 1998.

This ground is resolved in favour of the appellant

This ground succeeds.

#### GROUND TWO:

Whether the appellant is entitled to the equity of redemption Arguments  
for the Appellant

Counsel submitted that the clog on the equity of redemption has always been held as void and therefore the act of the second respondent to transfer into her own names, the security given by the appellant, was a clog on the equity of redemption. Counsel argued that this rendered the transaction void and the transfer of the land to herself not only illegal but also fraudulent.

Counsel for the appellant also submitted that the non-registration of the agreement for a loan took the transaction outside the ambit of the Registration of Titles Act into that of common law and doctrines of equity which governed the contract. Counsel further submitted that equity has always regarded a security interest in land to secure a debt as a mortgage and the right to redeem the land by payment of the debt and interest as an inviolable right of a mortgagor which cannot be taken away by any provision to the contrary in any contract. To support this position of the law, counsel relied on the holding of Justice Guthrie Smith in the case of *Erieza Wamala vs Musa Musoke (1920-1929) 111 ULR 120* at pp 120-121. Counsel also relied on the case of *Elmandry vs Salam [1956] 23 EACA 313* and *Phillips vs*

*Copping [1955] 1 KB 15* for the proposition that court cannot sanction what is illegal even when the matter had been agreed upon. (See also: *MAKULA INTERNATIONAL LTD VS HIS EMINENCE CARDINAL EMMANUEL NSUBUGA &Z A NOR [1982] HCB 11*; *MUHINDO ENTERPRISES LTD VS GREENLAND BANK LTD, HCCS No. 1287OF1997*). He prayed that this ground be allowed.

#### Arguments for the Respondent

Counsel submitted that this too is a new matter being raised on appeal which must pass the test in *MAKULA INTERNATIONAL VS H. E CARDINAL NSUBUGA [1982] H. C.B 11* where Court held that the appellate Court should only decide in favor of an appellant on a ground raised for the first time if it be satisfied beyond doubt, first that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an explanation had been afforded by them in the witness box.

Counsel agreed with the trial Judge's finding that the appellant did not adduce any evidence of a mortgage having been created for there to arise the equity of redemption and prayed that those findings be upheld.

However, counsel also submitted that if this Court is pleased to exercise its discretion and grants leave to the appellant to entertain this ground, the circumstances of the instant case should be considered in favor of the respondents. That, much as counsel for the appellant submitted that the land transfer was illegal, there are circumstances where if a person like in the instant case has benefited from an illegal transaction the said transaction can still be enforced by Court a per DR. NELSON ENONCHONG in his book, *ILLEGAL TRANSACTIONS* published by LLP 1998 cited with approval in *HARJIT SINGH MANGAT VS CHRISTINE LILIAN NAKITTO* in HCCS No. 442 of 2003.



Counsel then argued that the appellant received a loan from the second respondent, failed to pay the loan back and consequently handed over the said property. In further reply to the appellant on this ground, counsel for the respondent reiterated that the second respondent acted with the full agreement

and consent of the appellant and there was no wrong doing on her part. Furthermore that the clog on the equity of redemption was not proved as counsel for the appellant did not make any reference to any evidence of this in his submissions. Counsel prayed that this ground be accordingly dismissed.

#### RESOLUTION OF COURT

The ground for consideration here is whether the appellant can benefit from the equity of redemption. The circumstances of this case are such that the appellant and second respondent entered into a contract where the latter lent money to 10 the former who deposited his certificate of title comprised in Block 232 Plot 608 at Kireka.

We agree with the trial Judge that the parties intended to create a mortgage because this is clear from their agreement (exhibits P2 & D1). The trial Judge 15 held however, that the appellant did not adduce any evidence of a mortgage having been created thus there was no mortgage (legal or equitable) in this case. He further held that the appellant's claim failed under the Money Lenders Act and the Registration of Titles Act (RTA). Under the Registration of Titles Act, the claim failed due to non-registrability of the mortgage as is the requirement 20 under Section 54 of the RTA. The trial Judge also relied on Section 129(3) of the RTA, which provides that every equitable mortgagee shall cause a caveat to be entered as provided for by section 139. Further reliance was also placed on the case of UCB vs MRS BUSHUYU (ADMINISTRATRIX OF THE ESTATE OF J. W. BUSHUYU, HCCS No. 123/1994) where G.M Okello, J (as he then 25 was) held that:

*I am of the view that to enforce an equitable mortgage in land, the mortgagee must register it either as a legal or equitable mortgage under the RTA”*

*[See also GO VINDJI POP A TI.AI. vs PREMCHAND R. LTD [1963J E A*

We disagree with those findings. Although the issue of whether the appellant was entitled to the equity of redemption was not agreed to or framed in the Court below, it is our considered opinion that it naturally arises out of the loan agreement between the appellant and second respondent so we shall consider it. It has been held in several cases like MAKULA INTERNATIONAL LTD vs HIS EMINENCE CARDINAL EMMANUEL NSUBUGA & ANOR [HCB] II that court cannot sanction what is illegal even where the matter had been agreed upon as in the present case.

We agree with counsel for the appellant that while the nonregistration of the agreement for a loan may have taken the transaction outside the ambit of the RTA still the principles of common law and equity would be applicable to this case by this Court by virtue of Section 14(2) (b) of the JUDICATURE ACT, 15 Cap. 13.

Equity has always regarded a security interest in land to secure a debt as a mortgage and the right to redeem the land by payment of the debt and interest as an inviolable right of a mortgagor which cannot be taken away by any provision to the contrary in any contract. There must be no clog or fetter on the equity of redemption. This means that, the mortgagor cannot be prevented from redeeming his property [See: MEGGARY & WADE, THE LAW OF REAL PROPERTY, 6<sup>th</sup> ED. PARA 19-129 CITED IN COMMERCIAL MICROFINANCE LTD VS DAVID EDGAR KAYONDO,HCCS NO. 0012 25 OF 2006]

It is an old established rule that if money is lent on the security of land, the lender will get security and nothing more. Therefore if the borrower wishes to redeem the land within a reasonable time he will always be allowed to do so, even though the due date is past. This rule is so strict that not even an express agreement will be allowed to exclude the borrower's right to redeem. [See: ERIEZA WAMALA vs MUSA MUSOKE (19204929)111 ULR120 at PP120' 121]

In our view, based on the re-evaluation of the facts and evidence on record, we find that the appellant and second respondent intended to create a mortgage and indeed created an equitable mortgage. In para. 3 of their agreements (dated 10/6/97 and 11/8/97), it is expressly provided that:

*“3. That in case the borrower fails/refuses to pay the lender, the lender shall instead turn to be the owner of PLOT NO. 608 BLOCK 232 in 10 MENGO DISTRICT, KYADONDO COUNTY. This mentioned plot currently belongs to the borrower. All in all, the borrower has mortgaged his plot plus a house built on it” (Emphasis ours).*

We find that this clause was used as a clog on the equity of redemption available to the appellant arising from an equitable mortgage. From the principles espoused, if money is lent on the security of land, the lender will get security and nothing more. It is trite law that once mortgage always a mortgage. Furthermore Counsel for the respondent totally misunderstood the holding in HARJIT SINGH MANGAT VS CHRISTINE LILIAN NAKITTO in HCCS No. 442 of 20 2 0 03 on illegal transactions when it discussed the legal principle of “*in pari delicto*”. No party who is not in “*delictum*” can benefit from such a transaction.

This ground accordingly succeeds.

### GROUD THREE:

Whether the second respondent validly and without fraud transferred the suit land into her names

Arguments for the Appellant

Counsel submitted that since the transfer was based on an illegality, it follows that its presentation for registration was fraudulent and ought to be impeached. Counsel for the appellant argued that by agreement dated 10<sup>th</sup> June 1997, the parties, inter alia, created a future transfer in case there was a default on the part 5 of the appellant. Counsel relied on Section 116 of the Registration of Titles Act, which clearly provides

that a mortgage shall not operate as a transfer of the land thereby mortgaged. Counsel submitted that this provision is re-enacted in Section 8 of the Mortgage Act which confirms the common law position which is to the effect that “*once a mortgage always a mortgage*”

Counsel submitted that the second respondent stated that she paid transfer tax of Ug. Shs. 15,000/= for the value of land at Ug. Shs 1,500,000/= but nowhere does she say that she paid any consideration for the purchase of the land to the appellant. Counsel further argued that by making a declaration that the suit 15 land was taken at a consideration of Ug. Shs. 1,500,000/= when no consideration was paid to the appellant, the second respondent as a result committed an offence and the certificate procured from it is void for fraud.

Counsel for the appellant submitted that in the application form for consent to 20 transfer land, the second respondent fraudulently lied that there were no developments on the land which was a contradiction to the loan agreement where it provided that there was a house built on the said land. Counsel relied on Section 190 (then 199) of the Registration of Titles Act which provides that it is an offence for anyone to deliberately make a false declaration in any 25 instruments dealing with land. Counsel further submitted that the legal effect of such declaration is to make the transaction void.

Counsel for the appellant concluded this ground by submitting that the second respondent fraudulently procured the transfer of the appellant’s security into her names and thus deprived the appellant of his legal estate in the suit land and also deprived him of his equity of redemption. He prayed that this ground be allowed.

Arguments for the Respondent

Counsel for the respondent submitted that the learned trial Judge properly evaluated the evidence and found that exhibit P2 does not smack of any fraud on the part of the respondent as alleged. Counsel further submitted that section 176 (c) of the Registration of Titles Act, Cap 230 provides that no action shall be brought against a registered proprietor under the RTA except in the case of a person deprived of any land for fraud. He made reference to the cases of Fredrick J. K Zaabwe vs Orient Bank Ltd & 5 Ors, SCCA No. 04 of 2006 and Kampala Bottlers vs Damaniko, SCCA No. 22 of 1992 which, among others, define fraud as intentional perversion of truth.

Counsel argued that the transfer of land by the appellant into the names of the second respondent were individual actions of the appellant and in no way did the said transfer involve any actions of fraud on the part of the second respondent. He further argued that it was the appellant himself who filled in the transfer instrument after defaulting in payments and handed it to the second respondent (DW1 testimony at page 74 of the record in CA No. 76 of 2010). Regarding the value of the suit property and tax paid, counsel submitted that there was no fraud since this was done with agreement of the parties.

Counsel agreed with the trial Judge's finding that the second respondent's transferring of the suit land into the names of the first respondent during the pendency of the suit was not fraudulent since the first respondent was not a party to the suit. He prayed that this ground be dismissed in favour of the respondents.

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#### RESOLUTION OF COURT

This ground addresses the issue of fraud attributed to the second respondent's act of transferring the suit land into her own names. In the appellant's amended plaint dated 12<sup>th</sup> January 1999 in HCCS No. 108 of 1999 at the High Court, para. 5 states and particularizes the incidents of fraud as follows:

*“11. The breach of the said agreement the defendant fraudulently transferred the suit land into her names.*

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*i.* Purporting to have purchased the suit land on 21<sup>st</sup> November 1997 10 for Shs. 1,500,000/= whereas not.

*ii.* Causing her name to be registered as proprietor on 31.12.97 while she continued receiving payment from the plaintiff.

*Hi.* Purporting to have purchased property worth about 200,000,000/= at Shs. 1,500,000/=

15 *iv.* Defrauding government of revenue by not paying adequate stamp duty.

On this issue of fraud, the trial Judge held that:

*“The above conclusion notwithstanding, I am not remiss of the 20 plaintiff’s claim that the defendant fraudulently transferred the suit land in breach of the agreement. The particulars of fraud were given in paragraph 10 of the plaint... ”*

He went on to hold:

*“ The transfer into the names of Josephine Sseguya is not one of the 25 particulars of fraud in the plaint and Josephine Sseguya was not made a party to this suit. On this account also the plaintiff would be secluded by*

*S. 176 (ante) from suing the Defendant. Furthermore the evidence and*

***exhibit “P2” do not smack of any fraud on the part of the Defendant.’”***

The law on fraud has already been established. Halsbury’s Laws of England, Vol. 16, para 666 at page 618 states that:

***5 ““Fraud ” in its equitable context does not mean, or is not confined to deceit; it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties. It is victimization, which can consist either of the active extortion of a benefit or of the passive acceptance of a benefit in unconscionable circumstances. The general principle is that if a party is in a situation in which he is not a free agent and is not equal to protecting himself, a court of equity will protect him. In all these cases, there might also be circumstances of contrivance or undue advantage implying actual fraud ” (Emphasis added)***

Based on the authorities cited and a review of the evidence on record, we find that it was wrong and fraudulent for the second respondent to have transferred the suit land, intended to act only as security, into her own names. This was evident from the fact that payments against the loan were being paid even as the transfer was taking place. In light of the case of Makula International Ltd --VS' 20 His Eminence Cardinal Nsubuga & Another, [1982] HCB 11, we cannot depart from the principle that:

***“A court of law cannot sanction what is illegal, and illegality once brought to the attention of the court overrides all questions of pleading, including admission made thereon. ”***

We allow this ground.

GROUND FOUR:

Whether the first respondent is a bonafide purchaser of the suit land Arguments for



the Appellant

Counsel submitted that the first respondent is not a bona fide purchaser of the suit property by any means since she told court that at the time of purchasing 5 the suit property, the appellant was occupying the house on the mortgaged plot. Counsel also pointed out that the second respondent even went ahead to inspect the plot although she did not enter the house because the gate was locked.

Counsel contended that the first respondent, through her lawyer Mr. Lumweno 10 Nasser, had knowledge of a pending suit between the appellant and the second respondent and that she had been waiting to take possession when the case was finally determined. He relied on the case of Fredrick J. K Zaabwe vs Orient Bank Ltd & 5 Ors, SCCA No. 04 of 2006 (unreported) where it was held by KATUREEBE, JSC (as he then was), that the decision that a bonafide purchaser 15 for value cannot have his transfer defeated by fraud per se only applied where the purchaser was not a party to the fraud or had no knowledge of the fraud at the time when he purchased.

Counsel for the appellant further relied on the authority of Uganda Posts & 20 Telecommunications vs Abraham Kitumba, SCCA No. 36 of 1997 (1997) IV KALR 102 where it was held that if a person purchases an estate which he knows to be in occupation of another , other than the vendor, such person is bound by all equities which the parties in such occupation may have in the land.

Counsel argued therefore that for the reasons above, the first respondent is not a bonafide purchaser since she had knowledge of the encumbrances upon the said land and prayed that this ground be allowed.

Arguments for the Respondent

Counsel for the respondent submitted that in the trial Court there was no issue framed as to whether the first respondent was a bonafide purchaser of the suit property and it is improper for the same to be raised in this appellate Court now.

That the suit in the trial Court proceeded on the basis of the second respondent being the registered proprietor of the suit land and this issue should therefore be disregarded.

Counsel submitted that since the appellant's written statement of defence was struck out together with the counter claim, there was no fraud raised against the first respondent hence counsel is raising allegations from the bar. That there was no evidence adduced to prove fraud thus Court should find that there was no fraud proved against the first respondent.

Regarding the appellant's argument that the first respondent had notice of the appellant's interest since he has always been in possession, respondents' counsel submitted that the case of Uganda Posts & Telecommunications vs Abraham Kitumba, SCCA No. 36 of 1997 states the correct position of the law that a person who purchases land is bound by all equities which the persons in 20 occupation may have. However, counsel submitted that the appellant had already transferred his interest to the lender and so had no legal and equitable interest to claim at the time the second respondent purchased the suit land. That therefore, the said case is distinguishable from the circumstances of this case.

In the alternative, counsel submitted that the second respondent is a bonafide purchaser for value without notice according to the case of J.W Kazzora vs Rukuba, SCCA No. 13 of 1993 which espouses the principle that barring the transfer of property on the ground of there being a pending suit does not apply in Uganda. That therefore, this ground should be disregarded since transfer of property the subject of a suit does not impute fraud.

#### RESOLUTION OF COURT

This ground arises majorly from HCCS No. 217 of 2001 between the first 5 respondent

and appellant. The facts are that Josephine Seguya purchased the suit land from Birabwa Wilbrod during the pendency of HCCS No. 108 of 1999. This Court has already found that the second respondent fraudulently transferred the suit land into her own names upon default on the loan by the appellant. Counsel for the appellant accordingly questioned ownership of the 10 first respondent who is now the registered proprietor of the suit land.

***The law governing a bonafide purchaser for value without notice is settled. Black's Law Dictionary, 8<sup>th</sup> Edition at page 1291 as "one who buys something for value without notice of another claim to the property and without actual 15 and constructive notice of any defects in or informalities claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims "***

In the case of DAVID SEKAJJA NALIMA vs REBECCA MUSOKE, SCCA No. 12 of 1985 relied on by counsel for the respondent, it was held that a bonafide 20 purchaser was defined as a person who purchased the land without the notice of any suitable interest or claim. The tests of a bona fide purchaser is that (she) he:

- 1) Must have a valid certificate of title from a person registered as proprietor not through fraud or otherwise.
- 25 2) Must have paid valuable consideration for the land.
- 3) Must have acted in good faith without notice of fraud whether actual or constructive or implied.

The concept of bonafide purchaser for value without notice is enunciated in Section 176 (c) and 181 of the Registration of Titles Act which provides that once a registered proprietor has purchased the property in good faith, his title cannot be impeached on account of fraud of the previous registered proprietor.

On this point, the trial Judge held that:

*“In the instant case the defendant has not put forward any claim of interest by way of defence. He has not expressed the capacity in which he is entitled to occupation of the property in dispute. The duplicate certificate of title (Exhibit P.1) shows that he was the registered proprietor of the land from the 13<sup>th</sup> day of October 1995. However, he lost his proprietorship of the land on 31/12/97 when Wilbrod Birabwa was registered as owner. The defendant did not make it known to this court whether he has some other capacity in which he claims to be entitled to possession and occupation of the suit land.”*

The Court had earlier held that:

*“However, before this suit came up for hearing information was received that the defendant had lost his suit in HCCS No. 108/1999. It was also understood that the defendant intended to appeal to the Court of Appeal against the decision in that suit.*

*This Court was of the view that it could not determine the issue of fraud between the defendant and Birabwa because:*

- i. Birabwa was not a party to this suit; and*
- ii. The matter had become res judicata ”*

It is our considered opinion on the evidence on record that the first respondent

does not pass the test for bonafide purchaser for value since she had notice of the appellant's possession of the land during the physical inspection of the 5 property. In her evidence (page 34), she stated that Wilbrod told her the occupant was a relative so she did not cross-check that information and took her word for it as they were friends. Secondly, the first respondent was put on further notice when her lawyer informed her of a pending suit between the appellant and Wilbrod during which time the suit land was transferred into the 10 second respondent's names. We find that the first respondent at this point undertook to become subject to the outcome of that suit which is now on appeal. In that light, the case of Uganda Posts & Telecommunications vs Abraham Kitumba, SCCA No. 36 of 1997 (1997) IV KALR102 in which it was held that if a person purchases an estate which he knows to be in occupation of another, 15 other than the vendor, such person is bound by all equities which the parties in such occupation may have in the land.

We are aware that there were procedural issues in the High Court which prevented the full and proper determination of this case given the existence of 20 separate suits on the same subject matter suit property. Also, much as the appellant's defence was struck out, the burden of proof still lay on the second respondent to prove her case. In the interest of justice, this ground also succeeds.

#### Final Result

This appeal succeeds on all grounds. We order that:

1. The Judgment in HCCS No 108 of 1999 is set aside and Judgment is entered in favour of the appellant in the following terms:-
  - a) The appellant is declared the lawful proprietor of the suit land
  - b) The appellant be registered by the Registrar of Titles as proprietor

thereof.

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- C)** The appellant is awarded nominal damages of Shs 1,500,000/= against the second respondent for fraudulent deprivation of his property at court interest rate from the date of High Court Judgment until payment in full.
- d)** Costs of the appeal and those in the Court below shall go to the appellant against the second respondent.

The Judgment in HCCS No 217 of 2001 is set aside and Judgment is entered in favour of the appellant in the following terms:-

- a)** An eviction Order is granted against Ms Josephine Segujja.
- b)** Costs of the Appeal and the Court below shall go to the appellant against the first respondent.

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HON. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

