

THE REPUBLIC OF UGANDA
COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.231 OF 2019

(Arising Out of Civil Suit No.72 of 2006)

CORAM

- 6 **Hon. Lady Justice Elizabeth Musoke JA**
Hon. Lady Justice Catherine Bamugemereire JA
Hon. Mr. Justice Stephen Musota JA

MOHAMMED

ABDALLAH GARELNABI ::::::::::::::: APPELLANT

12 VERSUS

DIANA IRENE NAYIGA :::::::::::::::RESPONDENT

*(Appeal arising from the Judgment of the High Court at
Kampala Land Division before Andrew K. Bashaija J dated
25th day of June 2018 in Civil suit No.72 of 2006)*

- 18 **Judgment of Catherine Bamugemereire JA**

Background

This is a case involving double-titling. The facts of this matter are that both the Appellant and Respondent are in possession of Certificates of Title registered in each of their names over the same piece of land comprised in Kyadondo Block 248 Plot 244 situate at Kawuku, Ggaba, Makindye division, Kampala measuring 0.41 ha.

The Appellant is registered as a proprietor on the original Certificate of Title as of 2nd July 1976 up to date while the respondent is a registered proprietor as of 12th January 2001 to date. The Respondent occupied the suit land until 2005 when the Appellant evicted her. The Respondent then sued the Appellant in the High Court, land division vide High Civil Suit No.72 of 2006 for trespass and fraud. She sought

orders of vacant possession, cancellation of the Appellant's original Certificate of title, general damages and costs.

The learned Trial Judge declared the Appellant a trespasser on the suit land and granted the Respondent all the orders
6 sought.

The Appellant being dissatisfied with the Judgment of the learned Trial Judge appealed to this Honourable court on four grounds:

12 **Grounds of Appeal**

1. *That the learned Trial Judge erred in law and fact when he held that the Respondent was a bona fide purchaser for value.*
2. *That the learned Trial Judge erred in law and fact when he held that the respondent had not adduced evidence of
18 fraudulent transfer.*
3. *That the learned Trial Judge erred in law and fact when he held that the appellant was a trespasser and ejected him from the suit land.*
4. *That the learned Trial Judge erred in law and fact when he failed to properly re-appraise evidence on the record thereby
24 reaching wrong conclusions.*

Representation:

At the hearing of the appeal, the Appellant was represented by Martin Musigire and Ronald Tumusiime for LMN Advocates and Bashasha & Co. Advocates respectively

while the Respondent was represented by Oscar John Kihika and Anthony Baziira for Messrs Byenkya Kihika & Co. Advocates. Both Counsel filed their written submissions that were adopted by this Court.

6 **Appellant's Submissions**

On Ground No. 1, counsel for the Appellant contended that the respondent under-declared the value of the land thereby paying less stamp duty during the transfer of her title, which amounted to fraud; hence the Trial Judge erred when he held that she was a *bona fide* purchaser for value.

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Counsel added that the Respondent did not carry out a physical search/inspection on the land, as there is no cogent evidence on court record to support her allegations of carrying out a search on the said land. He prayed that this court finds merit in Ground No. 1 and set aside the Trial
18 Judge's holding to prevent the abuse of process and miscarriage of justice.

Regarding Ground No. 2 counsel submitted that the Trial Judge misdirected himself by shifting the burden of proof from the Respondent to the Appellant and erroneously
24 holding that the Appellant had not adduced evidence of fraudulent transfer. Counsel argued that it was the Respondent who had sued the Appellant alleging fraud hence she bore the burden to prove the fraud, which she failed to do. It was counsel's conclusion that the learned

Trial Judge's decision occasioned a miscarriage of justice upon the Appellant hence it ought to be set aside.

In respect of Ground No. 3, counsel for the Appellant faulted the Trial Judge for holding that the Appellant was a trespasser and ejected him from the land. It was counsel's contention that a registered proprietor of the land cannot trespass on his or her own land therefore, it was illogical for the trial Judge to find as he did. Counsel also argued that although the Respondent was a registered proprietor of the suit land, she had no locus standi to sue the Appellant for trespass since he was also the registered proprietor of the same land. Counsel prayed that court allows this ground of appeal.

Regarding Ground No. 4, counsel for the Appellant submitted that the Trial Judge did not consider some evidence of the Appellant and ended up arriving at a wrong decision thereby causing a miscarriage of justice. It was counsel's contention that had the Trial Judge should have critically analysed how two titles came to exist on the same page. The Appellant's title, which ranked higher would supersede the Respondent's thus this court should re-appraise this evidence and hold for the Appellant.

In conclusion, Counsel for the Appellant prayed that this Court grants the appeal, sets aside the Trial Court's

Judgment and declares the Appellant as the registered proprietor of the suit land.

Respondent's submissions

6 In reply to Ground No. 1, counsel for the Respondent submitted that the Respondent is a *bona fide* purchaser for value and whereas she might not have stated the true consideration of the transaction in the transfer form, it did not bar her from being a *bona fide* purchaser for value.

12 Counsel added that the purported fraud raised on behalf of the Respondent does not lie in respect of the suit land but lies only for purposes of payment of stamp duty.

18 It was counsel's argument that where property is under declared or over declared, it does not defraud government of revenue and what finally settles the valuation is the professional assessment of the Chief Government Valuer. He submitted that regardless of the under declaration in the transfer form, it does not take away the fact that the Respondent is a *bona fide* purchaser within the meaning of S. 81 of the RTA, therefore the Trial Judge was right to find that the Respondent was a *bona fide* purchaser for value without notice of any fraud.

24 In respect of Ground No.2 counsel for the Respondent submitted that no evidence was adduced to prove that the Respondent had taken part in the fraudulent processing of the special Certificate of Title. He contended that the

Appellant failed to substantiate the averments in his written statement of defence when he alleged that he has always been in possession of the suit land, and that his own witness DW2 testified to the contrary. Counsel concluded that the Trial Judge was right to hold that the Appellant had adduced no evidence of fraudulent transfer on the part of the Respondent.

Regarding Ground No.3 counsel submitted that the Respondent is not a trespasser since after purchase of property she had quiet possession of the land until she was violently evicted in 2005. It was counsel's submission that the Trial Judge was correct to find that the Appellant was a trespasser on the land.

In reply to Ground No. 4, counsel for the Respondent submitted that the Appellant did not lay claim on cancellation of the Respondent's certificate and is therefore not entitled to that remedy. Counsel added that the Appellant's testimony was full of falsehoods and the learned Trial Judge was right to make a finding that the Appellant's title was fraudulent and it ought to be cancelled. In conclusion, counsel prayed that this honourable court finds that the appeal has no merit and should be dismissed with costs.

Consideration of the Appeal

Rule 30 of the Judicature Act (Court of Appeal Rules)

Directions SI 13-1 states that;

6 "On any appeal from decisions of the High Court acting in the exercise of its original Jurisdiction, the Court may-

(a) Reappraise the evidence and draw inferences of fact;

In **Uganda v George Wilson Simbwa, Criminal Appeal No. 37 of 2005**, the Supreme Court stated as follows:

12 "*This being the first appellate court in this case, it is our duty to give the evidence on record as a whole that fresh and exhaustive scrutiny which the appellant is entitled to expect and draw our own conclusions of fact. However, as we never saw or heard the witnesses give evidence, we must make due allowance in that respect.*" I shall bear in mind the fact that I did not have the benefit of seeing the witnesses first hand.

18 I will consider Grounds No. 1, No.2 and No.3 together:

1. *That the learned Trial Judge erred in law and fact when he held that the Respondent was a bona fide purchaser for value.*
2. *That the learned Trial Judge erred in law and fact when he held that the respondent had not adduced evidence of*
24 *fraudulent transfer.*
3. *That the learned Trial Judge erred in law and fact when he held that the appellant was a trespasser and ejected him from the suit land.*

Counsel for the Appellant contended that the Respondent's omission to carry out a search and inspection of the suit land before purchase and under-declaring the value of the land on the transfer forms from UGX 30,000,000/= to UGX 15,000,000/= amounted to fraud hence she was not a *bona fide* purchaser. A *bona fide* purchaser for value was defined in the case of **David Sejjaka Nalima v Rebecca Musoke CACA No. 12 of 1985**, as;

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"A purchaser who at the time of purchase was acting in good faith, fully paid the legally recognized value and had his interest registered. He or she must have acquired a legal interest without notice of any fraud and in good faith."

In the instant case, it is not in dispute that the Respondent possesses a certificate of title over the land. What is more perplexing, however, is that both parties appear to hold good title on the same piece of land. The Respondent
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successfully sued the Appellant when she was wrongfully dispossessed of land. She sued for the specific restitution of that land in an action of ejectment. An action for the recovery of land is the modern equivalent of the old action of ejectment (see **Bramwell v Bramwell, [1942] 1 K.B. 370**). It is action by which a person not in possession of land can
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recover both possession and title from the person in possession if he or she can prove his or her title. Actions for recovery of land are premised on proof of a better title than that of the person from whom the land is sought to be recovered. Clearly in this case both titles cannot be valid.

The presence of two apparently valid titles in different names in respect of the same piece of land means that one of them has to be cancelled. The question is which of the parties holds better title? There can only be one main proprietor at any one time. At the court of first instance the
6 Respondent succeeded in proving that she had better title. On appeal the Appellant faults the Respondent for holding a title fraudulently.

In order to get to the bottom of this complex issue I will take a granular look at the white pages each of the parties holds. The Appellant holds a clean white page with Mohamed
12 Abdalla Gabelnabi as the sole proprietor of Block 248 plot 244, land at Kawuku, Bunga, Kampala which he is said to have acquired on 2nd July 1976 under instrument No. KLA81076. During cross-examination the Appellant affirmed that he had a duplicate copy and not a special certificate. He seemed not to be aware that he had declared
18 his title lost and a special certificate was issued to him the year 2000. It is the issuance of the special certificate of title that created the double titling. The Appellant seemed unaware of Naomi Manyangwa Binaisa from whom Garelnabi acquired title.

On the other hand, the Respondent produced a duplicate
24 title whose white page had a history of transactions dating from 5th December 1975 to 12th January 2001 when the Respondent Diana Irene Nayiiga was registered on the title. The transactions on the title Nayiiga holds show the

transfers and the relevant instruments used during the transfer. For example Naomi Manyangwa Binaisa transferred to Mohamed Abdalla Garelnabi under instrument KLA 81076. The next transfer from Garelnabi was to Eriyasi Mukwaya on 27th February 1997 vide instrument no. KLA 186379. The next transfer to a one Abdul Lateef Moses happens on 29th January 1999 vide instrument No. KLA201698. Abdu Lateef Moses sold and transferred to Geoffrey Lwanga Dingiro in 2000 vide instrument no. KLA 215536. It is Dingiro Lwanga who sold and transferred to Diana Irene Nayiiga on 12th January 2001 vide instrument no. KLA 221599.

The sequence of transactions clearly outlined above as entered on this title prove that this was an active page who transfers were not only recorded on the white page but can also be traced as part of the land transactions on the Kalamazoo, a handwritten life-size journal in which daily transactions are entered.

On the one hand, in determining ownership of land the court must satisfy its self that the Respondent is a *bona fide* purchaser for value without notice. On the other hand the court must be convinced that the Appellant comes with clean hands and can lay a proper claim on land that he may have once owned but which has since changed hands several times.

I have cautiously and thoroughly examined the above evidence. Copies of the land title, Exp1, P2, and P8, a copy

of the Kalamazoo, have a story to tell unravelling the history of this title. I agree with the learned trial Judge that during the trial the respondent/plaintiff adduced cogent evidence both documentary and oral that she was far removed from whatever fraud might have occurred on the title. If there was any fraud it could not be attributed to her or even to PW3 who sold to her. The respondent testified that she is an optician who is a resident of the United Kingdom although she is a Ugandan. Even if she was normally resident in Uganda, there was no evidence brought against her and she could not be assessed as a person who would have been involved in fraudulent land dealings.

On his part the Appellant claims that he had title and possession from 1976. He testified that he lost but regained possession of the contested land in 2006. That was where he found PW2 Peter Matovu while was caretaking the land on behalf of the respondent. Not only did he eject him but he also had him prosecuted and convicted. The Appellant's testimony is not only confusing but is almost beyond belief and incredulous. He claims to have bought the land in 1976 but did not know the person who sold it to him. It was his evidence that Israel Mayengo bought the land for him. He did not know from whom Israel Mayengo bought the land.

S.181 of the Registration Of Titles Act protects *bona fide* purchasers and it provides that:

“Nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or to an action for recovery of damages as aforesaid or for deprivation of the estate or interest in respect to which he or she is registered as proprietor any purchaser bona fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he or she claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this applies whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.”

12 A bonafide purchaser of a legal estate for value without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can. See **John Busulwa v John Kityo and 2 Others CACA112/2003** in which Mpagi Bahigeine, JA held that it can be safely inferred in **Taylor v Stibbet (1803) All ER 432** that it is incumbent upon the purchaser to make exhaustive inquiries as to the status of the land he is purchasing. I find that in this case the respondent performed due diligence before and after the purchase and enjoyed quiet possession for a considerable period. Indeed I agree with **Sir John Bagaire v Ausi Matovu CACA 7 of 1996** when it is correctly noted that “Lands are not vegetables that are

bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only about the land but also of the seller before purchase." I find **Sir John Bagaire** distinguishable on two fronts; the question of bias does not exist in this case before us and the respondent took her quest for land cautiously and seriously. She did due diligence.

It should be noted that transactions involving Ms Manyangwa Binaisa who then transferred to Garenalbi took place in 1976 after the passing of the Land Reform Decree that made all land public land on which a person could only acquire a lease. It is hardly unlikely that transactions were taking place on Private Mailo. It may however not be completely ruled out. What is possible though is that since the Appellant did not know who sold him land he may also not have known the person he sold to many years later. This stands in stark contrast with the respondent who could point to the person she bought from. Ddingiro-Lwanga Geoffrey who also testified as **PW3** confirmed that he sold the land to the Respondent. The Respondent further stated that she carried out a search at the land office where she found that the land title was genuine and had no encumbrances thus she took possession immediately. She did not only carry out the search but subsequent to paying for the land, took possession of the land for five years, grew crops and a hedge without let or hindrance. She was in quiet

possession for five years until the Appellant forcefully evicted her.

The Appellant's testimony, on the other hand portrayed him as a person who wields so much power that the Uganda police owe him a duty, make reports to his company, Concorp International Ltd, and are at his beck and call see report marked Exh. D3. PW2 testified that the Appellant sent armed men to pursue him PW2 threatened his life and that although his sister, the respondent had obtained an interim order to keep the status quo on the land, the Appellant ignored the orders, evicted them, built a wall on the land and prosecuted them. Here below are some of the excerpts of his testimony:

- "That Order (*the Interim Order sic*) was stopping both the plaintiff and the defendant from any developments on the land until the determination of the application.
- Because of the force he came with, I did my best to defend our property because we were in possession...
- Because he was putting up structures ... I broke those structures
- I knew the law would protect me because the defendant was the intruder.
- Consequently the defendant sued me in criminal court for malicious damage.
- During that period the Defendant put me on the run until I was arrested.
- After serving the Defendant with the interim order of 5th June 2006 he still continued to build there.
- The defendant put two armed men with guns
- Because of the gravity of the matter and threats over my life I reported this matter to Army authorities who consequently arrested the soldiers.
- Because I had to take care of my life we were evicted from the property.
- Yes the Defendant evicted the Plaintiff from the land in defiance of the subsisting Court Orders."

The above testimony, which is a matter of great concern and has hallmarks of impunity, was not broken down in cross-examination and is a finding of fact.

It remains unclear to whom the Appellant lost proprietary rights but what is true is that the respondent was a *bona fide* purchaser for value without notice and should be allowed to enjoy quiet and full possession of her land.

The above said conduct such as has been demonstrated in PW2's testimony is what has caused mayhem not only in the land registry but also on the land itself. The Appellant had resources and the least he could have done is respect the court process. He instead chose to use coercive means to force his will and way. I regrettably find that this was an abuse of the criminal justice process and amounts to contempt of court. Courts should not look too kindly on such conduct. In this case it does not amount to fraud but is perverse.

The alleged fraudulent transfer, 'that the respondent had not adduced evidence of fraudulent transfer'

The Appellant did not file a counter-claim pleading fraud. I do not understand how on appeal he can claim there was fraud on the part of the respondent when fraud was not pleaded. The appellant claims fraud based on the respondent's act of under-declaring the sale price of the disputed land at the payment of stamp duty.

The Respondent was **PW1** and testified that she purchased the land from a one Ddingiro-Lwanga Geoffrey, at a

consideration of **UGX 30,000,000/=** which was paid in two instalments of UGX 15,000,000/=.

It is my finding that the allegation of fraud raised by the Appellant refers to a transaction in respect to payment of stamp duty. The Appellant has not disputed the fact that the Respondent paid a consideration of **UGX30,000,000/=** in purchase of the land, obtained title and took possession. I have carefully analysed this ground and agree with the trial Judge that the value as assessed by the Chief Government Valuer finally settles the necessary Government tax to pay regardless of whether the purchaser states a lesser value on the form. For as long as the purchaser pays a duty assessed by CGV, it cannot be evidence of fraud attributed to a purchaser. However, if the lands office finds that a higher duty could have been paid had the CGV conducted a proper assessment, then a minute should be entered on the file and the concerned party should be notified to pay the stamp duty as would have been commensurate. I find the decision in **Betty Kizito v David Kizito and 7 others SCCA No. 8 of 2018** distinguishable since the whole context involved and was riddled with fraudulent transactions. In this particular case the issue of fraud was not pleaded and neither has it been proved and the facts are distinguishable.

In my considered opinion, failure to pay the correct stamp duty is breach of a legal duty. The proper remedy would be

to order the person in breach to pay the appropriate stamp duty or the difference. Not all irregularities amount to fraud *per se* otherwise the concept of *bona fide* purchasers would be defeated and justice would not be served.

- 6 In the circumstances, I find that the Trial Judge was correct to find that the Respondent was a *bona fide* purchaser for value without notice. I would answer Grounds No. 1, No.2, and No. 3 in the negative.

12 In considering Grounds No. 4, this ground is closely linked to Grounds No. 1, No. 2 and No.3 where all the evidence leads to the conclusion that the Respondent was a *bona fide* purchaser for value without notice. Given the above context Ground No. 4 would also fail.

In the final result, I would dismiss the appeal with costs.

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Dated at Kampala this 18th day of ... March2022

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CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0231 OF 2019**

MOHAMMED ABDALLAH GARELNABI:.....APPELLANT

VERSUS

DIANA IRENE NAYIGA:.....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Bashaija, J dated 25th June, 2018 in Civil Suit No. 72 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

I have had the advantage of reading in draft the Judgment prepared by my learned sister Bamugemereire, JA. I agree with it and for the reasons she has given, I too would dismiss the appeal and make the order on costs she has proposed.

As Musota, JA also agrees, the appeal is dismissed with costs to the respondent.

It is so ordered.

Dated at Kampala this18th..... day of.....March.....2022.

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Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NO. 231 OF 2019

*(Arising from the Judgment of Justice Bashaija, J in High Court Civil Suit No. 72
of 2006)*

MOHAMMED ABDALLAH GARELNABI ::::::::::: APPELLANTS

VERSUS

DIANA IRENE NAYIGA ::::::::::: RESPONDENTS

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

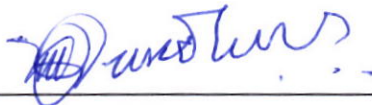
HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

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

I agree with her analysis, conclusions and the orders she has proposed. This appeal is void of merit and is dismissed accordingly with costs to the respondent.

Dated this 18th day of March 2022



Stephen Musota

JUSTICE OF APPEAL