

THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL NO. 50 OF 2014

BETWEEN

MUTABA BARISA KWETERENA LTD:.....APPELLANT

AND

BAZIRAKYE YEREMIYA:.....RESPONDENT NO. 1

KANYOMOZI EPHRAIM:.....RESPONDENT NO. 2

(An appeal from the judgment and decree of the High Court of Uganda (Kwesiga, J.), dated 3<sup>rd</sup> August  
2011)

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my learned brother Egonda-Ntende, JA. I agree with his findings and conclusion that this appeal be dismissed with costs here and below.

Dated at Kampala this 15<sup>th</sup> day of November, 2019.



Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
(Coram: Egonda-Ntende, Musoke and Obura, JJA)  
CIVIL APPEAL NO. 50 OF 2014  
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MUTABA BARISA KWETEREMA LTD :::::::::::::::::::::::::::::::::::::: APPELLANT

AND

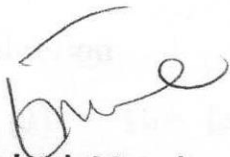
BASIRAKYE YEREMIYA AND OTHER :::::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the lead judgment of my learned brother Fredrick Egonda- Ntende, JA.

I concur with the conclusions and reasons therefor with nothing useful to add.

Dated at Kampala this 15<sup>th</sup> day of Nov. 2019



Elizabeth Musoke

JUSTICE OF APPEAL

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

*(Coram: Egonda-Ntende, Musoke & Obura, JJA)*

**Civil Appeal No. 50 of 2014**

*(Arising from High Court Civil Appeal No. 43 of 2008 at Kabale and Chief Magistrates Court of Kabale Civil suit No. 020 of 1985)*

**BETWEEN**

Mutaba Barisa Kweterena Ltd=====APPELLANT

**AND**

Bazirakye Yeremiya=====RESPONDENT NO. 1

Kanyomozi Ephraim=====RESPONDENT NO.2

*(An Appeal from the Judgment and Decree of the High Court of Uganda,  
[Kwesiga, J.], dated 3<sup>rd</sup> August 2011)*

**JUDGMENT OF FREDRICK EGONDA-NTENDE, JA**

**Introduction**

- [1] This is a second appeal. The respondents filed a civil suit in the Magistrates Court of Kabale seeking to recover a piece of land measuring approximately 4 hectares from the appellant claiming ownership by way of customary title. The appellant contended that this was public land that it had acquired and obtained a leasehold certificate of title. The respondents contended that the certificate of title had been obtained fraudulently. The trial court found for the appellant. On appeal to the High Court the judgment of trial court was set aside and judgment entered for the respondents. The first appellate court concluded that the appellant had obtained the certificate of title fraudulently. It ordered cancellation of the same.

[2] The appellant was dissatisfied with that decision and now appeals to this court setting forth 2 grounds of appeal. I will set the same out.

‘1. The appellate Judge of the High Court erred in law when he failed to re-evaluate the entire evidence and arrived at a wrong a conclusion in which he allowed the Respondents appeal and declared that the land was not public land and that it was owned by the Respondents.

2. The learned appellate Judge erred in law when he held that the Appellant obtained registration of the land by fraud when actually the Appellant obtained registration of the land lawfully and through the requisite procedure.’

[3] The respondents oppose the appeal.

[4] At the hearing of the appeal Mr Lawrence Tumwesigye and Daniel Byaruhanga appeared for the appellant while Rev. Ezra Bikangiso appeared for the respondent. The appellants adopted their conferencing notes as their written submissions in this appeal. The respondent’s counsel relied on the written submissions filed prior to the hearing of the appeal.

### **Duty of a Second Appellate Court**

[5] As this is a second appeal this court will ordinarily entertain matters of law only and will not re-evaluate the evidence unless the first appellate court did not do so or erred in doing so. See Active Automobile Spares Ltd v Crane Bank Ltd and Anor [2003] UGSC 32.

[6] On the other hand, the duty of a first appellate court is to subject the evidence on record to a fresh appraisal and reach its own findings of fact and law. See Peters v Sunday Post Ltd [1958] EA 424; Selle and Another v Associated Motor Boat Co. Ltd [1968] EA 123 and Milly Masembe v Sugar Corporation of Uganda Ltd S C Civil Appeal No. 1 of 2000 (unreported).

## Ground 1

- [7] The appellant under this ground contends that the learned appellate Judge failed to re-evaluate the evidence as a whole and thereby arrived at a wrong conclusion by concluding that the suit land was not public land and that it belonged to the respondents. Counsel for the appellant submitted that the learned trial Judge in his re-evaluation of the evidence only took into account the evidence for the appellants. It was further contended that the learned Judge had not considered the evidence of DW4 which was to the effect, *inter alia*, that the land in question was applied for in 1974 and the applicants were recommended for a lease on the 15<sup>th</sup> December 1977 by the Land Committee.
- [8] Counsel for the respondent supported the judgment of the High Court. He submitted that the learned Judge had exhaustively considered the evidence for both sides on the record and came to the correct conclusion.
- [9] I note from the judgment of the court below that the learned Judge stated the case for both parties and then considered the evidence adduced in the case to support each version of the case. The appellant's version was that the suit land was public land that had been owned by the 'Lukiiko' and or Kabale District Administration and it was therefore available for leasing. The respondent's version was that they and the people on whose behalf they had brought this representative action were the customary owners of the suit land.
- [10] The learned Judge considered the crux of the appellant's version which was that the suit land belonged to Kabale district administration and found, after analysis of the evidence, that the suit land did not belong to Kabale District Administration as contended. He also held that it was not public land available for leasing. He found that the land was being held under customary tenure by the respondents and others whom they represented in the original action. He also found that the appellant was aware of the respondent's interest in his land when it initiated its application for a lease to the said property and sought to defeat it by acquisition of a certificate of title.
- [11] It is correct to say that he did not make specific mention of DW4. DW4 was a technical witness. He was Land Officer who had no personal knowledge of the land and the on-going wrangles since it was applied

for in 1974. He left college only in 2002. I am not sure when he was recruited into his job. There was no dispute about the records produced from the Land Office. DW4 testified that the suit land was applied for in 1974. He did not disclose the name of the applicants. The land committee inspected the land in 1977 and recommended a lease for the unnamed applicants on 15<sup>th</sup> December 1977. A lease offer was prepared on 24<sup>th</sup> August 1984 for five years extendible to 49 years in favour of the appellant. He testified that he did not know whether the land was public land or customarily owned.

- [12] In 1974 when the land was applied for the law in force was the Public Land Acts, 1969. It was amended in 1975 by the Land Reform Decree, 1975 which had decreed all land in Uganda to be public land, vide section 1 thereof. At the time of inspection of the land this land was technically public land. So the appellants were technically correct to claim that the land in question was public land. However, it was their further claim that the suit belonged to Kabale District Administration and was vacant land available for leasing that was contentious. It was established that the suit land did not belong to Kabale District Administration. The respondents and other people were using it and had asserted that it belonged to them under customary tenure.
- [13] The crux of the respondents' case was that the appellant had brought this land under the Registration of Titles Act ignoring the respondent's customary ownership of the same. On an analysis of the evidence and departing from the trial court's conclusions the first appellate court found for the respondents. Save on the issue of Public Land I am unable to say that the learned appellate Judge failed in his duty to review the evidence afresh.
- [14] The salient points in the appellant's case were considered. And for reasons he provided he preferred the version of the respondents. The appellant was incorporated only in 1980. The application for this land was, on the appellant's evidence, first made in 1974 by some unnamed applicants. Obviously the appellant having been only incorporated in 1980 could not have been the applicant for this land in 1974. In the evidence for the appellants it is not explained how a company incorporated in 1980 could have applied for land before it came in existence.

- [15] If the land was applied for by other people, the nexus between the unknown applicants and the appellant was not established. Ordinarily a certificate of title would only be issued in the names of the applicant. The applicant's forms that were filled and filed were not introduced in evidence. The lease offer was not introduced in evidence to know who was initially granted a lease and when this was done.
- [16] Without explaining how the appellant came to be registered as the lease holder / registered proprietor when it was not in existence at the time the lease was applied for left a gaping hole in the case for the appellant.
- [17] I would find that the evidence on record substantially supports the findings of the learned appellate Judge. I do not find any substantial error in his re-evaluation of the evidence. I would reject ground 1.

## **Ground No 2**

- [18] In relation to this ground the appellant contends that the appellant obtained registration of the land lawfully and through the requisite procedure rather than fraudulently as found by the learned appellate Judge.
- [19] In their amended plaint the respondents stated their case as follows:

‘3. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs sue the defendant in a representative capacity for and on their own behalf and on behalf of numerous other persons having the same interest in the land in dispute, having been granted permission so to sue by the order of the magistrate grade 1 vide Civil Miscellaneous Application No. MKA 73 of 1984 dated the 30<sup>th</sup> day of November, 1984, which is annexed hereto.

4. On or about the 18<sup>th</sup> day of October 1984 the defendant unlawfully brought a group of persons who were its servants and agents upon the plaintiff's land situate at Bunagana village, Kagunga Parish, Bufundi Sub-county, rubanda, Kabale District together with surveyors who purported to survey the plaintiff's land, which attempt survey was resisted. The said acts of trespass are till continuing.

5. During the course of the attempted survey, the defendant's agents and servants while in the course of their employment destroyed the plaintiff's crops valued at shs. 26,000/=.

6. Subsequently the defendant got the land in dispute registered under the Registration of Titles Act fraudulently:-

Particulars of Fraud:

(a) Applying for the land in dispute well knowing that it was in occupation and possession of the plaintiffs.

(b) Obtaining registration well knowing that the plaintiff's had interest in the land in dispute.

(c) Applying for the land well knowing that the same was not free from dispute.

(d) Obtaining title to the land with the full knowledge that the same was in dispute.

(e) Obtaining registration of the land in dispute without inviting claims.

(f) Failure to compensate the plaintiffs.'

[20] The appellant in its defence stated,

'2. Paragraphs 4, 5 and 6 of the plaint are denied and the plaintiffs are put to strict proof. 3. The defendant shall contend that the disputed land was public land and nobody occupied it at the material time when the defendant society applied for it. 4. The defendants shall further contend that there was no fraud in applying for disputed land as all legal steps were complied with from the state of application to granting of a certificate of title.'

[21] The trial court held that the respondents had failed to establish their interest in the land in question and dismissed their claim. On Appeal to the High Court the learned Judge found to the contrary after a re-evaluation of the evidence. He concluded that fraud on the part of the appellant had been established.

[22] The learned Judge on appeal stated in part in his judgment,

'A fraudulent act is any act done designed to cheat a man or woman of a known existing right and this



includes acting in bad faith to defeat interest of the victim or a deliberate and dishonest trick causing an interest not to be registered and thus keeping clear if such interests did not exist. The decisions in *Katarikawe vs Katwiremu and Another* (1977) HCB 187 and *Matovu & 2 Others vs Seviri & Another* (1979) HCB 174 clearly state that fraud for purpose of land law includes dishonest dealing in land such as depriving a purchaser for value in occupation of the land of his unregistered interests. It also perfectly includes dishonestly dealings in land, registration of land depriving occupants of the land unregistered interests in the said land. The test would include proof that the prejudiced person had registrable interests. From the evidence on record it is clear from the overwhelming correspondence that the suit land was in dispute. The plaintiffs interest had been voiced through their protects (sic) against the survey of the land, protests to the Sub County Chiefs and to the District Commissioner all of who acknowledged and communicated these interests to the Respondents. The Respondents proceeded to procure registration of the land with full knowledge of the plaintiff's / appellant's unregistered interests and therefore the intention to defeat the Appellant's unregistered interests is very clear.'

[23] After a review of the evidence and law the learned Judge concluded,

'Considering this as a whole I find that the Respondents at the time of the acquisition of the certificate of title acted fraudulently with intention to defeat and deprive the appellants of their interests in the suit land. I therefore allow the appeal .....

[24] Counsel for the appellant submitted that the respondents had failed to prove their possession of the suit land in the trial court and therefore fraud could not have been proved against the appellant, presumably on the ground that the land was vacant and free for leasing to anyone.

[25] It is clear from the evidence of both the appellant and the respondents that the suit land was part of a larger piece of land that was used communally by many people including the respondents for cultivation of crops and grazing of animals. The directors and or sponsors of the

appellant were aware of this state of affairs. This is consistent with the respondents' claim. Possession of the suit land by the plaintiffs and those on whose behalf they brought the action in the magistrate's court was proved. In setting out to appropriate this land and obtain a certificate of title for the same the appellant intended to deprive the respondents of their interests in this land without compensation. I agree with the learned Judge that this amounted to fraud.

[26] Secondly as observed hereinbefore the appellant was only incorporated in March 1980, long after the application for the land was made and inspected. Obviously it could not have been the applicant for the land in 1974 when this land was applied for. It does not explain how it became the registered proprietor of land it could not have applied for. In the absence of an explanation of how it got involved with this land it would be difficult for it to sustain its own version of the state of affairs with regard to the suit land.

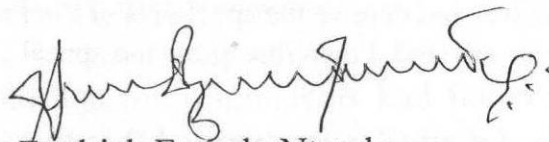
[27] I would dismiss ground 2.

[28] I would dismiss this appeal with costs here and below.

### **Decision**

[29] As Musoke and Obura, JJA, agree this appeal is dismissed with costs here and below.

Dated, signed and delivered at Kampala this 15<sup>th</sup> day of Nov. 2019



Fredrick Egonda-Ntende

**Justice of Appeal**