

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEALS NO. 40 & 41 OF 2010

LAWRENCE MUSEBENI BAGUMA APPELLANT

VERSUS

NAMUGALA DAVID & ANOTHER RESPONDENTS

(Arising from Mukono Chief Magistrates Court Civil Suits No. 557 & 576 of 2007)

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The brief facts of this appeal are as follows. The appellant, Lawrence Musebeni Baguma, purchased 1.5 acres of private mailo land comprised in Block 92 plot 72 situated at Namwezi, Mutuba III, Kyaggwe County in East Buganda (Mukono District) from the 2nd respondent, Mubiru Ssalongo, at Ushs. 8 million vide a sale agreement dated 16th June 2005. He executed part-payment of the purchase price in the sum of Ushs. 7.3 million leaving an outstanding balance of Ushs. 700,000/= that was to be paid upon receipt of a certificate of title and signed transfer forms from the 2nd respondent. The 2nd respondent reneged upon his obligations under the transaction, and sold and transferred part of the same piece of land measuring about 0.25 acres to the 1st respondent, under the belief that the 1st respondent was a kibanja holder on the same piece of land and therefore entitled to the first right of purchase in respect thereof.

Two separate suits were filed in the Chief Magistrates Court at Mukono in respect of this dispute, both of which were decided against the appellant hence the lodging of civil appeals 40 and 41 of 2010. The appeals were subsequently consolidated into the present appeal at the instance of court as provided for in section 80(2) of the Civil Procedure Act (CPA) and Order 11 rule 1(a) of the Civil Procedure Rules (CPR).

The memorandum of appeal in respect of civil appeal (CA) 40/2010 detailed the following grounds of appeal:

- 1. The trial magistrate erred in law and fact and occasioned a miscarriage of justice when he held that the respondent was a kibanja holder on the suit land at the time it was sold to the appellant.**
- 2. The trial magistrate erred in law and fact and occasioned a miscarriage of justice when he held that there was no fraud in the transfer of title in the suit land to the respondent.**
- 3. The trial magistrate erred in law and fact when he held that the purchase of the suit land by the appellant was null and void.**
- 4. The trial magistrate erred in law and fact when he held that the respondent is the lawful owner of the suit land entitled to vacant possession.**
- 5. The trial magistrate erred in law and fact when he held that the appellant is a trespasser on the suit land.**
- 6. The trial magistrate failed to evaluate the evidence and therefore came to a wrong conclusion.**

The memorandum of appeal in respect of CA 41/2010 detailed the following grounds of appeal:

- 1. The trial magistrate erred in law and fact and came to a wrong conclusion when he held that despite taking possession of the land, the appellant did not acquire title to the land since he did not complete payment therefor.**
- 2. The trial magistrate erred in law and fact and occasioned a miscarriage of justice when he held that failure by the appellant to pay the balance of the purchase price on the agreed dates was breach of contract.**
- 3. The trial magistrate erred in law and fact and occasioned a miscarriage of justice when he held that there was no breach of contract by the respondent.**
- 4. The trial magistrate erred in law and fact when he failed to evaluate the evidence and therefore came to a wrong conclusion that the appellant and not the respondent breached the contract.**
- 5. The learned trial magistrate erred in law and fact when he ordered the respondent to refund the purchase price when this was neither sought by the appellant nor was it an appropriate remedy in the circumstances.**

At the hearing of the appeal Mr. Gabriel Byamugisha appeared for the appellant while Mr. Kenneth Kajeke represented both respondents.

It would appear that Mr. Kamugisha opted to abandon grounds 1 and 6 of civil appeal 40/ 2010 and ground 2 of appeal 41/ 2010, although he did allude to them in general terms in the course of his submissions. Learned counsel argued grounds 1 of CA 41/ 2010 and 2 of CA 40/ 2010 together and contended that the 2nd respondent sold the disputed land to the appellant, the latter having complied with all the terms of the sale agreement and the 1st respondent was merely a neighbour to the appellant not a kibanja holder on the sold premises. Counsel argued that prior to purchasing the disputed land the appellant had inspected it and found it vacant and free from any third party claims, and a search in the land office at Mukono revealed that its certificate of

title was still in the names of its original owner, a one Kawere, but with signed transfer forms in favour of 2nd respondent. It was Mr. Byamugisha's contention that the purported sale of the same piece of land to the 1st respondent transpired after the sale of the same land to the appellant; the 1st respondent never had a customary interest in the disputed premises as there was no proven relationship of a customary nature between him and Kawere, the original land owner, from whom the 2nd respondent derived title. Counsel further argued that given the appellant's uncontroverted evidence before the trial court that he had bought vacant land, such land could not have been held customarily as customary land holding is defined on the basis of the developments thereon. Learned counsel concluded that the 1st respondent was not entitled to any rights by virtue of his alleged customary interest as no such customary interest existed between the 1st and 2nd respondents in 2008 that did not exist in 2005 when the appellant purchased the land.

With regard to ground 3 of CA 40/2010, it was learned counsel's contention that far from the appellant's purchase of land from the 2nd respondent being a nullity as was held by the trial magistrate; the appellant purchased a mailo interest from the 2nd respondent, which purchase was legal and conferred good title to him. The gist of counsel's argument was that there was no proof that the 1st respondent's alleged customary interest was ever brought to the attention of the 2nd respondent by the original owner of the disputed premises because such customary interest did not exist. Mr. Byamugisha concluded that similarly there was no need for consent from the 1st respondent before the 2nd respondent could sell the same premises to the appellant, neither was the 2nd respondent obliged to recognise the 1st respondent's unproven customary interest. Learned counsel reiterated these arguments with regard to grounds 4 and 5 of CA 40/ 2010, contending that while the 1st respondent had failed to furnish proof of any developments on the suit land prior to the appellant's occupation thereof, the latter was in full possession of the said premises. Counsel submitted that the issue of the land's ownership had been determined beyond reasonable doubt in a criminal trial against the 1st respondent and therefore the appellant was not a trespasser on that land.

Mr. Byamugisha argued grounds 3 and 4 of CA 41/2010 concurrently and contended that it was the second respondent and not the appellant who breached the sale agreement in respect of the suit premises. Counsel premised his argument on an addendum to the sale agreement dated 16th November 2009, which stipulated that the outstanding purchase price as at that date would only fall due upon the 2nd respondent executing the transfer of the land. With regard to ground 5, counsel argued that the 2nd respondent's willingness to refund the purchase price on account of his failure to execute the transfer of the suit premises to the appellant was a misrepresentation of paragraph 5 of the sale agreement. It was counsel's submission that the question of a refund would only have arisen had the 2nd respondent attempted to pass good title and failed, not in the circumstances of the instant case where the appellant met all the terms of the sale agreement but the respondent wilfully chose to transfer the land to the 1st respondent. Counsel attributed the

present scenario to fraud and prayed for the specific performance of the contract, as well as, costs in this and the trial court.

Mr. Kajeke, on the other hand, contended that the allegation of fraud raised by the appellant had neither been pleaded nor proved before the trial court as by law required, and there was no proof of fraud before this court as would warrant the cancellation of the 1st respondent's certificate of title. Learned counsel referred this court to the case of **Kampala Bottlers Limited vs. Damanico (U) Ltd Civil Appeal No.22 of 1992** which defined fraud and underscored the requirement for it to be pleaded and proved.

With regard to the 1st respondent's customary interest in the suit premises, Mr. Kajeke argued that the evidence of both respondents clearly proved that the 1st respondent was a kibanja holder on the suit premises; was, as such, entitled to first right of offer for the acquisition of the said premises, and any purported sale of the same land to the appellant was in contravention of section 35(4) of the Land Act (as amended). Mr. Kajeke did not respond to any of the other grounds of appeal as, in his view, they all gravitated around the question of fraud which had not been proved.

In a brief reply, Mr. Byamugisha urged this court to find the 1st respondent's evidence unreliable and untruthful for *inter alia* taking 3 years to institute proceedings against the appellant, only commencing the said proceedings after he had fraudulently secured a certificate of title to the disputed premises.

It is my considered view that grounds 3 and 4 of CA 41/ 2010 both pertain to the question as to which of the parties perpetuated the breach of the sale agreement that underscored the appellant's right of claim over the suit premises; ground 1 of CA 41/ 2010, as well as grounds 3, 4 and 5 of CA 40/ 2010 relate to the ownership of the suit premises; while ground 2 of CA 40/ 2010 raises the issue of fraud as an underlying factor in the disputed ownership of the suit premises and ground 5 of CA 41/ 2010 relates to remedies. To that extent, therefore, I would agree with learned counsel for the respondent that the determination of the ownership of the suit premises gravitates around the question of fraud. Consequently, I propose to address grounds 3 and 4 of CA 41/ 2010 on breach of contract together, determine the grounds of appeal that pertain to the ownership of the suit premises and the allegedly underlying fraud concurrently and conclude with a consideration of appropriate remedies.

Breach of contract (Grounds 3 and 4 of CA 41/ 2010)

It is not in dispute in the present appeal that there was breach of the agreement for sale of land. What is in contention is whether or not the trial magistrate was right to hold that the appellant and not the respondent was responsible for that breach.

Pages 51 – 54 of the record of proceedings in respect of CA 41/ 2010 entail an agreement for the sale of land to the appellant by the 2nd respondent for a consideration of Ushs. 8,000,000/= . The

agreement is dated 16th June 2005. Upon the execution of the agreement the appellant effected part payment of Ushs. 3,500,000/= leaving an outstanding balance of Ushs. 4,500,000/=, which was to be paid in 2 instalments of Ushs. 1,000,000/= and Ushs. 3,500,000/= on 31st July 2005 and 31st July 2005 respectively. Included alongside the typed sale agreement at the back of pages 52 and 54 are handwritten paragraphs in respect of the agreement. These handwritten additions were referred to by learned counsel for the appellant as an addendum to the sale agreement.

An addendum may be defined as an addition to a completed written document; in contracts this would be a proposed change or explanation in the contract as the buyer and seller negotiate fine points for instance the terms of financing, how payments will be made, date of transfer of title etc. Ideally, addenda should be signed separately and attached to the original agreement so that there will be no confusion as to what is included or intended by the parties thereto. Against that definition, I would accept the handwritten additions to the present sale agreement as addenda to the original agreement in so far as they clarified the actual payments made by the appellant towards the outstanding purchase price; varied the contractual terms of the sale agreement, and were duly signed, dated and affixed to the original sale agreement. These addenda were an integral part of the original sale agreement and demarcated new and additional terms of that agreement. The question then would be, looking at the totality of the sale agreement with recourse to the addenda as well, who of the 2 parties was in breach of the agreement for sale of land.

Paragraph 3 of the original agreement, as well as the last portion of the addenda at page 52 of the record of proceedings in CA 41/ 2010 do shed light on this although they appear to be in direct contradiction. The portion in the addenda reads as follows:

'Today the 16th day of November 2005 I have received one million shillings from Mr. Baguma Lawrence remaining with seven hundred thousand to be paid immediately on transfer of land title.'

Quite clearly, this phrase made the transfer of the land title a condition precedent to the payment of the final instalment of the purchase price. Conversely, paragraph 3 of the agreement made full payment of the purchase price a condition precedent to the appellant's receipt of a certificate of title and fully executed transfer forms. However, as this court has held above, the duly signed addenda do form an integral part of the original agreement and must be read alongside the original provisions thereof. Further, in so far as the 2nd respondent acted upon the provisions of the addenda and recognised the provisions thereof, he did recognise their validity and authenticity. Indeed, the 2nd respondent did not, either at the trial court or the present appeal, dispute having received the total sums of money stipulated in the addenda to the agreement. On the contrary, in his pleadings, evidence and submissions, the 2nd respondent expressed willingness to refund the said monies. This is reflected in the 2nd respondent's evidence in CA 41/ 2010 at page 27 of the record of proceedings, as well as in paragraph 14 (a) of the 2nd

respondent's counter claim at page 41 of the same record of proceedings where he acknowledges Ushs. 700,000/= as the only outstanding balance due to him. I do, therefore, hold that the provisions of paragraph 3 were invalidated by the cited portion of the addenda as duly endorsed by the 2nd respondent.

Be that as it may, the addendum did not spell out who bore the obligation to transfer the land title. This was spelt out in paragraph 5 of the original agreement, which placed the obligation to pass good title upon the vendor – the 2nd respondent. As indicated earlier, both in the trial court and at the hearing of this appeal, the 2nd respondent conceded that he did not fulfil this obligation and offered to refund the purchase price that had been paid. Therefore, it is the 2nd respondent and not the appellant that was in breach of the sale agreement. In the result, grounds 3 and 4 of this appeal do succeed.

Ownership of the suit premises and alleged fraud (grounds 1 & 2 of CA 41/ 2010 & grounds 3, 4 and 5 of CA 40/ 2010)

Under this cluster of issues the appellant was dissatisfied with the trial magistrate's findings that the purchase of the suit land by the appellant was null and void in the face of the 1st respondent's kibanja interest; that the 1st respondent is the lawful owner of the suit land; that the appellant is a trespasser on the suit land; that the appellant did not acquire title to the land since he did not complete payment therefor, and that there was no fraud in the transfer of the suit land to the 1st respondent.

The question of part payment of the purchase price has been addressed by this court under the issue of breach of contract above. The main bone of contention under the remaining grounds of appeal would be whether or not the sale transaction between the 1st and 2nd respondents was tempered with fraud. Inherent within this issue is the question of whether or not the trial magistrate was legally or factually correct to recognise the 1st respondent's alleged kibanja interest on the suit premises and, on that basis, declare him and not the appellant as the lawful owner of the premises.

On the question of trespass by the appellant, paragraph 2 of the sale agreement granted the appellant vacant possession and immediate use of the suit premises upon payment of the first instalment of the purchase price. This term of the agreement was never varied by the addenda thereto. Therefore, at the onset the appellant was not a trespasser to the suit premises. The question then is whether the subsequent recognition of the 1st appellant's alleged kibanja interest, which led to the sale transaction between the 1st and 2nd respondents, nullified any rights of ownership and possession that might have accrued to the appellant from the sale agreement.

Customary tenure, under which the 1st respondent allegedly sought and was granted first offer of purchase for the suit premises, is defined in section 3(1) of the Land Act. Section 3(1)(e) defines customary tenure as a form of land holding that applies 'local customary regulation and management to individual and household ownership, use and occupation of, and transactions in,

land.’ In so far as that legal provision includes customary management and regulation of *use and occupation* of land as a determinant of what constitutes customary tenure, I would agree with Mr. Byamugisha that for one to claim to hold land under customary tenure there should be proof of use and occupation of the land in accordance with the local customary practices of a given locality. However, such proof is not exclusive to the other parameters outlined in that definition. Sufficient proof, for instance, that the ownership or transactions in respect of a piece of land are regulated by local customary practices could also establish customary tenure. In other words, non-utilisation of land held under customary tenure *per se* should not impugn one’s claim to customary tenure where it is proved that the other parameters against which customary tenure is gauged do exist.

What is more, at page 8 of the record in CA 41/ 2010 the trial judge stated that a visit to the *locus in quo* revealed that, in fact, there were coffee trees on the suit land that the plaintiff conceded were on the land at the time he purchased it. Unfortunately, the site visit report was not availed on the record for re-consideration by this court. Nonetheless, given my earlier conclusion that utilisation of suit land was not the only parameter by which the existence of customary tenure may be determined, Mr. Byamugisha’s contention to the contrary cannot be sustained. I would, therefore, disallow ground 1 of CA 41/ 2010. That ground of appeal fails.

Nonetheless, this court must resolve the question as to whether indeed the 1st respondent was proved to have been a customary tenant or kibanja holder.

Section 101 of the Evidence Act places a general burden of proof on the party that seeks judgment as to any legal right or liability dependant on the existence of alleged facts. In the case of **Kampala District Land Board & Another vs. Venansio Babweyaka & Others Civil Appeal No. 2 of 2007 (SC)** it was held that land holding under customary tenure must be proved by the party intending to rely on it. In that case the following decision from the case of **Ernest Kinyanjui Kimani vs. Muira Gikanga (1965)EA 735 at 789** was cited with approval on the parameters applicable to proof of customary tenure by local customary practices:

“As a matter of necessity, the customary law must be accurately and definitely established. ...The onus to do so is on the party who puts forward the customary law. ...This would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law as he would prove the relevant facts of his case.”

The onus therefore lay with the 1st respondent to prove his kibanja interest in the suit premises. No such evidence was adduced. I find that the 1st respondent did not prove his alleged kibanja interest in the suit premises and, therefore, the trial magistrate was wrong to determine the appellant’s right of claim to the suit land on that unproven basis.

Even if the 1st respondent had been proven to have been a customary tenant, which was not the case; in the present appeal there did appear to be some confusion as to the rights of customary

tenants viz the holder of a freehold or leasehold reversionary interest in land. In his judgment, the trial magistrate appears to have addressed the notion of tenancy by occupancy interchangeably with the concept of a kibanja holder or customary tenure, and concluded that the 2nd respondent was by law obliged to give first right of purchase of his reversionary interest to the 1st respondent. With utmost respect, I take the view that this was erroneous. A tenant by occupancy is defined in the interpretation section of the Land Act as ‘the lawful or bona fide occupant declared to be a tenant by occupancy by section 31.’ Who would amount to a lawful or bonafide occupant is defined in section 29 of the Land Act and must be sufficiently proved. Having proved that a person is either a lawful or bonafide occupant, it must also be proved that such person has been declared to be a tenant by occupancy as provided for in section 31 of the same Act. No such evidence was adduced in the trial court. It was erroneous, therefore, for the trial magistrate to hold that the omission to give the 1st respondent first option of purchase vitiated the sale agreement between the appellant and the 2nd respondent, and thus left the 1st respondent as the lawful owner of the suit premises. Consequently, ground 3 of CA 40/ 2010 does succeed.

On the question as to whether or not the 1st respondent was the lawful owner of the suit land and the appellant a trespasser thereon, the 1st respondent argued both in the trial and court and during the hearing of this appeal that he was the holder of a certificate of title in respect of the suit premises. At page 31 of the record in CA 41/ 2010 then counsel for the plaintiff (the appellant in this appeal) enjoined court to admit the alleged certificate of title on record as it had never been exhibited and the document the 1st respondent had attested to as the certificate of title in respect of the suit premises was a photocopy. The said ‘certificate of title’ was then recorded to have been admitted on the record for identification purposes as Exhibit P.I.D 1. This court has had occasion to peruse the said exhibit. It is found at pages 56 and 57 of the record of that appeal. What court observed to be PID 1 are 2 very unclear photocopies of mapping documents in respect of what appears at the top of each document to be Block 92 plot 164 (at page. 56) and Block 92 plot 119 (at page 57). The document at page 56 demarcates the land into three pieces that are attributed in handwritten print to the 1st respondent, the appellant and a one Vincent Koyekyenga. Page 18 of the record, on the other hand, reveals contradictory circumstances under which Exh. P.I.D 1 was admitted on the record. On that page it is indicated that the documents were produced in court by the appellant. Exhibit P.I.D 1 is certainly not a certificate of title.

I would, therefore, hold that in this appeal there is no proven registered proprietor of the suit premises. I would have gone further to hold that the 1st respondent is not the registered proprietor of the suit premises; however, the consolidated record points to the contrary. Under cross examination at page 23 of the record in CA 41/ 2010 the appellant conceded that he was aware that the suit premises were no longer in the names of the 2nd respondent; in the same record at page 31 it would appear that the 1st respondent availed the trial court with a certificate of title in respect of the suit land, which title has mysteriously disappeared from the record; at page 21 of the record in CA 40/ 2010 the appellant testified that the title to his land had been transferred into the names of the 1st respondent. I take the view that the net effect of this

evidence is that, though not proven before this court, there does exist a certificate of title in respect of the suit premises and it is registered in the names of the 1st appellant. To hold otherwise would, in my view, be tantamount to this court adjudicating an issue that has been conceded by the appellant and is therefore mute. Such a conclusion could result in a travesty of justice. A matter that is conceded by a party to a suit ceases to be in issue. Whether the conceding party was right or wrong to so concede an issue is not a matter for court to deliberate.

The net effect of sections 59, 64 and 176 of the RTA is that a certificate of title is conclusive evidence of title that can only be impeached upon proof that it was secured through fraud. Having recognized the 1st respondent as the holder of a certificate of title in respect of the suit premises, it follows that his ownership of the suit premises as registered proprietor can only be impeached upon proof that the certificate of title he holds was secured through fraud. I therefore revert to a determination of the issue of fraud before making a final conclusion on the question of ownership of the suit land.

In the present appeal it was the appellant's case that the sale of the suit premises to the 1st respondent by the 2nd respondent was procured through fraud and consequently, the certificate of title registered in the 1st respondent's names was also procured through fraud and should be impeached.

It is trite law that fraud should be specifically pleaded and proved. When a claim is based on fraud it must be specifically so stated in the pleading, setting out particulars of the alleged fraud, and those particulars must be strictly proved. However what is required is for the pleading to explicitly disclose the facts which, if proved strictly, would constitute fraud. See **Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC)**. Reference in that case was made to the following decision in the case of **B.E.A Timber Co. vs Inder Singh Gill (1959) EA 463**:

“It is of course established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud however is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud, it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out and then it should be stated that these acts were done fraudulently but from the acts fraudulent intent may be inferred.” (*emphasis mine*)

In the present case, as quite rightly stated by counsel for the respondent, fraud was never pleaded by the appellant in his trial court pleadings. The appellant only sought to raise the inference of fraud at the hearing of this appeal where it was argued on his behalf that the 1st respondent was never a customary land holder on the suit premises so as to warrant his being offered the first right of purchase over the land. It was also argued for the appellant in this regard that, far from being unable to transfer the suit land to the appellant, the 2nd respondent willfully sold the suit land to the 1st respondent well-knowing that he had already sold it.

The decisions cited above posit that fraud, though not explicitly pleaded, may be inferred from the facts alleged in pleadings that are such as to create fraud. In order to re-consider the appellant's pleadings against the foregoing legal position it is pertinent, in my view, to clarify what constitutes fraud in the first place. It would then be necessary to determine whether or not the facts complained of by the appellant constitute fraud, that is, the circumstances under which the 2nd respondent sold the suit premises to the 1st respondent.

Fraud in land transactions has been defined to include dishonest dealing in land, sharp practice intended to deprive a person of an interest in land, or procuring the registration of a title in order to defeat an unregistered interest. See **Kampala Bottlers Ltd vs Damanico Ltd Civil Appeal No. 22 of 1992 (SC)**, **Kampala District Land Board & Anor vs National Housing & Construction Corporation Civil Appeal No. 2 of 2004 (SC)** and **Kampala Land Board & Another vs. Venansio Babweyaka & Others** (supra).

In the present appeal the acts complained of by the appellant which might raise an inference of fraud are the offer of purchase by the 2nd respondent to the 1st respondent and the sale of the suit land to the 1st respondent, both actions undertaken in spite of the sale agreement between the appellant and 2nd respondent. These facts were pleaded in paragraphs 10 – 16 of the plaint in CA 41/ 2010. I have re-evaluated the evidence of the 2nd respondent. At page 28 he clearly explains that he reneged on his obligations to the appellant under the belief that the 1st respondent was a kibanja holder. This is also reflected at page 23 of the record of proceedings of the additional evidence adduced by the appellant. Therefore, although that interest has not been proved before this court, it is apparent that the 2nd respondent acted upon the belief, mistaken or otherwise, that the 1st respondent was a kibanja holder on the suit land. There is no contrary evidence, as argued by learned counsel for the appellant, that the 2nd respondent *willfully* and, implicitly, *dishonestly* sold the suit land to the 1st respondent well-knowing that he had already sold it to the appellant. I therefore find that the allegation of fraud has not been proved by the appellant. In the result, ground 2 of CA 40/2010 cannot be sustained and must fail.

Having so found, I cannot fault the trial magistrate's finding that the 1st respondent the lawful owner of the suit land and the appellant a trespasser thereon. I would only add that the appellant did have the legal mandate to enter onto the suit premises upon payment of the first instalment of the sale agreement as provided for in that agreement but, upon the subsequent transfer of title to the 1st respondent, such claim of right ceased and he then would be deemed a trespasser on the said land. In the result, grounds 4 and 5 of CA 40/ 2010 are not sustainable and are answered in the negative.

Before I take leave of this issue, I shall address myself to the certificates of title on record in so far as they relate to the suit land. There are 2 Exhibits P2 – one at page 55 and the other at page 71 of the record in CA 41/ 2010. They are both in respect of private mailo land at Namwezi Block 92. However, while the former exhibit is in respect of plot 119, measures 1.151 hectares and the original interest therein was registered in June 2006; the latter is in respect of plot 72, measures 18. 985 hectares and the original owner's interest therein was registered in May 2000. It would appear to me that, although derived from the same Block 92, the land reflected in Block

92 plot 119 was curved out of the larger Block 92 plot 72 and later sub-divided into plots 164, 165 and 166. This conclusion is borne out by the 2 documents on the record marked P.I.D 1. It is indicated in P.I.D 1 at page 56 that plot 165 was demarcated to the 1st respondent; plot 166 was demarcated to the appellant and plot 164 to a one Kyoyekyenga. The foregoing documentary evidence goes to support the appellant's pleadings in Paragraph 9 of the plaint (page 46 of CA 41/ 2010) and his oral evidence at pages 18 – 19 of the record. The sum effect of this evidence is that while the 1st respondent is the registered proprietor of land, the particulars of which this court has not seen as the title was never produced in court; the land registered therein should not extend to the residual land comprised in plot 166 (less the 0.25 acres that comprise the suit land) that is not the subject of this dispute. I so hold.

Finally, I shall briefly address the additional evidence adduced by the appellant. The evidence entails the record and judgment of a criminal trial in which the 1st respondent was tried and convicted of the offence of malicious damage to property. In arriving at its decision, the trial court made a finding that the present appellant had a right to the land sold to him vide the sale agreement of 16th June 2005. First and foremost, this court is in no way bound by the decision of a Grade 1 magistrate. Secondly, as a first appellate court, this court was under a duty to re-evaluate all the material evidence before it before arriving at its own conclusions on the matter before it. See **J. Muluta vs S. Katama Civil Appeal No.11 of 1999 (SC)**. The applicable standard of proof would be by balance of probabilities. See **Sebuliba vs. Cooperative Bank Ltd (1982) HCB 130**. It is against these laid down rules that this court re-evaluated the totality of the evidence before it and arrived at the conclusions herein.

In the final result, this appeal succeeds in part and fails in part with the following orders:

- i. I do grant a declaration that the 2nd respondent is in breach of the sale agreement dated 16th June 2005 in respect of the land comprised in Block 92 plot 72 situated at Namwezi, Mutuba III, Kyaggwe County in East Buganda (Mukono District).
- ii. I award general damages for breach of contract in the sum of Ushs. 20,000,000/= payable with interest at 8% per annum from the date hereof until payment in full.
- iii. I make a declaration that the outstanding purchase price in the sum of Ushs. 700,000/= shall not be paid to the 2nd respondent owing to his breach of contract.
- iv. I do grant an order of specific performance for the 2nd respondent to duly transfer to and surrender the land title for Block 92 plot 166 to the appellant, less the 0.25 acres suit land sold and transferred to the 1st respondent.
- v. I do uphold the trial magistrate's decision that the appellant is a trespasser on the suit land.
- vi. I do uphold the trial magistrate's decision that the 1st respondent is entitled to vacant possession of the suit land, and hereby order that such vacant possession is granted by the appellant forthwith.
- vii. I award two-thirds of the costs in this court and the lower court to both respondents, and one-third thereof to the appellant.

Monica K. Mugenyi
JUDGE

16th November, 2012