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THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 290 OF 2017

(ARISING FROM CIVIL SUIT NO. 251 OF 2009)

(CORAM: OWINY DOLLO, DCJ, KAKURU, MADRAMA JJA)

10 **ROSEMARY NABUKENYA}..... APPELLANT**

(Administrator of the Estate of the late Lwiiza Nalongo Nanyonga)

VERSUS

BWOGI ABDUL}..... RESPONDENT

JUDGMENT OF COURT

15 When this civil appeal came for hearing, this court struck out the name of the second respondent Mr. William Nsamuzi Kasiga and the appeal proceeded against the Abdul Bwogi, the current respondent only.

At the hearing of the appeal the appellant was represented by Counsel Norah Matovu Winy while the respondent was represented by Counsel Musoke Suleiman. The court
20 was addressed in written submissions.

Background to the appeal:

The first Respondent Bwogi Abdul Nassir is a son of Musa Mayanja Luyombya and was given a gift of the suit property by Musa Mayanja. The facts are that in 2008 Musa Mayanja Luyombya bought the suit property from the registered proprietor William
25 Nsamuzi Kasiga who was the second respondent before his name was struck off the appeal. Musa Mayanja claimed to be a bona fide purchaser for value without notice of any defect in title of his predecessors in title to land comprised in Kibuga Block 9 Plot 358 Makerere-Kagugube. He bought the property on the 8th of May 2008 and executed a sale agreement. Thereafter he donated the suit property to his son Mr. Bwogi Abdul
30 Nasir who is the first Respondent). The suit property was transferred directly from the

5 names of the second respondent to the first Respondent's names. The first respondent
found a caveat on the suit property and his suit for removal of caveat against the
appellant in the Mengo Magistrates Court did not succeed. He later filed an application
in the High Court Land Division for the removal of the caveat and the plaintiff/appellant
was advised to and filed a suit for cancelation of title of the first respondent and upon
10 dismissal of the suit, she appealed to this court.

At the trial, the issue was whether the suit property belonged to the estate of Maria
Lwiiza Nalongo Nanyonga, the mother of the appellant. The Appellant is the legal
representative of the estate of Maria Lwiiza Nalongo Nanyonga who left an unattested
will leaving information that led to discovery of fraud wherein her land was found
15 registered in the names of one Emmanuel B.S. Lumu under the same instrument.
Secondly, the issue for resolution was whether the first respondent's father Mr. Musa
Mayanja was a bona fide purchaser for value? Additional facts are contained in the
submissions of counsel and the judgment of court. The High Court decided the suit
against the appellant on the ground that first respondent's benefactor was a bona fide
20 purchaser for value without notice of defect and secondly, the suit was time barred. The
appellant appealed against that decision and the material facts of suit and the issues
giving rise to the appeal are sufficient contained in the submissions of counsel of the
parties set out below.

GROUND OF APPEAL

- 25 1. That the learned trial judge erred in law and fact when he failed to properly
evaluate the evidence on record regarding the effect of fraud on the title of the
respondent thereby arriving at an erroneous decision and occasioning a
miscarriage of justice to the appellant.
- 30 2. That the trial judge having established that the appellant is the rightful
beneficiary of the suit land as the Administrator of the estate of the Late Maria
Lwiiza Nalongo Nanyonga, her mother who found out about the fraud in the title
for the suit land in 1998 and has diligently pursued this matter and failed to
evaluate this crucial evidence thereby occasioning a miscarriage of justice.
- 35 3. That the learned trial judge erred in law and fact when he held that the
respondent is a bona fide purchaser without notice of the other interests existing

5 on the suit land by failing or neglecting to undertake due diligence prior to the purchase of the suit land which resulted in a miscarriage of justice.

At the conferencing inter parties in this court in March 2018 the parties Counsel of parties to the appeal agreed on the issues for resolution by the Court of Appeal; namely:

- 10 1. Whether the learned trial judge erred in law and fact when he did not find that there was constructive notice of the fraud in title on the part of the respondent.
- 15 2. Whether the trial judge erred in law and fact when he decided that the matter was filed out of time.
3. Whether the trial judge erred in law and fact when he decided that the father of the respondent was a bona fide purchaser of the suit land.

Submissions of Counsel

20 Issues 1 and 3 were argued together by the Appellants counsel and are:

- Whether the learned trial judge erred in law and fact when he did not find that there was a constructive notice of the fraud in title on the part the father of the respondent.
- Whether the trial judge erred in law and fact when he decided that the father of
25 the respondent was a bona fide purchaser of the suit land.

The Appellant's Counsel relied on the definition of fraud in **Fredrick Zaabwe v Orient Bank & Ors SCCA No: 4 of 2006** and the quotation therein of the definition in **Black's Law Dictionary 6th Edition, page 660** that;

30 'Fraud is an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.'

5 Furthermore, fraud;

'As distinguished from negligence, it is always positive, intentional. It comprises all acts, omission and concealments involving a breach of legal or equitable duty and resulting in damage to another.'

10 The appellants counsel submitted that the particulars of fraud in the appellants case against the respondent is that in 1953, the Late Maria Lwiiza Nalongo Nanyonga executed a sale agreement for the purchase of a chunk of land from one Eriabu Nsubuga and the agreement was exhibited as PEXH 3. In 1954, she built a residential house with 11 rooms on the property and photographs of the house were exhibited on the record as PEXH A. A subsequent survey shows that the house lies on Plots 358 and
15 360. In 1961, the deceased Maria Lwiiza Nalongo Nanyonga went to the Department of Lands and Surveys at Entebbe to subdivide her land into plots and this was done and the property registered as Kibuga Block 9 Plots 351-360. Microfilms were made of the various plots and they all had the instrument number MRV 201 Folio 12 in the names of the deceased.

20 In the ensuing years, the Late Maria Lwiiza Nalongo Nanyonga entrusted some of her documents to Mr. Emmanuel Lumu who promised to assist her to process certificates of title for her inclusive of a title for the suit property. Instead, Mr. Lumu used the late Lwiiza Nalongo Nanyonga's documents to register the suit land in his name in the Kampala land office on the same date of 15th April, 1961 using the same instrument No
25 MRV 201 Folio 12. The appellant established that the land was transferred to William Kasiga Nsamuzi who was a party to the suit (*though Counsel failed or neglected to serve him in time after he disappeared from the jurisdiction*), and who later sold the suit land to DW1 the father of the respondent and it was registered in the name of the respondent, a son of DW1.

30 The judgment shows that Musa Mayanja Luyombya (DW1) the father of the respondent, testified that he undertook a search at the Kampala Land Registry and on the basis of the results, bought the land without any encumbrances. The appellant submitted that a land search report is not conclusive evidence of the status of title for land but is the initial step taken by a potential purchaser. Secondly, it was essential for the trial judge to
35 appreciate that the interested party (purchaser) is the one who has a duty to satisfy him or herself of the fact that the land in issue is the property of the person claiming

5 ownership and not of someone else. Furthermore, information of a land search report is
always provided on the understanding that its accuracy is not guaranteed and that no
liability whatsoever can be accepted by the land office for loss occasioned thereby. It is
incumbent on the buyer or the person interested in any piece of land to ascertain that
the land belongs to the vendor/stated owner in the search report and there are no other
10 claimants/encumbrances.

DW1 testified that he inspected the land with DW2 and he found that the land had been
fenced off and it had a house of 3 rooms. The appellant was pointed out to him during
his inspection visit. According to the testimony of DW1, the boundaries were verified in
2012, four years after the purchase and three years after the appellant had placed a
15 caveat on the title of the land.

On the basis of the above, the appellant submits that the respondent's father was aware
of the fraud in the registration of title and this is the reason he avoided verification of
the actual size and dimensions of the suit land prior to the purchase. It is due diligence
that in land transactions apart from a search report from the land registry, the property
20 has to be physically inspected because search of the register per se is not sufficient to
ascertain all relevant interests.

The appellant's counsel further submitted that the respondent's father feared or wilfully
neglected to ascertain the truth about the appellant's status or claim on the land prior
to the purchase and therefore, the trial judge erred in law when he held that the
25 respondent received good title as no evidence was adduced to connect him or his father
to the fraud or knowledge of the fraud that had been orchestrated by the previous
registered proprietors.

Furthermore, when DW1 (respondent's father) saw the appellant during the land
inspection with DW2 (the LC I Chairperson) he was informed by DW2 that the appellant
30 was a squatter/kibanja holder on the suit land. This claim was vehemently refuted by
the appellant who clearly demonstrated at the trial that her late mother Lwiiza Nalongo
Nanyonga had bought the land and had initiated the process of obtaining certificates of
the titles for her 10 plots including the suit property and this was not disputed by the
respondent.

35 No evidence was adduced in court to indicate that any attempts were made by DW1 to
engage the appellant to ascertain or verify the status of her interests in the suit land

5 after the assertions of DW2 that she was a squatter/kibanja holder. The appellant has a house which is partly on the suit land and this fact was not denied in the lower court. There is no evidence that the respondent's father consulted the neighbours whatsoever including the appellant before buying the property. These facts should have alerted the trial judge to the fact that though the father of the respondent did not directly
10 participate in the fraudulent registration of Dr. Lumu, he chose or opted not to find out, most probably, because he feared to establish the truth.

It is the usual practice in land transactions as part of due diligence to obtain information from all credible sources for the buyer to satisfy himself or herself about the ownership of land he or she wants to buy. DW1 cannot and should not claim that he
15 depended on the testimony/word of the Local Council leader (LC1 Chairperson-DW2) who was a resident in the area just like the appellant who had no technical knowledge in land matters.

The appellant submitted that this was intentional and a clear attempt by Musa Mayanja Luyombya the father of the respondent to defeat the appellant's interest in the suit land. William Kasiga Nsamuzi did not have good title to pass on to DW1 as he was aware of the fraud orchestrated by Dr. Lumu because he had been alerted about this fact. The respondent's father had constructive notice of the fraud and neglected or deliberately chose not to take all necessary steps to ascertain the actual interest of the appellant in the suit land. Had he done so, he would have found out that the ownership of the land
25 was in dispute.

To further counsel submitted that the case of the appellant was complicated when DW1 gave the land to his son, the respondent who already is in the process of disposing off the land despite the existence of an interim order issued in April 2018, and a court order in the main application for stay of execution obtained in August, 2018.

30 She further argued that the learned trial judge in his judgment stated that the appellant's claim should have been against Dr. Lumu and it was difficult to understand why the former counsel of the appellant did not include Dr. Lumu as a defendant in this suit as clearly the fraud originated from him.

The trial judge also noted that the appellant's house is situated on two Plots namely
35 plots 258 and 360. She observed that it is perplexing that the same Counsel who was handling the court case relating to Plots 360 and 358 included Dr. Lumu as a party in the

5 former case and not the later and he also failed to serve the would be 2nd defendant for two years at which point the case against him was dismissed. In fact, judgment was entered against Dr. Lumu and the subsequent transferees in relation to Plot 360 based on the fraud in title he committed in 2013.

10 The appellant's counsel argued that the mistakes of the appellants counsel should not jeopardize the appellant's rights. She relied on **Banco Arabe Espanol v Bank Uganda SCCA No: 8 of 1998**. On the issue of whether the 'oversight,' 'mistake,' negligence or error as the case may be of counsel should be visited on a party, it was held that the fault of the professional advisor should not be visited on his client. Counsel submitted that the appellant's case deserves consideration by this honourable court to apply its
15 discretion and revisit the points of substance so that the rights of this senior citizen who have been before courts of law for almost 10 years over this matter can be finally determined.

On issue 3: the learned trial judge found that the respondent was a bona fide purchaser of the suit land for value without notice of fraud. He relied on the evidence
20 adduce by the DW1 who is the father of the respondent and who bought it from William Kasiga Nsamuzi who was fully aware of the fraud.

The Appellant's Counsel submitted that the evidence of DW1 was that at the time of purchase of the land, it was free from any encumbrances. He inspected the land with DW2 who informed him that the appellant was a squatter/kibanja holder. She submitted
25 that if the trial judge had rightly evaluated the evidence on record he would have found that the father of the respondent had constructive notice that there was an encumbrance on the land and would have taken steps to investigate if further.

The learned trial judge also failed to properly evaluate the fact at the time of purchase of this land by the father of the respondent, the appellant had an existing house on part
30 of the suit land and this was not disputed by the respondent. There was however, no evidence adduced to confirm that the appellant was consulted at any one time before DW1 purchased the suit land, not even in her capacity as the person living on the neighbouring plot of land (plot 360). The pictures of her house that had been in place for a long time which would mean the occupants may have historical information of
35 interest to a potential purchaser.

- 5 If DW1 had talked to the appellant he would have found out that there were ownership wrangles over the suit land between the appellant and William Kasiga Nsamuzi. This would have prevented him making the mistake of purchasing the disputed land. Counsel submitted that the father (DWI) of the respondent deliberately refused to establish material facts.
- 10 Had the trial judge properly evaluated the evidence before him, he would not have arrived at the conclusion that the respondent was a bona fide purchaser for value without notice of any defects in title. The evidence adduced clearly indicated that the respondents' father had constructive notice of possible defects in title before the purchase of the suit land but chose or neglected not to act on this information.
- 15 Counsel relied on the principle of constructive notice discussed in **Omar Salim Mukasa v Hajji Mohammed & Anor CACA No. 114 of 2003** where it was held that the equity of constructive knowledge is deemed to constitute fraud.

Section 181 of the Registration of Titles Act provides that:

20 "Nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or to an action for recovery of damages as aforesaid or for deprivation of the estate or interest to which he or she is registered as proprietor any purchaser bona fide for valuable consideration of land under the operation of this Act on the ground that the proprietor through or under whom he or she claims was registered as proprietor through fraud or error or had
25 derived from or through a person registered as proprietor through fraud or error; and this applies whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever."

30 She submitted that for one to seek the protection of Section 181 of the Registration of Titles Act, he or she must prove that he or she is a bona fide purchaser. He or she must have acted in good faith, ought to have given due consideration to all essential aspects and must have purchased the land without notice of any fraud or defects in title. Such notice of fraud can be actual and constructive.

Counsel submitted that the respondent did not demonstrate good faith on his part when he failed, refused or neglected to verify the dimensions of the land prior to the

5 purchase and the actual interests of the appellant in the suit land or as a potential neighbour living in a house that clearly had existed in the area for a long time.

The appellant relied on **Senkugu & 4 Ors v Mukama SCCA No 17 of 2014** at page 10 thereof where it was held that:

10 "A purchaser has constructive notice fraud if he had actual notice that there were some encumbrances and a proper inquiry would have revealed what it was and has refrained whether deliberately or carelessly from making those inquiries which a prudent purchaser would have made."

15 Counsel reiterated submissions that the Respondent's father had notice actual or constructive when he purchased the suit land. This is mainly because the appellant had an interest in the land. He took no further steps to establish her interests even after he confirmed that she lived or had been occupation of the house for a long time. This material fact should not have been ignored by the learned trial judge in his final deliberation.

20 In addition, the appellant was living in the house located partly on the suit land. The respondent's father, as a reasonable human person, should have asked her about her origins, how she got onto the suit land. He should have tapped into her knowledge and the history of the land ownership in the area as part of his due diligence. Therefore because of these omissions the respondent could not have received good title from his father who had constructive notice of her encumbrance on the suit land.

25 Counsel emphasised that a person new in an area and wants to buy property ought to ask the LC 1 Chairperson. Evidence of further inquiries from the immediate neighbours should have been adduced. These are the people who would be in a likely position to give unsolicited information.

30 The respondent's father ignored her simply because he did not want to know more or was afraid to find out the truth. On that basis counsel submitted that the trial judge misdirected himself on the counterclaim when he held that the respondent's father was a bona fide purchaser of the suit land.

Furthermore, one of the acts of due diligence of purchasing land is the opening of boundaries and surveying of the land to be purchased. The respondents did not do that.

5 She contended that land is not like vegetables that can be purchased at the market without knowing the origins thereof. It requires careful scrutiny to establish that there are no encumbrances on the property.

In the case of **David Ssejaaka Nalima v Rebecca Musoka CACA No: 12 of 1985**, it was held that at page 15 of the judgment that:

10 It is reasonable to infer from the appellant's conduct that his suspicions were aroused but that he feared to learn the truth from the tenant, by inquiring from him who was his landlord. Had he done so he would have definitely found out that Ochiti's landlord had been Prof. Latimer Musoke. Where the purchaser's
15 suspicions are aroused but he abstains from making inquiries for fear of learning the truth, fraud may be properly ascribed to him.

It was held that the circumstantial evidence adduced was incompatible with the 2nd defendant being bona fide purchaser and was only consistent with fraud. The court took into account the occupation of Plot 120 by the 2nd defendant when he purchased only Plot 121, his apparent failure to inquire from the neighbours the ownership of the
20 two plots and his failure to open up the boundaries of the two plots.

The above case clearly resonates with the current one at hand as the respondent's father failed to carry out sufficient inquiries prior to the purchase. Giving the suit land to his son was also a deliberate attempt to defeat the appellant's claim to the land. In August 2018, the respondent in his affidavit filed in support of his reply to the main application
25 for stay of execution confirmed that he had received the balance of the purchase price in June 2018 even when he was fully aware of the existing interim court order not to undertake any transactions on the suit land issued in April, 2018.

Counsel prayed that the holds that the trial judge failed to properly evaluate the evidence on record thereby reaching a wrong decision and conclusion that the
30 respondent's father was a bona fide purchaser for value without notice of defect in title. The failure of the respondent's father (DW1), to undertake due to diligence to verify the dimensions of the land and to ascertain the actual interest of the appellant in the suit land was deliberate and for fear of what he would establish if he inquired. His father had been told that the appellant had an interest in the land and had constructive notice
35 which should operate to his detriment. This is a material fact which fact which the trial

5 judge did not adequately consider to enable him to arrive at the right decision in this case.

In reply to issues 1 and 3 the Respondents counsel submitted as follows:

10 On issue No. 1 of **Whether or not the trial Judge erred in law and fact when he did not find any fraud on the part of the first Respondent**, set out the facts and the Respondent's counsel submitted that during the trial of the case in the High Court, four issues were framed. The record of appeal compiled by the Appellant on page 9 and 10 shows the legal issues which were framed during the trial namely;

- 15 i. Whether or not the land in dispute forms part of the estate of the late Maria Lwiiza Nalongo Nanyonga.
- ii. Whether or not the First Respondent is a bona fide purchaser of the suit property for value without notice.
- iii. Whether or not the First defendant's title is liable for cancellation for the land comprised min Kibuga Block 9 plot 358.
- iv. What remedies are available to the parties.

20 Counsel submitted that none of the issues at the trial was about fraud but he opted to address it anyway because the appellant raised it.

He submitted that allegations of fraud are serious matters which must be proved strictly and relied on the case of **Fred J.K. Zaabwe v Orient Bank LTD & 5 Ors, Civil Appeal No. 4 of 2006** (Supreme Court) on pages 27-28 for the definition of fraud. The questions raised by the Supreme Court at page 27 & 28 were pertinent that and were
25 whether any fraud was committed upon the appellant? Secondly, who committed the fraud, if at all? Thirdly, were the Respondents singly or collectively involved in the fraud, or did they become aware of the fraud?" The respondents counsel submitted that despite the allegations raised by the plaintiff in the plaint to the effect that the
30 Respondent committed fraud, the appellant failed to adduce any evidence to prove her claim. With regard to the list of particular of fraud submitted on by the appellants counsel, these were different from those mentioned in the plaint at page 5 of the Record of Appeal.

5 The Respondent's counsel pointed out that the trial judge in his judgement rightly considered the Appellant's particulars of fraud, and came to a finding that there was no evidence led by the Appellant to substantiate her allegations.

10 The evidence of DW1- Musa Mayanja Luyombya is that he inspected the land before purchasing it. He had conducted a search in the land office and established that there were no encumbrances on the title. The land was fenced and the Appellant's house was outside the fence. There was no any indication that the Appellant had any interest in the suit land and the person who showed him the boundaries of the suit land was the LC1 chairman of the area who also testified in court as DW2.

15 Further to the testimony of DW4, a surveyor, the Appellant's house occupies an area of 4 metres (0.02 Acres) of plot 358 (suit land). Counsel contended that this constitutes a very tiny portion of the land though the Appellant kept arguing that her house sits squarely on plot 358, which is incorrect.

20 Furthermore, the respondents counsel submitted that the evidence of DW2 on record does not show anywhere that he pointed out to DW1 that the Appellant was a squatter/Kibanja-holder on the suit land.

25 With reference to the submission of the appellant's counsel that the former registered proprietor of the suit land William Nsamuzi Kasiga "did not have good title to pass on to DW1 as he was aware of the fraud orchestrated by Dr. Lumu because he had been alerted about this fact", the respondents counsel contended that during the trial the Appellant did not adduce any evidence about this allegation. She further failed to connect William Nsamuzi Kasiga to the allegations of fraud allegedly committed by Dr. Lumu.

30 The Appellant's counsel rightly agreed that counsel at the trial of the suit ought to have included Dr. Lumu as one of the Defendant's because the "fraud" originated from him. She further submitted that the same counsel included Dr. Lumu in another case for recovery of plot 360. He prayed that the court takes note of these submissions. Counsel submitted that those apparent legal errors ought not to be visited on the Respondent who is a third transferee of the suit land and was not privy to any of the alleged acts of fraud. In the premises, the respondent's counsel prayed that the first issue is resolved in
35 favour of the Respondent.

- 5 In reply to the third issue of **whether or not the trial Judge erred in law and fact when he decided that the Respondent was a bona fide purchaser of the suit land**, the respondent's counsel submitted that the fundamental principle of land law provides that a person who purchases a legal interest in the land without any notice of fraud is a bona fide purchaser against any claims of prior equitable interests in the land.
- 10 DW1-Musa Mayanja Luyombya testified that he purchased the suit land on 8/5/2008 and tendered in court the sale agreement exhibit DE1. He paid consideration of Uganda shillings 51,000,000/=. The physical land itself was free and vacant, surrounded by a fence and main gate. The search in the land office revealed that the title was free from any encumbrance.
- 15 The Respondent adduced further evidence at the trial of a white page (original certificate of title) as DE3 which shows that there was a caveat lodged on the title on 10/3/2000 by a one Janet Bukenya Muganga. This caveat was removed on 15/11/2001 vide instrument No. KLA230712. The Respondent purchased the suit land on 8/5/2008 well after the removal of the said encumbrance. It should be noted that the said
- 20 caveator by lodging her said caveat she was not acting on behalf of the Appellant.

The Respondent adduced further evidence, which was not disputed, that the suit land was surrounded by a fence at the time of purchase. DW2- Badru Bwanika who was the LC1 chairman of the area showed the purchaser DW1 the boundaries of the suit land, surrounded by a fence. None of the two was aware of the Appellant's alleged interests

25 in the suit land.

The evidence of DW4- Daudi Kasiga- shows that the plaintiff's house encroached on the suit land by 4 meters (0.02 acres). The level and size of encroachment was indeed negligible. The truth is that the purchaser did not know of the existence of the plaintiff's house on part of the suit land.

- 30 There was no any evidence to arouse the suspicions of the Respondent's father that the Appellant had any interest in the suit land. There is no any legal obligation on the part of the purchaser of land that he has to inquire from the neighbours of the land, which he intends to buy. In the instant case, the Respondent's father did not consult the Appellant as a neighbour because he had been informed by the LC1 chairman of the
- 35 land was free of any encumbrance.

5 What is defined to be “constructive notice” would not apply in the instant case. The facts of this case differ from those in the case of **David Sejaaka Nelima V Rebecca Musoke CACA No. 12/1985** which was cited by counsel for the Appellant.

There was no any indicator of the existence of constructive notice on the part of the Respondent’s father.

10 Consequently, the respondents counsel submitted that the Respondent’s father purchased the suit land after verifying from the land office that the suit land was free from any encumbrance. The wall fence surrounding the suit land gave it its shape such that there was no need for the purchaser to engage a surveyor for boundary opening. The plaintiff’s house was totally outside the wall-fence and issue number 3 ought to be
15 resolved in favour of the Respondent.

ISSUE NO 2

Whether the learned trial judge erred in law and fact when he held that matter was filed out of time?

On this issue the Appellant’s Counsel submitted as follows:

20 In his judgment, his Lordship, Justice Godfrey Namudi held that the appellant’s action was time barred. He determined that her right to recover the land accrued in 1961 when Dr. Emmanuel Lumu first fraudulently registered it in his names. The learned judge based his decision on section 5 of the Limitation Act; which provides that;

25 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.

30 The appellant argued that the learned trial judge erred in law when did not consider Section 25 of Limitation Act which provides for the postponement of the limitation period in case of fraud or mistake.

The appellants counsel submitted that the learned trial judge erred as the appellant first discovered the fraudulent dealings in 1999 after the death of her mother. It cannot also

5 be determined that Dr. Lumu was registered in 1961 because he was registered using the same instrument number assigned to Maria Lwiiza Nalongo Nanyonga (the mother) in 1961 and this evidence was adduced by PW1.

10 In the will the testator stated that that Dr. Lumu took the papers pertaining to the land from her in the 1990s so clearly he could not have been registered in 1961. The testator also did not know about the transfer of the land into Dr. Lumu's names until 1998. The appellant thereafter instituted Civil Suit No: 44 in 2005 against Dr. Lumu Emmanuel though the suit was unfortunately dismissed for want of prosecution.

15 The learned judge in his deliberation decided that it had been 47 years since the suit land had changed hands from the late Lwiiza Nalongo Nanyonga to the current proprietor, respondent and therefore the suit is barred by limitation. It is the submission of the appellant that the trial judge failed to take into consideration the fact that the appellant did not know about the illegal transfer of the land into Dr. Lumu's names prior to death of her mother.

20 Dr. Lumu never made any moves to evict her from the land or from the home. It is his transferee William Kasiga Nsamuzi who gave her notice to vacate after purchasing the suit land. When he found out the defects in his title he sold to the respondent's father (DW1) who refused or neglected to ascertain the origins of the appellant's claim to the suit land. To defeat the appellant's claim he gave the land to his son, the current registered owner. The son never appeared during the trial and it is the father who has
25 been holding out as the son.

30 Under those circumstances the Appellants counsel submitted that it was erroneous for the trial judge to decide that the case was barred by limitation when the appellant discovered the fraud in 1999 and took immediate action. The limitation period therefore started running from 1998 when the appellant's mother discovered or suspected the fraudulent acts of Dr. Lumu.

35 The appellant prays that the Court should be pleased to allow the appeal with costs and set aside the judgment of His Lordship Justice Godfrey Namundi of the High Court, Land division by declaring that the appellant is the rightful owner of the suit land and her name should be registered onto the land title after the cancellation of that of the respondent. The appellant further prayed for an order of award of damages due to the inconvenience, stress and loss caused to her since 2009 when she filed the trial suit.

5 **In reply to the submissions of the appellant's counsel on issue 2 the respondent's**
counsel submitted as follows:

10 It is the evidence of the Appellant that her late mother Maria Lwiiza Nalongo Nanyonga
purchased the suit land in 1953 from a one Eriabu Nsubuga. That in 1962 the late Maria
Lwiiza Nanyonga instructed Dr. Lumu Emmanuel to process the certificates of title into
her names.

15 It is further shown that the said Dr. Emmanuel Lumu got registered on the suit title on
15/4/1961. According to the evidence on the original certificate of title (white page)
exhibit DE3, the first entry on the title was recorded on 15/4/1961 in the names of
Emmanuel B.S. Lumu. The second entry was that of William Nsamuzi Kasiga registered
on 21/9/2001. The Respondent then got registered on 19/6/2008.

20 If the Appellant is pursuing a claim, she ought to have joined the first proprietor Dr.
Emmanuel B.S. Lumu as a party to this suit. She feared to do so because in so doing she
would be caught up by the law of limitation. **Section 5 of the Limitation Act** provides
that "no action shall be brought by any person to recover land after the expiration of
twelve years from the date in which the right of the action accrued....."

25 Without prejudice, if the first proprietor Emmanuel B.S. Lumu misappropriated the land
from the late Maria Lwiiza Nalongo Nanyonga, a fact that the respondent denies, the
cause of action to recover that land subsisted in 1961 or between 1961 and 1973. No
suit was filed until the year 2009 and the action was time barred. No disability was
pleaded to enable the Appellant file this suit after 48 years (i.e. from 1961-2009).

30 The respondent's counsel submitted that the provisions of **section 25 of the Limitation**
Act bring in the issue of "discovery" before the limitation period begins to run. The
Appellant contended that she discovered the alleged fraud in 1999 after the death of
her mother Maria Lwiiza Nanyonga but did not plead any disability to necessitate the
extension of time within which to file the action.

In the premises counsel prayed that this court dismisses the appeal with costs to the
Respondent both in this court of Appeal and in the High Court.

5 Resolution of Appeal

The facts of the appeal are sufficiently contained in the conferencing notes of the parties. The appellant instituted Civil Suit No 251 of 2009 against the respondent for the cancellation of the first respondent's names on the certificate of title and for a declaration that the appellant is the lawful owner of this suit property namely 10 plots located at Makerere Kivulu. The suit was first heard in the High Court by Lady Justice Damalie Lwanga before it was determined by his Lordship Godfrey Namundi. The appellant's mother, the late Maria Lwiiza Nanyonga bought a piece of land in Makerere Kivulu from Eriabu Nsubuga in 1953 and part of the land was subdivided into 10 plots including Plot 358 which is the suit property. She constructed a residential house on the property with 11 rooms in 1954 before the land was divided into plots and houses presently located partly on plots 358 and 360. The division of the land was done in 1961 by the Department of Lands and Surveys in Entebbe and microfilms were printed for the 10 plots (approximately 51 – 360) the name of the deceased Maria Lwiiza Nanyonga appears on the microfilms. Maria Nanyonga passed away and left a will which appointed the Plaintiff as the executor of the will. Furthermore, the will mentions three persons who through trickery took possession of the documents concerning the land purportedly to assist her to complete the processing of obtaining land titles for the 10 plots. One of the persons mentioned is Dr Emmanuel Lumu who turns out to be the land title holder for the suit property registered in the same year as the registration of the deceased and using the same instrument number MV 201 Folio 12.

The appellant Rosemary Nabukenya traced the land documents from the Department of Lands and Surveys in Entebbe and obtained copies of microfilms which kept a record of the transactions. She established from the land registry in Kampala that the suit property had been registered in the names of Dr Emmanuel Lumu in 1961 and later in the names of William Kasiga Nsamuzi. She informed William Kasiga upon the illegal transfers of the suit property who upon finding out about the fraud, went ahead and sold the property to the first respondent's father Mr. Musa Mayanja Luyombya who donated the land to the first respondent. At the trial, the appellant adduced documentary evidence of the sale agreement between her mother and Eriabu Nsubuga (exhibit P3) and copies of microfilms obtained from the land office at Entebbe exhibit P8 among other documents. The appellant has been in possession of the land though in 2001 the second respondent fenced off part of the land to deny the appellant access to this part of the plot 358. The appellant's sued the defendants who include the first

5 respondent and they contended that they were bona fide purchasers for value without
notice of fraud that was orchestrated by Dr Lumu Emmanuel. The former second
respondent did not appear in court for the trial at all and did not file a defence. The
appellant was informed that he had left the country and is presently residing abroad.
The first respondent's case was that his father conducted a search at the Land Office in
10 Kampala before he purchased the land where he found out that the land had no
encumbrances at all. On the other hand the appellant's case was that the first
respondent had notice of the fraud but refused, neglected or chose not to make any
further inquiries possibly fearing to establish the actual truth about the claim of the
appellant to the land and the transfers clearly indicate efforts to defeat the claims of the
15 appellant on the land.

The first respondent relied on the law of limitation to extinguish the claims of the
appellant and asserted that the suit ought to have been filed in 1961 or between 1961
and 1971 but was filed late in 2009. The appellant contended that her late mother got to
learn about the fraud in 1998 and before her death because Dr. Lumu had taken the
20 papers concerning the land on the pretext that he was going to process titles into her
names. The deceased suspected fraud when Dr. Lumu took a long time without showing
up with the relevant documents.

The High Court in the judgment of Namundi J, determined that the appellant had not
adduced sufficient evidence to connect the 1st defendant to any acts of fraud and that
25 he therefore, bought the suit land in good faith and without notice of any irregularity on
the title. Secondly, the action for recovery of land was time barred.

I have carefully considered the grounds of appeal and issues for determination in this
appeal set out below:

- 30 1. That the learned trial judge erred in law and fact when he failed to properly
evaluate the evidence on record regarding the effect of fraud on the title of the
respondent thereby arriving at an erroneous decision and occasioning a
miscarriage of justice to the appellant.
- 35 2. That the trial judge having established that the appellant is the rightful
beneficiary of the suit land as the Administrator of the estate of the Late Maria
Lwiiza Nalongo Nanyonga her mother who found out about the fraud in the title

5 for the suit land in 1998 and has diligently pursued this matter and failed to evaluate this crucial evidence thereby occasioning a miscarriage of justice.

10 3. That the learned trial judge erred in law and fact when he held that the respondent is a bona fide purchaser without notice of the other interests existing on the suit land by failing or neglecting to undertake due diligence prior to the purchase of the suit land which resulted in a miscarriage of justice.

At the conferencing which took place in March 2018 the parties and Counsel agreed on the following issues for resolution by the Court of Appeal.

15 1. Whether the learned trial judge erred in law and fact when he did not find that there was constructive notice of the fraud in title on the part of the respondent.

2. Whether the trial judge erred in law and fact when he decided that the matter was filed out of time.

20 3. Whether the trial judge erred in law and fact when he decided that the father of the respondent was a bona fide purchaser of the suit land.

The first ground of appeal deals with whether as a matter of fact, there was any fraud in procuring the title of the respondent and this issue is related to the question of limitation of cause of action in the sense that the appellant asserts that the fraud was discovered much later in 1998 and the suit was filed within 12 years thereafter. Issue number 1 addresses ground 1 of the appeal. Secondly, ground 2 of the appeal relates to evaluation of evidence as to whether fraud was discovered much later and is also connected to the question of limitation of actions. The third ground relates to the bona fides of purchase by the predecessor in title of the first respondent. There are therefore two main questions for consideration of this court and they deal with whether the learned trial judge erred in law and fact to hold that the appellant's suit was barred by the law of limitation. Secondly, the question is whether the learned trial judge erred in law to decide that the first respondent was a bona fide purchaser of the suit property.

35 A bona fide purchaser can be held to have good title even if it is discovered that the original title was fraudulently obtained though subsequently transferred to a bona fide purchaser for value without notice of the fraud. I therefore agree that the resolution of

5 grounds of the appeal can be made on the basis of the issues that arise from the
grounds and agreed to by counsel. The issue of whether the predecessor in title of the
first respondent is a bona fide purchaser for value without notice does not have to be
determined if the suit, the basis of the appeal was barred by the law of limitation. The
predecessor in title donated the proprietorship to his son who is the first respondent
10 and we do not have to deal with his bona fides since he received a donation from the
purchaser who procured the registration of his name direct from the registered
proprietor. The case revolves around two legal principles; namely, that of discovery of
fraud which addresses the issue of limitation and that of the defence of bona purchase
for value without notice which proceed from the premises that there was no notice of
15 the alleged fraud and the title of the first respondent is protected. It follows that the
most logical order of resolution of the appeal is to first deal with the issue of limitation
of causes of action to recover land which is a defence that operates as a bar to the suit. I
would therefore consider issue number two on whether this suit was filed out of time
first and consider the first and third issues last. This may be taken as a point of law but
20 the learned judge considered it on the merits of the evidence and not on the pleadings.
That being so we shall examine the pleadings as well as the evidence.

With regard to the evidence, our duty as a first appellate court is to subject the evidence
on record to fresh scrutiny and come to our own conclusions bearing in mind, that we
did not hear or see the witnesses testify. This duty is stipulated by Rule 30 (1) of the
25 Rules of this court which provides:

“30. Power to reappraise evidence and to take additional evidence.

(1) On any appeal from a decision of the High Court acting in the exercise of its
original jurisdiction, the court may—

(a) reappraise the evidence and draw inferences of fact; and

30 (b) in its discretion, for sufficient reason, take additional evidence or direct that
additional evidence be taken by the trial court or by a commissioner.”

The power to exhaustively scrutinise the evidence of the trial court afresh is exercisable
in civil as well as criminal proceedings. In the case of **Peters v Sunday Post Limited**
[1958] 1 EA 424, at page 429, the Court of Appeal for East Africa held that:

5 "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

10 These principles is restated by the Supreme Court of Uganda in **Supreme Court Criminal Appeal No. 10 of 1997 Kifamunte Henry v Uganda**; when the Supreme Court held that the duty of a first appellate is:

"... to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

15 As noted above we shall first consider issue No 2 which is **whether the trial judge erred in law and fact when he decided that the matter was filed out of time?**

The ruling of the learned trial judge on the issue of limitation rested principally on the fact that one Emmanuel Lumu was registered on the same title to the suit land using the same instrument attributed to the registration of the late Maria Nanyonga Lwiiza in a microfilm record. The estate of Maria Nanyonga Lwiiza is administered by the appellant. The alleged fraud of Emmanuel Lumu is said to have occurred about 47 years earlier and thereafter the suit property changed hands twice. First to William Nsimuzi Kasiga and then to the son of Musa Mayanja Muyombya. Musa Mayanja Muyombya had the property transferred directly from the said vendor William Nsamuzi Kasiga to the current proprietor Bwogi Abdul Nasir. The learned trial judge relied on section 5 of the Limitation Act which prescribes a period of 12 years within which to bring an action for recovery of land from the date on which the right of action accrued. He held that the right of action accrued in 1961 when it was registered in the names of Emmanuel B.S Lumu under the same instrument number.

30 As a matter of pleading, the facts giving rise to the cause of action of the plaintiff can be found at page 4 of the record and paragraph 4 of the plaint. It is averred that the beneficiaries of the estate of the late Malia Lwiiza Nalongo Nanyonga after her death started investigating the details of the property stated in the will of the deceased and established some details that showed the transactions on the plot. On 19th of June, 35 2008, the first respondent Mr. Bwogi Abdul Nasir was registered as proprietor of the property. To protect the interests of the beneficiaries, the plaintiff's/appellant lodged a

5 caveat and thereafter the first defendant filed a suit in Mengo and High Court which was dismissed for lack of evidence. The date of discovery of the alleged fraud was not specifically pleaded. It only arises from the fact of having discovered it after the death of late Malia Lwiiza Nalongo Nanyonga, their mother. The will of the deceased was made on 12th February 1996. The letters of administration to the estate of the late Malia Lwiiza Nalongo Nanyonga is at page 45 of the record was granted on 12th of September 2002 without the will annexed. No probate of the will was granted.

Learned counsel for the respondent submitted that the appellant in the trial court did not plead disability from filing the action within time and could not therefore raise the question of whether the cause of action in fraud was concealed until it was discovered. This is a matter of procedure and is material to preliminary points that the plaint is barred by limitation. As a matter of law, a pleading that the fraud was concealed and only discovered subsequently is not a disability of fact but is an exemption provided for by the law of limitation. Disability to file an action within time relates to the inability of the plaintiff to bring the action due to disability may be some factual disablement that needs to be proved in evidence. Failure to discover fraud is a statutory exception to the operation of the period stated in the law of limitation expressly provided for under section 25 of the Limitation Act. The cause of action only arises upon discovery of fraud and the 12 year limitation period runs after that discovery. On the procedural law, Order 7 rule 6 of the Civil Procedure Rules (CPR) provides that exemption from the law of Limitation shall be pleaded when the action is time barred and the rule only operates when the action is time barred: Order 7 rule 6 of the CPR provides that:

6. Grounds of exemption from limitation.

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the grounds upon which exemption from that law is claimed.

To our understanding, exemption from the law of limitation is claimed only when the action is barred by the law of limitation. The question is whether this applies to statutory provisions which exempt the law of limitation from running until discovery of fraud. The cause of action only arises upon discovery of fraud and the period of limitation begins to run upon accrual of the cause of action. In such cases, the action is not time barred but is exempted from limitation by the statute providing that the period of limitation does not run and is postponed until upon discovery of the fraud or mistake. As far as

5 Order 7 rule 6 of the CPR is concerned, the requirement to plead exemption was considered by the East African Court of Appeal in **Iga v Makerere University [1972] 1 EA 65**, when the Court of Appeal on the issue of limitation of actions said per Mustafa JA at 66 that:

10 "A plaint which is barred by limitation is a plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim. The appellant was clearly out of time, and despite an opportunity afforded him by the judge, he did not show what grounds of exemption he relied on, presumably because none existed.

15 The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief."

The question is whether where the limitation period is suspended from running, the plaintiff is barred by limitation? The authority cited requires exemption from the law of limitation to be pleaded. It is a different point to say that the period of limitation did not operate on account of a statutory provision which suspends the operation of the law. If exemption is not pleaded, then the plaint shall be rejected for being barred by the law of limitation under Order 7 rule 11 (d) of the Civil Procedure Rules which provides: "(d) *where the suit appears from the statement in the plaint to be barred by any law*". This

25 deals with disclosure of a cause of action by the pleading and is a preliminary matter which has to be considered on the basis of the pleadings and deals with the question of whether the plaint discloses a cause of action. There is a wealth of authorities on examination of the plaint only to establish whether it discloses a cause of action. In the case of **Auto Garage v Motokov (1971) EA 514** the East African Court of Appeal held

30 that the provision that a plaint be rejected for disclosing no cause of action is mandatory. Secondly, a Plaint which discloses no cause of action is a nullity and cannot be amended. Thirdly, an amendment will not be allowed when the cause of action is barred by the law of limitation. The facts disclosing a cause of action must be alleged in the plaint. In **Attorney General v Oluoch (1972) EA 392**, at page 394, the East African

35 Court of Appeal, per Spry Ag. President held that:

"In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true."

5 The above holding was cited with approval by the Supreme Court of Uganda in **Ismail Serugo v Kampala City Council & The Attorney General; Constitutional Appeal No. 2 of 1998** and I particularly refer to the judgment of Wambuzi CJ at page 3 of his judgment that:

10 "In my view, it is important to note that both respondents asked the Constitutional Court to strike out the petition and that was the remedy granted. The relevant provisions in this regard would appear to be Order 7 Rule 11 or Order 6 Rule 29. ...

15 I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the plaint can be looked at..."

The proposition of law is clear enough and applying it to the facts of this case, the plaint clearly indicated that the on 3rd July 1953, Lwiiza Malia Nalongo Nanyonga purchased the property from one Eriyabu Nsubuga and the plot was registered in her names on 15th of February 1961 and instrument number MRV 201 Folio 12. Subsequently after the
20 demise of the deceased and facts in a will, the beneficiaries discovered a microfilm in the names of the late Maria Nalongo Nanyonga upon investigation. They established through investigation that a certificate of title was caused to be registered in the purported names of Emmanuel Lumu. Emmanuel Lumu subsequently transferred the property to William Nsamuzi Kasiga. The same instrument was used to register the
25 property into the names of Mr Emmanuel Lumu. The root of the fraud is therefore the registration of Mr Emmanuel Lumu. The appellant did not plead disability or exemption from the law of limitation in the plaint and the learned trial judge relied on registered particulars in the registry file to establish proprietorship to the property in question. The matter was not considered as a preliminary point of law and no issue was raised even in
30 the joint scheduling memorandum endorsed by both counsel for trial of the question of whether the suit of the appellant could be maintained on the point of law. The matter was considered on the merits and I will follow the same procedure and consider the issue on the merits by examination of the evidence pleaded and adduced at the trial.

35 The question remains how two different people can be registered under the same instrument. Where they registered at the same time? When did the registration take place? What is unknown cannot be pleaded. What can be pleaded is when it was discovered that the property was registered in the names of Mr Lumu. Strangely, the

5 record of appeal does not have the certificate of title. In fact I do not have the benefit of perusing the exhibits referred to in the record of proceedings.

The evidence evaluated by the learned trial judge according to exhibit P7 which is a survey report from the Department of lands and survey in Entebbe shows that by 15th of February 1961 the late Lwiiza was the owner of plots 351 – 360. On the other hand, a
10 Senior Registrar of Titles DW3 stationed at KCCA testified that he was in possession of the file in respect of the suit property and according to the records thereof, the first registered owner of the plot was EMMANUEL B.S. Lumu who was registered on 15 April 1961 under Instrument Number MRV 201 Folio 12. This is what the learned trial judge held:

15 "The records kept at the lands Department Entebbe as testified by PW3, the principal staff surveyor revealed that Lwiiza was registered as proprietor of the same land in February in the same year that Lumu was registered and under the same instrument number.

On the other hand at page 8 of the judgement as well at paragraph 4 thereof this is
20 what the learned trial judge found:

"On the other hand, DW3; a Senior Registrar of Titles stationed at KCCA testified that he was in possession of the file in respect of the suit land. It was his evidence that according to the records kept at the Department of land at KCCA, the first registered owner of the plot was Emmanuel B.S. Lumu of P.O. Box 14005 Mengo.
25 He was registered on 15.04. 1961 under instrument number MRV 201 Folio 12.

There were two conflicting registrations under the same instrument for the court to consider. Secondly, it was crucial to examine the original certificate of title to establish whether there was a forgery. The joint scheduling memorandum indicates that there was a certificate of title for Kibuga Block 9 plots 358 which is the subject of contention. This
30 plot however came from a mother title. The learned trial judge found on an issue of fact according to his judgement at page 7 that from the evidence adduced by PW2 at the trial, the suit land is part of a chunk of land that was purchased by the mother of the plaintiff on 3rd July, 1953 lending credence to the claim of the appellant.

The evidence shows that the late Lwiza bought all the land located at Makerere Kivulu
35 that belonged to Eriyabu Nsubuga. She was the registered owner of plots 351, 352, 353,

5 354, 355, 356, 257, 358, 359 and 360. With regard to the specific suit property, it is
averred that the property that was unlawfully transferred is Plot 358. He also established
as a matter of fact that plot 358 was developed with a building that lies between plots
358 and 360. He established that the late Lwiiza had constructed a house which
occupied small portions of both plots 360 and 358. I note with emphasis that the
10 learned trial judge noted at page 10 as follows:

"It is unfortunate that both departments of land in Entebbe and Kampala
recorded the two persons as the owners of the suit land."

The judge meant Emmanuel B.S Lumu and Malia Lwiiza Nalongo Nanyonga (deceased).
Both were registered under the same instrument. It for analysis of facts that the
15 Department of lands in Entebbe is of lands & surveys while the one at Kampala is
concerned with the registration of titles. The Entebbe Department is concerned with
surveys and mapping. It is not concerned with the registration of titles. Though the
microfilm relied on by the appellant and PW3 is a historical document that captured
what happened in 1961. PW3 testified as the Principal Staff Surveyor who came from
20 Entebbe. On the other hand DW3 is a Senior Registrar of Titles stationed in Kampala.
The evidence is consistent with the fact that Lumu was subsequently registered by the
Department of Land Registration and the glaring fact is that the late Maria Lwiiza
Nalongo Nanyonga was in occupation of the land and had also been registered as
reflected by the records at Entebbe. The conclusion that Mr Lumu was registered in
25 1961 can be faulted because is not reflected in the microfilm historical records. This
aspect of the evidence required a critical and forensic examination of all the titles to the
plots and not only one plot with regard to the registration of Emmanuel B.S Lumu
considered by the trial court. The time the entry was made would be material.

An examination of the record of proceedings is required. It clearly shows that several
30 exhibits were admitted showing that the deceased used to receive demands from KCCA
to pay rates and 10 plots were involved. Evidence of PW 2 indicates that the deceased
Nalongo Nanyonga remained on the premises until she passed away and it was
occupied thereafter by Rosemary Nabukenya the appellant. The case inter alia was that
the first respondent's father bought the property when the Appellant was in occupation
35 of part of the plot where the house she lives in is situated. Furthermore PW2 testified
that the house of the deceased was mainly on plot 358 though it was also on part of

5 plot 360. The house is an old house that was built a long time ago possibly in the 60s or 70s.

On the other hand the testimony of DW1 Mr Musa Mayanja Muyombya is that the first respondent is his biological son and he bought the property from one William Kasiga Nsamuzi who was the former registered proprietor of plot 358 Block 9 Kibuga. He
10 donated the property to his son and he purchased the property on 8th May, 2008 from William Nsamizi Kasiga. Note worthy is the fact that the property was transferred direct from William Kasiga Nsamuzi to the son of the purchaser Mr. Musa Mayanja Muyombya. It is therefore the said bona fides of the purchaser Mr. Musa Mayanja Muyombya which
15 is the subject of inquiry to establish whether the learned trial judge erred in law to hold that he is a bona fide purchaser for value without notice. William Kasiga Nsamuzi never appeared in court because he was unavailable for service and the suit against him was dismissed for want of service and the appeal against that dismissal was also struck out in this court.

DW2 Sekitto Moses, the Senior Registrar of Titles testified that the property comprises
20 of 0.24 acres. The current registered proprietor who is the first respondent was registered on 19th June, 2008. The first registered owner was Emmanuel B.S Lumu of P.O. Box 14005 Mengo under instrument No MRV 201 Folio 12 on 15/4/1961 which plot was transferred to William Kasiga of P.O. Box 10964 on 21st of September 2001. Sekitto testified that the instrument on which Emmanuel Lumu was registered was not on the
25 file. A certified copy of the white page was admitted as exhibit D3. The said exhibit is not on the record of appeal. DW2 testified in cross examination that the registry file has no survey report. Secondly it has no deed plan/blueprint in it. However the micro film report on the record it shows several plots 351 – 360 and the owner as Maria Rwiza Nalongo Nanyonga and it has the same instrument number. Kasiga was registered while
30 the caveat of one Bukenya Janet was on record. It is abundantly clear that the instrument number for plot 358 is the same. In cross examination DW2 testified that plot 358 is not a result of a mutation. From a reading of the record it remains in doubt as to whether Emmanuel Lumu was also registered under the same instrument number in respect of the plot 358 in 1961. Going back to the testimony of PW3 the principal
35 surveyor from Entebbe, this is what he says:

"I report on the Genesis of plot 3 which features plot 3 which generated plots 351 – 360 of Block 9 Kibuga.

5 It starts from 1907 to 1961. The first entry on the cartridge which shows that plot 3 (351 – 360) blocks 9 is located on Kagugube hill, Makerere, Kyadondo – Mengo. The area then in the certificate of title was 21.25 acres. In 1907, the owner was Mensusela Kamyia Makubya ...

10 On 18/10/1912, the owner and the area were still the same. As of 15/02/1961, the owner is shown to be Maria Rwiza Nalongo Nanyonga.

This is the Ammonia print out from the microfilm. Plot 358 is in the report. The instrument number is MRV 201 folio 12 as of 1961. It shows Maria Rwiza Nalongo Nanyonga was registered owner. It shows 15/02/1961. It has a reference (faded) C/C/769."

15 If we go by the conclusion that the instrument number only relates to plot 358, it meant that Emmanuel S Lumu was only registered in respect of plot 358 which evidence is inconsistent with the registration of the deceased in several plots amounting to 10 and the KCC records indicating payment of rates for 10 plots. The conclusion is that it was Maria Luisa Nalongo Nanyonga who was in effective occupation and control of the suit premises and Emmanuel S Lumu appears on the title on the fraudulent registration. In any case he never had possession of the suit premises. In the very least, legal representative of the deceased, the appellant, and her predecessor (the deceased) could be considered bona fide occupants protected by article 237 (8) of the Constitution of the Republic of Uganda which provides that upon coming into force of the
25 Constitution and until Parliament enacts an appropriate law under clause (9) of that article, the lawful or bona fide occupants of Mailo land, Freehold or leasehold land shall enjoy security of occupancy on the land. In the very least, the appellant and her predecessor whose estate she is administering can be taken to be bona fide occupants who occupy the land unchallenged for a period of more than 12 years prior to the
30 coming into force of the Constitution of the Republic of Uganda in terms of section 29 (2) (a) of the Land Act Cap 227 which provides as follows:

29. Meaning of "lawful occupant" and "bona fide occupant".

(1) ...

35 (2) "Bona fide occupant" means a person who before the coming into force of the Constitution—

5 (a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or

The learned trial judge found as a fact that the late Lwiisa occupied part of the plot 358. At page 9 of his judgement he found that exhibit P1, a survey report by PW1 revealed that plot 258 was developed with a building that lay in both plots 358 and 360. The report indicated that the ending in the boundary of both plots 358 and the 16th covering small portions of both plots. He established that she at one time owned plot 358 and constructed the house thereon (albeit on part of the plot). The only evidence established by the learned trial judge is that Emmanuel Lumu was also registered on the same plot. There is no evidence whatsoever that he was in occupation of the plot from 15 1961 to the date of transfer to Nsamuzi Kasiga. The conclusion that the plot changed hands and the cause of action of the appellant was against Lumu does not take into account the fact that the appellant and the predecessor in title were in occupation of the property while there was no evidence that the alleged registered owner was ever in occupation thereof. The microfilms is clear evidence that the appellant's predecessor in title Ms Lwiiza was in occupation of plot 358 though her old house only occupies part of 20 the plot. This evidential not brought into mind the issue over bona fide occupancy and claims as against an alleged lawful registered owner, not in occupation. Such occupants would enjoy security of occupancy.

The basis of the judgment that the suit of the appellant was time barred is that the 25 transaction took place in 1961.

A suit barred by statute of limitation, cannot be maintained under Order 7 rule 11 (d) of the Civil Procedure Rules and the plaint thereof shall be rejected. Order 7 rule 11 (d) of the Civil Procedure Rules provides that:

"The plaint shall be rejected in the following cases—

30 ...

(d) where the suit appears from the statement in the plaint to be barred by any law;"

The bar of a suit on the ground of limitation of the cause or causes of action is an absolute defence to a suit or any cause or causes of action in the suit.

5 Section 5 of the Limitation Act provides that:

“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.”

However, the limitation period does not apply where the cause of action is concealed by the fraud of the defendant and discovered subsequently. Until the fraud is discovered, the period of limitation does not apply. Section 25 of the Limitation Act Cap 80 provides as follows:

15 25. Postponement of limitation period in case of fraud or mistake.

Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent;

20 (b) the right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) of this section; or

(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it; but nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—

(d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

30 (e) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

5 It is therefore the law that provides that the limitation period does not apply until
discovery of the fraud that is when the cause of action arises. The issue of exemption
from the law of limitation does not arise until discovery of the fraud and 12 years
thereafter. Thereafter, one may count 12 years from the time of accrual of the cause of
action in fraud and if the person does not file the action within 12 years, he can plead
10 exemption on any other ground such as imprisonment or other incapacity under Order
7 rules 6 of the Civil Procedure Rules. Order 7 rules 6 is a procedural rule while section
27 of the Limitation Act is the substantive law.

We have further considered the case of **Elizabeth Thorne v Heard and Marsh [1895]**
AC 495 that discusses the discovery of fraud be relied upon to take it case out of the
15 statute of limitation. Lord Davey at page 506 said:

"In my opinion, if fraud, or a non-discovery of fraud, is to be relied on to take a
case out of the Statute of Limitations, it must be the fraud of or in some way
imputable to the person who invokes the aid of the Statute of Limitations."

In this case, the first respondent was not responsible for any transaction and cannot be
20 considered a bona fide purchaser for value without notice. If anything his father was his
agent since he was the ultimate beneficiary and therefore the acts of his father are his
acts as his father acted on his behalf. It is his father who carried out transactions on the
suit property and therefore it is his father who can be considered on the issue of
whether he is a bona fide purchaser for value without notice of defect in title. In as much
25 as the father of the first respondent is not a registered proprietor, he testified about the
transaction and how he transferred the suit property to his son, the first respondent. The
first respondent as a donee is affected by the fraud if any, or bona fides of his father.
The question for consideration in my view is not only the registered proprietorship of
this suit property but also the fact that the appellant was a resident of the suit property.
30 Secondly, the predecessor in title of the first respondent was not in possession of the
suit property. The only question is whether the first respondent's father who was heard
in defence of the transaction was a bona fide purchaser for value without notice of any
defect in title. In the cases of **Hajji Abdu Nasser Katende v Vithaldas Haridas & Co**
Ltd, Court of Appeal Civil Appeal No. 84 of 2003, The court of Appeal held that a
35 bona fide purchaser is a person who (a) holds a certificate of title; (b) purchased the
property in good faith; (c) had no knowledge of the fraud; (d) purchased for valuable

5 consideration; (e) the vendors had apparent title; (f) purchased without notice of any fraud; and (g) was not party to the fraud.

Numerous other cases hold that a purchaser of land should inquire further than the bare legal registration of the proprietor to find out whether there are adverse claims on the land by establishing the terms of occupancy of occupants. In the Court of Appeal case of
10 **David Sejjaka Nalima v Rebecca Musoke; Court of Appeal Civil Appeal No. 12 of 1985** it was held that a bona fide purchaser for value is one without notice of fraud. The appellant was not a bona fide purchaser for value because he had imputed fraud from his advocate and had avoided discovering who the rightful owner of the land was. In
15 **Charles Lwanga v Xaverio Damulira; SCCA No.16 of 1992**, the Supreme Court held that the respondent could not be said to be a bona fide purchaser when he knew that the appellant was in possession of the suit house and did not inquire from him as to the position. Possession was notice to the respondent upon which he ought to have made the necessary inquiries. Finally in the case of **Uganda Posts & Telecommunications v A.K.P.M Lutaya; Supreme Court Civil Appeal No 36 of 1995**, it was held that a person
20 who conducts a perfunctory search of title to the land before purchase, takes it subject to the existing equitable interests on the land. Court further stated that land is not vegetables that one can buy from unknown vendors in the market. Consequently the 2nd defendant ought to have conducted a physical search on the suit land before purchasing it short of which it robbed the transaction of honesty and truthfulness hence
25 making it fraudulent.

We have particularly taken note of the finding of the learned trial judge at page 9 of the judgement in the following words:

30 "From the evidence on record, it is clear that the late Lwiiza at one time owned plot 358. When she bought the chunk of land in 1953, she settled on it and constructed the house. She registered her land and owned plot 351 to 360. The house she built occupied the small portions on both plot 358 and 360. Evidence on court record shows that both Lwiza and Lumu were registered on the same plot 358 within the same year using the same instrument number....

35 Upon evaluation of evidence on record, it is my considered view that the plaintiff's claim over the suit land ought to have been against Lumu to explain the circumstances under which he was registered on the suit land. Overtime the land changed hands from normal to the second defendant and then to the first

5 defendant. This suit was filed about 47 years later after it had changed hands from the late Lwiza to the current proprietor.

10 Further to the above holding, the learned trial judge held that this suit was barred by the law of limitation. Secondly, he held that the first defendant who is the first respondent to this appeal is currently in occupation of the property and in possession of a certificate of title which is in his names. Furthermore, he held that the certificate of title issued upon application to bring land under the RTA cannot be impeached except for fraud. He therefore held that the property in question did not form part of the estate of the late Lwiza. These findings of fact cannot be faulted. What is material is the fact that the learned trial judge found upon evaluation of the record that the alleged fraud was
15 discovered upon the death of the late Maria Nalongo Nanyonga Lwiza. Evidence adduced and the court record indicates that she passed away in 1998. Secondly the pleadings clearly indicate in paragraph 4 (d) that the beneficiaries commenced private investigations after the death of Lwiiza Malia Nalongo Nanyonga. The alleged fraud was discovered after the death and the facts leading the investigation are contained in the will which was made on 12 February 1996. The plaintiff's plaint was filed on 23rd of
20 September 2009. Letters of administration had been granted on 12 September 2002 to the current appellant.

Further evidence shows that the court admitted exhibit P5 and P6 which inter alia indicate that the appellants and the predecessor in title paid the rates to KCC for plots
25 358. DW1 admitted that the plot of the appellant was partly on the property bought from Nsamuzi Kasiga.

Furthermore, the learned trial judge did not consider the issue of conflicting registration. The person registered prior in time takes priority over one registered subsequently. This is provided for by section 48 of the Registration of Titles Act cap 230 laws of Uganda
30 which provides:

48. Instruments entitled to priority according to date of registration.

(1) Every instrument, excepting a transfer, presented for registration may be in duplicate and shall be registered in the order of and as from the time at which the instrument is produced for that purpose, and instruments purporting to affect
35 the same estate or interest shall, notwithstanding any actual or constructive

5 notice, be entitled to priority as between themselves according to the date of registration and not according to the date of the instrument.

(2) Upon the registration of any instrument not in duplicate, the registrar shall file and retain it in the office of titles, and upon the registration of any instrument in duplicate, the registrar shall file one original and shall deliver the other, hereafter
10 called the duplicate, to the person entitled to it."

The law is clear that the registration of the late Lwiiza was made in February 1961 had priority over the registration of Lumu in April 1961. However, Lumu subsequently allegedly transferred all that interest to one William Nsamuzi Kasiga and the primary question being whether Mr Musa Muyombya who purchased the property for his son
15 was a bona fide purchaser for value without notice of defect. The issue is whether the fraud attributable to Lumu can be imputed on the first respondent's benefactor.

In the premises, we conclude as follows:

- (a) The appellant was in occupation of this suit property even if the house constructed thereon was in part thereof from the 60s.
- 20 (b) The first respondent could only take the property subject to the equities of occupation by the appellant as Legal Representative of the estate of Lwiiza Nalongo Nanyonga.
- (c) Emmanuel B.S. Lumu was fraudulently registered on the suit land.
- (d) The appellants did not discover the fraud until after other persons claimed the
25 suit property and her suit in the High Court was not time barred.
- (e) The right of occupation by the appellant is not caught by the law of limitation.

On the first and third issues, it is the finding of this court on the first issue agreed upon for resolution of this appeal are firstly that there was fraud in the registration of the first respondents predecessor in title Mr. Lumu. The first respondent's father who is the
30 purchaser in question, bought from one Nsamuzi Kasiga who was the registered proprietor and DW1 testified that he had houses on the plot. This house was partly fence with a wall fence and iron sheets and a main gate was in place. He replaced the fence with a new one and the main gate with a new one. He never found the boundaries and only had boundaries ascertained in 2012. He opened the boundaries after a caveat
35 was lodged on the title. A caveat was lodged by the appellant and he was shown the appellant by the chairman. He also complained to the chairman. The plaintiff was

5 claiming 10 plots including the suit property. He got a surveyor who established that the
plaintiff's house was partly on plot 356 and partly on his plot. He filed an application in
the High Court for removal of caveat. In cross examination, DW1 Mr Musa Muyomba
testified that he carried out a search in the land office before purchasing the suit
property. The survey only carried out the opening of the boundaries. The fact that Mr
10 Nsamuzi Kasiga built houses on the property is corroborated by DW2 Badru Bwanika
Waladde. He testified in cross examination that they did not open boundaries when
Kasiga bought. However they opened the boundaries with DW1 Mr. Musa Muyomba.

This evidence was not challenged and it is hard to fault the first respondent's father Mr.
Musa Muyomba for buying from a person in occupation of the suit property. The
15 primary question seems to be the extent of the property because this suit cannot be
resolved on the basis of registered ownership only. It goes to the fact that the appellant
used to collect rent from tenants in the same area. What was the extent of her
occupancy? It is apparent that at this stage of the proceedings, the dispute cannot be
resolved on the basis of registered proprietorship but on the basis of the extent of land
20 owned by the late Lwiiza and occupied by the appellant who is the legal representative
of the estate. In the premises I will find that the first respondent's father was a bona fide
purchaser for value of the registered title only but he bought the property subject to the
right of occupancy of and the interest represented by the appellant as a legal
representative of the estate of the late Malia Lwiiza Nalongo Nanyonga.

25 In the premises, issue number 01 of whether the learned trial judge erred in law and fact
when you do not find that there was constructive notice of fraud in title on the part of
the father of the respondent has to be answered in the negative. The learned trial judge
cannot be faulted to the extent that his judgment only dealt with the registered
proprietorship and not the right of occupancy.

30 As far as issue number three is concerned, the issue is whether the trial judge erred in
law and fact when he decided that the father of the respondent was a bona fide
purchaser of the suit land. Again the learned trial judge cannot be faulted to the extent
that his holding only dealt with the registered proprietorship and not the right of
occupancy. The learned trial judge erred in law not to consider the right of occupancy of
35 the appellants.

In the premises the appellants appeals succeeds in part and this court holds that the
registered ownership of the first respondent is subject of the right of occupancy of the

5 appellant under section 29 of the Land Act and article 237 (8) of the Constitution of the Republic of Uganda and she enjoys security of occupancy of that portion which is yet to be ascertained.

10 The appeal having succeeded in part, the judgment of the court is set aside to the extent that it did not deal with the right of occupancy of the appellant and also the extent that the suit of the appellant in the High Court was time-barred. The rest of the appeal as challenges registered proprietorship of the first appellant is disallowed. Though the extent of the boundaries of occupancy of the appellant's interest is unascertained, the part of the appeal which challenges registered proprietorship is disallowed with no order as to costs. The suit is remitted to the Land Division of the High Court to establish the portion occupied by the appellant without reference to registered ownership and boundaries thereof as the basis for determining the right of occupancy of the appellant on the suit property as a Legal Representative of the Late Malia Lwiiza Nalongo Nanyonga. The High Court shall establish the occupancy of the appellant and estate she represents on the basis of section 29 of the Land Act.

20 The appellant is awarded half the costs of the appeal and that in the High court.

Dated at Kampala the 15th day of April 2019

Alfonse Owiny Dollo

Deputy Chief Justice

25 

Kenneth Kakuru

Justice of Appeal



Christopher Madrama Izama

Justice of Appeal

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