

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 241 OF 2006

AKETA FARMERS & MILLERS LTD & ANOTHERPLAINTIFFS

VERSUS

TURYAMUREEBA MILTON & ANOTHER DEFENDANTS

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The 1st plaintiff was the alleged beneficiary of a gift from the 2nd plaintiff in the form of the land and property described as LRV 446 folio 22 situated at plot 19 Mackenzie Vale, Kololo in Kampala District. The 1st defendant was the registered proprietor of the suit land, having allegedly purchased it from the 2nd defendant. The plaintiffs' claim against the 1st defendant is premised on the averment that the latter's registration as the proprietor of the suit premises was occasioned by fraud, illegality and/ or error; whereupon the plaintiffs seek a declaration that the registrations of both defendants as proprietors of the premises are a nullity, as well as the cancellation of the 1st defendant's registration as such and substitution thereof with the 1st plaintiff as registered proprietor of the suit premises.

In a joint scheduling memorandum dated 29th November 2012, the following issues were framed:

1. Who is the rightful owner of the suit premises.
2. (a) Whether the suit property was fraudulently transferred into the names of the 2nd defendant.
(b) Whether the suit property was fraudulently registered in the names of the 1st defendant.
3. Whether the plaintiffs are entitled to the reliefs sought.

At the hearing of this suit the plaintiffs were represented by Mr. George Omunyokol, while Mr. Wilfred Nuwagaba represented the 1st defendant. The 2nd defendant did not file a written statement of defence in this matter neither did he appear for the hearing at all, despite the issuance of substituted service. It was submitted for the plaintiffs that a defendant who does not file a defence is deemed to have admitted the facts as presented in the plaint. In support of this position Mr. Omunyokol referred this court to the case of **Efulaimu Kasiwukira vs. Samuel Serunjogi Civil Suit No. 380 of 2008** (unreported). With respect, that position is erroneous. It would be akin to suggesting that failure by a party to file a defence would entitle a trial court to enter judgment against such party. That is not the spirit of our rules of procedure. On the contrary, Order 9 rule 10 of the CPR is quite explicit on the correct position. That rule provides that where a party does not file a defence as by law prescribed ‘**the suit may proceed as if that party had filed a defence.**’ To my mind, this would mean that the plaintiff would be required to prove his allegations against such defaulting defendant. I do, therefore, hold that the present plaintiffs are required to prove their allegations against the 2nd defendant to the required standard, his failure to file a defence notwithstanding.

I now revert to the substantive issues. I propose to determine the first and second issues concurrently.

The facts alluding to the plaintiffs’ interest in the suit premises were pleaded in paragraphs 6 to 13 of the plaint. These facts were attested to by PW1 and PW2. In a witness statement deponed on 14th November 2012 PW1 testified that in June 1972 he and his brother, a one Zulfikar Noordin Thobani (now deceased), purchased the suit premises from a one Roshan Aman but, before they could register their interest in the premises, the then sitting government expelled the Asian community from Uganda in August 1972 whereupon the property was taken over by the Departed Asian Custodian Board (DAPCB). This court has seen a transfer deed to that effect dated 15th June 1972 and admitted on the record as Exh. P3 and accepts it as proof of the purchase of the suit premises by the 2nd plaintiff and his deceased brother. PW1 further testified that sometime in 1980 he and his brother decided to give the suit premises to the 1st plaintiff in appreciation of transportation services it had rendered them earlier. He stated that the property was subsequently returned to him and his brother in 1998 and they formally repossessed it in 2000. A certificate authorising repossession and dated 10th April 2000 was admitted on the

record as Exh. P5. It is in the names of a one Roshan Aman with the 2nd plaintiff's name in brackets. It is accepted as evidence of the 2nd plaintiff and his deceased brother's right to repossession of the suit premises.

It was PW1's evidence that following the physical return of the property to him he did apply for a special certificate of title to be issued in the names of Roshan Aman to enable the transfer of the suit premises, initially to himself and his brother and subsequently to the 1st plaintiff; and the registrar of titles duly placed a notice of intention to issue a special certificate of title in the Uganda Gazette. The cited application and gazette notice were admitted on the record as exhibits P10 and P13 respectively. These exhibits are accepted as evidence of the land office having been on notice that there did exist an unregistered interest in the suit premises as far back as 1998.

In an additional witness statement deponed on 28th November 2012, the same witness attested to him and his brother having occupied the suit premises between 1972 when it was purchased and early 1973 when he (PW1) left Uganda. He clarified that although the property was returned to them in 1993, they were unable to take possession thereof as it was at the time occupied by the mother to H.E the President, a one Esteri Kokundeka (now deceased); but upon her departure from the premises the suit land had in 1995 been rented to another tenant by the 1st plaintiff. This court has seen an electricity bill in the names of the said Esteri Kokundeka billed in December 1994, as well as a tenancy agreement between the 1st plaintiff and a one Harshad Patel dated 10th March 1995, both of which documents were admitted on the record as exhibits P9 and P8 respectively.

PW1 further clarified that he and his brother had been unable to register the suit premises into their names in 1972 owing to the prevailing tension in the country following the expulsion of the Asian community, but initiated the registration process on various occasions in 1992 and 1995. Under cross examination he stated that the 1st plaintiff company was given possession of the suit premises in 1996; conceded that he was not the registered proprietor of the property but had given it to the 1st plaintiff on the basis of the transfer deed executed in 1972, and that he was in occupation of the property between 1995 and 1996 when he passed occupation to the 1st plaintiff. In re-examination PW1 stated that in 1993, vide a letter admitted on the record as Exh. P7, DAPCB had acknowledged him and his brother as the rightful applicants for repossession of the

suit premises. He further clarified that following the departure of Ms. Kokundeka from the suit property in 1994, he assisted the 1st plaintiff secure a tenant for the premises.

On his part, in a witness statement deponed on 14th November 2012 PW2 testified that he was one of two shareholders of the 1st plaintiff company, which was the beneficiary of a gift of the suit premises from the 2nd plaintiff and his deceased brother in 1998. The witness further testified that upon receipt of the suit property the 1st plaintiff rented it out but, upon the departure of that tenant, the 1st plaintiff company entered into occupation thereof as depicted by utility and other bills that were admitted on the record as Exh. P9. This exhibit entailed various bills in the names of Roshan Aman, Roshan Aman/ Aketa Farmers and Roshan Aman/ Z. N. Mohamood. It was PW2's evidence that, against this background, the 1st plaintiff was shocked to receive a letter from the 1st defendant seeking vacant possession of the suit premises on the account of his being the registered proprietor of the same. The said letter dated 9th May 2006 was admitted on the record as Exh. P14. Under cross examination PW2 stated that the suit property was given to him in the 1980s for transportation services rendered to the Thobanis between 1978 and the 1980s; that, at the time, the Thobanis were in possession of a land title in the names of Roshan Aman, and that he did not know the 2nd defendant or of any dealings between him and Roshan Aman with regard to the suit premises. This court did see a letter dated 23rd October 1980 and admitted on the record as Exh. P4 relaying the then pending transfer of the suit land to PW2.

On the other hand, the gist of the evidence adduced by PW3 and PW4 was that the plaintiffs were indeed in occupation of the suit premises between 1998 and 2006. To that end, PW3 furnished this court with documentary evidence of a security report of a broken wall, security note book entries and payments extended to a one George William Ochen, who guarded the premises on behalf of the 2nd plaintiff's company. These documents were admitted on the court record as exhibits P22, P23 and P24 respectively and are quite explicit on the circumstances under which Ochen came to be in occupation of the suit premises, DW1's evidence to the contrary notwithstanding. I did find PW3's evidence more plausible than DW1's given the supportive documentation furnished, and accept that Ochen was indeed an agent of the 2nd plaintiff's company on the suit premises.

Conversely, it was pleaded in paragraphs 3(iii), (iv) and 4 of the 1st defendant's written statement of defence that he was a bonafide purchaser for value with no notice of fraud by his predecessor

in title, the 2nd defendant. In a witness statement deponed on 29th November 2012, the 1st defendant testified that he was the registered proprietor of the suit premises and was currently in occupation thereof, having taken possession of the premises on 14th May 2006 when the last occupant left. The fact of the 1st defendant's ownership was reiterated by DW1, the LC Chairman of the area where the suit property is situated.

I now revert to the question of the parties' alleged interests in the suit property. It was submitted for the defence that the plaintiffs' evidence was riddled with inconsistencies as to when the 1st plaintiff received the gifted land from the 2nd plaintiff, with lack of clarity as to whether it was in 1980, 1995 or 1998. Mr. Nuwagaba faulted the plaintiffs for purporting to transfer land that was subject to the Expropriated Properties Act (EPA), contending that this amounted to an offence under section 2(2)(a) of the Act. Mr. Nuwagaba did also question the plaintiffs' interest in the suit property.

It is my considered view that the evidence highlighted above did establish that the 2nd plaintiff and his deceased brother had an unregistered interest in the suit premises, having duly purchased the same from a one Roshan Aman in June 1972, and that the 2nd plaintiff and his brother occupied the property until 1973 when the former left Uganda. This was established by the evidence of PW1, as well as a signed transfer deed (Exh. P3). The Thobanis' occupation of the suit property pursuant to their purchase thereof amounted to part performance of their purchase viz Roman Amani and goes to underscore their equitable, unregistered interest in the premises. See **Katarikawe vs. Katwiremu (1977) HCB 187.**

Further, the evidence did also establish that it was on the basis of that unregistered interest that the 2nd plaintiff sought to transfer the suit premises to the 1st plaintiff company. The sought transfer has never been legally effected to date hence the present suit. The 2nd plaintiff and his brother simply communicated their decision to transfer the property to PW2 vide Exh. P4 then subsequently sought to implement their decision but have been unable to formally do so to date. The purported transfer of the property to the 1st plaintiff company attested to by the plaintiffs' witnesses simply entailed an informal ceding of occupation between 1996 and 1998 and not a formal transfer in the strict sense. I do agree with learned defence counsel that there was disparity as to the exact year the property was handed over to the 1st plaintiff company. However, I do also agree with learned counsel for the plaintiffs that PW1 and PW2 were persons

of advanced age that were unable to clinically recall the dates in issue owing to the passage of time. This court did, however, observe them to have been extremely credible and cogent witnesses and finds no reason to question their evidence.

The question of proof of ownership of land is fairly well settled. Section 59 of the RTA enjoins courts to conclusively adjudge the person registered in a certificate of title as the owner or proprietor thereof. Furthermore, it is trite law that a certificate of title confers indefeasible title upon such person. Nonetheless, the courts do recognise the co-existence of registered and unregistered interests in land, which co-existence is arguably the basis for many a land dispute in Uganda. As was quite aptly held in the case of **Katarikawe vs. Katwiremu (1977) HCB 187 at 190**;

“In a land system based on registration there are basically two interests, the registered estate and other registerable interests such as mortgages and charges. Equity will, however, intervene to protect other unregistered interests in limited circumstances. Registered interest, especially the registered estate, are known as rights *in rem* and bind the whole world. The other interests are rights *in personam*, such rights may often arise from contracts for sale of land before transfer. The purchaser acquires an equitable interest in the nature of a right *in personam* enforceable only against the vendor.”

I respectfully agree with that position.

It is also well settled law that the courts may look beyond the fact of registration and impeach the indefeasibility of a registered proprietor’s interest on account of fraud by the transferee in the registration of land. This is the import of sections 64 and 176 of the RTA, as well as the *ratio decidendi* in the cases of **David Sajjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985 (CA)** and **Robert Lusweswe vs. Kasule & Another Civil Suit No. 1010 of 1983** (unreported).

In the present case, while the 1st defendant was a registered proprietor of the suit premises with rights *in rem* in respect thereof; the 2nd plaintiff and his deceased brother had an unregistered interest in the same premises. The plaintiffs sought to impeach the defendants’ registered interest on account of alleged fraud in the acquisition thereof. The issue of fraud was pleaded in

paragraph 15 of the plaint and detailed particulars in respect thereof were duly listed. It was attested to by all the plaintiff's witnesses. On the other hand, the 1st defendant pleaded in paragraph 4 of his defence that he was a *bonafide* purchaser for value without notice of any defects in title from his predecessor in title. The 2nd defendant made no attempt to defend himself.

In my view, it is pertinent to restate the definition of fraud prior to a consideration of whether or not it was, in fact, perpetuated by the defendants in the registration of their alleged interest in the suit land. Fraud has been invariably defined as actual fraud, being dishonesty of some sort or constructive fraud that denotes transactions in equity similar to those which flow from fraud; 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 & Another vs National Housing & Construction Corporation Civil Appeal No. 2 of 2004 (SC)** and **Kampala Land Board & Another vs. Venansio Babweyaka & Others Civil Appeal No. 2 of 2007 (SC)**.

In **Robert Lusweswe vs. Kasule & Another** (supra) the following passage from the case of **Assets Co. Ltd vs. Mere Roihi & Others (1905) AC 176 at 210** was cited with approval:

“It appears to their lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value whether he buys from a prior registered owner or from a person claiming under the Native Lands Act, must be brought to home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him and to his agents.”

For present purposes the import of this position is that the fraud in question must be attributable to the 1st defendants or his agents, and fraud by the 2nd defendant from whom he derives his title would only impeach the 1st defendant's title if it can be proved that he or his agents had knowledge of it.

In the present case, the gist of the fraud allegations pleaded by the plaintiffs was as follows:

1. The registration of the 2nd defendant as proprietor of the suit premises in spite of a pending application for a special certificate of title dated 9th July 1998 in respect of the same property. This letter was admitted on the record as Exh.P10.
2. Ignoring a letter from the Chief Registrar of Titles dated 6th June 2001, a gazette notice of 29th June 2001, correspondence from DAPCB that was brought to the attention of the Chief Registrar of Titles and a certificate of repossession all in respect of the same property. The Chief Registrar's letter, gazette notice, DAPCB correspondence and certificate of repossession were admitted on the record as exhibits P12, P13, P6 and P5 respectively.
3. The registration of the 1st defendant as proprietor of the suit premises.
4. The omission to investigate the ownership of the suit property, enquire from the neighbours of the property as to its ownership prior to purchasing it or make specific inquiries about the plaintiffs' interests in the property for fear of discovering the truth.
5. The presentation of forged documents in the registration of the defendants' alleged interests.

A perusal of the record reveals that the application for a special certificate of title was addressed to the registrar of titles, while the letter from the Chief Registrar of Titles dated 6th June 2001 was in response to that application. Ordinarily those documents (or copies thereof) would be entered on the file in respect of the suit premises. Similarly, the gazette notice in respect of the cited application would have been filed on the same file, as would the subsequent correspondence from DAPCB to the Chief Registrar of Titles. In fact, a gazette notice is tantamount to notice to the entire public, the defendants inclusive. It would be reasonable to conclude, therefore, that in the absence of dishonest practice the office of the registrar of titles was on notice that there was an unregistered interest in the suit premises. Similarly, both defendants would have been notified by the gazette notice of 29th June 2001 that there existed an unregistered interest in the premises. In the event that the defendants missed such notification, a simple search devoid of any dishonest malpractice should have revealed the correspondence cited above in respect of the 2nd plaintiff's interest in the suit premises. As it is, the 1st defendant attested to having undertaken a search in the lands office that yielded no encumbrance on the suit land and emboldened him to go ahead to register his purported interest therein. The only inference that can be drawn from this turn of events is that either the records in the lands office

had been tampered with, which in itself would constitute dishonest practice and therefore fraud, or no search was conducted by the defendants at all, which would render the 1st defendant a dishonest and unscrupulous person guilty of the offence of perjury before this court. To compound matters, it was testified as follows by PW1 in paragraph 11 of his witness statement deponed on 14th November 2012:

“The officials in the land office have all along been stating that the file in respect of the suit property has been lost and misplaced from the land office.”

This piece of evidence suggests that between the gazette notice of June 2001 and 14th November 2012 when the 2nd plaintiff deponed his witness statement, the requisite file had been missing. However, the 1st defendant quite categorically testified that he did conduct a search in respect of the missing file. This court finds no reason to disbelieve him. The most probable conclusion that I would draw from this evidence is that while the missing file was not accessible by the 2nd plaintiff, the defendants had easy enough access to it as enabled them to register the 2nd defendants interest in the suit premises on 30th March 2006 and thereafter register the 1st defendant’s allegedly acquired interest on 5th May 2006. The defendants’ access to and dealings with the file were clearly to the exclusion of a person with an equitable albeit unregistered interest in the suit premises. This court takes the view that this course of events plainly bespoke of dishonest malpractice and unfair play, and denoted fraud in the registration of both defendants’ purported interests in the suit land. Quite clearly the 2nd defendant was the beneficiary of this fraud. On a higher balance of probabilities, I would find it most probable that the 2nd defendant was party to the fraud that resulted in the registration of his purported interest in the suit premises to the exclusion of the 2nd plaintiff’s unregistered interest. I therefore answer issue No. 2(a) in the affirmative.

The question then would be whether or not the 1st defendant was aware of the fraud that underpinned the 2nd defendant’s title to the suit premises or, indeed, whether he too was party to fraud in the registration of his interest therein. In his defence the 1st defendant pleaded that he was a *bonafide* purchaser for value without notice of fraud and, in the alternative, that the plaintiffs’ occupation of the suit premises could not have conferred upon them a registerable interest in the same given that it was illegal and unauthorised.

I shall dispose of the alternative averment forthwith. The registerable interest attributed to the plaintiffs was derived from proof of purchase of the suit premises by the 2nd plaintiff and his deceased brother as borne out by Exh. P3 and not simply by the fact of occupation.

With regard to the protection due to a *bonafide* purchaser for value, this relief is provided in section 176(c) of the RTA. The section reads:

“No action of ejection or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases -

- (a) ...**
- (b) ...**
- (c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.”**

Learned counsel for the plaintiffs referred this court to the case of David Sajjaka Nalima vs. Rebecca Musoke (supra) in support of his argument that once the defence of bonafide purchaser for value without notice of fraud is made the burden of proof shifts to the defendant. In that case it was held that while the burden of proving the case lay with the plaintiff, the onus of establishing the plea of a *bonafide* purchaser lay with the person that sets up such plea. I most respectfully agree with the above position.

In the present case the 1st defendant was under the mistaken notion that since the burden of proof in the overall case lay with the plaintiffs, he bore no duty to establish his defence that he was a bonafide purchaser for value without notice of fraud. It is my considered view that while the duty to prove the allegation of fraud lay with the plaintiffs, the onus of proving the plea of bonafide purchase lay with the 1st defendant. As quite rightly stated by Mr. Omunyokol in submissions, no attempt was made to avail this court with proof of the purchase of the suit land, the value or consideration of that purchase or indeed that the defendant had no notice of fraud. Instead, on the issue of fraud, it was learned defence counsel’s contention in submissions that the

2nd plaintiff's application for a special certificate prior to the issuance of a repossession certificate was of no consequence since he had no certificate of repossession and in any event such dealings were illegal; similarly, the letter from the Chief Registrar of Titles dated 6th June 2001 was of no consequence and moreover by the said date the certificate of registration existed in the names of Roshan Amani as shown by Exh. D1 and so, too, was the correspondence from DAPCB to the registrar of titles since DAPCB ceased to have an interest when a certificate of repossession was issued. Counsel further argued that the gazette notice of 29th June 2006 was issued long after the first defendant had purchased the property and become a registered proprietor, and the complaints about the registration of both defendants related to the workings of the registrar of titles, who was not called by the plaintiffs to confirm these allegations. Finally, counsel submitted that if the plaintiffs had thought they would prove their case from the 1st defendant, they were wrong as it was their duty to summon the registrar of titles in whose custody the documents of the transfer of the suit property into the first defendant's name are to know how the transfer form was filled, the consideration paid and the stamp duty.

First, with regard to counsel's concern over the 2nd plaintiff's dealing with land not yet dealt with under the EPA, I would agree that the said property was under the management of DAPCB as by law prescribed. In 1993 pursuant to the letter depicted as Exh. P7, DAPCB had acknowledged him and his brother as the rightful applicants for repossession of the suit premises. The said letter was addressed to Roshan Aman, the original proprietor of the land, as well as the 2nd plaintiff and his brother albeit in brackets. It would appear that it was on the basis of this letter that the 2nd plaintiff and his brother applied for a special certificate of title and purported to hand over the suit property to the 1st plaintiff company. Indeed, Exh. P7 explicitly stated that the expropriated property would automatically stand repossessed by the persons to whom that letter was addressed within 14 days thereof. Mr. Aman had ceded his rights in the property to the 2nd plaintiff and his co-proprietor, the DAPCB acknowledged the latter's interest in the property and sought to grant them repossession rights. However, vide a letter dated 17th April 2000 (Exh. P6) DAPCB notified the registrar of titles that it had issued a certificate of repossession (Exh. P5) in respect of the suit premises and it was that document and not the earlier letter (Exh. P7) that should be considered for registration. It would appear to me that by the time that letter was conveyed to the registrar of titles, the 2nd plaintiff had already lodged his application for a special

certificate of title and handed over the suit property to the 1st plaintiff company. PW1 stated as much under re-examination. I would not fault him for seeking to regularise his interest in the suit premises. However, and perhaps more important for present purposes, although the 2nd plaintiff's application might have been premised on a faulty document it nonetheless would serve as notice to an intending buyer of the premises in respect of which it was made that there was a subsisting, unregistered interest in the same. The same principle would apply to the correspondence from DAPCB and the Chief Registrar of Titles, that learned counsel so casually dismissed.

Secondly, quite clearly the reference to the gazette notice of 29th June as 2006 rather than 2001 would appear to have been a typographical error on the part of the plaintiffs. The only gazette notice in issue in this court was one dated 29th June 2001 and admitted as Exh. P13. It is this gazette notice that is under consideration presently. Finally, as this court did find, the fraud denoted by the inexplicably selective disappearance of the file in respect of the suit premises was attributable to the 2nd defendant. The 1st defendant did not provide evidence that would, on a balance of probabilities, disassociate him from that fraudulent malpractice so as to entitle him to protection as a bonafide purchaser for value without notice of fraud. For counsel for the 1st defendant to purport to place the burden of proof of that defence on the plaintiffs was an apparent misconception of the rules of evidence. Therefore, this defence by the 1st defendant remained unproven and, to that extent, is unsustainable. I so hold.

In any event, the 1st defendant did appear to have been complicit in the alleged fraud. It is well recognised that applicants seeking to register land under the RTA are expected to follow due process and illustrate a reasonable amount of due diligence viz any subsisting unregistered interest(s) in the same land. This is so to avert the possibility of depriving a person with an equitable albeit unregistered interest of his land without due process. The decision in **Kampala Land Board & Another vs. Venansio Babweyaka & Others** (supra) is extremely pertinent in this regard. In that case the appellant obtained a title without consulting the occupants and the authorities in the area. Counsel for the appellants argued that this was not fraud. In her lead judgment in the Court of Appeal Mpagi-Bahigeine JA, as she then was, held that the 2nd appellant had been deliberately dishonest when he deliberately proceeded to obtain a title without consulting with occupants and authorities of the area. In his lead judgment on appeal to

the Supreme Court, Odoki CJ restated the definition of fraud to include ‘dishonest dealing in land or sharp practice intended to deprive a person of an interest in land, including unregistered interest’, and upheld the decision of the Court of Appeal that there was indeed fraud by the appellants. His lordship held:

“I entirely agree with the conclusions reached by the Court of Appeal on the issue of fraud. There was a deliberate effort by the appellants to sideline the respondents as bona fide occupants or tenants at sufferance of the suit land. The respondents were not informed of the 2nd appellant’s interest in leasing the land and given an option to lease the land or to make any representations to protect their interest. The appellants seem to have consulted officials of a different Local Council and ignored the views of the proper Local Council.”

The *ratio decidendi* in that case would appear to overturn the earlier decision in **Assets Co. Ltd vs. Mere Roihi & Others** (supra), to which this court was referred, that non-investigation of co-existing interests in land by a transferee does not in itself constitute fraud. Needless to say, the decision in **Kampala Land Board & Another vs. Venansio Babweyaka & Others** (supra) is binding upon this court.

In the present case, in paragraph 15(vii) and (viii) of his first witness statement, PW1 stated that the defendants did not investigate the title for the suit property nor did they enquire from the occupants of the property before purporting to purchase the same. Given the evidence of PW3 in paragraphs 14 to 16 of his witness statement, as well as that of PW4 in paragraph 4 of his witness statement, it would appear that the 1st plaintiff had been in occupation of the suit premises from 1998 to 2006 when the 1st defendant took possession thereof. During the time the 1st plaintiff was in occupation of the premises a one George William Ochen, an agent of the 2nd plaintiff’s company – Fourways Group of Companies, was caretaking the premises. It was the evidence of PW1 that no enquiries were addressed to this gentleman by any of the defendants. On the contrary, under cross examination DW1 did state that while he had known the 1st defendant as far back as 1995 he first knew him in respect of the suit premises in 2006 when he reported to him as proprietor of the premises duly armed with a title in his names. This evidence confirms that the 1st defendant did not confer with him – the area LC Chairman – on the ownership of the property but simply went ahead to register it on the basis of a questionable search, and was

deliberately dishonest in omitting to so consult the LC Chairman yet he had prior knowledge of him. This conduct would most probably denote fraud on the part of the 1st defendant.

Further, it was testified by both DW1 and the 1st defendant that Ochen and a one Ebong who the 1st defendant found in occupation of the suit premises in 2006 were duly paid to leave the premises and acknowledgment of payment to that effect was adduced as Exh. D3. This court has already pronounced itself on Ochen having been an agent of the 2nd plaintiff's company. Against that background, paying Ochen to return to his home district rather than inquire from him as to the ownership of the suit premises he was found in occupation of would, in my view, underscore the dishonest dealings by the 1st defendant with respect to the suit premises. Most certainly, such conduct cannot be deemed to constitute fair play with regard to persons with an equitable albeit unregistered interest in the premises to whom Ochen reported. In **Marko Matovu & Others vs. Mohammed Sseviri & Another Civil Appeal No. 7 of 1978 (CA)** the then Court of Appeal equated unfair play to fraud. I respectfully agree with this position.

This court therefore finds that the plaintiffs have duly proved that the suit property was fraudulently registered in the names of the 2nd defendant; the 1st defendant has not proved that he was indeed a bonafide purchaser for value with no notice of the proven fraud, rather, he too was complicit in fraud. Issue No. 2(b) is, therefore, answered in the affirmative.

In the result, judgment is entered for the plaintiffs against the defendants jointly and severally with the following orders:

1. A declaration is hereby granted that the registration of the land comprised in LRV 446 folio 22 situated at plot 19 Mackenzie Vale, Kololo – Kampala in the names of the 2nd defendant and the subsequent transfer thereof into the names of the 1st defendant was procured by fraud and is therefore null and void.
2. The Registrar of Titles is hereby ordered to cancel the names of the 1st defendant from the certificate of title in respect of the land comprised in LRV 446 folio 22 situated at plot 19 Mackenzie Vale, Kololo – Kampala, and substitute it with the registration of the 2nd plaintiff as the registered proprietor thereof.

3. A permanent injunction is hereby issued restraining the defendants by themselves or any of them, their servants or agents, or any person acting under their authority from occupying or interfering with the plaintiffs' quiet enjoyment of the suit premises.
4. General damages in the sum of Ushs. 75,000,000/= only, payable at 8% per annum from the date hereof until payment in full.
5. Costs of the suit.

Monica K. Mugenyi

JUDGE

7th December, 2012