THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 087 OF 2017

JOSEPH KABUUZA BOSSA::APPELLANT

VERSUS

LAMECK MUKEEZE MUWANGA::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Mugenyi, J. (as she then was) dated the 30th day of September, 2014 in Civil Suit No. 499 of 2006)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

This appeal is from the decision of the High Court (Mugenyi, J (as she then was) ruling in favour of the respondent in a suit he filed there.

Background

The respondent's suit concerned a dispute over ownership of a piece of land situated at Komamboga in Kampala District. At the time of institution of the suit, the land had been subdivided into two separate pieces of land to wit, Plots 790 and 791 of Kyadondo Block 196. The appellant was the registered proprietor for Plot 790 while Ms. Esther Nasuna, who was sued jointly with the appellant, was the registered proprietor for Plot 791. The respondent's suit, inter alia, was for a declaratory order that the registration of the appellant and Ms. Nasuna had been procured by fraud with the intention of defeating his lawful equitable interest in that land, and that consequently the titles obtained from that fraudulent registration were liable to be cancelled by the High Court.

The respondent claimed that Plots 790 and 791 were carved out of Plot 225, a piece of land he had earlier purchased from its then registered proprietor, Ms. Jowelia Kulustina Nalubuga Nasanga, and for which he was the equitable

owner. This was because by agreement of 6th May, 1986, he had purchased Plot 225 measuring approximately 2 acres, and had shortly thereafter paid all agreed upon consideration. He had not been able to execute transfer forms and process a certificate of title so as to acquire legal title, because he was ordinarily resident in the United States. However, he stated that in 1995, he had taken possession of the suit land and carried out some developments thereon.

Noteworthy, is that between 1982 and 1995, the respondent was married to Ms. Esther Nasuna. It also transpired that the appellant was Ms. Nasuna's relative and had some knowledge of the couple's affairs. The respondent claimed that in 1995, without his authorization, Ms. Nasuna approached Ms. Jowelia and made fraudulent representations that persuaded Ms. Jowelia to execute transfer forms for the relevant land in Ms. Nasuna's favour. With the aid of those transfer forms, Ms. Nasuna was able to obtain registration as the proprietor of the interest that the respondent purchased from Ms. Jowelia. Subsequent to getting registered, Ms. Nasuna caused a subdivision of that land into plots 790 and 791, and she sold the former plot to the appellant. As stated earlier, the respondent complained that the transactions carried out after Ms. Nasuna acquired transfer forms from Ms. Jowelia including the alleged sale to the appellant were fraudulent. The respondent stated in evidence that at the time of Ms. Nasuna obtaining a certificate for the suit land in 1995, and at the time of her transferring part of the suit land to the appellant in about 2001, all the three parties were living in Denver-Colorado in the USA.

In the High Court, Ms. Nasuna was sued alongside the appellant and she filed a defence alleging that she had lawfully dealt with the land in issue, because the respondent had previously transferred his interest therein to her, as a gift inter vivos. She never called evidence to support these allegations. The appellant's defence was that he was a bonafide purchaser of the relevant land without notice of the appellant's equitable interests, if any.

In her judgment, the learned trial Judge found that the respondent never gave Ms. Nasuna the relevant land as a gift inter vivos and neither did he ever authorize Ms. Nasuna to deal with the land in the manner she did. The learned trial Judge concluded that Ms. Nasuna got registered as the proprietor of the relevant land through fraud by falsely purporting to have authorization from the respondent to deal with the land yet none had been given her.

With regard to the appellant, the learned trial Judge found on the evidence that the appellant was aware of Nasuna's fraud and therefore could not qualify as a bonafide purchaser for value without notice. The learned trial Judge made a declaratory order that the registration of the appellant and Nasuna as owners of Plots 791 and 790, respectively, was procured by fraud so as to defeat the equitable interest of the respondent. She ordered for cancellation of the relevant certificates of title for Plots 791 and 790 as issued to the appellant and Nasuna and also granted a permanent injunction restraining the duo from interfering with the respondent's possession and utilization of the suit land. The learned trial Judge also awarded the respondent general damages of Ug. Shs. 20,000,000/= with interest at 8% per annum from date of judgment until payment in full to be paid jointly and severally by Nasuna and the appellant, and the costs of the suit.

The appellant was dissatisfied with the judgment of the learned trial Judge and appealed to this Court. The grounds of appeal are as follows:

"1. **The learned trial Judge erred in law and fact in failing to come to a finding that the respondent did not hold or prove that he held or ever acquired any interest in the suit land capable of being enforced against the appellant.**

2. **The learned trial Judge erred in law and in fact when she failed to properly evaluate and scrutinize the evidence before her thereby coming to a wrong decision and occasioning a miscarriage of justice by:**

   (i) **Failing to consider and find that the grant of a gift inter vivos of land by the respondent to his wife, the appellant's predecessor in title was in respect of the suit land.**

(ii) **Holding that the house referred to in the grant by the respondent of a gift inter vivos to the appellant's predecessor in title was a completed house and was on another piece of land other than the suit land without visiting the locus in quo and without any factual evidence of the existence of that other land.**

(iii) **Failing to hold that the discrepancies and inconsistencies in the respondent's and his witnesses' evidence was not substantial, material and irreconcilable and pointed to deliberate untruthfulness on the part of the respondent (sic).**

3. **The learned trial Judge erred in law and fact when she misdirected herself in finding and holding that the appellant was registered as proprietor of the suit land through fraud because he was registered on 24th January, 2001 well before he purchased the suit land on 11th February, 2001 which was factually wrong, thereby coming to a wrong decision and occasioning a miscarriage of justice.**

4. **The learned trial Judge erred in law and fact in finding and holding that there was fraud on the part of the appellant and in ordering for the cancellation of his certificate of title on account thereof when –**

(i) **No fraud had been pleaded as against the appellant;**

(ii) **No evidence of fraud had been adduced against the appellant;**

(iii) **The acts of a third party were wrongly and without reasonable basis attributed to the appellant.**

5) **The learned trial Judge erred in law and in fact in finding and holding that possession of the suit land was with the respondent whereas the respondent had never been in possession thereof thereby coming to a wrong decision and occasioning a miscarriage of justice.**

6) **The learned trial Judge erred in law and fact when she failed to find and hold that the respondent's suit as against the appellant was time barred on account of the law of limitation."**

The appellant prayed that this Court allows the appeal with costs to the appellant.

The respondent opposed the appeal.

Representation

At the hearing, Mr. Ramathan Waiswa and Mr. Patrick Reagan Nyero, both learned counsel, jointly appeared for the appellant. The respondent was absent but his lawful attorney Mr. Serufusa Edward was present.

Written submissions filed for both parties are on record and have been considered in this judgment.

Appellant's submissions

Counsel for the appellant submitted on each ground separately.

Ground 1

Counsel submitted that there was insufficient evidence to prove the respondent's interest in the contested land and therefore the learned trial Judge's contrary conclusion was in error. Counsel pointed to several instances of the respondent's evidence which in his view were unsatisfactory in proving acquisition of the suit land by the respondent. There were issues with the witnesses to the land sale agreement between the respondent and Ms. Jowelia, while the respondent claimed that his brother one Salongo Mamuli Muwanga was a witness, Ms. Jowelia the vendor made no mention of that person as being present during the making of the sale agreement and instead stated that Mr. Charles Kiragga, the respondent's father in law was the one present during the signing of the agreement.

It was further submitted that there was confusion on whether the size of the suit land was 2 acres or 6 acres. The relevant land sale agreement indicated that the land was 6 acres, yet Ms. Jowelia the vendor gave evidence that the relevant land was 2 acres, and that the land sale agreement was also in respect of an additional 4 acres that belonged to Ms. Jowelia's grandmother, one Ms. Nagadya Teopista. In counsel's view, the confusion generated as to the exact size of the suit land put the appellant's interest in the suit land in doubt.

Counsel further submitted that any interest that the respondent had in the suit land was lost when he made a gift inter vivos of the suit land to Ms. Esther Nasuna. The appellant testifying as DW2 had adduced evidence to support the making of that gift to Ms. Nasuna. Therefore, having given out the suit land, the respondent could not claim ownership of the same.

It was also contended that some of the evidence relied on to prove the making of the relevant land sale agreement was untruthful and should not have been relied on by the learned trial Judge. Counsel singled out the evidence of PW3 who claimed to have been present during the making of the relevant land sale agreement and seen the witnesses although he was aged only 12 years at the time. PW3 had not signed the land sale agreement as a witness and therefore PW3 told lies to the Court about his presence at the time.

Further, counsel submitted that the respondent's evidence contained several inconsistencies that were aimed at misleading the trial Court and which ought to have led to rejection of that evidence. Counsel pointed out the inconsistencies on whether there was a single sale agreement made for 6 acres including Ms. Nagadya's land. PW2 claimed that there was a single agreement while, the respondent stated that there was a separate agreement with Ms. Nagadya. There was also a contradiction on whether PW2 the vendor signed an acknowledgment of receipt of the consideration for the sale of land. While PW2 stated that she signed the acknowledgment of receipt, there was evidence that she was unable to write and that another person one Nsubuga had signed the acknowledgment on her behalf. The respondent's evidence also contained contradictions on the person that had paid the consideration for the land sale to PW2. PW2 contended that the consideration was paid by Mr. Kiragga while the respondent stated that the consideration was paid by his brother Salongo Muwanga. Counsel further contended that there was a contradiction as to whether the transfer forms signed by PW2 were dated or not. The respondent testified that the PW2 had indicated a date of 6th May, 1986 on the forms whereas the appellant testified that the transfer forms contained no date.

Counsel further pointed out that there was a contradiction on how PW2 was able to sell 4 acres of land on behalf of her grandmother yet she did not have a power of attorney for that purpose. There was also a further contradiction on whether the house on the suit land was complete or incomplete. In parts of his evidence, the respondent testified that there was a complete house on the suit land in which he used to live, yet there was photographic evidence given by the appellant showing that the house on the suit land was incomplete.

Counsel contended that the above highlighted contradictions and disparities in the respondent's evidence pointed to deliberate lies intended to mislead the trial Court to believe that the respondent had an interest in the suit land whereas not, and that it was erroneous for the learned trial Judge to base on such unsatisfactory evidence to find in favour of the respondent.

Ground 2

Counsel submitted that the learned trial Judge erred in finding that the respondent had never given the suit land to Ms. Nasuna as a gift inter vivos. It was submitted that there was documentary evidence (Exhibit D1) written by the respondent, indicating that he bequeathed the suit land to Ms. Nasuna, then his wife, and consequently, Ms. Nasuna became owner of the suit land and had lawfully sold it to the appellant. Counsel pointed out that the respondent, while admitting that he wrote Exhibit D1, sought to qualify the document by stating that he meant to give out the house on the suit land and not the suit land, and that the land was for the benefit of his children and not for sale. However, counsel submitted that the said claims were not backed by evidence.

Furthermore, counsel pointed out that the learned trial Judge's finding, in agreement with the respondent's claims, that the house given to Ms. Nasuna was on another piece of land Plot 1001 or 1139, but he submitted that those claims were baseless and the learned trial Judge had erred to base her findings on them. In counsel's view, it was necessary for the learned trial Judge to make a visit to the locus to verify existence of Plot 1001 or 1139 as claimed by the respondent. He referred to the authority of **Yowasi**

Kabiguruka vs. Samuel Byarufu, Court of Appeal Civil Appeal No. 18 of 2008 (unreported) for the rationale for conducting locus visits.

It was further submitted that the learned trial Judge erred in finding that the property constituting the gift to Ms. Nasuna was of a complete house when there was no evidence to support that finding. Counsel contended that the house on the suit land was an incomplete house.

Ground 3

Counsel submitted that the learned trial Judge took an erroneous view of the evidence of the circumstances of the appellant's registration as proprietor of plot 790 and as a result came to a wrong conclusion that the appellant was aware of the purported fraud of Ms. Nasuna. While the learned trial Judge found that the appellant got registered as proprietor of Plot 790 before he completed paying the purchase price, the evidence showed otherwise. The appellant completed paying the purchase price on 11th February, 2001 but was registered as proprietor on 24th January, 2005.

Further, it was submitted that there was no evidence that the appellant had knowledge of Ms. Nasuna's fraud, save for allegations that the appellant was Ms. Nasuna's relative and that both were resident in Denver, USA, where the transaction for purchase took place. In counsel's view, mere existence of a blood relationship between two people involved in a land transaction cannot be regarded as conclusive of fraud.

Counsel further submitted that the evidence did not rule out the fact that the appellant was a bonafide purchaser of Plot 790 for value without notice, and the appellant's evidence actually supported his being a bonafide purchaser. The appellant purchased his interest from Ms. Nasuna in good faith and for consideration of US Dollars 5,000. He only found out about the respondent's interest in 2006 when he went to occupy the suit land. He was not aware of any illegal registration instigated by Ms. Nasuna. There was no reason for the appellant to doubt Ms. Nasuna's title as she had been the registered proprietor for over 6 years at the time she sold the suit land to him. In counsel's view the appellant qualified as a bonafide purchaser for value without notice, in terms articulated in the authority of **Ndimwibo and**

3 Others vs. Ampaire, Court of Appeal Civil Appeal No. 65 of 2011 (unreported), and that his claim as a bonafide purchaser established an absolute and unqualified defence to the respondent's suit.

Counsel concluded by submitting that the learned trial Judge's findings of fraud against the appellant were based on speculation, and that the learned trial Judge was wrong in concluding that the appellant was not a bonafide purchaser of Plot 790 for value without notice.

Ground 4

It was submitted that the respondent did not in his pleadings satisfactorily set out the allegations of fraud against the appellant and as such there could not be any findings of fraud against the appellant. Counsel referred to the respondent's pleadings where he only made allegations of fraud against Ms. Nasuna and the Registrar of titles but not the appellant. Counsel made reference to **Order 6 Rules 3** of the **Civil Procedure Rules S.I 71-1** which stipulates that in all cases in which the party pleading relies on any fraud, the particulars with dates shall be stated in the pleadings. For interpretation of that provision, counsel cited the following authorities; **Lawrence Musebeni Baguma vs. Namugala David and Another, High Court Civil Appeal No. 40 and 41 of 2010 (unreported)**; **Tifu Lukwago vs. Samwiri Kizza and Another, Supreme Court Civil Appeal No. 13 of 1996 quoting from B.E.A Timber Co. vs. Inder Singh Gill [1969] EA 463.**

Counsel contended that the respondent's pleadings did not set out any allegations of fraud against the appellant and therefore in the circumstances, the learned trial Judge's findings of fraud were misplaced.

Ground 5

It was submitted that the learned trial Judge's finding that the respondent was in possession of the suit land at the material time was erroneous as the evidence indicated otherwise. The respondent himself stated that he was resident in the United States, although in other parts of his evidence he indicated that there he had built an incomplete house on the suit land. On the other hand, the appellant's evidence was that there was a garden on the

suit land. In counsel's view, the uncertainty in evidence on this point required the learned trial Judge to conduct a locus visit but this was not done. The learned trial Judge ought to have found that the respondent's claims to possession of the suit land were not established.

Ground 6

No submissions were made on ground 6 and I take it that the ground was abandoned.

In view of his submissions, counsel urged this Court to allow grounds of appeal, set aside the decision of the learned trial Judge and substitute in its place an order dismissing the respondent's suit in the trial Court with costs of the appeal and in the Court below.

Respondent's submissions

The respondent was unable to retain the services of an advocate to file submissions on his behalf. However, written submissions were filed by his attorney Mr. Serufusa who is not an advocate.

In the submissions, Mr. Serufusa raised a preliminary objection to the appeal contending that the memorandum of appeal was filed out of time in contravention of the law and there was no application to extend time for filing the memorandum.

It was further submitted that the present appeal is rendered incompetent because the letter written on behalf of the appellant's advocates seeking for a certified copy of the trial proceedings was served on M/S Wameli & Co. Advocates on behalf of the respondent yet that firm did not have instructions to represent the appellant on appeal. Mr. Serufusa contended that the said letter was served on the wrong address contrary to the requirement to serve on the respondent under **Rule 78 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10**.

On the substance of the appeal, Mr. Serufusa argued each ground of appeal separately.

Ground 1

Mr. Serufusa supported the decision of the trial Court as in his view, it was based on the evidence on record showing that on 6th May, 1986, the respondent purchased 2 acres of land then comprised in Plot 225 Kyadondo Block 196 from its then registered proprietor Ms. Kulustina Nalubuga Nassanga Jowelia and took possession of the land, and remains in possession. Although he is ordinarily resident in the United States, the respondent usually occupies the suit land when he is in Uganda.

Ground 2

Mr. Serufusa supported the learned trial Judge's finding of fraud against the appellant. He pointed out that the appellant's predecessor in title Ms. Nasuna fraudulently obtained registration as proprietor of the suit land through fraud and suggested that the appellant was privy to this fraud which also involved officials of the Ministry of Lands. This is because the appellant was at all times aware that Ms. Nasuna, his paternal aunt had no interest in the suit land and could not therefore transfer any interest therein. Mr. Serufusa asserted that the respondent had sufficiently pleaded fraud against the appellant, and the respondent's evidence against the appellant was that the latter obtained registration through dishonesty.

As regards the submission that the house given to Ms. Nasuna was on the suit land, Mr. Serufusa submitted that the evidence indicated that the house given to Ms. Nasuna was on a different piece of land, Plot 1139.

In respect to the contention that the respondent gave the suit land as a gift intervivos to Ms. Nasuna, Mr. Serufusa submitted that the learned trial Judge appropriately handled the evidence on the point showing that Ms. Nasuna fraudulently obtained transfer forms for the suit land by lying to PW2 that she was acting on behalf of the appellant whereas not. He urged this Court not to interfere with the learned trial Judge's findings of fact on the point.

Ground 3

Mr. Serufusa submitted that the learned trial Judge's reference to 24th January, 2001 as the date of registration of the appellant as proprietor of

Plot 790 resulted from a typing error, and the actual date of registration was 24th January, 2005. Nonetheless, the learned trial Judge was justified to conclude on the evidence that the appellant obtained registration through fraud. The appellant's registration followed the fraudulent registration of Ms. Nasuna which was evidence that the appellant conspired with Ms. Nasuna. In Mr. Serufusa's view, a person caught with grabbed property is automatically complicit and becomes a grabber too, and that in the present case, the appellant was privy to Ms. Nasuna's fraud having aided and abetted her acts.

Ground 4

It was submitted that contrary to the appellant's contentions, the respondent sufficiently pleaded fraud in his pleadings.

Ground 5

Mr. Serufusa submitted that the respondent has at all material times been in possession of the suit land since purchasing it in 1986, and the learned trial Judge was right to find so. The trial Court was right not to conduct a locus visit as the appellant's counsel had not asked it to do so.

Mr. Serufusa concluded by praying that this Court dismisses the appeal with costs to the respondent.

Appellant's submissions in rejoinder

On the competence of the appeal, counsel submitted that the present appeal was duly filed in compliance with **Rule 83 (1)** and **(2)** of the **Rules of this Court**. The judgment of the lower Court was delivered on 30th September, 2014, a notice of appeal was filed on 7th October, 2014, and subsequently the appellant applied for a certified copy of the trial proceedings which were availed to him on 17th March, 2017. The appellant's memorandum of appeal was filed on 15th May, 2017 after 58 days which was within the acceptable timelines.

In further rejoinder, counsel pointed out that Mr. Serufusa had irregularly substituted himself for the respondent without obtaining leave of this Court under **Order 1 Rule 10 of the Civil Procedure Rules, S.I 71-1.**

Moreover, according to counsel, no powers of attorney were produced as evidence that Mr. Serufusa is the respondent's lawful attorney. The respondent was not at liberty to adduce any further evidence having not obtained leave to do so. In the circumstances, counsel urged this Court to find that Mr. Serufusa is not properly before this Court and to proceed as though the respondent did not file a response in this appeal.

In all other respects, counsel reiterated the submissions earlier made for the appellant.

Resolution of the Appeal

I have carefully studied the record, considered the submissions of counsel for both sides, and the law and authorities cited in support thereof. I have also considered other relevant law and authorities that were not cited.

On a first appeal, like the present one, this Court is expected to reappraise the evidence and come up with its own conclusions on all issues of law and fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10; Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported).** I shall bear the highlighted duty in mind as I deal with the respective grounds of appeal.

I have noted the appellant's contention that Mr. Serufusa, by filing written submissions in this matter, has unlawfully substituted himself for the respondent without obtaining leave of this Court. Counsel for the appellant also submitted that Mr. Serufusa did not have valid powers of attorney. It must be stated that at the hearing, Mr. Serufusa informed this Court that he was the respondent's duly appointed attorney. I am prepared to believe him if only to assist this Court to deal with this appeal on its merits, and to have some representations made for the respondent.

I will therefore deal with the appeal on its merits and will resolve each ground of appeal separately.

Ground 1

Ground 1 challenges the learned trial Judge's finding that the respondent had an interest in the disputed land at all, and it was submitted for the

appellant that there was insufficient evidence to prove the respondent's interest.

It will be noted that the respondent's pleadings in the trial Court disclosed that the respondent purchased land from Ms. Jowelia Nalubuga in 1986, and it was that land out of which the appellant's Plot 790 was carved. The respondent's claims were not contested in the respective pleadings of Ms. Esther Nasuna nor of the appellant. Ms. Nasuna accepted that the respondent had acquired the interest from Ms. Jowelia Nalubuga, but she pleaded that the respondent had transferred the interest to her. The appellant restricted himself to pleading that he acquired Plot 790 from Ms. Nasuna as a bonafide purchaser for value, without notice. The appellant never contested the fact of the respondent having purchased the suit land nor of Ms. Nasuna having derived her interests from the respondent. Moreover, the respondent's evidence clearly supported his claims of purchasing land from Ms. Jowelia Nalubuga.

Therefore, the appellant cannot, now on appeal, contest the respondent's interest having not done so in his pleadings, as that would amount to a departure from his pleadings. It is trite law that a party cannot be allowed to succeed on a case that he has not set up in his/her pleadings. **(See: Inter-Freight Forwarders (U) Ltd vs. East African Development Bank, Supreme Court Civil Appeal No. 33 of 1992 (unreported) (per Oder, JSC).** In my view, the arguments in support of ground 1 were made in vain, as this issue cannot succeed.

I would dismiss ground 1.

Ground 2

The learned trial Judge is criticized for finding that the respondent never made a grant of the suit land to Ms. Nasuna, as a gift intervivos. It must be noted that Ms. Nasuna who was sued alongside the appellant alleged in her pleadings that she had acquired the suit land as a gift from the appellant. She stated:

"The 2nd defendant (Ms. Nasuna) denies the allegations of fraud set out in the plaint and shall aver that the suit land was transferred into her names with the full indulgence and knowledge of the plaintiff at his behest."

Ms. Nasuna did not enter appearance to defend her claims. On the other hand, the respondent denied giving the suit land as a gift to Ms. Nasuna stating at page 63 of the record that he had never transferred the suit land to Ms. Nasuna or given her any consent to deal with the land by transfer. In cross examination, it was put to the respondent that he had by a document (Exhibit D1) dated 18th September, 1993 given the suit land to Ms. Nasuna, but he explained that he only gave out a house and not land. He further stated that the house in question was built on another piece of land (Plot 1001) and not the suit land. No other evidence was adduced to contradict the respondent's explanation. The failure of Ms. Nasuna to appear and substantiate on the alleged gift from the respondent was fatal to any allegations of the gift of the suit land. In my view, the appellant stating that he had seen the agreement by which the respondent gave the suit land to Ms. Nasuna was not sufficient to rebut the respondent's evidence that the gift granted to the appellant was on another piece of land. I cannot therefore fault the learned trial Judge for finding that there was insufficient evidence to prove the granting of the gift to Ms. Nasuna, as those findings were based on the evidence adduced by the parties.

I have also considered the appellant's submission that the learned trial Judge ought to have visited the suit land in order to get clarity on whether the house given to Nasuna was on the suit land or on another piece of land. As rightly submitted by counsel for the appellant, the rationale for visiting the locus was discussed in **Yowasi Kabiguruka vs. Samuel Byarufu, Court of Appeal Civil Appeal No. 18 of 2008 (unreported) (per Engwau, JA)** , where this Court making reference to the **Yeseri Waibi vs. Edisa Lusi Byandala [1982] 28** stated that the practice of visiting the *locus in quo* is to check on the evidence given by witnesses and not to fill gaps [in the witnesses' evidence] for then the [judicial officer] may run the risk of making himself a witness in the case.

In **William Mukasa v Uganda [1964] 1 EA 698**, it was stated:

"...the purpose of a view [locus visit] by a court should not be to gather information extraneous to the evidence already given by witnesses on oath and prejudicial to an accused person, nor to fill up gaps in the evidence, nor to clear doubts entertained as to the guilt of an accused person.

A view of a locus in quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observations should be a substitute for evidence."

Although the above authority was a criminal matter, in my view, the rationale of visiting the *locus in quo* articulated therein also applies in civil matters. However, it must be noted that the trial Court was not asked to conduct a locus visit to clarify the matters surrounding the location of the house that was given to Ms. Nasuna. The appellant as the defendant called two witnesses, and thereafter closed his case. In those circumstances, it would be unfair to criticize the trial Court for failing to visit the locus.

All in all, I find that from the evidence, the learned trial Judge's findings that the respondent did not grant the suit land as a gift to Ms. Nasuna was justified.

Ground 2 of the appeal must also fail.

Ground 3

This ground as framed challenges the learned trial Judge's finding of fact that the appellant was registered as the proprietor of Plot 790 on 24th January, 2001 yet he purchased the suit land at a later date on 11th February, 2001, and the learned trial Judge's decision to base on that finding to impute fraud in the registration of the appellant as proprietor of Plot 790. However, I noted that in his submissions, counsel for the appellant argued other points which are not related to the ground as framed. I will say more on this later.

According to Exhibit P3, a certificate of title for Plot 790, the appellant became registered as proprietor on 24th January, 2005. The appellant alleged

to have purchased the suit land on 11th February, 2001 as stated in an agreement of February 11th 2001 (Exhibit DID1). Thus, the statement in the learned trial Judge's judgment at page 372 of the record that the appellant got registered before purchasing his interest in the suit land was factually incorrect.

I stated earlier that the appellant argued some points which cannot be covered under ground 3 as framed. These arguments related to whether the appellant had knowledge of Ms. Nasuna's fraud and whether the appellant was a bonafide purchaser for value without notice. I would decline to consider them because they cannot arise in ground 3.

Nonetheless, for the reasons stated earlier, I would allow ground 3.

Ground 4

It was contended that the learned trial Judge erred in finding that the appellant obtained his registration as proprietor of Plot 790 through fraud. Three points were argued in support of this contention and I will consider each point in turn. First it was contended that the respondent did not set out the particulars of fraud against the appellant and as such it could be deemed that no fraud was pleaded against the appellant. For the respondent, it was contended that fraud had been sufficiently pleaded against the appellant.

It must be stated that in all cases in which the party pleading relies on any fraud, the particulars of the fraud with dates shall be stated in the pleadings. **(See: Order 6 Rule 3 of the Civil Procedure Rules, S.I 71-1).** In **Tifu Lukwago and Another vs. Kizza and Another, Supreme Court Civil Appeal No. 13 of 1996,** Mulenga, JSC stated:

> **"...when a claim is based on fraud, then it must be specifically so stated in the pleading, setting out particulars of fraud; and those particulars must be strictly proved. However, what is required in pleading is to disclose clearly, the fact which, if proved strictly, would constitute fraud."**

The respondent claimed at paragraph 8 of his plaint that the appellant obtained registration as proprietor of Plot 790 through fraud, but set out no particulars to substantiate the claims of fraud against the appellant. The

respondent's evidence focused on establishing fraud as and against Ms. Nasuna who had transferred the suit land to the appellant, but did not drive home any fraud against the appellant. The respondent's evidence was that Ms. Nasuna fraudulently caused Ms. Jowelia Nalubuga to transfer the suit land before the former subsequently transferred the suit land to the appellant.

I would therefore accept the submissions of counsel for the appellant that the respondent's pleadings did not sufficiently disclose any fraud against the appellant. Having critically reviewed the judgment of the learned trial Judge, I formed the impression that she deemed fraud to have been proven against the appellant because Ms. Nasuna, who transferred her interest in the suit land to the appellant was guilty of fraud. For example, at page 373 of her judgment, the learned trial Judge stated:

> **"It seems to me, then, that this Court is faced with a case where the plaintiff alleges fraud against a third defendant that inexplicably derived title from a second defendant [Ms. Nasuna] whose interest was registered with proven fraud. This is clearly borne out in Exhibit P3. Section 176 (c) of the RTA provides that an action may lie and be substantiated against a person such as the third appellant who derives legal title from a person registered through fraud. Accordingly, having found that the third defendant [appellant] derived his title in Plot 790 from the second defendant, and given the fact that the second defendant has been adjudged herein to have registered her interest in plot 544 through fraud; it does follow that the reversionary interest acquired by the third defendant was similarly tainted with fraud. I so hold."**

In other words, the learned trial Judge found that because Ms. Nasuna who transferred an interest in Plot 790 to the appellant was guilty of fraud, then for that reason per se, the appellant's interest as transferee was also tainted with fraud. This cannot be correct because fraud had to be pleaded and proven against the appellant individually. But this was not done by the respondent. Accordingly, the appellant's defence that he was a bonafide purchaser of his interest in Plot 790 for value and without notice of the respondent's interest was not destroyed. The learned trial Judge therefore erred in rejecting it.

In my view, ground 4 of the appeal must succeed.

The manner of resolution of ground 4 means that the appellant was a bonafide purchaser of Plot 790 for value without notice of the respondent's interest in that land. It also means that his certificate of title, which was conclusive of his ownership of the suit land was not impeached by the respondent, as there was no evidence to prove that the appellant got registered through fraud. It is therefore unnecessary to consider grounds 5 and 6, because the manner of resolution of ground 4 disposes of the appeal.

Therefore, I would allow the appeal, set aside the judgment of the learned trial Judge against the appellant, and replace it with an order dismissing the respondent's suit in the trial Court against the appellant. I would also order that the respondent pays the appellant's costs of this appeal and those of the proceedings in the Court below.

As Bamugemereire and Musota, JJA agree, the Court unanimously allows the appeal and enters judgment for the appellant on terms as stated in this judgment.

It is so ordered.

Dated at Kampala this ..... 19th ..... day of..... April .....2022.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 87 OF 2017

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JOSEPH BOSSA KABUZA :::::::::::::::::::::::::::::: APPELLANT

VERSUS

LAMECK MUKEEZE MUWANGA:::::::::::::::::::: RESPONDENT

JUDGMENT OF CATHERINE BAMUGEMEREIRE, JA

I have had the privilege of reading the draft opinion of my sister Elizabeth Musoke JA. I agree with the reasoning, decision and orders made.

19-4-2022

Catherine Bamugemereire

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 087 OF 2017

(Arising from the Judgment of Justice Mugenyi, J in High Court Civil Suit No. 499 of 2006)

JOSEPH KABUUZA BOSSA :::::::::::::::::::::::::: APPELLANT

VERSUS

LAMECK MUKEESE MUWANGA :::::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Hon. Justice Elizabeth Musoke, JA.

I agree that the appeal be allowed for the reasons she has given and the respondent's suit at the trial court be dismissed against the appellant. As stated in the lead judgment, Mr. Serufusa substituted himself for the respondent as duly appointed attorney without Powers of Attorney. A Power of Attorney is a document that grants authority of the Principal to an agent to act on behalf of an agent. Such authority must be granted by deed. Under Section 146 of the Registration of Titles Act, it is only a registered proprietor of land who

can give a power of attorney to another in respect of the land. Mr. Serufusa claims to have a power of attorney granted by the respondent to act on his behalf, however, no such instrument has been exhibited on record. The only evidence available is the statement of Mr. Serufusa informing court that he was the respondent's duly appointed attorney.

From the evidence on record, Mr. Serufusa (PW3) appears to have been in direct conduct of the matters involving the suit land right from purchase. He caveated the suit land after the transfer to the 2nd defendant and also filed the suit from which this appeal arises in the High Court. I therefore agree with the decision of my sister, Hon. Justice Elizabeth Musoke, JA to believe the evidence of Mr. Serufusa so as to deal with the appeal on merit.

With regard to ground 2, the purpose of visiting *locus in quo* is to clarify on evidence already given in court. It is for purposes of the parties and witnesses to clarify on special features, to confirm boundaries and neighbors to the disputed land, to show whatever developments either party may have put up on the disputed land, and any other matters relevant to the case. However, if the trial court finds/or is satisfied that the evidence given in court is enough, then he or she may not visit the *locus in quo*. Evidence at the *locus in quo* cannot be a substitute for evidence already given in court. It can only supplement. See **Practice Direction No. 1 of 2007**

It should therefore be noted that visiting *locus in quo* is not mandatory. It depends on the circumstances of each case and in this

case, the learned trial Judge was not tasked to conduct a *locus in quo* visit after the appellant called only two witnesses and closed the case.

All in all, I agree with the analysis, conclusions and orders proposed by my sister, Hon. Justice Elizabeth Musoke, JA in the lead judgment.

Dated this 19th day of April 2022

Stephen Musota

JUSTICE OF APPEAL