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

(Coram: Obura, Muhanguzi & Musota, JJA)

CIVIL APPEAL NUMBER 41 OF 2011

IRENE KALIBALA.....APPELLANT

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VERSUS

MICHAEL ROBERT MUGYENYI..... RESPONDENT

*(Appeal against judgment of the High Court sitting at Kampala in Civil Suit No.220 of 2005 before Lady Justice Anna Magezi dated 2/3/2010)*

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**JUDGEMENT OF EZEKIEL MUHANGUZI, JA**

**Introduction**

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This is an appeal against judgment of the High Court in Civil Suit No. 220 of 2005, where the Court held that the Respondent was a Bonafide purchaser for value and ordered for vacant possession of the suit property through eviction of the Appellant.

**Brief Background**

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The facts of this case as accepted by the trial judge are that the Respondent is a registered owner of the suit property on which the appellant had lodged a caveat on 15/7/2003. Both the Appellant and the Respondent claim to have purchased the same land from different persons at different times. The appellant was in possession of the property at the time of filing the suit.

30 In his plaint, the respondent alleged that he purchased the property in issue without any encumbrances and sought for an order of eviction, special and general damages and *mesne* profits.

35 The trial judge found in favour of the respondent and held that there was no spousal consent as required by the law and that the respondent had done all due diligence and was therefore registered lawfully on the certificate of title. She further held that the respondent was a bonafide purchaser for value of the property in issue and awarded an order for vacant possession, general and special damages and costs.

Being dissatisfied with the decision of the High Court, the appellant now appeals to this court on the following grounds.

- 40 ***"1. That the learned judge erred in law and fact in holding that the suit property was lawfully registered in the names of the respondent.***
- 2. The learned trial judge erred in law and fact when she held that at the time of registration into the names of the respondent, the suit property was free from any encumbrances.***
- 45 ***3. The learned judge erred in law and fact when she held that the respondent was a bonafide purchaser for value without notice of the appellant's interest in the suit property.***
- 4. That the learned trial judge erred in law and fact in holding that the appellant purchased the suit property without the consent of the vendor's spouse, one Othieno***
- 50 ***5. That the learned trial judge erred in law and fact in holding that the appellant had no locus(sic) to challenge the legitimacy of the respondent's title.***
- 55 ***6. That the learned trial judge erred in law and fact when she failed to properly evaluate the evidence on record and thereby reaching a wrong decision."***

The appellant asked court for orders that:-



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- “(a) Set aside the judgment of the High Court of Uganda and allow the appeal with costs to the Appellant.*
  - (b) A declaration that the appellant is the equitable owner/proprietor of the suit property comprised in Kyadondo Block 246 Plot 677 at Kyeitabya.*
  - (c) A declaration that the transfer or conveyance of the suit property to the respondent comprised in Kyadondo Block 246 Plot 677 at Kyeitabya was null and void having been procured unlawfully and fraudulently to the appellant’s interest.*
  - (d) An order cancelling the respondent from the register or his agents or anybody claiming title or right from the respondent and an order that the appellant be registered on the suit property as the owner thereof.”*

### **Representation**

70 At the hearing of this appeal learned Counsel Mr. Paul Muhimbura and Mr. Richard Okalany represented the appellant while the respondent was represented by learned counsel Ms Rebecca Nakiranda. The appellant and respondent were absent in court.

### **75 Submissions by the appellant**

Counsel argued grounds 1, 2 and 5 together and grounds 3, 4, and 6 separately.

80 In respect to grounds 1, 2, and 5, Mr. Muhimbura submitted that there was a caveat before the respondent transferred the suit property in his names. He pointed out that this was not disputed by the respondent himself since he testified that he came to know of the caveat when he took transfer forms to Toro Business Services.



85 Counsel argued that since the respondent was aware of the subsisting caveat at the time of transfer, he was not lawfully registered and the appellant is empowered by Section 176(c) of the Registration of Titles Act to challenge the registered proprietor in instances of fraud. Counsel relied on Section 141 of the RTA, ***Tropical Bank Ltd Vs Grace Were Muhwana, Supreme Court Civil Appeal No. 04 of 2011*** and submitted that any registration of a purchaser of land on a title with a  
90 caveat is unlawful/invalid where a caveator was not notified of the removal of the said caveat.

On ground 3, Counsel submitted that, the learned trial judge erred in holding that the respondent was a bonafide purchaser for value without notice since the respondent himself had knowledge of a  
95 subsisting caveat before transfer of title. Counsel relied on ***Makula International Limited V His eminence Cardinal Nsubuga & Anor, Court of Appeal Civil Appeal No. 4 Of 1981*** and submitted that court cannot sanction that which is illegal.

100 On ground 4, Counsel pointed out that one of the witnesses to the sale agreement between the appellant and one Othieno was the latter's wife, Lydia Othieno. According to him, this amounted to consent and thus valid as required by law. He argued that her signature as a witness was not challenged in court by the respondent.

105 In respect to ground 6, Counsel faulted the trial Judge for failing to properly evaluate the evidence on record to come to a just decision that the appellant's interest was duly registered and that her interest prohibited any dealing in the suit property without notice.

### Submission by the Respondent

110 Counsel argued grounds 1 and 2 together, grounds 3 and 5 together and grounds 4 and 6 separately.



115 On grounds 1 and 2, she submitted that at the time of transfer of title from Tom Kaaya to the respondent, the caveat had lapsed. Counsel pointed out that DW4, Mr. Dan Oundo a registrar of titles testified that the appellant's caveat was removed on 21/2/2005 and the instrument of transfer from Kaaya to the respondent was effected on 14/6/2005.

120 On grounds 3 and 5 Counsel submitted that the respondent was a bonafide purchaser for value without notice and the appellant has no locus to challenge the legitimacy of the respondent's title because by the time the transfer was registered, there was no subsisting caveat on the title. Counsel relied on ***Ndimwibo Sande & 3 ors V Allen Peace Ampaire***, Court of Appeal Civil Appeal No. 65 of 2011 to define a bonafide purchaser for value without notice.

125 In reply to ground 4, Counsel submitted that exhibit D2 which was presented in court as a sale agreement was not genuine because the name of Lydia Othieno was affixed without a signature and there was no evidence to prove that she was a wife to Othieno. She relied on Sections 46, 51 and 139 of the Registration of Titles Act.

130 On ground 6, Counsel submitted that, the learned Judge properly evaluated the evidence on record as required by law. She asked court to disallow the appeal and uphold the findings of the lower court. She prayed for costs both in this court and the court below.

### **Consideration of the appeal**

135 I am mindful of the duty of this court as a first appellate court. I am alive to the law that requires this court to reappraise the evidence and come up with its own inferences on all issues of law and facts. See Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and



the cases of *Pandya VR [1957] EA 336* and *Kifamunte Henry V Uganda, Supreme Court, Criminal Appeal No 10 of 1997*.

140 The appellant's case is that she entered into an agreement for sale of the suit property with Othieno. She took possession of the property and lodged a caveat on 15/7/2003 to protect her interest. The property in issue was by then registered in the names Tom Kaaya who was registered on 10/6/2003.

145 The respondent's case is that he purchased the said property from Tom Kaaya who was a registered proprietor. He had knowledge of a subsisting caveat but the same was vacated on 21/02/2005. The respondent alleges that the registration process was concluded on 14/6/2005 when the appellant's caveat had expired.

150 **Issue one**

The process of registering land lawfully involves some of the steps taken before the stage of registration. They include the following:

1. Site visit to the land
2. Land title search in the land Registry office
- 155 3. Negotiation of prices
4. Surveying the land to verify the size of the land
5. Preparation of the sale agreement
6. Payment of land rates
7. Transfer documents and consent to transfer
- 160 8. Property evaluation
9. Stamp duty and fees payments
10. Registration of transfer



165 From the evidence on record, the respondent testified at trial that, when a search was conducted at the land registry, he was informed that there was a caveat. DW4, Mr. Dan Oundo, a registrar of titles testified that where a caveat exists on a title and an application is made for its removal, a notice is issued to the caveator. However, such notice was not on the file. He further testified that at the time the respondent was registered, the appellant's caveat was still subsisting.

170 Section 106 of the Evidence Act provides that in civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person. The authenticity of the transfer to the respondent was a fact within the knowledge of the respondent but the fact that the appellant was notified upon removal of the caveat  
175 was not proved. The absence of this evidence and the fact that there was no possession/occupation of the land by the respondent after the purported transfer from Tom Kaaya irresistibly points to an inference of a fraudulent transfer.

180 Section 92 (2) Registration of Titles Act provides for the Form of transfer. It provides as follows;

185 ***“Upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument or which he or she is entitled or able to transfer or dispose of under any power, with all rights, powers and privileges belonging or appertaining thereto, shall pass to the transferee; and the transferee shall thereupon become the proprietor thereof, and while continuing as such shall be subject to and liable for all the same requirements and liabilities to which he or she would have been subject and liable if he or she had been the former proprietor or the original lessee or mortgagee.”***

190 Section 64(1) of the Registration of Titles Act provides as follows;



195 *“Notwithstanding the existence in any other person of any estate or interest, whether derived by grant or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in the case of fraud, hold the land or estate or interest in land subject to such incumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other incumbrances, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.”*

205 **Kerr on “*Fraud and Mistake*”,** 5<sup>th</sup> edition, Part 1, Page 1 defines fraud in the contemplation of a civil court of justice to include all acts, omissions and concealments which involve a breach of legal or by which an undue or unconscientiously advantage is taken of another. All surprise, trick cunning dissembling and other unfair way that is used to cheat anyone. Fraud in all cases implies a willful act, on the part of anyone, whereby  
210 another is sought to be deprived, by illegal or unequitable means of what he is entitled to. See: ***Fredrick JK Zaabwe V orient Bank and others, Supreme Court Civil Appeal No. 141 of 2006.*** In ***Uganda Posts and Telecommunications V A. K. P. M Lutaaya, Supreme Court Civil Appeal No. 36 of 1995,*** the Supreme Court *Inter-alia* held that if a  
215 person purchases an estate which he knows to be in occupation of another other than the vendor, he is bound by all the equities which the parties in such occupation may have in the land.

220 In this case, the appellant was in possession/occupation of the property in issue. Although the appellant does not have a legal right over the land, she has an equitable one. The respondent therefore holds/owns the property subject to the appellant’s interest.





Section 77 of the Registration of Titles Act provides for the effect of title obtained by fraud. It expressly provides as follows;

225 *“Any certificate of title, entry, removal of incumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud.”*

See: the judgment of Wambuzi, CJ (as he then was) in ***Kampala Bottlers V Damanico (U) Ltd***, *Supreme Court Civil Appeal No. 22 of 1992*.

230 The only instance where the transfers/ transferees can be protected is under Section 181 of the Registration of Titles Act, that is if they were bonafide purchasers for value without notice.

235 In order for one to seek protection of section 181 (supra) he/she must prove that he/she is a bona-fide purchaser. The purchaser must act in good faith, ought to have given due consideration and purchased the land without notice of the fraud. Such notice covers both actual knowledge and constructive notice of the fraud. A purchaser is said to have actual notice of rights of which he knows, and to have constructive notice of rights which he could be reasonably expected to discover. He will have imputed notice of any matter which his agent has  
240 or should have discovered.

245 In this case, Tom Kaaya transferred the suit land to the respondent (Michael Robert Mugenyi) for a consideration of Shs.49,500,000= Micheal’s interest was registered on 9/07/2005 under instrument No. KLA 261814 at 3:12 p.m. The appellant’s (Irene Kalibala) caveat was registered 15/7/2003 under instrument no. KLA 252256 at 10:28. The caveat is said to have lapsed on 21/2/2005.

I note that on the certificate of the property in issue the caveat was registered in the year 2003, the respondent’s interest registered on 2004 and the caveat expired/lapsed in the year 2005. This shows that



250 the caveat was still subsisting at the time the respondent was  
registered. I do not agree with the respondent's submission that  
registration was concluded 14/6/2005 because this date is not the one  
indicated on the title as the date when registration of the respondent  
was effected. This casts doubt on the truthfulness that the respondent  
255 is a bona-fide purchaser for value without notice. The record also  
shows that the respondent's agents had visited the premises and found  
it in occupation by the appellant's tenants.

Further, during the registration process, the respondent was informed  
of a subsisting caveat. However, it was not proved how this caveat was  
260 vacated since there is no notice of such on record. With all due respect,  
I fault the trial Judge for failure to evaluate the evidence on record and  
she thus reached wrong conclusions that the respondent was/is a bona-  
fide purchaser for value without notice and that he had lawfully  
registered the land in his name as there were no incumbrances on the  
265 said land.

Therefore grounds 1,2,3,5 and 6 succeed.

#### **Ground 4**

The appellant's contention in regard to this ground is that the learned  
Judge erred in law and fact when he held that the appellant purchased  
270 the suit property without the consent of the vendor's spouse. The  
relevant law on consent in land transaction is section 39 of the Land Act  
as amended by the Land (Amendment) Act of 2004, it provides as  
follows:

#### **"39. Restrictions on transfer of family land**

275 **(1) No person shall—**

**(a) sell, exchange, transfer, pledge, mortgage or lease any family land;**



**(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land; or**

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**(c) give away any family land, inter vivos, or enter into any other transaction in respect of family land; except with the prior consent of his or her spouse.**

**(2) The consent required under subsection (1) shall be in the manner prescribed by regulations made under this Act.**

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**(3) Subsection (1) of this section shall not apply to any transfer of land by the mortgagee in exercise of powers under the mortgage.**

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**(4) Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) of this section has not been complied with, the transaction shall be void but the purchaser shall have the right to claim from any person with whom he or she entered into the transaction, any money paid or any consideration given by him or her in respect of the transaction.**

**(5) A consent referred to in subsection (1) shall not be unreasonably withheld.**

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**(6) Where the consent required by subsection (1) is withheld, a person aggrieved by the withholding of the consent may appeal to the Land Tribunal and the Tribunal shall require the spouse to show cause why the spouse cannot give consent and may, in its discretion, dispense with the consent.**

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**(7) A spouse, not being the owner of the land to which subsection (1) applies, may lodge a caveat on the certificate of title, certificate of occupancy or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1).**

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**(8) Notwithstanding subsection (2) of section 149 of the Registration of Titles Act, a caveat referred to in subsection (7) shall not lapse while the caveator's right to security of occupancy subsists.**



*(9) For purposes of subsection (4) — “notice” means actual or constructive notice;*

*“purchaser” means a grantee, lessee, sub-lessee, assignee, mortgagee, chargee or other person who acquires an estate or an interest or right in the land.”*

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In this case, the appellant and Othieno entered into a land sale agreement. It was witnessed by Peter Watenga, Flora T. Kalyanga and Lydia Othieno. I agree with the appellant’s submission that Lydia Othieno’s signature on the sale agreement amounted to consent. There is no proof of a pending suit between Lydia Othieno and Irene Kalibala challenging the purchase of the property. The respondent did not challenge the genuineness of the signature at the trial. I therefore find that the signature on the sale agreement by Lydia Othieno amounts to a spousal consent. Ground 4 succeeds.

### **Ground 5**

As noted above, the appellant had an equitable interest in the land and therefore competent to challenge the legitimacy of the respondent’s title to protect her interest.

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### **Conclusion**

All the grounds of the appeal having succeeded, I would make the following orders:

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1. The judgment of the High Court is set aside
2. The appellant is declared an equitable owner of property in Kyandondo Block 246 Plot 677 at Kyeitabya.
3. The transfer of the suit property to the Respondent is declared null and void having been obtained by fraud.



4. The title granted to the respondent be cancelled and the appellant registered as the rightful owner of property in Kyandondo Block 246 Plot 677 at Kyeitabya.

5. Costs are awarded to the appellant both in this court and in the lower court.

Dated at Kampala this.....30<sup>th</sup>..... day .....April.....2019.



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**Ezekiel Muhanguzi**  
**JUSTICE OF APPEAL**

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

(Coram: Obura, Muhanguzi & Musota, JJA)

**CIVIL APPEAL NO. 41 OF 2011**

**IRENE KALIBALA.....APPELLANT**

**VERSUS**

**MICHAEL ROBERT MUGENYI.....RESPONDENT**

*(Appeal against the judgment of the High Court of Uganda, sitting at Kampala in HCCS No. 220 of 2005 before Lady Justice Anne Magezi, J dated 2/3/2010)*

**JUDGMENT OF HELLEN OBURA, JA**

I have read in draft the judgment prepared by my brother Ezekiel-Muhanguzi, JA and I agree with his findings and conclusion that the appeal be allowed with the proposed orders.

Dated at Kampala this 30<sup>th</sup> day of April 2019.



Hellen Obura

**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA**  
**CIVIL APPEAL NO. 41 OF 2011**

5 **IRENE KALIBALA ::: APPELLANT**

**VERSUS**

10 **MICHAEL ROBERT MUGENYI ::: RESPONDENT**

*(Arising from the judgment of the High Court sitting at Kampala in Civil Suit No. 220 of 2005 before Justice Anna Magezi)*

15 **CORAM:**

**HON. JUSTICE HELLEN OBURA, JA**

**HON. JUSTICE EZEKIEL MUHANGUZI, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

20 **JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA**

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Ezekiel Muhanguzi.

I agree that for the reasons he has given and the orders he has proposed, this appeal should succeed.

25 Dated at Kampala this.....<sup>30<sup>th</sup></sup>.....day of <sup>April</sup>.....2019

  
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30 Hon. Stephen Musota  
**JUSTICE OF APPEAL**