

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 222 OF 2013**

[Arising from the decision of Hon. Justice M. Chibita in Fort Portal High Court  
Civil Suit No 009 of 2009 delivered on 24<sup>th</sup> September, 2013]

**KELLEN MUHIMBISE.....APPELLANT**

**VERSUS**

**1. MUHAMMED ALI SALEH**

**2. CAIRO BANK INTERNATIONAL**

**3. GEORGE BEGUMISA**

**.....RESPONDENTS**

**CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**  
**HON. LADY JUSTICE MONICA MUGENYI, JA**  
**HON. MR. JUSTICE REMMY KASULE, Ag. JA**

**JUGDMENT OF THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**

**INTRODUCTION**

This is a first appeal from the decision of the Hon Mr. Justice Mike Chibita (as  
he then was) sitting at the High Court holden in Fort Portal.

## BACKGROUND TO THE APPEAL

The Appellant was, until the 31<sup>st</sup> day of December 2008 registered as proprietor of land comprised in LRV 3658 Folio 13 Plot 10 Lugard Road, Fort Portal, Kabarole District (“**the suit property**”).

5 The case for the Appellant is that she started residing in the suit property in 2005 as a tenant after which she bought it from the then registered owner M/s Begumisa Enterprises Limited.

Sometime in December 2008, a one Begumisa George stole her duplicate certificate of title and took it to the second Respondent bank ostensibly to settle  
10 the indebtedness which M/s Begumisa Enterprises Limited had with the said Bank.

On or about the 7<sup>th</sup> day of April 2009, the Appellant was served with a notice to vacate the premises and this is when she discovered that her title had been stolen.

15 When she conducted her searches at the land registry, she discovered that her name had been cancelled out as the registered proprietor and that of the second Respondent had been entered as the registered proprietor on 31<sup>st</sup> December 2008. Subsequently, it was also cancelled and that of the first Respondent was reflected on the title as the registered proprietor in March 2009.

20 Upon this discovery, the Appellant filed the Civil Suit No. 009 of 2009 (from which this Appeal arises) seeking among other reliefs a cancellation of the first Respondent’s name as registered proprietor of the suit land and a declaration that the second Respondent acquired interest in the suit property fraudulently



and sold it to the first Respondent through fraud. She also applied for an interim order and a temporary injunction to thwart the immediate threat of eviction she was facing at the time.

At the commencement of the suit, the third Defendant/Respondent filed a  
5 Written Statement of Defense but in the course of the proceedings, he wrote a letter to court admitting to the theft of the Appellant's title and the fraudulent transactions he did with the Respondents and accordingly deposited UGX 140,000,000/= to act as a refund of the funds allegedly paid by the first Respondent to the second Respondent as the purchase price of the suit  
10 premises.

On the 15<sup>th</sup> day of May 2013, Court entered a Judgment on admission of the fraud against the third Respondent.

The learned trial Judge however in the final result found that the first Respondent was a Bonafide Purchaser of the suit premises for value without  
15 notice of any fraud and that the first and second Respondents were not fraudulently registered as proprietors of the suit premises. Accordingly, the trial Judge ordered that the Appellant immediately vacates the suit premises, hence this Appeal.

The following are the grounds of Appeal: -

- 20 **1) The Learned Judge erred in law and in fact when he failed to properly evaluate the evidence on record hence reaching a wrong decision.**



2) The Learned Trial Judge erred both in law and in fact to base his decision on the fact that the witness of the 2<sup>nd</sup> Defendant/Respondent identified the Plaintiff in Court.

3) The Learned Trial Judge erred in law and in fact when he ignored a letter exhibited in Court by the 2<sup>nd</sup> Defendant/Respondent which showed that there was a deal between Begumisa George and the 1<sup>st</sup> Respondent in respect of the suit property.

4) The decision of the learned Trial Judge occasioned a miscarriage of Justice to the Appellant.

#### 10 Representations and Hearing.

When this appeal came up for hearing Mr Alfred Okello Oryem; Ms. Evelyn Akello and Mr. Bwiruka appeared for the first Respondent while Mr. Ivan Kyateeka appeared for the second Respondent. The Appellant and her counsel were absent. This Appeal was heard during the Covid 19 pandemic and directions had been given that the parties file written submissions and then appear to highlight them. The panel ruled that since the submissions of the Appellant were already on file that judgment would be given on notice.

#### Duty of a first Appellate Court.

This is a first appeal. The duty of a first appellate court was well detailed in the case of **Selle v Associated Motor Boat Co.** [1968] EA 123 where it was held that a first appeal: -

*"...is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always*



bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities  
5 materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270 followed) ...”

I shall follow these principles in determining this Appeal. I shall further take the same order in resolving the grounds as did the parties.

10 **Grounds 3 and 4: The learned trial Judge erred in law and fact when he ignored a letter exhibited in court by the second defendant/respondent which showed that there was a deal between Begumisa George and the 1<sup>st</sup> respondent in respect of the suit property.**

**And**

15 **The decision of the trial Judge occasioned a miscarriage of justice to the Appellant.**

### **Submissions of the Appellant.**

20 It is the case for the Appellant that the transaction involving the three Respondents amounts to nothing more than a “street deal” because the level of inquiries undertaken about the suit property before its purchase was inadequate and no reasonable buyer could have done that. Counsel for the Appellant submitted that in any case, the sale agreement between the second

Respondent bank and the first Respondent provided as a precondition that the purchaser had to inspect the property which did not happen.

Secondly, the documentation applied in this transaction fell short of what would be expected. This is because the debtor to the 2<sup>nd</sup> Respondent bank was not the third Respondent, Mr Begumisa George but rather M/s Begumisa Enterprises Ltd. However, there was no power of attorney from the Appellant exhibited that allowed M/s Begumisa Enterprises Ltd to use her title to offset its loan with the bank. Counsel further submitted that: -

10 *"...There should have been a corresponding resolution from Begumisa Enterprises Ltd resolving (1) to accept powers of attorney issued by the Appellant to use her title, (2) a resolution that the said title be presented to Cairo Bank and (3) a resolution appointing Mr. George Begumisa as the person to handle these matters on behalf of the company. No such resolution exists..."*

15 Counsel further argued that there was no nexus between the handover of the title deed of the suit land and the indebtedness to the bank of the third Respondent or the company in which he has shares.

Thirdly, the indebtedness was settled by the judgment on admission entered by court on 15<sup>th</sup> May 2013; and what remained was for the court to determine whether the first Respondent had notice of the fraud. Counsel for the Appellant submitted that there was unchallenged evidence from the first Respondent that she had never had any dealings with the second Respondent Bank. Counsel in particular submitted: -

25 *"... the 2<sup>nd</sup> Respondent only avers that the title for the suit property was presented by the 3<sup>rd</sup> Defendant/Respondent, the father of the Plaintiff/Appellant with the Plaintiff/Appellant's knowledge who transferred it to the 2<sup>nd</sup>*

*Defendant/Respondent to enable the 3<sup>rd</sup> Defendant/Respondent raise money to settle his indebtedness to the second Respondent (bank)...”*

However, there was no evidence to show that the third Respondent was indebted to the Bank. It is the case for the Appellant that the first Respondent was a party to the fraud admitted to by the third Respondent. Furthermore, the first Respondent took advantage of the fraudulent acts of the third Respondent to deprive the Appellant of her property and even offered a “cash reward (sic)” of Ug Shs 40,000,000/= to the Respondent as shown in Exhibit DE3 which he reneged on later. Counsel for the Appellant argued that Exhibit DE3 written on M/s Begumisa Enterprises headed paper and signed by Begumisa George was indicative of the following three things: -

“ ...

- (i) *That there was an arrangement between Mr. Begumisa (who confessed to have stolen the Appellants title) and the 1<sup>st</sup> Respondent to pay him Begumisa a whopping UGX 40,000,000/= separate from the official fees of 140,000,000/= the first Respondent paid Cairo Bank for the Appellant’s land. This was within the knowledge of Osama who according to the record was the Managing Director of the 2<sup>nd</sup> Respondent Bank*
- (ii) *Contrary to the testimony given on court record by DW2 Hedwig Gariyo that Mr. Begumisa owed money to the bank and that is why he presented the Appellants title, it is in fact Begumisa Limited which owed money to Cairo Bank. The 2<sup>nd</sup> Respondent.*
- (iii) *Begumisa Enterprises Ltd had mortgaged some other properties in its names to secure the loan from the second Respondent...”*

Finally, counsel for the Appellant submitted that the trial Court applied the wrong standard of proof to determine fraud. He argued that it was the duty of the Defendant/Respondents to prove that their transaction was *bonafide*.

However, at the trial Court the burden of proof to show that the first

5 Respondent was not a *bonafide* purchaser for value without notice was instead shifted onto Appellant.

### **Submissions of the Respondents.**

#### **First Respondent.**

I shall start with a review of the highlights of the submissions of counsel for  
10 the first Respondent.

Counsel for the first Respondent opposed the Appeal. He argued that the first Respondent was not aware of the fraud of the third Respondent and did not as a result take advantage of it.

It is the case for the first Respondent that he is a bona fide purchaser for value  
15 without notice of any fraud. Counsel for the first Respondent argued that the first Respondent dealt exclusively with the second Respondent bank in the purchase of the suit property. He further argued that the alleged fraud took place long before he had shown interest in the suit property; and therefore he was not privy to it. Counsel submitted that fraud should be proved at a  
20 standard slightly higher than that of a balance of probabilities. In this regard he referred Court to the decision of **Kampala Bottlers Ltd V Damanico (U) Ltd** CA No 22 of 1992 (SC).

Counsel for the first Respondent denied that his client had been negligent in not doing a due diligence on the suit property before its purchase. He



submitted that the first Respondent viewed the property documentation at the bank and even visited the property upon purchase but saw no sign of the Appellant. He further submitted that if there was anything wrong with the purchase his client would have revoked it and activated the dispute resolution clause in the sale agreement.

As to the allegation that there was a balance of Ug shs 40,000/= that the first Respondent had to pay to the third Respondent as stated in his Exhibit DE3, Counsel submitted that the said letter was written more than a year after the sale of the suit property. This was during the period of struggle to take possession.

### **Second Respondent.**

The second Respondent bank also opposed the Appeal.

Counsel for the second Respondent submitted that at the trial Court, the Appellant had pleaded (2<sup>nd</sup> Amended Pleint, page 97 of the Record of Appeal) paragraphs 4 (c) and 5 (e) that the first and second Respondents (then first and second defendants respectively) had obtained transfer of the suit property on the basis of forged documents and yet no forged documents were exhibited in court. This, the trial Judge properly pointed out in his Judgment. Counsel argued that the burden to prove the forgery under Section 101 of the Evidence Act lay with the Appellant. Counsel further argued that the Appellant had failed to apply to the Registrar of Titles for the alleged forged documents forcing the first Respondent to do so instead. Furthermore, the reference to not conducting a prior inspection of the suit property before sale does not in itself point to any act of fraud.

Counsel argued that the only evidence of collusion was between the third Respondent and the Appellant. The Appellant was a niece of the third Respondent and the two of them worked together to frustrate the first Respondent from taking possession of the suit property after the sale. This is  
5 evident from the letter from the third Respondent Exhibit DE3 that he resisted the eviction from the suit property.

Counsel further submitted that the title of the suit property in reality had not been stolen as alleged and that is why the Appellant never reported the alleged theft to the police.

10 Counsel for the second Respondent submitted that when the Appellant prayed for judgment on admission against the third Respondent (who had promised to deposit Ug shs 140,000,000/= in Court) this was just a clever ploy to buy back the suit property from the first Respondent which was not successful. In any event the letter of admission to the Registrar of the Court did not state  
15 that the fraudulent action also involved the second Respondent.

### **Findings and decision of Court.**

I have had the opportunity to read the pleadings and submissions of both Counsel for which I am grateful.

To my mind the main ground here is that the trial Judge ignored a letter  
20 exhibited in court (i.e. Exhibit DE3) by the second Defendant/Respondent which showed that there was a deal between Begumisa George and the first Respondent in respect of the suit property. The arguments however preferred by both counsel were cast in a much wider scope. It must be clear to parties on Appeal that they must stick to their pleadings or put differently their  
25 grounds of Appeal. Rule 86 (1) of the Rules of this Court provides: -

5 “...A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make...”

Therefore, the Court of Appeal is a correctional court and the Appellant must prepare and argue his/her Appeal within the meaning of Rule 86 (1) and not engage in a “fishing exercise”. I consequently shall address the grounds as filed and not be drawn into other matters not pleaded in the grounds.

10 The letter in question in ground number three reads as follows: -

“...

24/03/2010

Cairo International Bank

Kampala Road

15 Kampala

Dear sir,

**RE: BALANCE OF CREDIT FACILITIES EXTENDED TO US WORTH US \$**

20 **221,292**

On 16-04-2008, Begumisa Enterprises Ltd went into Receivership. Since then things have not been good. I would like to inform you that **all securities** mortgaged to Cairo Bank belong to Prince Sulaiman Walugembe Kakungulu. These securities belong to him even when they are in my names.

*In order to salvage these properties, I have decided to try and pay at least US\$5000 per month beginning with April 2010.*

*Kindly accept my deepest appreciation of having waited for me up to today. Thank you. Thank you again.*

5     **Fort Portal House Sale**

*This is to confirm that the buyer for this house owes me 40 million as he verbally confirmed to Mr. Osama. This is the reason why I have resisted eviction from the same. Let us combine effort to persuade him to pay either to the Cairo Bank or to me. After this payment we shall allow him peaceful occupation of his house.*

10     **Interest to the US\$221,292**

*Cairo Bank knows that I have been in Limbo since 16<sup>th</sup> April 2008. Even now, I am still, but with some little hope, I am trying to salvage those properties.*

*Kindly allow me to pay only this principle of US\$221,292.*

15     *Yours faithfully,*

***George Begumisa***

***MANAGING DIRECTOR***

***C.C Prince Sulaiman Walugembe***

*...”*

20     To my mind the ground suggests that the “deal” between the first Respondent and Begumisa George (the third Respondent) as detailed in Exhibit DE3 is

evidence that the first Respondent is not a bona fide purchaser for value without notice of any fraud during the purchase of the suit property. The point being flagged is that the third Respondent states that the first Respondent owes him some Ug Shs 40,000,000/= presumably for the suit property which the first Respondent had bought from the second Respondent Bank.

I have read the record of the trial Court and especially the submissions of counsel for the Plaintiff (now Appellant, at pages 32 to 37 of the record). Counsel for the then Plaintiff did not refer to Exhibit DE3 (which is now the subject of a ground of Appeal) at all and therefore did not rely on it. It is true that the trial Judge did not refer to Exhibit DE3. However, I wonder how the trial Judge could ignore what was not even relied upon in the first place? However, even on re-evaluation of the evidence as a whole I find Exhibit DE3 to be very problematic. Apparently none of the titles pledged in this transaction were in reality owned by M/s Begumisa Enterprises Ltd and or Begumisa George. This notwithstanding, the agreement of sale of the suit property is dated 19<sup>th</sup> February, 2009 whereas the said letter is written on the 24<sup>th</sup> March 2010 about a year later. The language therein is duplex and contradictory. The letter is written on behalf of M/s Begumisa Enterprises Ltd and yet it states "*...the buyer of this house owes me 40 million...*" and then ends the paragraph by stating "*after this payment we shall allow him peaceful occupation of this house...*" Clearly one finds difficulty distinguishing Begumisa George the Managing Director and Begumisa George the third Respondent. Furthermore, why would Begumisa George write a letter on behalf of M/s Begumisa Enterprises Ltd which according to the same letter went into Receivership in 2008; as if he is the Receiver of that company? In addition,

Begumisa George on 20<sup>th</sup> April 2012 (page 40 of the Record of Appeal) writes to the trial Court: -

“ ..

*The Registrar High Court*

5 *Fort Portal*

*Your Honour*

***Re: Civil Suit HCT-01-CV-CS-0009 of 2009; Kelen Muhimbise V  
Muhammad Ali Saleh, Cairo Bank international & Begumisa George.***

*Above refers*

10 *In the interest of the spirit of settlement of the above suit, I admit having fraudulently taken the plaintiff's title deed to the suit land which I gave to the second defendant, who eventually sold the same to the first defendant.*

*Your Honour I hereby refund Ug Shs 140,000,000/= which the first defendant paid for the land by depositing the same in Court.*

15 *I, also undertake to meet the taxed costs for all respective parties in the suit.*

*Yours faithfully*

*Begumisa George of P. O. Box 57 Fort Portal*

*Cc Nyote & Co Advocates*

*Cc Bwiruka, Kafuuzi Kaahwa & Co Advocates*

20 *Cc Kabega, Tumusiime & Co Advocates*

....”

This letter to Court is couched as if to resolve the entire dispute at the trial Court and even settle matters relating to costs. So where did the Ug Shs 40,000,000/= come from?

The evidence relating to the stolen title is also contradictory. At pages 16 to 19  
5 of the Record of Appeal, the Appellant (then as Plaintiff) testified at the trial Court. At page 18 the Appellant testified: -

*"...Begumisa George is my cousin and I have known him for a long time..."*

Earlier at page 17 of the Record of Appeal the Appellant testified: -

*"...Begumisa told me that **he took** the title and paid Shs 140,000,000/=..."*  
10 *(emphasis mine)*

Then at page 19 of the Record of Appeal the Appellant testified: -

*"...Begumisa confessed stealing the title. I **reported to the police**. I went to Kampala where my lawyer (sic). **I didn't report to police**. I came to court and left the matter to court..."* *(emphasis mine)*

15 All of the above when read with Exhibit DE3 leaves more unanswered questions on the side of the Appellant and third Respondent than does the first Respondent.

I therefore find that ground number 3 is not proved and is accordingly disallowed.

20 With regard to ground number 4 I am consequently unable find how the decision of the trial Judge occasioned any loss to the Appellant. Ground Number 4 is also disallowed.



**Ground No 2: The learned trial Judge erred both in law and fact to base his decision on the fact that the witness of the second defendant identified the plaintiff in court.**

### **Submissions of the Appellant**

- 5 It is the case for the Appellant that the trial Judge relied heavily on the testimony of Hedwig Gariyo (DW2) for the bank that she positively could identify the Appellant who she testified came with the third Respondent to the bank to bring the title of the suit property. Ms. Gariyo testified that the third defendant came with a lady whom the third defendant called his daughter.
- 10 However, the Appellant at the trial Court had testified that she had not had any dealings with the second Respondent bank and that the third Respondent was her cousin. Counsel for the Appellant referred to this as a “Dock identification” which a court should warn itself about. In this regard we were referred to the cases of **Julius S/o Justine & 4 Ors V The Republic** Criminal
- 15 Appeal No 155 of 2005 (CA)(TZ) and **Siyabulela Mfikili V The State** CC 56/01 (SA).

### **Submissions of the First Respondent**

The first Respondent in this matter left this ground to be argued by the second Respondent.

### **20 Submissions of the second Respondent**

Counsel for the second Respondent submitted that there was nothing in the Judgment of the trial Court to suggest that the Judge heavily relied on the identification of the Appellant by the official of the bank.





## Findings and Decision of Court

This ground rests on a matter of fact. The trial Judge at page 87 of the Record found as follows: -

5 *"...She (i.e. DW2 Hedwig Gariyo) positively identified the plaintiff as the person with whom the 3<sup>rd</sup> defendant came to the bank with. Her testimony was not contradicted by the either the 3<sup>rd</sup> Defendant or the Plaintiff..." (additions mine)*

It is true that the Appellant testified at the trial Court that she had never had any dealings with the second Defendant Bank nor that M/s Begumisa Enterprises Ltd was indebted to the bank (pages 17 & 18 of the Record of Appeal). Furthermore, that the only way her title ended up with the bank was because it was stolen by the third Respondent. The trial judge considered the versions of the Appellant and that of Hedwig Gariyo, DW2, and believed that of Hedwig Gariyo that the Appellant and the third Appellant went to the bank together and that the Appellant was aware of the transfer of the property to Cairo Bank since the papers were there. In this regard I find that indeed the trial Judge misevaluated the testimony of the Appellant at the trial Court. I am however unable to find that this error occasioned a miscarriage of justice notwithstanding that the trial Judge heavily relied on it to come to a final decision given my earlier findings in resolving grounds three and four; which findings I shall not repeat here.

I accordingly disallow ground number 2.

As to ground number one on re-evaluating the evidence, this is too general in nature and has nonetheless been addressed through the other grounds. I disallow it as well.

**Final Result**

This Appeal stands dismissed and the decision of the trial Court is upheld.

**Costs**

Costs are awarded to the first and second Respondents only.

5 **It is so Ordered.**

Dated at Kampala this ...<sup>23<sup>rd</sup></sup>..... day of July Sept..... 2021

10



**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**





THE REPUBLIC OF UGANDA

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

**CORAM: KIRYABWIRE, MUGENYI, JJA AND KASULE, AG. JA**

**CIVIL APPEAL NO. 222 OF 2013**

**BETWEEN**

**KELLEN MUHIMBISE ..... APPELLANT**

**AND**

**1. MUHAMMED ALI SALEH  
2. CAIRO BANK INTERNATIONAL  
3. GEORGE BEGUMISA ..... RESPONDENTS**

**(Appeal from the Judgment of the High Court of Uganda (Chibita, J) in Civil  
Suits No. 009 of 2013)**

**JUDGMENT OF MONICA K. MUGENYI, JA**

I have had the benefit of reading in draft the Judgment of my brother, Hon. Justice Kiryabwire, in this Appeal. I agree with the findings and conclusions arrived, and having nothing useful to add. Accordingly, I do respectfully abide the decision that the Appeal be dismissed with costs in the terms set out in the lead Judgment.

Dated and delivered at Kampala this <sup>23<sup>rd</sup></sup> day of <sup>Sept</sup>....., 2021.



Hon. Lady Justice Monica K. Mugenyi

**JUSTICE OF APPEAL**



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

10

**Civil Appeal No. 222 of 2013**

*((Arising from the decision of Hon. Justice M. Chibita in Fort Portal High Court Civil Suit N. 009 of 2009 delivered on 24<sup>th</sup> September, 2013)*

15 **Kellen Muhimbise ::: Appellant**

**Versus**

- 1. **Muhammed Sale Ali**
- 2. **Cairo Bank International Ltd**
- 3. **George Begumisa**

} ::::::::::::::: **Respondents**

20

**Coram: Hon. Mr Justice Geoffrey Kiryabwire, JA  
Hon. Lady Justice Monica Mugenyi, JA  
Hon. Mr. Remmy Kasule, Ag. JA**

25

**Judgment of Remmy Kasule, Ag. JA**

I have had the opportunity of reading through the lead Judgment of my brother Hon. Mr. Justice Geoffrey Kiryabwire, JA, I agree with his analysis of the facts of the case, the application of the law to those facts and the conclusions he draws.

I too support the final decision he arrives at that the Appeal be dismissed and the decision of the trial Court be upheld. I also agree that the costs of the Appeal be awarded to the first and second Respondents only.

Dated at Kampala this ..... day of **July, 2021.**

35

**Remmy Kasule  
Ag. Justice of Appeal**

20/07/2021