

- (1) The Tribunal erred in law when it heard the matter for formal proof.
- (2) The Tribunal erred in law and fact when it failed to evaluate the evidence on record.
- (3) The Tribunal erred in law and fact when it ordered cancellation of the Appellant's title when fraud had not been strictly pleaded and proved against her.

The Appellant accordingly made the following proposals to the court.

- (1) To allow the appeal;
- (2) Set aside the judgement and orders of the Tribunal;
- (3) Order the Registrar of Titles to reinstate the Appellant as proprietor of the suit land; and
- (4) Award the Appellant costs in the Tribunal and in the High Court.

The Respondent made a cross-appeal on the following grounds:-

- (1) The Tribunal erred in law and fact when it failed to evaluate the evidence on record.
- (2) The Tribunal erred in law and fact when at hearing, it failed to exercise its discretion to cause the evidence available to be sufficiently examined and or formally admitted.

The Respondent proposed that:-

- (1) This Honourable court affirms the decision of the Tribunal on grounds and reasons to be advanced at hearing of this Appeal.

- (2) In the alternative but entirely without prejudice to the above, this Honourable court orders the production of witnesses and evidence to enable it pronounce judgement on the merits of the claims of the parties or for any other substantial cause.
- (3) In further alternative and entirely without prejudice to the aforementioned proposed decisions that this Honourable court orders a new trial.
- (4) That the Honourable court makes any other order it shall deem appropriate in the circumstances.

During the hearing the Appellant was represented by Mr. Nerima of M/S Nambale, Nerima & Co. Advocates while the Respondent was represented by Mr. Ntende of M/S Ntende, Owor & Co. Advocates. Both Counsel filed written submissions in the matter.

The Duty of the Appellate Court:

The duty of the first appellate court is now much settled as it was recently restated in Supreme Court Civil Appeal No.4 of 2006, **Fredrick J. ZAABWE v ORIENT BANK and 5 OTHERS:-**

“The duty of this court as the First Appellate court is well settled. It is to evaluate all the evidence which was adduced before the Trial Court and to arrive at its own conclusion as to whether the finding of the Trial Court can be supported.”

The duty of the first appellate court can therefore be summarised as follows:

- (1) To evaluate the evidence as a whole and reconsider the said evidence.
- (2) Not to be bound by the findings of fact of the lower court especially where the lower court clearly failed on some points.

Resolution of Grounds of Appeal:

In their submission, the learned Counsel for the Appellant abandoned the first ground of appeal and argued the 2nd and 3rd grounds of appeal jointly. I will also treat them in that order.

The Respondent's claim was based on fraud. Her claim was that she had an equitable interest in the suit land as an administrator and also as granddaughter to the late Bulasio Musoke. She averred in her pleadings that a one Lameck Njuki who purported to be related to the late Bulasio Musoke and who purported to transfer the suit property acted fraudulently. The following particulars of fraud were outlined:-

- (a) Obtaining Succession Certificate alleging that he is related to the late Bulasio Musoke alias Mazinga whereas he is a Samia but not a Muganda of Mamba clan.
- (b) Transferring land comprised in Block 188 Plot 9 yet he had no interest, either legal or equitable.
- (c) Holding out as an administrator to the estate of the deceased, Bulasio Musoke alias Mazinga.

In her short evidence the Respondent testified as follows:-

"I have land at Nakapinyi. In 1991 Lameka Njuki sold my land to Grace Butale Karuhanga. He sold the land fraudulently. The land is 130 acres. It is on Block 122 Plot 8 Nakapinyi. When I went to the land office, I found that it had been registered on Block 188 Plot 9 and registered in the names of Grace Butale Karuhanga. Njuki Kyazike stated that Bulasio Mazinga had given the land to her. I pray that the new title be cancelled and my land returned to me.

Pw2 Lutaya Lodovik who supported the evidence of the Respondent said in his testimony:

“I know the claimant in this case. She is my neighbour. I am here to give evidence concerning the case. I know Lameck Njuki. He had been allocated a shamba during Amin’s regime. Njuki was allocated Mafuta Mingi. I know that the land did not belong to Njuki but I do not see him these days.”

On 21st December 2005 the Tribunal recalled the claimant purportedly to clarify her evidence. She stated:-

“Lameck Njuki is not her relative (sic). He is a Musamya by tribe. He illegally transferred the land in his names. This was done by Grace Karuhanga and Njuki. It is Bulasio Mazinga who leased the land to the Asians. The land is 130 acres but sold at 500,000/=. There are minerals on the land. I pray that the names of Grace Butare be crossed out and the land registered in my names. I also pray that the caveat be lifted.”

From the above evidence there is no proof that the suit land had ever belonged to the Respondent or her grandfather Bulasio Musoke. The Respondent did not also adduce evidence confirming that she was administrator or granddaughter of the late Musoke to enable her gain interest in Musoke’s estate. More importantly, it was important for the Respondent to prove fraud against the Appellant. The Respondent pleaded particulars of fraud against one Njuki. In her evidence she stated that Njuki transferred the land in his names. However, she did not point out how and when the Appellant contributed to the alleged fraud. Fraud must be pleaded and strictly proved. In **Kampala Bottlers Ltd. V Damanico (U) Ltd** Wambuzi CJ (as then was), held that the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of it.

What amounts to fraud was restated in **Fredrick Zaabwe v Orient Bank & 5 others**.
Supreme Court Civil Appeal No.04 pf 2006:-

“An intentional pervasion 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 of mouth 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.... A generic term, embracing all multifarious, means which human ingenuity can get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling and unfair way by which another is cheated dissembling, and any unfair way by which another is cheated. “Bad faith” and “fraud” are synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc...

As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be direct falsehood or by innuendo, speech or by silence, by word of mouth or by look or gesture....”

The evidence adduced by the claimant does not establish at all, any of the above elements of fraud. I also find the evidence of Lutaya Lodovik Pw2 worse than useless. Apart from alluding to the fact that Njuki had been allocated a shamba during the regime of Idi Amin, he does not indicate whether there was anything wrong in that

allocation or whether that shamba did belong to the late Bulasio Musoke. In totality, the evidence on record does not establish the claimant's title to the suit property, meaning that the court ought to have dismissed the claim. Even if the matter was for formal proof, the burden of proof was still on the claimant to prove her case on the balance of probabilities. That position was well taken by **LAW Ag. V.P in DAVE v BUSINESS MACHINES LTD. [1974] EA 18:-**

*“If a defence had been filed, and the only failure on the Defendant's part had been a failure to appear, either personally or through his advocate, on the day when the suit was called for hearing, then the Plaintiff ought properly to have been called formally to prove his claim, **that is to say, to prove everything the burden of proof of which, on the pleading, lay on him in order to establish his claim**” emphasis mine.*

In other words formal proof is not a matter of cause but it is a matter of laying relevant evidence before court in line with the cause of action as pleaded. In the instant case the Respondent laid very scanty evidence before the Tribunal which in my opinion did not prove the claim against the Appellant. Her evidence did fall short of the standard of proof required for fraud. The Tribunal failed to subject the evidence to scrutiny which could have established that the case had not been established. It was therefore wrong for the Tribunal to impeach the Appellant's title without proof of fraud. Under section 55 and 136 of the Registration of Titles Act, a Certificate of title is conclusive evidence of title and cannot be impeached except for fraud. Since fraud was not established, it was wrong for the Tribunal to cancel the Appellant's title.

It was contended for the Respondent in cross-appeal that this court should allow fresh evidence to be called and that this court has powers under order 43 rules 22 of the CPR.

I would be very reluctant to support the above contention. First of all, this is a case where the Respondent was represented by a professional lawyer who was granted the

liberty to proceed *ex parte* without any adversary. With the above privilege, he was free to lead his witnesses calmly and with confidence. He was free to sweep all the corners of the Respondent's claim. Having failed to do so then it would not be appropriate to allow him to re-assemble his evidence. That would tantamount to the court entering the arena of litigation.

Secondly I do not think Order 43 rule 22 CPR is relevant in the instant situation. That rule provides as follows:-

“22(1) The parties to an appeal shall not be allowed to produce additional evidence,

Whether oral or documentary, in the High Court; but if-

- (a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted;*
 - (b) the High Court require any document to be produced of any witness to be examined to enable it to pronounce judgment, or for any other substantial cause the High Court may allow such evidence of document to be produced, or witness examined.*
- 2. Wherever additional evidence is allowed to be produced by the High Court the court shall record the reason for its admission.”*

Order 43 rule 22 of the Civil Procedure Rules is therefore invoked:

- (a) Where the lower court had rejected to admit evidence which ought to have received, and*

(b) Where the High Court deems it fit in case of a document to be produced of any witness.

It should be observed that before additional evidence is adduced there must be an application to that effect and there ought to be sufficient reasons to justify the reception of additional evidence. Whether or not to grant such application is in the discretion of the court.

In the instant case there were no exceptional circumstances as indicated above to justify adducing of additional evidence.

All in all, I find no merit in the cross-appeal. There was no evidence to support the Respondent's claim. The cross-appeal was an afterthought. The appeal is accordingly allowed with costs while the cross-appeal is dismissed. The Applicant is entitled to costs both in the lower court and the High Court. The order cancelling the Applicant's title is accordingly vacated. She should accordingly be reinstated on the title. I so order.

HON. JUSTICE RUBBY AWERI OPIO
JUDGE
17/6/2009

22/06/2009

Judgement read in open Chambers.

Isaac Walukaga for the Applicant in Court.

Clerk: Magala

Signed:

JOHN EUDES KEITIRIMA
DEPUTY REGISTRAR