

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT
KAMPALA
CIVIL APPEALS No.307 of 2018**

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**CORAM: Hon. Lady Justice Catherine Bamugemereire JA
Hon. Mr. Justice Stephen Musota JA
Hon. Lady Justice Irene Mulyagonja JA**

**PATRICK MUKASA :::::::::::::::::::: APPELLANTS
VERSUS**

10 **DOUGLAS ANDREW KANYIKE :::::::::: RESPONDENT**
*(Arising out of the Decree and Judgment of Andrew Bashaija
J. in Civil Suit No.3 of 2010, in the High Court of Uganda (Land
Division) at Kampala, delivered on the 31st day of August 2018)*

15 **JUDGMENT OF CATHERINE BAMUGEMEREIRE JA**

The brief facts of this case were that a civil suit was filed upon the cancellation of the appellant, Patrick Mukasa's name off the Mailo Register for land comprised in Kyaddondo Block 216, Plot 455 land at Bbuye Kigoowa on account of fraud whereupon a permanent injunction was issued restraining him from the land. The appellant preferred an appeal against this decision on the following grounds:

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1. That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record there by arriving at a wrong conclusion which occasioned a miscarriage of justice to the Appellant.
 2. That the learned trial Judge erred in law and fact when he found that the respondent was irregularly and wrongfully cancelled from the certificate of title of the suit land ignoring the fact that he... no interest having bought land from persons none (*sic*) other than the administrators of the estate.
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3. That the learned trial Judge erred in fact when he found that the late Naume Nankya died in 1998 and not 1981.
4. That the trial Judge erred in fact when he found that the respondent is the lawful occupant on the suit land.
5. That the learned trial Judge erred in law and fact when he held that the respondent regularly acquired the suit land from the previous registered proprietor and or even bought any interest.
6. That the learned trial Judge erred in law and fact when he held that the Appellant was not a bona fide purchaser for value without notice of the suit land.
7. That the learned trial Judge erred in law and fact when he found that the appellant obtained registration of the suit land in his names fraudulently.

Representation

The appellant was represented by Stelah Busingye Co. Advocates while the respondent was represented by Mr. Kenneth Henry Damba of M/S Niwagaba Advocates & Solicitors. By consent counsel relied on written submissions which were adopted by this court.

Before I delve into the submissions of both counsel regarding the grounds of appeal, I would like to start by acknowledging them for the written submissions and the authorities provided to this court brought on time. I have taken both your submissions and your authorities into consideration in this appeal. I thank you. I shall however not deny, that I was a little apprehensive about **the phrasing of Ground No. 2** which I find inaccurate, confusing and grammatically incomprehensible. I note that the inclusion and the use of (**none** other than') altered the meaning of the

ground materially. I therefore find that if the words 'none other than' are excluded from the who sentence there will be clarity and the ground will become more discernible.

Appellant's submissions

5 Counsel for the appellant argued Grounds No.1, No.2 and No.3 together. He made the case that the respondent received no interest in the land having bought land from persons that had no interest; neither registered nor non-registered. Faulting the trial Judge counsel contended that
10 had the trial Judge considered the corroborated evidence adduced by the appellant DW1 and DW2 Kalemba Peter it would have led to the conclusion that Nankya died on 13th March 1981, well before the transaction in question. Regarding Grounds No.4 and No.5, counsel argued that the
15 respondent did not acquire good title since the transferors had no title to pass. He submitted that no one can give better title than he himself possesses; Lord Denning in **Bishopsgate Motor Finance v Transport Brakes (1949) 1 ALLER 37.**

20 In respect to Ground No. 6 counsel for the appellant submitted that he was a *bona fide* purchaser for value without notice. Counsel therefore argued that the trial Judge did not properly evaluate the evidence on the file and urged the court to allow the appeal with costs.

25 Respondent's submissions

Counsel for the respondent contended that the Commissioner Land Registration had no power to cancel the

respondent's name on the title let alone without notice. Counsel submitted that indefeasibility of title was only impeachable on account of fraud which had to be specifically pleaded and argued. Regarding Grounds No.5, 5 No.6 and No. 7, counsel invited this court to agree with the learned trial Judge that the appellant was not a *bona fide* purchaser for value without notice since he was aware of the respondent's possession of property. Counsel for the respondent prayed for the dismissal of the appeal with 10 costs.

Consideration of the Appeal

This is a first appeal. It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny 15 and reappraisal before coming to its own conclusion see **Father Nanensio Begumisa and three Others v Eric Tiberaga SCCA 17of 2000**. This court makes due allowance for the fact that it has neither seen nor heard the witnesses and therefore will draw its own inference and come to its 20 own conclusions. See **Lovinsa Nankya v Nsibambi [1980] HCB 81) and R v Pandya 1957 EA 336**. I warn myself of the requirement to bear in mind the above mentioned principles.

I shall handle Grounds No. 1, No. 2 and No.3 together:

- 25 1. That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record there by arriving at a wrong conclusion which occasioned a miscarriage of justice to the Appellant.

2. That the learned trial Judge erred in law and fact when he held/found that the respondent was irregularly and wrongfully cancelled from the certificate of title of the suit land ignoring the fact that he bought no interest having bought land from persons none other than the administrators of the estate.
3. That the learned trial Judge erred in fact when he found that the late Naume Nankya died in 1998 and not 1981.

This appeal is premised on three issues; the first was that the cancellation of title from the names of the respondent was not justified since he bought no interest having bought land from third parties who could not have passed a genuine title to him. Secondly it was argued that the cancellation was in accordance with section 91 of the Land Act and finally that the respondent paid no attention to and therefore neglected or refused the cancellation notice leading to changes being made on the register. The respondent, on the other hand, contended that the Commissioner Land Registration had no power to cancel the respondents name on the title on account of fraud since fraud had not been specifically pleaded and proven and insisted that no notice was issued to the respondent before the cancellation.

An examination and review of the whole judgment proves that the learned trial Judge found and quite rightly in my view, that the evidence clearly demonstrated that the Commissioner of Land Registration did not notify the respondent prior to altering the register a fact which was a flagrant contravention of the law and procedure stipulated under S.91(8) Land Act Cap227. He further held that by

failing to comply with the stipulations of the law at the time of amending the register, the commissioner for land registration acted illegally and irregularly and as such the decision must be set aside *ex debito justitiae*.

5 I have carefully examined the record of the trial court and reviewed the evidence available and having done so, I agree that the trial Judge correctly evaluated the evidence which led him to conclude that the Commissioner of Land Registration unlawfully and illegally cancelled the name of
10 the respondent from the land title. The cancellation of the title by the Commissioner Land Registration was premised on allegations that Elijah Serubiri and Eric Mukasa had been found guilty and convicted in **Criminal Case No. 523 of 2001** for offences of **Forgery of a Land Title and Uttering**
15 **False Documents** cases related the same land. I carefully reviewed the record of the appeal and found that at the time Naomi Nankya passed on she had signed transfer forms for Serubiri and Mukasa. It was on the basis of the signed transfers that land was transferred from Naomi Nankya to
20 Douglas Kanyike. I also discovered from the High Court record of Appeal in the criminal matter that the persons who sold the respondent the land were acquitted of all charges. It was not enough that they were acquitted on appeal. It was more important to note that the criminal charges were
25 malicious since the persons who accused them, particularly their aunt, Jane Nanfuka, a sister of the late Naomi Nankya had ulterior motives of grabbing the land which had been

passed to the two young men and using an LC official by the names Peter Kayemba. PW2 stated that this Chairman committed many land frauds in the Kigowa area of Ntinda and eventually run away from the area. The evidence of
5 DW1 Nanfuka does not portray her as a truthful person. This is because having buried her sister Naomi Nankya, and with knowledge that there was no death certificate, Nanfuka stealthily processed letters of the Administration. It was a finding of the trial court and it is indeed my finding that just
10 before the letters were issued a short death certificate was hurriedly procured. The death certificate had erroneous dates. It is a fact that Nanfuka used the letters of Administration and the short death certificate to purportedly bring criminal charges against her nephews.
15 Indeed if the Commissioner Land Registration had paid careful attention to the unique facts and evidence in this case, she would have given the respondents a fair hearing. The decision to cancel their title was hasty and not based on fact.

20 **The question of fraud**

It was a fundamental error on the part of the Commissioner Land Registration for her not to notify the respondents prior to cancelling the name of Naomi Nankya from the register. This amounted to a serious breach justifying civil action by
25 the parties. I have examined in detail the special powers and exercise of the powers by the Commissioner for Land

Registration as provided for under Section 91 of land Act (as amended by Land Amendment) Act No.1 of 2004.

Notedly, fraud is a grave allegation over which the Commissioner land Registration has no powers under S 91
5 (2a) of the Land Act the Commissioner is not bound by any rules of evidence. Persons suspecting fraud are required to revert to the High Court for appropriate remedies.

Section 59 of the Registration of Titles Act provides for the indefeasibility of a certificate of title only impeachable on
10 account of fraud. It is therefore a general principle of law that a person whose name appears on title is presumed to be the registered proprietor and they have indefeasibility of title and the only exception to this rule is fraud.

It is important to acknowledge the changes in the law and
15 the recent position of the Supreme Court in **Hilda Wilson Namusoke & 3 Ors v Owalla's Home Investment Trust (E.A) Limited SCCA No. 15 of 2017** regarding the powers of the Commissioner Land Administration regarding the area of fraud in land transactions. Before the introduction of
20 section 91 of the Land Act (1998) As Amended, the position of the law was that under s.59 of the RTA as amended, where the Registrar of Titles, upon proof of fraud or mistake, found that a tile was wrongfully granted, he/she could cancel such certificate and re-issue the same in the
25 name of the person deprived of the land by the said fraud or mistake. See **Edward Rurangaranga v Mbarara Municipal Council SCCA No. 10 of 1996**. While indeed **Rurangaranga**

may have been departed from it should be noted that the Justices in **Edward Rurangaranga** were careful to note that although a certificate of title is conclusive proof of ownership where fraud or mistake were found, it was not
5 sufficient for a party to waive the certificate of the title to the court as ultimate proof of ownership. Indeed the introduction of s.91 of the land act provides a platform for articulation of these exceptions to s. 59 of the RTA. It would have been neater if they were in one law. It is worth
10 mentioning that in **Hilda Wilson Namusoke & 3 Ors v Owalla's Home Investment Trust (E.A) Limited SCCA No. 15 of 2017** the Supreme Court clarified the current position of the law as regards jurisdiction where fraud is specifically pleaded and proven. The current position of the law re-
15 enforces the powers of the Registrar under s.91 of the Land Act. S.91 of the Land Acts stipulates as follows:

91. Special powers of Registrar.

(1) Subject to the Registration of Titles Act, the registrar shall, without referring a matter to a court or a district land tribunal,
20 have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise.

(2) The registrar shall, where a certificate of title or
25 instrument –

1. (a) is issued in error;
 2. (b) contains a misdescription of land or boundaries;
 3. (c) contains an entry or endorsement made in error;
 4. (d) contains an illegal endorsement;
 - 30 5. (e) is illegally or wrongfully obtained; or
 6. (f) is illegally or wrongfully retained,
- call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party.

The Supreme Court acknowledged that the Registrar could
the cancel a certificate of title if it was issued by mistake,
contained errors in description and endorsement and if it
contained illegalities in endorsement or in the way it was
5 obtained or retained. It is noted that the same court ruled
on fraud as a ground within the remit of the Registrar to
adjudicate without referring a matter to a court. Whereas it
noted that fraud was an illegality, the court set apart fraud
as an illegality requiring a more critical level of review. It
10 remains good law that where fraud is alleged, the Registrar
of titles ceases to have jurisdiction. Allegations of fraud are
the province of the High court. Persons with cases of fraud
on title have recourse in the High Court and to succeed
fraud must be specifically pleaded and specifically proven.

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In **A.K. Detergents Ltd v G.M. Combine (U) Ltd (1999)**
KALR 536 Court held that;

20 *“Allegations of fraud are quite serious in nature and
require to be specifically pleaded and proved before a
Court of law beyond a mere balance of probability
through not necessarily beyond reasonable doubt.”*

Besides, if there had been sufficient evidence of fraud, which
there is not in the instant facts, the Commissioner Land
25 Registration would still not have jurisdiction to cancel the
title of the respondent. Likewise, the Commissioner would
have no powers under s.91 of the Land Act to hear
complaints in which fraud was imputed. In spite of all the
facts and the law the Commissioner proceeded to cancel the

respondent's name in the circumstances of the alleged fraud. Regarding powers of the Registrar under s.59, s. 69 and s. 176(c) of the Registration Titles Act; read together with s.91 of the Land Act the Commissioner's role does not
5 extend to circumstances of fraud. This court therefore cannot but agree with the trial Judge that the Commissioner Land Registration went beyond his or her statutory powers.

My understanding of **Zebiya Ndagire V Leo Kasujja (1994)**
10 **HCB 153** cited by counsel of the appellant is that the court interprets the word, "directed" in regard to cancellation of title.

15 *"The word directed clearly means in circumstances of fraud the Commissioner is directed to cancel out the name of the party in circumstances of fraud and not deciding upon himself as he does not have powers to do so without the direction of court"*

In regard to whether the trial Judge erred in fact when he
20 found that the late Naume Nankya died in 1998 and not 1981, this court finds that the trial Judge properly evaluated the evidence of PW2 Elijah Serubiri, PW3 Jackson Tinkamanyire all residents of the area where the land in question was situated and attended the burial of Naume
25 Nankya which evidence was corroborated with that of the respondent.

Given the above resolution Grounds No. 1, No. 2 and No.3 of thi appeal must fail.

Grounds No. 4, No. 5, No. 6 and No. 7 will be handled together one ground.

4. That the trial Judge erred in fact when he found that the respondent is the lawful occupant on the suit land.
- 5 5. That the learned trial Judge erred in law and fact when he held that the respondent regularly acquired the suit land from the previous registered proprietor and or even bought any interest.
- 10 6. That the learned trial Judge erred in law and fact when he held that the Appellant was not a bonafide purchaser for value without notice of the suit land.
- 15 7. That the learned trial Judge erred in law and fact when he found that the appellant obtained registration of the suit land in his names fraudulently.

In of Fredrick Zaabwe vs. Orient Bank & Others SCCA No.4 of 2006 the supreme court defines fraud as.

20 *"The intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her legal right. It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives, and it is intended to deceive another so that*
25 *he or she shall act upon it to his or her legal injury."*

To every general rule, lies an exception and the exception to a fraudulent transaction is a *bona fide* purchase for value without notice. The appellant submitted that they were the
30 *bona fide* purchasers for value without notice and that the trial Judge erred in law when he held otherwise. While the appellant claimed to be a *bona fide* purchaser it is on court record that the appellant indeed had notice of the encumbrance on the land before purchase.

In David Sejjaka Nalima v Rebecca Musoke CACA No.12 of 1985 this court held that.

5 *"A bonafide purchaser is one who at the time of purchase was acting in good faith, fully paid the legally recognized value and had his or her interest registered. It is a legal interest acquired without notice of any fraud and in good faith. The purchase must have been without intent to defeat any interest in the land. The purchaser must have acquired interest by the purchase for legally recognized value and a donee of a gift is not a purchaser for value, so he is not protected by the law."*

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15 I have carefully studied the authorities supplied by the both counsel and would like to thank each of them for the time taken to research and provide this court with authorities. I however would like to point out that under different circumstances and given a separate set of facts, I would

20 agree with the principle espoused by Lord Denning in the Bishopsgate case, when he expounded the *nemo dat quod non habet* rule which is to the effect that, no one can pass a better title than he himself possesses. The reasoning of Lord Denning was thus, 'in the development of our law, two

25 principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first

30 principle has held sway for a long time, but it has been

modified by the common law itself and by statute so as to meet the needs of our own times.' Sadly, on this occasion I wish to depart from the interpretation of this important principle. Indeed in regard to the matter now before us, the

5 **Bishopsgate** case (supra) is distinguishable both in fact and in law.

The appellant in this case was steeped deep in the shady dealings surrounding this case. The *nemo dat quod non*

10 *habet* rule which is to the effect that, no one can pass a better title than he himself possesses, applied to the appellant. His seller could not pass a better title to him than what he had. He was therefore not a *bona fide* purchaser for value without notice. As a result, I do not find reason to fault the

15 learned trial Judge when he drew the conclusion that the appellant admitted to knowing of the respondent's interest in the suit land and that he apparently used that knowledge to collude with DW3 to buy the land with the attendant risks and therefore cannot be a *bona fide* purchaser for value

20 without notice. I carefully reviewed **Exhibit P.14**, the sale agreement, between the appellant and Jane Nanfuka . This agreement clearly proves that the appellant had notice of the interests of the respondent in the suit land.

The agreement precisely named the respondent as the

25 person with interest in the contested land. I find that the appellant did not do due diligence before purchasing the land from Nanfuka. Besides, the visible developments on

the land ought to have sent warning bells to the appellant but he seemed to have ignored the red flags. The appellant had a duty to inquire from the occupants regarding their ownership and interests.

5 Given the preponderance of the evidence in favour of the respondents, and without be-labouring the point further, I find that the appellant in this case was steeped deep in the shady dealings surroundings this case. The *nemo dat quod non habet* rule which is to the effect that, no one can pass a better title than he himself possesses, applies to the
10 appellant. His seller could not pass a better title to him than what he had. He had none and passed none. Consequently, the trial Judge was justified when he found that the appellant was not a *bona fide* purchaser for value without
15 notice.

All the grounds of the appeal having failed the appeal is dismissed. Costs are awarded to the respondent in this court and in the court below.

Dated at Kampala this ... 15th day of ... Feb 2022

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CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEALS NO. 307 OF 2018

(Arising from the Judgment of Justice Bashaija, J in High Court Civil Suit No. 03 of 2010)

PATRICK MUKASA ::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

DOUGLAS ANDREW KANYIKE ::::::::::::::::::::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

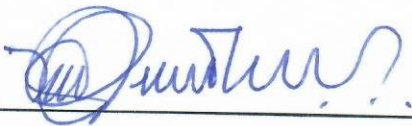
HON. JUSTICE IRENE MULYAGONJA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

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

I agree that the appellant was not a bonafide purchaser for value without notice. This appeal has no merit and ought to be dismissed with costs to the respondent.

Dated this 15th day of Feb 2022



Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram; Bamugemereire, Musota, Mulyagonja, JJA)
CIVIL APPEAL NO. 307 OF 2018

PATRICK MUKASA.....APPELLANT

VERSUS

DOUGLAS ANDREW KANYIKE.....RESPONDENT


*(Arising from the judgment of Andrew Bashaija J, delivered on 31st
August, 2018)*

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Catherine Bamugemereire, JA.

I agree that the appeal should be dismissed with costs to the respondent, for the reasons that she has set out in her judgment.

Dated at Kampala this^{15th} day of^{Feb} 2022


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Irene Mulyagonja
Justice of Appeal/Constitutional Court