THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 195 OF 2017

(Arising from High Court Civil Suit No. 078 of 2011)

DR. DAVID KAGGWA :: APPELLANT

VERSUS

AUDREY MUSIIMENTA :::::::::::::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

This is a first appeal against the judgment and orders of Hon. Justice Eva K. Luswata in Civil Suit No. 078 of 2011.

Background

The respondent sued one Emily Migisha, John Sekindi, John Junior Sekindi, the Commissioner Land Registration and the appellant as the 4th defendant for recovery of land comprised in Kyadondo Block 221 Plot 772 at Nalyako and sought an eviction order against the fourth defendant, now appellant, who had taken possession of the suit property. The respondent's claim was that in 2002, she borrowed

money from Emily Migisa and as collateral, she surrendered her duplicate certificate of title for the suit land together with a signed transfer form. On payment in full, she requested that the 1st defendant destroys the transfer forms and return the Duplicate certificate of title to her sister Grace Musinguzi. In 2009 when the respondent returned to Uganda, she discovered that there were ongoing constructions on the suit land by the appellant's agents. The respondent challenged the transfer of the property to the names of the 1st and 3rd defendants in the High Court original civil suit and subsequent sale to the appellant. The learned trial Judge found that the transaction between the respondent and Emily Migisa was one of money lending and not a sale and declared the appellant a trespasser on the suit land and ordered that he vacates the suit land within 14 days.

The appellant, was dissatisfied with the decision of the learned trial Judge and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and fact when she failed to evaluate the entire evidence on record, compromised the law on admissibility of documentary evidence, and burden and standard of proof imposed on the respondent, thereby arriving at the following conclusions that;
    a) Having found that there was no evidence of a loan transaction, the learned trial Judge erred in law and in fact when she turned around and concluded that the transaction

between the respondent and Ms. Emily Migisa was one of money lending and not sale and transfer of land.

b) The respondent presented herself as the most consistent and honest witness, despite her failure to adduce cogent evidence to prove that the transaction between her and Ms. Emily Migisa was one of money lending and not sale and transfer of land.

2. The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and apply the correct legal principles thereby arriving at the following conclusions that;

a) The appellant was not a *bonafide* purchaser for value without notice of the suit land.

b) The appellant did not acquire any interest in the suit land that can be protected at law.

3. That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and came to a wrong conclusion that the appellant's entry on the suit property was a result of a series of fraudulent acts by Emily Migisa and John Sekindi that the appellant knew or ought to have had knowledge of.

4. The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and came to the wrong conclusion that the appellant was a trespasser on the suit property.

5. The learned trial Judge erred in law and fact when she made orders for payment of general damages in excessive sums against the appellant, despite the absence of any prayer and cogent evidence for the same by the respondent against the appellant.
6. The learned trial Judge erred in law and fact when she made orders for payment of costs against the appellant.

Appearances

At the hearing of the appeal, Mr. Joseph Kyazze appeared for the appellant while Mr. Paul Rutisya appeared for the respondent.

Appellant's submissions

Counsel for the appellant submitted that the learned trial Judge failed to appreciate the principles applicable to P1D6 and admitted it as an exhibit yet it was never tendered in as such and the reasons advanced were not in tandem with the law. A proper evaluation of the evidence and the law applicable would have led the trial Judge to a conclusion that the respondent did not prove that the alleged transaction between her and Ms. Emily was one of money lending and not a sale and transfer of land. P1D6 was not properly admitted into evidence and should not have been relied on.

Counsel argued that the principle that a witness whose evidence by itself or with others is grossly tainted with grave contradictions or inconsistencies unless satisfactorily explained, their evidence may be rejected. That the appellant claimed that in 2002, she borrowed

4,000,000/= (four million) from the 1st defendant and in her witness statement, she stated to have borrowed the money in 2001. That the respondent had not pleaded that Emily was in the business of money lending where transactions in form of a loan would be concluded by execution of transfer and deposit of title. Counsel submitted that the respondent was bound by her pleadings and could not be allowed to lead evidence which was inconsistent with her pleadings. That the respondent's evidence was tainted with grave inconsistencies and contradictions thus pointing to material falsehoods.

Counsel further submitted that the cardinal principle of the statute is that the register is everything and except on account of fraud on the part of the person dealing with the registered proprietor, such person has an indefeasible title against the entire world. The law considers a purchaser fraudulent if at the time of purchase, the purchaser did not inspect the property to ascertain its status. It was incumbent on the respondent to adduce evidence linking the appellant to the alleged fraud. The appellant acquired the land by purchase from the then registered proprietors in 2008, completed payment and was given a Duplicate Certificate of Title.

Counsel argued that in 2008 when the appellant acquired the suit property, the respondent had ceased to be the registered proprietor. The law requires fraud or knowledge thereof to be specifically pleaded and proved not only against the transferor but also against the transferee. In addition, counsel argued that the respondent did not

plead general damages against the appellant in the plaint and did not produce any evidence on general damages against the appellant.

Respondent's submissions

Counsel for the respondent submitted that the evidence of the respondent sufficiently proved that the agreement made between the respondent and Emily was a lending agreement and not a sale agreement. The respondent stated that in December 2002, she borrowed money worth 4,000,000/= from the 1st defendant, Emily Migisa, to facilitate her travel to the United States of America. The learned trial Judge relied on the cogent evidence of the respondent as against the appellant and defendants' evidence which was tainted with inconsistencies.

Counsel relied on Section 92 of the Evidence Act on Parole evidence and submitted that the exceptions to parole evidence rule are in instances of fraud, intimidation and illegality. The trial Judge disregarded the transfer instrument marked PD16 which had been relied on by the 1st and 2nd defendants to prove the alleged sale. Counsel argued that the general principle is that there is a distinction between exhibits and articles marked for identification but the principle does not apply where parties rely on a document in their pleadings. That the learned trial Judge rightly observed that the transfer document being a photocopy, was only for identification and not admitted as evidence.

Counsel further submitted that the appellant was not a *bonafide* purchaser for value without notice of the suit land. Counsel relied on the case of **Katende V Haridas and Company Limited 2008 2 EA 173** which cited with approval **Hannington Njuki V William Nyanzi** in which it was held that any person who puts up a defence of being a *bonafide* purchaser has the burden of proof to adduce evidence that establishes him being a *bonafide* purchaser for value without notice. Such a person has to prove that he holds a certificate of title, he purchased the property in good faith, he had no knowledge of the fraud, he purchased for valuable consideration, the vendors had apparent valid title, he purchased without notice of any fraud and did not take part in the fraud.

Counsel further relied on the decision in **Ndimwibo Sande and ors Vs Allen Peace Ampaire Court of Appeal Civil Appeal No. 65 of 2011** in which it was held that the doctrine of *bonafide* purchaser for value without notice is a statutory defence available only to the person registered as a proprietor under the RTA. That the learned trial Judge evaluated the evidence and addressed her mind to the law and held that the appellant's behavior in failing to inquire into the 2nd defendant's actions can only amount to a fraudulent behavior. According to the certificate of title, the appellant is not the registered proprietor and the 2nd defendant could not pass good title to the appellant and the appellant was therefore a trespasser.

With regard to general damages, counsel submitted that general damages are at the discretion of the court and are intended to place

the injured party in the same position in monetary terms he would have been had the act complained of not taken place.

Consideration of the appeal

I am mindful that this is a first appeal and as such, the law enjoins this court to review and re-evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on the matter. This duty is recognized in **Rule 30 (1) (a)** of the Rules of this Court which enacts that;

> *30. Power to reappraise evidence and to take additional evidence.*
>
> *(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*
>
> *(a) reappraise the evidence and draw inferences of fact; and*
>
> *(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*

The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. I have borne these principles in mind in resolving this appeal.

Ground 1

Ground one faults the learned trial Judge for finding that the transaction between the respondent and Emily Migisa was one of money lending and not sale of land.

The respondent averred in her witness statement that she borrowed shs. 4,000,000/= from the 1st defendant, one Emily Migisa, when she needed to travel to the United States of America. She stated that she paid back the loan with interest in the sum of 2,735 USD which she wired from the USA into the account of one Peter Katende, the son to Emily Migisa.

For the appellant, who derived ownership from Emily Migisa, was the evidence of Emily Migisa who testified that she entered into a sale agreement with the respondent at a consideration of UG. Shs. 6,000,000/= and the respondent executed a transfer form and handed over the certificate of title of the suit property to her. There was neither a sale agreement to prove the alleged sale and neither a loan agreement to prove the evidence of the respondent. The respondent's evidence was that she repaid the loan through Katende and requested Emily to destroy the instrument which she did not do. Instead, she transferred the suit property into her names and the 3rd defendant, the respondent's son (a minor), allegedly for the benefit of the respondent's son.

There was a discrepancy at the trial court on whether the 2nd defendant procured registration as John Junior Sekindi and not John Lwalanda. Emily Migisa and John Sekindi insisted that the 2nd

purchaser on the transfer form is Sekindi John, an adult and father to the 3rd defendant who is a minor and son to Sekindi John. Emily Migisa testified that both her son and her grandson go by the same names. During cross examination, she testified that her son is the one known as Junior and not her grandson. The 2nd transferee in the transfer form is named as John Junior Sekindi. The respondent's testimony was that Emily intimated to her that she had transferred the title into her names and the name of John Junior Sekindi to safeguard the interest of the minor.

The respondent produced the birth certificate of the minor with the name John Junior Sekindi born on 20th October 2000 in Chicago Illinois. Throughout the evidence at the trial court, the 2nd defendant, who appears on the transfer form consistently referred to himself as John Lwalanda Sekindi, Lwalanda John or Lwalanda J. The sale agreement between the 1st and 2nd defendants and the appellant referred to the 2nd defendant as Lwalanda J.

The learned trial Judge found on page 12 of her judgment that;

> *"The plaintiff's testimony is that the 1st defendant advised her that she transferred the suit property into the 3rd defendant's name becomes of much relevance here and when I weigh the odds, it is the more credible evidence since she admitted filling in parts of the transfer. She took the opportunity to include the 3rd defendant in the transfer and 2nd defendant then signed as second transferee. Having found that the 1st defendant gave false testimony on this material aspect I would have no reason to*

believe her testimony on the equally important aspect that the transaction was a loan and in this, I am supported by authority..."

I find no reason to differ from the finding of the leaned trial Judge. Proof of the 2nd defendants' name was clear from the sale agreement to the appellant and through his testimony, he referred to himself as John Lwalanda Sekindi and Lwalanda J. He therefore cannot have been John Junior Sekindi like the 1st defendant, Emily Migisa, wanted this court to believe. This piece of evidence corroborates the testimony of the respondent and that of her sister Grace Mubangizi that the 1st defendant stated to have included the name of the 3rd defendant, John Junior Sekindi, to safeguard the rights of the child who was a minor.

Whereas it is the correct position of the law that documents admitted as exhibits and those marked for identification are treated differently, the transfer form in the present case was also one of the documents relied on by the parties in their pleadings and their respective evidence. The decision in **Uganda Breweries Ltd Vs Uganda Railways Corporation (2002) E.A 634** persuaded the learned trial Judge to admit P1D8 and P1D9. In that case, the Supreme Court had this to say;

"It is, indeed, correct that the learned trial judge relied on the police accident report in finding that the accident occurred in the manner described by the respondent's D.W.1. I have already set out in the judgment how the learned trial judge did so. The case

of Situma v Regina (supra) states the general principle of law that there is distinction of that between exhibits and articles marked for identification. The term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. That general principle, in my view, does not apply to the police accident report and sketch plan in the instant case because the manner in which the parties here relied on the two documents in their pleadings; referred to them in their respective appellant's evidence and in the closing. address of the learned Counsel at the trial were all on the apparent assumption that the documents in question were admitted in evidence. In my view, the parties are deemed to have accepted the police accident report and the sketch plan as evidence. The provisions of section 56 of the Evidence Act apply to the instant case. In circumstances my view is that learned trial judge rightly relied on the two documents in arriving to his decision to prefer the evidence of DW1 to that of PW1 regarding how the accident occurred. Ground 2 (iii) of the appeal must, therefore, fail."

The transfer form was therefore properly relied on by the learned trial Judge. The respondent having adduced reliable evidence that the name on the title was that of her son, which corroborates the evidence of the respondent that Emily intimated to her that she registered John Junior Sekindi on the title to protect his interest. The 1st defendant's evidence on the other hand was contradictory in this regard and the learned trial Judge accordingly outweighed it as against the respondent's evidence. The law on inconsistencies and

contradictions is well stated that when they are major, such contradictions lead to the evidence of the witness being rejected. I find no reason to disagree with the learned trial Judge's finding that the transaction of December 2001 between the respondent and Emily Migisa, the 1st defendant was one of money lending.

Ground one accordingly fails.

Grounds 2, 3 and 4

Grounds 2, 3 and 4 fault the learned trial Judge for having found that the appellant was not a *bonafide* purchaser, a trespasser who did not acquire an interest protected by law.

In the case of **Katende -vs- Haridar & Company Ltd (2008) 2 E A 173,** the Court of Appeal of Uganda stated what amounts to a *bonafide* purchaser for value without notice in real property as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. The core issue that is mostly addressed in this doctrine is whether an innocent purchaser for value can acquire a good title over a parcel of land from a person who had fraudulently acquired title over the land and thereby defeat the claim by the original owner of the proposed issue.

In the case of **Katende Vs Haridas & Company Limited 2008 E.A 173** which quoted with approval **Hannington Njuki -vs- William Nyanzi High Court civil suit number 434 of 1996** it was held that

for a purchaser to successfully rely on the *bonafide* doctrine he must prove the following:

1. He holds a Certificate of title
2. He purchased the property in good faith
3. He had no knowledge of the fraud
4. The vendors had apparent valid title
5. He purchased without notice of any fraud
6. He was not party to any fraud

I reiterate that the registration of Emily Migisa and John Sekindi on the title was without consent of the respondent, who was the registered proprietor on the suit land.

The definition of fraud as set out in the case of **Fredrick Zaabwe v Orient Bank & Ors SCCA No. 04 of 2006** as follows: -

> *"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture..."*

The evidence of the respondent was that the transfer of the suit property into the names of the 1st and 3rd defendants was effected without her consent. The transfer forms and the certificate of title of the suit land were handed to Emily Migisa as security for a loan at the time she needed money to travel to America. At the time the loan was repaid, the 1st defendant had to return the certificate of title to PW2, whom the respondent had assigned to receive it on her behalf. Emily Migisa did not hand over the title deed but fraudulently processed her registration jointly with the 3rd defendant and connived with the 2nd defendant to deprive the respondent of her property.

The appellant bought the suit land from John Junior Sekindi and Emily Migisa as co-owners. The caveat that had been placed on the land was lifted by Lwalanda John and the payments received from the appellant were also received from Lwalanda John. The title was however registered in the names of Emily Migisa and John Junior Sekindi. The appellant should have exercised due diligence and noted the discrepancy in the names of the 2nd defendant. The appellant carried out a search and found that the land was registered in the name of Emily Migisa and John Junior Sekindi. The person who lifted the caveat was Lwalanda John and Lwalanda J. This series of name changing should have aroused the appellant's doubt as to the ownership but she was negligent and cannot, in my view, claim to be a *bonafide* purchaser for value without notice of the fraud.

I therefore find no reason to interfere with the decision of the learned trial Judge that the appellant was not a *bonafide* purchaser and had

no interest protected by law in the land. In addition, the appellant did not get the title registered in his name by reason of the suit and the caveat earlier lodged on the land.

Grounds 2, 3 and 4 are dismissed accordingly.

Ground 5 and 6

Ground 5 faults the learned trial Judge for granting the respondent general damages in excessive sums and costs against the appellant.

The learned trial Judge ordered that the appellant to pay general damages in the sum of UGHs 30,000,000= (thirty million).

The principle that an appellate court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate equally applies to the instant case. It must be shown that the trial court proceeded on a wrong principle or that it misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low. Generally, an appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made. (see **Matiya Byabalema and others v. Uganda Transport company (1975) Ltd. S.C.C.A. No. 10 of 1993 (unreported)**

and Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises. S.C.C.A No. 16 of 2006).

The 1st and 2nd defendants fraudulently sold the respondent's land to the 4th defendant, now appellant. The award of general damages to the respondent as against the appellant was, in my view, neither proved nor supported with evidence. The respondent did not pray for general damages as against the appellant and in addition, the appellant was negligently a victim of circumstance and should not have been condemned to damages to the tune of Ugs. 30,000,000/=. I would therefore allow ground 5 and set aside the order for award of damages and costs of the trial court as against the appellant.

This appeal is largely dismissed for the reasons given above. The appellant shall pay ¾ of the costs of this appeal to the respondent.

I so order.

Dated this 15th day of March 2022

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 195 OF 2017

(Arising from High Court Civil Suit No. 078 of 2011)

(CORAM: Cheborion Barishaki, Stephen Musota, Christopher Madrama, JJA)

DR. DAVID KAGGWA ::APPELLANT

VERSUS

AUDREY MUSIIMENTA::RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Justice Stephen Musota, JA.

I agree with the analysis, conclusion, and orders he has proposed.

Since Madrama JA also agrees, only ground 5 of the appeal is allowed. The appeal is substantially dismissed with ¾ of the costs to the respondent.

It is so ordered.

Dated at Kampala this......1st......day of......March......2022

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

CIVIL APPEAL NO 195 OF 2017

DR. DAVID KAGGWA} ..... APPELLANT

VERSUS

AUDREY MUSIIMENTA} ..... RESPONDENT

(Appeal from the Judgment and Orders of the High Court of Uganda at Kampala (Land Division) Hon. Lady Justice Eva K. Luswata in Civil Suit No 078 of 2011)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Stephen Musota, JA.

I agree with my learned brother Hon. Mr. Justice Stephen Musota, JA that the appeal be substantially dismissed and only ground 5 of the appeal be allowed with the orders he has proposed in his Judgment and I have nothing useful to add.

Dated at Kampala the 15th day of March 2022

Christopher Madrama

Justice of Appeal